

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

Complaint no. : 760 of 2020
First date of hearing: 06.03.2020
Date of decision : 15.02.2023

Mr. Ashish Jain
Address:- 41/23, Near Hindu Girls College, Kath
Mandi Sonipat.

Complainant

Versus

Maxworth Infrastructure Pvt. Ltd.
Registered address at: F30-31, 1ST Floor,
MGF Mega City Mall, MG Road, Gurugram

Respondent

CORAM:

Shri Sanjeev Kumar Arora

Member

APPEARANCE:

Shri Sukhbir Yadav

Ms. Neha Sharma proxy

Advocate for the complainant

Advocate for the respondent

ORDER

1. The present complaint dated 17.02.2020 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 29 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. No.	Heads	Details
1.	Name of the project	"City Residencies", Sector 10A, Gurugram
2	Nature of the project	Residential
3	Allotment Letter	12.10.2017 (Page 23 of complaint)
4	Unit no.	602, 6 th floor, Block A (Page 27 of complaint)
5	Unit area admeasuring	1600 sq. ft. (Page 27 of complaint)
6.	Date of execution of Apartment Buyer's Agreement	13.10.2017 (Page 25 of complaint)
7	Possession clause	14. <i>Developer will based on its present plans and estimates and subject to all just exceptions, contemplates to give / offer possession of Unit to Buyer(s) within 36/3 months/years from the date commencement of construction of that particular tower where Buyer(s) unit is</i>

		<p><i>located (with a grace period of 6months), subject to force majeure events or governmental action/inaction or due to failure of Buyer(s) to pay in time the price of the said Unit along with other charges and dues in accordance with the schedule of payments or any other activity of Buyer(s) deterrent to the progress of the Project. However the Buyer(s) is entitled to Rs. 5/- per Sq. ft. per month for the delay in offering possession beyond the said period. That the Buyer(s) shall take possession of the Unit within 30 days from the date of issuance of final notice of possession failing which the Buyer(s) shall be deemed to have taken possession of the Unit on 30 day of such notice. In such case the developer shall not be responsible for any encroachment in the Unit occasioned due to failure of the Buyer(s) to take possession within the stipulated time. Besides, holding charges @Rs.5/- per sq. ft. per month and the maintenance charges, as determined by the Developer / Maintenance Agency, shall also be payable by the Buyer(s). However, the Buyer(s) shall be responsible and liable for all civil and liabilities, which may accrue qua such Unit.</i></p>
8	Date of start of construction	15.12.2014 (Annexure P4 at page 44 of complaint as decided in proceedings dated 25.08.2022)
9	Due date of possession	15.06.2018 (As decided by Authority in proceedings dated 25.08.2022)
10	Total sale consideration	Rs. 78,00,000/-

		(As per BBA on page 29 of complaint)
11	Amount paid by the complainant	Rs. 40,00,000/- (As per receipts annexed at P-5) Amount paid by bank: Rs. 54,00,000/- (SOA at annexure P-7)
12	Occupation certificate /Completion certificate	Not annexed
13	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:-
 - I. That in the month of September, 2017, the marketing staff of the respondent had approached the complainant/allottee for booking a residential flat/apartment in the project of the respondent, namely "City Residences" situated at Sector – 10-A, Village Kadipur, Gurugram, Haryana.
 - II. The marketing staff of the respondent showed rosy picture of the project through glitzy advertisements and colourful brochures, proposing to develop and construct an integrated residential project at prime location of Sector 10- A, Gurugram, claiming the same to be an oasis of convenience, space and luxury and perfect example of modern day residential complexes par excellence.

- III. That lured by assurances, promises and representations made by the respondent, the complainant booked a 3 BHK, apartment/unit/flat Unit No- 0602, 6th Floor, Block-A, admeasuring 1600 Sq. ft. in the residential project "City Residences", situated at, Sector -10-A, Gurugram. Flat was purchased under the construction link payment plan for sale consideration of Rs. 78,00,000/- including B.S.P., PLC, CFC plus Rs. 6,40,000/- as EDC and IDC.
- IV. That on 13.10.2017, a pre-printed, arbitrary, unilateral and ex-facie buyer agreement/ agreement to sale was executed between the complainant and the respondent. As per clause No. 14 of builder buyer agreement, respondent has to give the possession of flat "*within a period of thirty six (36) months & 6 months grace period from the date of "commencement of construction"*". It is pertinent to mention here that at the time of booking, super structure of tower "A" was completed and finishing work was started.
- V. It is pertinent to mention here that the respondent did not gave any affirm date for completion of project in builder buyer agreement, therefore, the complainant took reference from the demand letter dated 15.12.2014 issued by the respondent to some other allottee, which shows that the construction was completed upto DPC level of Block - B of the project on given date. Hence, if the date of the letter is taken into consideration then the due date of possession was December, 2017 and with

grace period of six months due date of possession was May, 2018.

- VI. The respondent raised the demand for the payment of the balance amount as per stage of construction, within 30 days of booking, therefore the complainant availed home loan of Rs. 60,00,000/- from Indian Bank against the allotted flat with permission of the respondent. The respondent issued permission to mortgage on 30.10.2017 in favour of Indian Bank.
- VII. That on 11.11.2019, the complainant obtained a statement of Loan Account, from the bank, which shows that on 31.10.2017, the Bank had disbursed Rs. 54,00,000/- in favour of the respondent.
- VIII. That the complainant came to know from a news-paper advertisement dated 28.08.2019 that his flat A- 602 was put on auction by Bank, alleging that the respondent / builder did not repay the loan. It is germane to mention here that the respondent issued permission to mortgage against the said flat and same was mortgaged by the complainant and the complainant was making regular payment of EMI. Thereafter the complainant raised his grievance to the bank and the bank has issued a letter regarding withdrawal of e-auction against said flat.
- IX. That the complainant kept visiting the project site and office of the respondent to get the possession of flat, but the respondent did not give any firm date of possession. Thereafter on repeated request of the complainant the respondent issued a letter dated 08.11.2019 informing that " Sub: Payment of Home Loan EMIs

for Unit No. 0602, Block - A, Area 1600 Sq. Ft. in City Residences at Village - kadipur, Sector - 10A, Gurugram, with reference to above mentioned subject we would like to inform to you that our company will bear the your home loan EMIs, sanctioned by Indian bank, Sushant Lok-1, Gurugram on the above mentioned unit, from Sep-19 to Mar-20 or Sep -19 to offer of possession, whichever is earlier. In case, company is not able to offer you possession for the above mentioned unit by the due date i.e. 30th April, 2020 then you would be paid interest as paid interest as paid by you on EMI till date of possession and company will refund your total payment made for above mentioned unit, to you on or before 30th Apr, 2020".

- X. That the complainant has already made more than 91% payment of the total consideration even then the Respondent fails to complete the construction of the project. It is pertinent to mention here that project is already delayed by more than 1.5 years till January 2020 and the respondent has not handed over the possession of the flat.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s)
 - i. Direct the respondent to pay delayed possession charges and handover possession of the unit.
5. On the date of hearing, the authority explained to the respondent /promoter on the contravention 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.

- i. That the complaint is neither maintainable nor tenable and is liable to be at the threshold. The apartment buyer's agreement was executed between the parties to the complaint prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.
- ii. That the complainant is estopped from filing the present complaint by his own acts, omissions, admissions, acquiescence's and laches.
- iii. That the complaint is not maintainable for the reason that the builder buyer agreement form contains an arbitration clause in serial no. 51 of the BBA which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.
- iv. That the contents of para no 10 state that the flat buyer agreement was executed on 19.11.2016. It is relevant to mention here that from November 2019 onwards things started moving out of control of the respondent. Many force majeure events, situations and circumstances occurred that made the construction at site impossible for a considerable period of time. Such events and circumstances included inter-alia,

- a) Repeated bans on construction activities by EPCA, NGT and Hon'ble Supreme Court of India,
- b) Nationwide lockdown due to emergence of Covid-19 pandemic.
- c) Massive Nationwide migration of labourers from metropolis to their native villages creating acute shortage of labourers in NCR region,
- d) Disruption of supply chains for construction materials and non-availability of them at construction sites due to Covid-19 pandemic,
- e) closure/restricted functioning of various private offices as well as government offices disrupting the various approvals required for the real estate projects,
- f) Resultant financial distress etc.
- g) The Environmental Pollution (Prevention and Control) authority for NCR ("EPCA") vide its notification bearing no. EPCA-R/2019/L49 dated 25.10.2019 banned construction activity in NCR during night hours (6 pm to 6am) from 26.10.2019 to 30.10.2019 which was later on converted into complete 24 hours ban from 01.11.2019 to 05.11.2019 by EPCA vide its notification no. EPCA -R/2019/ L-53 dated 01.11.2019. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ Petition no. 1309/1985 titled as "M.C. Mehta....vs.....Union of India" completely banned all construction activities in NCR which restriction was partly modified vide order dated 09.12.2019

and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020.

- h) The repeated bans forced the migrant labourers to return to their native states/villages creating an acute shortage of labourers in NCR region. Due to the said shortage, the construction activity could not resume at full throttle even after lifting of ban by the Hon'ble Supreme Court. Even before the normalcy in construction activity could resume, the world was hit by the Covid-19 pandemic presented yet another force majeure event that bought to halt all activities related to the project including construction of remaining phase, processing of approval files etc.
- i) The Ministry of Home Affairs, GOI vide notification dated March 24, 2020 bearing no. 40-3/2020-DM-I (A) recognised that India was threatened with the spread of Covid-19 epidemic and ordered a complete lockdown in the entire country for an initial period of 21 days which started from March 25, 2020. By virtue of various subsequent notifications, the ministry of Home Affairs, GOI further extended the lockdown from time to time. Various State Governments including the Government of Haryana have also enforced several strict measures to prevent the spread of Covid-19 pandemic including imposing curfew, lockdown, stopping all commercial, construction activity.
- j) This situation again resulted in massive nationwide migration hit of labourers from metropolis to their native villages creating acute shortage of labourers in NCR regions,

disruption of supply chains for construction materials and availability of them at construction sites and the full normalcy has not returned so far.

- k) Even before the nation could recover fully from the impact of the first wave of Covid-19, the second wave hit very badly the entire nation, particularly NCR region which resulted in another lockdown from April 2021 till June 2021 and now the threat of third wave is looming large.
- l) It is a matter of common knowledge and widely reported that even before the advent of such events, the real estate sectors were reeling under severe strain. However, such events/incidents as above noted really broke the back of the entire sector and many real estate projects got stalled and came to the brink of collapse. The situation was made worse by the dreaded second wave which again impeded badly the construction activities. The said unprecedented factors beyond control of the respondent and force majeure events have resulted so far in time loss of almost 14 months in total and as such all timelines agreed in settlement agreement stood extended at least by 14 months, if not more.
- m) The respondent is perhaps one of the very few developers in NCR region who had fought valiantly during these testing times/odd circumstances and completed the project.

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 respondent has raised a preliminary submission/ objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by The Town and Country Planning Department, Haryana the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

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

F. Findings on the objections raised by the respondents:

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

11. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.
12. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and would be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 and which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of

project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...

122. *We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

13. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

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

other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F.II. Objection regarding complainant is in breach of agreement for non-invocation of arbitration clause

15. The respondent submitted 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 and the same is reproduced below for the ready reference:

"51. That all disputes arising out of this Agreement between the parties shall be adjudicated by arbitration in accordance with the Arbitration & Conciliation Act, 1996. The Buyer(s) has agreed that...Business Head ofor in case his designation is changed, or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted with similar duties. There will be no objection by Buyer(s) to nay such Appointment on the ground that the arbitrator is Developer's employee or that he has dealt with matter to which the agreement relates or that in the course of his duties as a company employee, he has expressed his views on all or any of the matters in dispute. The venue of Arbitration shall be Delhi."

16. 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.

17. 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 complainant and builder 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."

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. The relevant para 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."

19. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within right 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. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.

F.III. Objection regarding force majeure

20. The respondent has raised plea regarding force majeure conditions which led to halting of the construction of project repeatedly. The respondent has submitted that the ban on construction due to orders of NGT, the Supreme Court order banning construction and the COVID-19 pandemic. With respect to NGT orders, it is specified that the same had effect only for short duration of time and thus cannot be said to have adverse effect on construction. Thus, this plea is devoid of merit. Even the Supreme Court order and the government notification thereafter only banned construction for 04 days as submitted by respondent itself, hence, the same plea is also devoid of merit. The plea regarding COVID-19 and its impact is also liable to be rejected as the due date of possession is of 2018 and the pandemic struck only in 2019. Hence, all pleas of respondent regarding force majeure circumstances affecting the construction are rejected.

G. Findings on the relief sought by the complainant:

G. I Delay possession charges

21. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

22. Clause 14 of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

14. POSSESSION

Developer will based on its present plans and estimates and subject to all just exceptions, contemplates to give / offer possession of Unit to Buyer(s) within 36/3 months/years from the date commencement of construction of that particular tower where Buyer(s) unit is located (with a grace period of 6months), subject to force majeure events or governmental action/inaction or due to failure of Buyer(s) to pay in time the price of the said Unit along with other charges and dues in accordance with the schedule of payments or any other activity of Buyer(s) deterrent to the progress of the Project. However the Buyer(s) is entitled to Rs. 5/- per Sq. ft. per month for the delay in offering possession beyond the said period. That the Buyer(s) shall take possession of the Unit within 30 days from the date of issuance of final notice of possession failing which the Buyer(s) shall be deemed to have taken possession of the Unit on 30 day of such notice. In such case the developer shall not be responsible for any encroachment in the Unit occasioned due to failure of the Buyer(s) to take possession within the stipulated time. Besides, holding charges @Rs.5/- per sq. ft. per month and the maintenance charges, as determined by the Developer / Maintenance Agency, shall also be payable by the Buyer(s). However, the Buyer(s) shall be responsible and liable for all civil and liabilities, which may accrue qua such Unit.

23. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. 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 fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period 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 floor and to deprive the allottees of their 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.

24. Admissibility of grace period: The respondent promoter has proposed to handover the possession of the unit within 36/3 months years from the date of commencement of construction of that particular tower where buyer(s) unit is located (with a grace period of 6 months) subject to force majeure events. The grace period of 6 months is allowed due to force majeure events. Therefore, the due date of possession comes out to be 15.06.2018.

25. Admissibility 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.

26. The legislature in its wisdom in the subordinate legislation under rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
27. 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., 15.02.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
- 28. Rate of interest to be paid by the complainant in case of delay in making payments-** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. 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;"*

29. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
30. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 13.10.2017, the possession of the subject unit to hand over within 36/3 months years from the date of commencement of construction (with a grace period of 6 months) subject to force majeure events. The counsel for the complainant has drawn attention towards letter dated 15.12.2014 (annexure-P4 page 44 of the complaint) vide which the promoter has intimated about constriction work reaching DPC level and hence, start of construction has to be treated before that date. Therefore the, letter dated 15.12.2014 is being taken as start of construction. Therefore as per same, the due date comes out to be 15.06.2018 including grace period of six months. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject unit and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's


agreement dated 13.10.2017 to hand over the possession within the stipulated period.

31. 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 delayed possession at prescribed rate of interest i.e. 10.70% p.a. w.e.f. 15.06.2018 till the actual handing over of possession or offer of possession plus two months after obtaining occupation certificate whichever is earlier as per provisions of section 18(1) of the Act read with rules and section 19(10) of the Act of 2016.

H. Directions of the authority

32. 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 the interest at the prescribed rate i.e. 10.70% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 15.06.2018 till the actual handing over of possession or offer of possession plus two months after obtaining occupation certificate whichever is earlier
 - ii. The arrears of interest accrued from due date of possession till the date of order by the authority shall be paid by the promoter to the complainant within 90 days from the date of this order and interest for every month of delay shall be paid by the promoter to

- the complainant before 10th of the subsequent month 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
 - iv. The rate of interest chargeable from the complainant/allottee by the promoter in each of the case, 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 delay possession charges as per section 2(za) of the Act.
 - v. The respondent shall not levy/recover any charge from the complainant which is not the part of the buyer's agreement.
33. The complaints stand disposed of.
34. File be consigned to registry.



(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.02.2023