

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

**Complaint no. :** 5511 of 2022  
**Date of filing of complaint:** 08.08.2022  
**Ordre reserved on:** 10.03.2023  
**Order pronounced on:** 23.05.2023

1. Mr. Bal Kishan Gupta  
2. Mrs. Ritu Gupta  
Both RR/o: - B-4, Satyawati Colony, Ashok Vihar, Phase-  
III, New Delhi- 110052

**Complainants**

Versus

M/s Raheja Developers Limited.  
**Regd. Office at:** W4D, 204/5, Keshav Kunj, Western  
Avenue, Sainik Farms, New Delhi- 110062

**Respondent**

**CORAM:**  
Shri Ashok Sangwan

**Member**

**APPEARANCE:**  
Sh. Venket Rao (Advocate)  
Sh. Garvit Gupta (Advocate)

Complainants  
Respondent

**ORDER**

1. This complaint has been filed by the complainant/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 provisions of the Act or the



Rules and regulations made thereunder 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                 | "Raheja's Atharva", Sector 109, Gurugram                                    |
| 2.    | Project area                              | 14.812 acres  |
| 3.    | Nature of the project                     | Residential Group Housing Colony  |
| 4.    | DTCP license no. and validity status      | 257 of 2007 dated 07.11.2007 valid up to 06.11.2017                         |
| 5.    | Name of licensee                          | Brisk Construction Pvt. ltd and 3 others                                    |
| 6.    | RERA Registered/ not registered           | Registered vide no. 90 of 2017 dated 28.08.2017                             |
| 7.    | RERA registration valid up to             | 27.02.2023<br>5 Years from the date of revised Environment Clearance        |
| 8.    | Unit no.                                  | IF16 - 01, ground floor, block/tower-IF16<br>[Page no. 42 of the complaint] |
| 9.    | Unit measuring                            | 2152.640 sq. ft.<br>[Page no. 42 of the complaint]                          |
| 10.   | Date of allotment letter                  | N. A  |
| 11.   | Date of execution of flat buyer agreement | 12.02.2010<br>[Page no. 39 of the complaint]                                |



|     |                   |  |
|-----|-------------------|--|
| 12. | Possession clause | <p><b>4.2 Possession Time and Compensation</b></p> <p><i>That the company shall endeavor to give possession of the apartments to the allottee(s) <b>within</b> thirty-six (36) months in case of tower <b>and thirty (30) months in case of 'Independent Floor' from the date of the execution of the Agreement to sell</b> and after providing of necessary infrastructure in the sector by the Government, but subject to force majeure conditions or any Government/ Regulatory authority's action, inaction or omission and reasons beyond the control of the company. The company on obtaining certificate for occupation and use by the Competent Authorities shall hand over the Unit to the Purchaser for this occupation and use and subject to the Purchaser having complied with all the terms and conditions of this application form &amp; Agreement To sell. In the event of his failure to take over and /or occupy and use the unit provisionally and/or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be liable to compensation @ Rs.7/- per sq. ft. of the super area per month as holding charges for the entire period of such delay..... "</i></p> |
|-----|-------------------|--|



|     |   |  |
|-----|---|--|
| 13. | Due date of possession  | <b>12.08.2012</b><br>[Note: 30 months form the date of agreement to sell i.e., 12.02.2010] |
| 14. | Payment plan  | Installment Payment Plan<br>[as per payment plan at page no. 64 of the complaint]          |
| 15. | Basic sale consideration as per BBA at page no. 64 of the complaint       | Rs.93,16,633 /-  |
| 16. | Total amount paid by the complainants                                     | Rs.88,36,975/-<br>(As pleaded by the complainants at page 13 of the complaint)             |
| 17. | Occupation certificate /Completion certificate                            | Not received   |
| 18. | Offer of possession   | Not offered  |
| 19. | Delay in handing over possession till date of this order i.e., 23.05.2023 | 10 years 9 months and 11 days  |

**B. Facts of the complaint**

3. The complainants have made the following submissions in the complaint: -

- I. That in the year 2009, the complainants came to know about project through marketing representative of the respondent. Acting on the tall claims and assurances provided by him on behalf of it, they booked an Independent Floor in the aforesaid project believing that the respondent had obtained all approvals /permissions necessary for construction of the project.



- II. That the respondent through its marketing representative claimed to be a renowned developer in the real estate sector and invited the complainants to book Independent Floor in the said project. It was assured that the instant project is one of the finest and is free from all kinds of encumbrances. Further, it also claimed that construction of the project was in full swing and promised to deliver the possession of the said unit as per the projected date. Thereafter, believing upon such assurances and commitments, they, agreed to purchase the Independent Floor bearing no. IF 16-01, ground floor, admeasuring to 2152.64 sq. ft. along with court/terrace area of 1485.75 sq. ft. for a total sale consideration of Rs.93,16,633.71/- and paid an advance booking amount of Rs.7,81,920/- for further registration.
- III. That the complainants opted for a construction linked plan and the respective instalments were to be raised only upon achieving the proposed milestone. The respondent at times failed to achieve the milestone for the project in question but being aware of the same, they continued to pay the instalment as and when demanded by it. The respondent failed to offer possession within proposed time.
- IV. That the respondent vide allotment letter dated 08.01.2010, provisionally allotted an independent floor, in the aforesaid project. Thereafter, on 12.02.2010, a flat buyer's agreement was executed between the parties for the above-mentioned floor. The respondent was required to deliver the possession of the unit



within 30 months from the date of execution of the agreement. But it failed to offer the said unit even after the delay of almost 10 (Ten) years.

- V. That in accordance with clause 4.2 of the agreement so signed and acknowledged, the respondent proposed to provide possession on or before 12.08.2012. But it was utter shock for the complainants on knowing that even on the due date as proposed by it the construction was not even completed. Despite, paying more than half of the total sale consideration, the respondent has not only violated the terms of the agreement but has also failed to give the possession as on date.
- VI. That believing upon the assurances and false promises made by it, they paid a total amount of Rs.88,36,975/- towards the agreed sale consideration of Rs. 93,16,633.71/-. The complainants have also obtained a housing loan from the Federal Bank to the tune of Rs.40,26,710/- in order to pay the instalments as and when demanded by it for the said floor in the project. They have been paying EMI's of Rs.95,247/- every month for the said loan.
- VII. That as per the agreement, the possession was proposed to be given by 22.10.2012. But, to the utter shock of the complainants the construction was not even completed even after the lapse of due date of possession. Despite making almost entire sale consideration, the respondent has not only violated the terms of the agreement but has also failed to give the possession as on date.

- VIII. That as per the commitment made at the time of booking and agreed under the agreement payment plan table, 5% of basic sale price timely payment incentive was assured to be provided by it. It is an evident fact that the respondent as on date has not paid any sort of incentive or rebate despite after receiving the instalment amount as and when demanded.
- IX. That they have already paid the amount of club membership and car parking apartment and other necessary charges as and when demanded by its way back in the years 2012 and 2013. However, till date, the respondent has failed to provide any of those facilities.
- X. That the respondent has not provided the complainants with any interest on delay in handing over the possession of the unit and thus violated the provision of section 18 of the Act, 2016.
- XI. That the terms and the conditions provided under the agreement are one-sided, unfair, and arbitrary in nature and were drafted merely to protect the interest of the respondent. On account of delay in payment the respondent, it is liable for delay charges and the rights provided to the respondent for default of others are not placed on an equal platform with the rights of the complainants.
- XII. That the respondent is a habitual defaulter and has defaulted in his various other projects by not delivering the possession of the unit in time. It is tactics of the respondent to cheat and dupe the innocent and gullible buyers by diverting the money collected from them for its own use or benefits.



XIII. That the respondent had utterly failed to fulfil his obligations to deliver the possession in time or refund the money along with the interest and caused mental agony, harassment, and huge loss to the complainants. Hence the present complaint.

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

4. The complainant has sought following relief(s).

I. Direct the respondent to handover the actual physical possession of the unit of the complainants immediately along with all the amenities as promised under the agreement.

II. Direct the respondent to pay the prescribed rate of interest on the amount paid i.e., Rs.88,36,975/- for delay in handing over of possession from the due date of possession i.e., 20.08.2012 till the date of actual handing over of possession.

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

**D. Reply by the respondent.**

6. The respondent contested the complaint on the following grounds: -

a) That the complaint filed by the complainants is neither maintainable nor tenable and is liable to be out-rightly dismissed. The present complaint has been filed without any locus standi, cause of action against the respondent and rather by divulging incorrect facts. There was no ground at all to have filed the present baseless, false and frivolous complaint. The respondent has registered the project





with the authority under the provisions of the Act of 2016, vide registration no. 90 of 2017 dated 28.08.2017.

- b) That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 15.2 of the agreement.
- c) That the complaint filed by the complainants is on the face of it highly frivolous, not maintainable and barred by law and has been filed with the sole motive to illegally extort money from the respondent. The present complaint has been filed by misinterpreting the provisions of Act, 2016 and the Rules, 2017 in order to somehow cause wrongful gain to himself and wrongful loss to the respondent and they cannot be allowed to succeed in their malafide motives. The true and correct facts are that: -
- That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as 'Raheja Atlantis', 'Raheja Atharva', and 'Raheja Vedanta' and in most of these projects large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.
  - That the complainants are real estate investors who had booked the commercial unit in question with a view to earn quick profit in a short period. However, it appears that their calculations have gone wrong on account of severe slump in the real estate

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market, and they are now raising untenable and illegal pleas on highly flimsy and baseless grounds. Such malafide tactics of the complainants cannot be allowed to succeed.

- That based on the application for booking, the respondent allotted to the complainant's unit no. IF-1601. However, the complainants are still liable to make payment towards the registration charges, stamp duty, service tax and other charges at the applicable stage and the same is known to the complainants from the very inception.
- That they were continuous defaulters from the very inception and despite being aware that timely payment was the essence of the allotment, they failed to remit the same on time and the respondent was constrained to remind them frequently. It is submitted that the complainants signed and executed the agreement to sell, and the complainants agreed to be bound by the terms contained therein.
- That the respondent raised payment demands from the complainants in accordance with the mutually agreed terms and conditions of allotment as well as of the payment plan and the complainants made the payment of the earnest money and part-amount of the total sale consideration and is bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, stamp duty, service tax as well as other charges payable at the applicable stage.
- That the time period for calculating the due date of possession shall start only when the necessary approvals will be provided



by the governmental authorities and the same was known to the complainants from the very inception. It is submitted that non-availability of the occupational certificate is beyond the control of it and the same also falls within the ambit of the definition of 'Force Majeure' condition as stipulated in Clause 4.4 of the agreement to sell.

- That despite the respondent fulfilling all its obligations as per the provisions laid down by law, the government agencies have failed miserably to provide essential basic infrastructure facilities such as roads, sewerage line, water, and electricity supply in the sector where the said project is being developed. The development of roads, sewerage, laying down of water and electricity supply lines has to be undertaken by the concerned governmental authorities and is not within the power and control of the respondent. The respondent cannot be held liable on account of non-performance by the concerned governmental authorities. The respondent company has even paid all the requisite amounts including the external development charges (EDC) to the concerned authorities.
- That despite the respondent fulfilling all its obligations as per the provisions laid down by law, the government agencies have failed miserably to provide the timely occupational certificate.
- That the respondent applied to the Director General, Town & Country Planning, Haryana on 27.04.2017 for the grant of occupation certificate. The District Town Planner, Gurugram on 31.07.2018 sent a report to the Senior Town Planner, Gurugram Circle, Gurugram wherein it was evident that the construction of

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the project had already been completed. A perusal of the report dated 31.07.2018 makes it evident that the construction of the project was complete and ready for possession.

- That the construction activity of the Raheja Shilas –Independent Floors (IF) which consists of low-rise floor apartment is already completed and only after completion of construction of the Raheja Shilas –Independent Floors (IF), the respondent applied for grant of occupation certificates to the Department of Town and Country Planning, Haryana on 05.06.2018 and the same is still pending with the department. That apartments are ready for delivery as is evident from the report of DTCP dated 31.07.2018. It is further submitted that the physical possession may only be offered to the complainants after obtaining occupation certificate from the concerned department.
- That every complaint has to be decided according to law, but there is a benchmark (the law), which the authority applies to the facts in order to discern (and adjudicate) what was the obligation, and if there is any deficiency in intent, effort or delivery as claimed but then facts have to reach the record completely and accurately. That variation in the economic situation and the upturns and the downturns or unfulfilled expectations of a few cannot form the basis or an excuse to feign deficiency in service delivery.
- That the unit buyers who had invested in the hope of rising markets, finding insufficient price rise – due to delay of Dwarka expressway, delay in development of allied roads and shifting of toll plaza engineered false and ingenious excuses to complain



and then used social media to make other (non-speculator) shop buyers join them and make complaints, in all probability, by giving them an impression that the attempt may mean 'profit', and there is no penalty if the complaint failed.

- That the three factors: (1) delay in acquisition of land for development of roads and infrastructure (2) delay by government in construction of the Dwarka Expressway and allied roads; and (3) oversupply of the commercial units/shops in the NCR region, operated to not yield the price rise as was expected by a few. This cannot be a ground for complaint for refund as the application form itself has abundantly cautioned about the possible delay that might happened due to non-performance by Government agencies.
- That the complainants willingly and voluntarily signed the application for allotment, after carefully reading and understanding the terms thereof and agreed to be bound by the terms and conditions of the booking application form. They were neither forced nor pressurized to apply for the allotment of the Independent Floor. It is stated that the agreement was in symmetry with the application form signed by the complainants. Further the buyer's agreement was executed between the Parties. The said agreement was duly signed by the complainants after going through the same and understanding each and every clause contained in the agreement as well as the application form. They were neither forced nor were influenced by anyone to transfer the allotment in their name and the same

was voluntarily and willingly entered into by the complainants after understanding the clauses thereof.

7. 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 submissions made by the parties.

**E. Jurisdiction of the authority**

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E.I Territorial jurisdiction**

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of 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**

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

***Section 11(4)(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.*

11. 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.

**F. Findings on the objections raised by the respondents**

**F.I. Objection regarding entitlement of DPC on ground of complainant being investor.**

12. The respondent has taken a stand that the complainants are investors and not a consumer. Therefore, they are not entitled to the protection of the Act and is not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of the consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules



or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that they are buyers and paid total price of Rs.88,36,975/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

13. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainants are allottee as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.





**F. II Objection regarding agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement.**

14. The agreement to sell entered into between the two side on 12.02.2010 contains a clause 14.2 relating to dispute resolution between the parties. The clause reads as under: -

*"All or any disputes arising out or touching upon in relation to the terms of this Application/Agreement to Sell/Conveyance Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at the office of the seller in New Delhi by a sole arbitrator who shall be appointed by mutual consent of the parties. If there is no consensus on appointment of the Arbitrator, the matter will be referred to the concerned court for the same. In case of any proceeding, reference etc. touching upon the arbitrator subject including any award, the territorial jurisdiction of the Courts shall be Gurgaon as well as of Punjab and Haryana High Court at Chandigarh".*

15. 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. Also, section 88 of the Act 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*, 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.

16. Further, in **Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017**, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

*"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*

*"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*

*It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such*



*matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*

...  
*56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

17. 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. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

*"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*



18. 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 and RERA Act, 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 complainant.**

**G. I Direct the respondent to handover the actual physical possession of the unit of the complainants immediately along with all the amenities as promised under the agreement.**

**G. II Direct the respondent to pay the prescribed rate of interest on the amount paid i.e., Rs.88,36,975/- for delay in handing over of possession from the due date of possession i.e., 20.08.2012 till the date of actual handing over of possession.**

19. 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."*

20. Article 4.2 of the agreement to sell provides for handing over of possession and is reproduced below:

**4.2 Possession Time and Compensation**



*That the company shall endeavor to give possession of the apartments to the allottee(s) **within thirty-six (36) months in case of tower and thirty (30) months in case of 'Independent Floor' from the date of the execution of the Agreement to sell** and after providing of necessary infrastructure in the sector by the Government, but subject to force majeure conditions or any Government/ Regulatory authority's action, inaction or omission and reasons beyond the control of the company. The company on obtaining certificate for occupation and use by the Competent Authorities shall hand over the Unit to the Purchaser for this occupation and use and subject to the Purchaser having complied with all the terms and conditions of this application form & Agreement To sell. In the event of his failure to take over and /or occupy and use the unit provisionally and/or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be liable to compensation @ Rs.7/- per sq. ft. of the super area per month as holding charges for the entire period of such delay....."*

21. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in making payment as per the plan 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 agreement to sell by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused



his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

**22. Payment of delay possession charges at prescribed rate of interest:**

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.*

23. 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.

24. Taking the case from another angle, the complainant/allottees were entitled to the delayed possession charges/interest only at the rate of Rs.7/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @ 18% per annum compounded at the time of every



succeeding instalment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved persons, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. The authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered between the parties are one-sided, unfair, and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These type of discriminatory terms and conditions of the buyer's agreement would not be final and binding

25. 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., 23.05.2023 is **8.70%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%**.
26. 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—*

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

27. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **10.70%** by the respondent /promoter which is the same as is being granted her in case of delayed possession charges.
28. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 4.2 of the agreement executed between the parties on 12.02.2010, the possession of the subject apartment was to be delivered within 30 months from the date of agreement to sell which comes out to be 12.08.2012. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the





part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the agreement to sell dated 12.02.2010 executed between the parties. Further, no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee. It is pertinent to mention over here that even after a passage of more than 10.9 years neither the construction is complete nor an offer of possession of the allotted unit has been made to the allottee by the builder. Further, the authority observes that there is no document on record from which it can be ascertained as to whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.

29. 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 charges at rate of the prescribed interest @ 10.70% p.a. w.e.f. 12.08.2012 till actual handing over of possession or offer of possession plus two months after obtaining occupation certificate from the competent authority, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

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**H. Directions of the authority**

30. 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 to the complainant against the paid-up amount at the prescribed rate of 10.70% p.a. for every month of delay from the due date of possession i.e., 12.08.2012 till actual handing over of possession or offer of possession plus two months after obtaining occupation certificate from the competent authority, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.
- ii. The arrears of such interest accrued from 12.08.2012 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10<sup>th</sup> of the subsequent month as per rule 16(2) of the rules;
- iii. The respondent is directed to offer the possession of the allotted unit within 30 days after obtaining occupation certificate from the competent authority. The complainants w.r.t. obligation conferred upon him under section 19(10) of Act of 2016, shall take the physical possession of the subject unit, within a period of two months of the occupancy certificate.



- iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period and after clearing all the outstanding dues, if any, the respondent shall handover the possession of the allotted unit.
  - v. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
  - vi. The respondent shall not charge anything from the complainants which is not the part of the agreement to sell.
31. Complaint stands disposed of.
  32. File be consigned to registry.

Dated: 23.05.2023

**HARERA**  
**GURUGRAM**

**(Ashok Sangwan)**  
Member  
Haryana Real Estate  
Regulatory Authority,  
Gurugram