

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

Complaint no. : 1030 of 2019  
Date of filing complaint : 13.03.2019  
First date of hearing : 26.11.2019  
Date of decision : 29.08.2022

Sandeep Arora R/O: - House no. 105, Sunhari Bagh Apartments, Sector-13, Rohini, Delhi- 110085.	<b>Complainant</b>
Versus	
1. M/s BPTP Limited 2. M/s Countrywide Promoters Private Limited <b>Regd. Office at:</b> - M-11, Middle Circle, Connaught Circus, New Delhi-110001	<b>Respondents</b>

<b>CORAM:</b>	
Dr. K.K. Khandelwal	<b>Chairman</b>
Shri Vijay Kumar Goyal	<b>Member</b>
<b>APPEARANCE:</b>	
Ms. Vridhi Sharma	Advocate for the complainant
Sh. Venket Rao & Pankaj Chandola	Advocate for the respondents

**ORDER**

1. The present complaint has been filed by the complainant/allottee 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 allottee 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.N.	Particulars	Details
1.	Name of the project	"Terra", Sector- 37-D, Gurugram
2.	Nature of project	Group Housing Towers
3.	<b>RERA registered/not registered</b>	Registered 299 of 2017 dated 13.10.2017
4.	<b>DTPC License no.</b>	83 of 2008 dated 05.04.2008 and 94 of 2011 dated 24.10.2011
	Validity status	04.04.2025 and 23.10.2019
	Name of licensee	SUPER BELTS PVT. LTD and 3 others and COUNTRYWIDE PROMOTERS PVT LTD and 6 others
	Licensed area	23.18 acres and 19.74
5.	Unit no.	T-24-201, Tower 24 [As per page no. 29 of complaint]

6.	Unit measuring	1998 sq. ft. [As per page no. 29 of complaint]
7.	Date of execution of Flat buyer's agreement	26.12.2012 (Page no. 23 of complaint)
8	Tripartite Agreement	26.12.2012
9	Allotment Letter	10.12.2012 ( page no. 18 of complaint)
10.	Possession clause	<p><b>5. Possession</b></p> <p><b>5.1 The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser(s) within e Commitment Period.</b> The Seller/Confirming Party shall be additionally entitled to a Grace Period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said Unit.</p> <p><b>1.6 "Commitment Period"</b> shall mean, subject to, Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC). Stamp duty and other charges, the</p>

		Seller/Confirming Party shall offer the possession of the Unit to the <b>Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyer's Agreement, whichever is later.</b>
11.	Due date of possession	26.06.2016 (calculated from the execution of BBA)
12.	Total sale consideration	Rs. 1,32,11,326/- [as alleged by complainant as per payment plan]
13.	Total amount paid by the complainant	Rs. 1,33,42,728/- (as alleged by the complainant)
14.	Occupation certificate dated	09.12.2021
15.	Offer of possession	not offered

**B. Facts of the complaint**

- That the complainant booked a unit in the project of the respondents namely, "Terra" located at Sector 37-D, Gurgaon, Haryana. On 10.12.2012, the complainant received an allotment letter from the respondents of unit bearing no. **T24-201** admeasuring **1,998 sq. ft.** under the subvention plan for total consideration of the unit was **Rs.1,32,11,326/-**.
- That finally a flat buyer's agreement was executed between the parties on 26.12.2012. As per the agreement, the possession of the said unit was

to be handed-over to the complainant within 42 months from the date of execution of the agreement, that is by, 26.06.2016.

5. That in the present case, the complainant has been arbitrarily charged without reaching any milestone in the construction of the project. The complainant till date has paid an amount of Rs.1,30,88,384/- to the respondents.
6. It is pertinent to note that initially the complainant had availed loan facility from the HDFC Bank and had foreclosed the policy later. It is submitted that the complainant has paid Rs. 2,54,344/- as interest on the loan availed from January 2013 to March 2016. There had only been a delay for the payment of the first construction linked installment (after initial 20% application money deposit) in Jan 2013, which also cannot be attributed to the complainant as there was a delay from the side of the respondents in getting "Terra" Project registered/approved with HDFC for loan. The compliant HDFC housing loan was sanctioned well in time by HDFC on Dec 20th 2012 to ensure payment for first construction link payment. However due to delay on the part of the respondents to submit project documents to HDFC for "Terra" project centralized approval for all applicants, there was delay in the disbursement from HDFC to the applicants. This was discussed and agreed by the respondents in December 2012. In addition to confirmation by the respondents customer care department over phone, the respondents also confirmed to the complainant over email on December 25, 2012, no interest will be charged on receipt of the HDFC loan sanction letter, which was submitted by the complainant well on time in Dec 2012 to the respondents. The respondents still have imposed and recovered unjustified interest on the complainant to avoid paying any penalty under the agreement.

7. That the booking has been made way back in 2012 and 99.06 per cent of the total consideration has already been paid by the complainant. That till date no concrete development has taken place on site nor the respondents look in any better position to deliver the unit anytime in the near future. That in such circumstances the respondents cannot any more assure the complainant of any further false promises and thus, the Hon'ble Authority is requested to direct the respondents to refund the money of the complainant along with a prescribed rate of interest.
8. That the complainant being aggrieved against the respondents for not completing the project and for not delivering the possession of apartments, the complainant paid number of visits to the site and requested the respondents to hand over the possession but all in vain and this shows that the respondents are not able to hand over the possession of the flat which they have already delayed and therefore, it is clear that the respondents are not able to hand over the possession in near future and therefore, the complainant is no more interested to continue with the project.
9. That the complainant has at all times made payments against the demands of the respondents and as per payment schedule of the agreement pertaining to has flat, therefore the fraudulent act and conduct of the respondents needs to be penalized in accordance with the provisions of the Real Estate (Regulation and Development) Act, 2016 (Hereinafter being referred as "the act"),

**C. Relief sought by the complainant.**

10. The complainant has sought following relief:
  - (i) Direct the respondents to return sale consideration sum of Rs. 1,33,42,728/- received by it from the complainant.

**D. Reply by the respondents.**

11. It is submitted that the complainant has approached this Authority for redressal of the 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 cases 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 respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

- That the complainant approached the respondents through a broker, namely "Investors Clinic Infratech Pvt. Ltd." after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same. It is further submitted that complainant is an investor and has booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slump in the real estate market, he has filed the present purported complaint to wriggle out of the agreement.
- That the complainant has concealed from this Hon'ble Authority that complainant has earned a broker discount of Rs.99,900/- from respondents.

- That the complainant falsely stated that the timely payments were made by him as and when demanded by respondents, however, as detailed in the reply to list of dates, it is submitted that the complainant made several defaults in making timely payments as a result thereof, respondents had to issue reminder letters for payment of the outstanding amounts.
  - That the complainant in the entire complaint concealed the fact that no updates regarding the status of the project were provided to him by the respondents. However, the complainant was constantly provided construction updates by the respondents vide emails dated 25.09.2015, 16.03.2017, 24.04.2017, 24.05.2017, 21.06.2017, 28.07.2017, 21.08.2017, 11.12.2017, 26.03.2018, 09.04.2018, 08.05.2018, 15.06.2018, 09.09.2018, 07.11.2018, 19.12.2018, 21.01.2019, 24.01.2019, 24.02.2019, 22.03.2019, 19.04.2019 and 15.05.2019
12. That agreements that were executed prior to implementation of the Act of 2016 and 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 complainant out of his own free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them.
13. It is further submitted that having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainant is



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". In this regard, the respondents reserve their right to refer to and rely upon decisions of the Hon'ble Supreme Court at the time of arguments, if required.

14. 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 complainant has raised dispute but did not take any steps to invoke arbitration.
15. Copies of all the relevant do 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.

#### **E. Jurisdiction of the authority**

The respondents have 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.*

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 complainant at a later stage.

## **G. Findings on the objections raised by the respondents**

### **F. I Objection regarding complainant is in breach of agreement for non-invocation of arbitration.**

16. The respondents have raised an objection for not invoking arbitration proceedings as per the provisions of plot 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:

#### **"17. Dispute resolution**

*All or any disputes arising out of or touching upon or in relation to the terms of this Agreement or its termination 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. A Sole Arbitrator who shall be nominated by the seller/confirming party managing director, shall hold the arbitration proceedings at Gurgaon . 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 .....*

17. 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 provides 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.

18. 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.
19. 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.

**F. Findings on the relief sought by the complainant.**

**Relief sought by the complainant:** The complainant has sought following relief:

- (i) Direct the respondents to return sale consideration sum of Rs. Rs. 1,30,88,384/- received by them from the complainant.

**Delay Possession Charge**

20. In the present complaint, the counsel for the complainant submitted that if possession of the unit is given to him as OC has been obtained during the intervening period rather than seeking refund, he will accept the unit subject to payment/adjustment of delay possession charges as per the report of the committee. 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."*

21. Clause 5.1 read with clause 1.6 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

*"Clause 5.1- The Seller/Confirming Party proposes to offer possession of the unit to the Purchaser(s) within the Commitment period. The Seller/Confirming Party shall be additionally entitled to a Grace period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said unit.*

*Clause 1.6 "Commitment Period" shall mean, subject to, Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of*

*instalments of the sale consideration as per the payment plan opted, Development Charges (DC), Stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyer's Agreement, whichever is later.."*

22. At the inception, it is relevant to comment on the pre-set possession clause of the floor buyer's agreement wherein the possession has been subjected to numerous terms and conditions and force majeure circumstances. 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 promoter 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 promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builders have 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.
23. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the unit within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyer's Agreement, whichever is later, the flat buyer's agreement was executed on 26.12.2012. So, the due date is calculated from the date of execution of flat buyer's agreement i.e. 26.06.2016. Further it was provided in the floor buyer's agreement that promoters would be entitled to a grace period of 180 days after the expiry of the said committed period for

making offer of possession of the said unit. In other words, the respondents are claiming this grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondent-promoters had completed the said project within this span of 42 months and had started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoter has not obtained the occupation certificate and offered the possession within the time limit prescribed by him in the floor buyer's agreement. 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.

24. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate of interest on the 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.*

25. 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.
26. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 29.08.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.
27. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

*"(z) "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;"*

28. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10% by the respondents/promoters



which is the same as is being granted to the complainant in case of delayed possession charges.

#### **H. Directions of the authority**

29. 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 respondents are directed to pay interest at the prescribed rate of 10% p.a. for every month of delay from the due date of possession i.e. 26.06.2016 till the date of receipt of OC plus two months to the complainant(s) as per section 19(10) of the Act.
  - II. The arrears of such interest accrued from due date of possession till its admissibility as per direction (i) above shall be paid by the promoter to the allottees respectively within a period of 90 days from date of this order as per rule 16(2) of the rules.
  - III. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period against their unit to be paid by the respondents
  - IV. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10% by the respondent/promoters which is the same rate of interest which the promoter


shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- V. The respondents shall not charge anything from the complainant 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.

30. Complaint stands disposed of.

31. File be consigned to registry.

*V.I - 3*  
(Vijay Kumar Goyal)  
Member

  
(Dr. K.K. Khandelwal)  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.08.2022

**HARERA**  
**GURUGRAM**