

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

Complaint no. : 76 of 2020
Date of filing : 07.01.2020
First date of hearing: 11.02.2020
Date of decision : 06.10.2021

Amit Kumar Chawla

Address: - House no. 172, Sector-7, Urban Estate,
Gurugram

Complainant

Versus

Imperia Wishfield Private Limited

Regd. Office: - A-25, Mohan Cooperative Industrial
Estate, Mathura Road, New Delhi-110044

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Ms. Alka Syal
None

Advocate for the complainant
Advocate for the respondent

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 thereunder 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	Information
1.	Project name and location	"Elvedor Retail", Sector-37C, Gurugram
2.	Licensed area	2 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no.	47 of 2012 dated 12.05.2012
	License valid up to	11.05.2016
	Licensee	Prime IT Solution Pvt. Ltd. and Davi Ram S/o Amar Singh
5.	RERA registered/not registered	Not registered
6.	Date of building plans approval	25.06.2013 (Page no. 112 of the reply)
7.	Unit no.	E-0152, ground floor, Evita tower (Page no. 39 of the complaint)
8.	Unit measuring	315 sq. ft. (Page no. 39 of the complaint)
9.	Date of allotment	24.08.2013 (Page no. 25 of the reply)
10.	Date of execution of retail buyer's agreement	14.04.2014 (Page no. 33 of the complaint)
11.	Payment plan	Construction linked payment plan



		(Page no. 65 of the reply)
12.	Total consideration	Rs. 33,49,509/- (Page no. 92 of the complaint)
13.	Total amount paid by the complainant	Rs. 20,05,527/- (Page no. 92 of the complaint)
14.	Due date of delivery of possession (as per clause 11(a), possession be handed over within a period of sixty (60) months from the date of execution of the agreement)	14.04.2019 (Calculated from the date of execution of agreement)
15.	Offer of possession	Not offered
16.	Occupation certificate	Not obtained
17.	Delay in handing over possession till the date of decision i.e., 06.10.2021	2 years 5 months 22 days

B. Facts of the complaint

The complainant has submitted as under:

3. That the respondent claims themselves as reputed builders and developers and big real estate player. The respondent gave advertisements in various leading newspapers about their forthcoming project namely, "Elvedor Retails" promising advantages like world class amenities and timely completion/execution of the project etc. Later a real estate agent based in Delhi contacted the complainant sharing information of the upcoming real-estate project of the respondent namely, "Elvedor Retail" in sector -37-C, Gurgaon.
4. That the complainant got interest and initiated the booking process on 13.09.2012 by presenting a cheque of Rs.2,70,000/- dated 13.09.2019 to the respondent. Thereafter, the complainant was allotted commercial unit no.E.0152, tower Evita in the project

namely, "Elvedor Retail" in sector 37-C Gurugram, Haryana measuring 315 sq. ft./29.26 sq. mtr. (Super area) on the basic sale price Rs.8730.00 psf in "Elvedor Retail" at Gurugram, Haryana. Later 1 more payment of sum of Rs. 4,25,239/- within 45 days of booking was made on 28.10.2012 to the respondent. Third instalment of Rs. 2,85,192/- was made at the time of excavation as agreed at the time of booking with applicable charges/taxes was made on 28.10.2013.

5. That commercial unit was offered and agreed by the complainant at a total price of Rs.28,73,537/- (including taxes).
6. That after making the initial payment of first three instalments, the complainant received a letter dated 28.03.2014 from the respondent which had enclosed two copies of retail buyer's agreement for the pursual of the complainant. The letter clearly asked the complainant to sign both the copies along with the stamp papers and annexure by each allottee/complainant on each page and return the same within 30 days from the issuance of the letter for execution of agreement. The allottee/complainant was also asked to paste 1 photograph of each allottee on page 34. The complainant signed the retail buyer's agreement on 14.04.2014 and after which the both the copies duly signed were returned to the respondent for further action.
7. That on 15.04.2014, the complainant received letter dated 15.04.2014 along with which was enclosed executed "B" copy of buyer's agreement in favour of complainant. As per clause 11 and 11(a) of the agreement, the builder was to handover the possession within 60 months from the date of agreement and the builder shall pay compensation of Rs. 215.28/- per sq. mtr. (Rs. 20/- per sq. ft.



approx.) of the super area of the said unit per month or any part thereof only to the first named allottee(s) and not to anyone else till the grant of occupation certificate. The complainant was made to understand that the promoter/developer of the real estate commercial project was a credible developer, known for its timely delivery of its past projects.

8. That as per the retail buyer's agreement, the respondents had allotted a unit bearing no. E-0152, tower Evita measuring 315 sq. ft./29.26 sq. mtr. (Super area) on the basic sale price Rs. 8730.00/- per sq. ft. in "Elvedor Retail" at sector-37C Gurugram, Haryana.
9. That as per clause 11 of the agreement, the respondents had agreed to deliver the possession of the flat within 60 months from date of execution of the retail buyer's agreement. According to the agreement, the unit was to be delivered on 14.04.2019.
10. That some of the clauses in the agreement, the complainant was made to sign by the respondent on one sided (unconscionable) agreement. The complainant had already signed prepared documents and that some of the clauses contained therein were totally unreasonable and only in favour of the respondent.
11. That after making 15% of the down-payment in 2012, the complainant made all the required payments according to payment schedule till 10.08.2015 which is 72.3% of the total sale consideration. In November 2015, the complainant requested for updates regarding the progress and possession of the flat but received no response from the respondent.
12. That early in 2016, the complainant visited the project site and noticed the project was massively lagging behind on its completion

- deadline. Thereafter, the complainant contacted the respondent seeking an explanation but received no response.
13. That numerous emails were also sent to the respondent but still there was no response from the respondent.
 14. That currently, the structure of the tower where the complainant has been allotted a unit has only been partially completed.
 15. That repeated reminders for handing over the possession of the unit were sent to the developer but there was no response from the respondent's side. Rather, the respondent kept sending demand letters and reminders to the complainant to make rest of the remaining payment of the total amount.
 16. That the intention of the respondent and their officers and directors was malafide right from the beginning and has been aimed to cheat the complainant.
 17. That the respondent has committed breach of trust and have cheated the complainant. The complainant would not have made the payments of the said amount but for the reorientations and promises made by respondent and their directors and officers the complainant did the booking and thereafter made the payments.
 18. That the complainant visited on several occasions to find out the activities at the site and to meet the concerned officials and noticed the project was massively lagging behind their deadline and no responsible authorized person was available there to answer the complainant of his grievances.
 19. That the complainant also sent a personal level notice and later a legal notice to the respondent but there was no action or response from the respondent on the same.

20. That despite of receiving major percentage of the payment of all the demands raised by the respondent for the said unit and despite repeated requests and reminders over emails and phone calls and personal visits of the complainant, respondent has failed to deliver the possession of the allotted unit to the complainant within stipulated period for reasons best known to the respondent only.
21. That till date on visit to the site, it is clearly visible that the construction of the project in which the complainant's unit was booked with a promise by the respondent to deliver the unit by 14.04.2019 has come to a halt and there is no further progress. This clearly explains the ulterior motive of the respondent to extract hard earned money from the innocent people fraudulently.
22. That the complainant has suffered from disruption on their future business plans at the unit, mental agony torture, agony and also continues to incur severe financial losses. This could be avoided if the respondent had given possession of the unit on time.
23. That as per clause 14 of the retail buyer's agreement, the builder shall pay compensation of Rs. 215.28/- per sq. mtr. (Rs. 20/- per sq. ft. approx.) of the super area of the said unit per month or any part thereof only to the first named allottee(s) and not to anyone else till the grant of occupation certificate. It is however pertinent to mention herein that a clause of compensation at such a nominal rate of Rs. 20/- per sq. ft. per month for the period of delay is unjust and the opposite party/respondent has exploited the complainant by not providing the possession of the unit on time. The respondent cannot escape the liability merely by mentioning a compensation clause in the agreement. It is very prominently visible that the respondent has

incorporated the clause in one sided buyer's agreement and offered to pay a meagre amount of Rs. 20/- per sq. ft. for every month of delay. If we calculate the amount in terms of financial charges it comes to a very low per annum rate of interest and whereas as per the agreement and demand letters, respondent charges a very high charges per annum interest on delayed payment.

24. That on the ground of parity and equity the respondent also be subjected to pay the same rate of interest that the respondent expects the buyer to pay in case of delayed payment. The respondent should pay the same rate of interest to the complainant from the promised date of possession till the unit is actually delivered to the complainant. Also, it is very important and pertinent to mention here that this trend of charging higher rate of interests by the respondents is totally an unfair trade practice and this shows that respondents malafide and dishonest motives and intentions to cheat and defraud the complainant.
25. That the respondent is liable for acts and omissions and have misappropriated the said amount paid by the complainant and therefore, are liable to be prosecuted under the provisions of law.
26. That the respondent failed to complete the project constructions activities till date.

C. Relief sought by the complainant:

27. The complainant has sought following relief(s):
 - (i) Direct the respondent to handover the possession of unit along with prescribed interest per annum on compounded

rate from the date of booking of the commercial unit in question.

(ii) Direct the respondent to pay the rate of interest of @24% per annum. The respondent should pay rate of interest of @24% to the complainant from the promised date of possession till the time the unit is actually delivered to the complainant.

28. On the date of hearing, the authority explained to the respondent/promoter about 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 on behalf of the respondent

29. The respondent has contended the complaint on the following grounds: -

- i. That answering respondent denies and disputed each and every statement, contentions and allegations contained in the complaint unless specifically admitted hereinafter, are denied in their entirety as unless specifically set forth and traversed herein. Further, it is submitted that the complainant has not approached this authority with *bonafide* intent as an evident attempt has been made to gain undue advantage by misrepresenting and twisting the material facts and circumstances herein. Further, the complainant cannot deserve any relief from the respondent as the complaint is *mala fide*, false, frivolous and misconceived and hence lacks merit. The complainant, thus, is not entitled to claim any equities from the respondent by way of the present complaint.

No cause of action has arisen in favour of the complainant to file the instant complaint for the desired reliefs.

- ii. That it is submitted that the retail buyer's agreement dated 14.04.2014 executed between the parties, in clause 56, has an arbitration agreement which provides for all disputes between the complainant and allottee to be resolved through arbitration to be held in Delhi. It is stated that no provision in Real Estate (Regulation & Development Act), 2016 (hereinafter referred to as "RERA") provides for exclusive jurisdiction to this authority or takes away the right of parties to render jurisdiction in an arbitration tribunal.
- iii. That the present complaint, filed by the complainant, is absolutely frivolous, misconceived, *malafide* and an abuse of the process of this authority.
- iv. That the complainant has failed to approach this authority with clean hands lacks *bonafide* intents and suppressed material facts and is as such guilty of *suppresloveri* and *suggestio falsi*.
- v. That the present complaint has been filed by the complainant with *malafide* intentions with a view to force the respondent to accede to the whims and fancies of the complainant.
- vi. That it was submitted that the complainant is an 'investor' and approached the respondent company seeking good returns on his investment in any of the projects of the respondent company. There is no *bonafide* requirement of any kind on the part of the complainant.

- vii. That the complainant, after being fully satisfied with the plans, sanctions and approvals of the project namely and applied for a retail unit in one of the esteemed projects namely, "Elvedor" located at sector 37C, Gurugram and consequently signed an application dated 13.09.2012.
- viii. That thereafter, the respondent company allotted a retail unit bearing no. E0152, admeasuring 315 sq. ft. super area on the ground floor in the project namely "Elvedor" located at sector 37C, Gurugram vide allotment letter dated 24.08.2013.
- ix. That post allotment of the said unit the complainant signed a retail buyer agreement dated 14.04.2014. It is pertinent to note that respondent company and the complainant bound themselves to the terms and conditions enumerated in the retail buyer agreement dated 14.04.2014.
- x. That the complainant had opted for construction linked payment plan and has till date paid an amount of Rs. 25,76,732/- against the said unit and Rs. 9,32,235/- against the said unit is still due on the complainant and the same was payable by the complainant as per the agreed payment plan.
- xi. That the respondent company for the records of the hon'ble authority would take an opportunity and the enlighten this authority about the various approval, permits and sanctions which have been granted to the respondent company in respect of the project namely, "Elvedor" located at sector 37C Gurgaon, Haryana in the name of M/s Prime IT Solutions Pvt. Ltd. The various approval, permits and sanctions are as follows:

- a) Letter of intent was issued by the Department of Town and Country Planning, Haryana on 24.05.2011 vide their memo no. LC-2571 JE(B)-2011/6842 for setting up a commercial colony at village Gadoli Khurd, District Gurgaon in Sector 37C, Gurgaon.
- b) License No. 47 of 2012 was issued by the Department of Town and Country Planning, Government of Haryana on 12.05.2012 to Respondent Company, which has been extended from time to time.
- c) The Ministry of Environment and Forests, Government of India granted environment clearance for the construction of the proposed project at sector 37C, Gurgaon vide memo no. SEIAA/HR/2014/1349 dated 07.11.2014. True copy of the Environment Clearance vide memo no. SEIAA/HR/2014/1349 dated 07.11.2014 is annexed herewith as Annexure R-7.
- d) The Haryana State Pollution Control Board, Panchkulla granted the consent to establish the project on 11.05.2015 vide memo no. HSPCB/Consent/:2821215GUSOCTE1796648.
- e) The Airports Authority of India issued a "no objection certificate" indicating the height clearance of the project on 01.05.2013 vide Memo No. AAI/NOC/2013/164/1194.
- f) Building plan concerning the towers in question, in which the complainant has purchased the units was sanctioned by Department of Town and Country

Planning dated 25.06.2013 vide Memo No. ZP-820/SD(BS)2013/43828.

- xii. That the answering respondent is a mere developer of the project "Elvedor". It is pertinent to note that the respondent company has no responsibility and ownership towards necessary compliances related issues for licenses and other approvals. It is to be noted that it is due to the pending issues with DTCP at the end of the licensee company i.e., "M/s Prime It Solutions Pvt. Ltd." this particular project did not get registered under Haryana Real Estate Regulatory Authority and thus in the interest of justice and equity demands that the licensee company, "M/s Prime It Solutions Pvt. Ltd." must be heard before the adjudicating upon this present complaint.
- xiii. That on merits of the present case, it is humbly submitted on behalf of the respondent company, no cause of action arose in favour of the complainant to seek the desired prayer which clearly makes the present complaint of the complainant bad in law.
- xiv. That, the respondent company has always acted with *bona fide* intents for all purposes. Furthermore, the act does not completely cast a shadow upon the defence of genuine delays resulting in failure to deliver timely possession of allotted units. The major reasons for delay in completing the development of the project are as follows:
- a) That due to active implementation of social schemes like National Rural Employment Guarantee Act ("NREGA") and Jawaharlal Nehru National Urban Renewal Mission

("JNNURM"), there was a sudden shortage of labour/workforce in the real estate market as the available labour preferred to return to their respective states due to guaranteed employment by the Central/ State Government under NREGA and JNNURM schemes. This created a further shortage of labour force in the NCR region. Large number of real estate projects, including one that of the respondent company herein, were struggling hard to timely cope up with their construction schedules. Also, even after successful completion of the commonwealth games, this shortage continued for a long period of time. That the said fact can be substantiated by newspaper article elaborating on the above-mentioned issue of shortage of labour which was hampering the construction projects in the NCR region. This certainly was never foreseen or even imagined by the respondent company while scheduling their construction activities. Due to paucity of labour and difference in between demand and supply there were many labour disputes resulting into delay of the project.

- b) That in addition to the labour shortage, the respondent company faced extreme water shortage which was completely unforeseen by any of the real estate companies in the NCR region. The respondent company, already coping up hard with the above-mentioned shortage of labour, was now also faced with the acute

shortage of water in the NCR region. It is a well-known fact that there is extreme shortage of water in State of Haryana and the construction was directly affected by the shortage of water. Further, the Hon'ble Punjab and Haryana High Court vide an Order dated 16.07.2012 in CWP No. 20032 of 2009 directed to use only treated water from available sewerage treatment plants (hereinafter referred to as "STP"). As the availability of STP, basic infrastructure and availability of water from STP was very limited in comparison to the requirement of water in the ongoing constructions activities in Gurgaon District, it was becoming difficult to timely schedule the construction activities. The availability of treated water to be used at construction site was thus very limited and against the total requirement of water, only 10-15% of required quantity was available at construction sites,

- c) That further, the Ministry of Environment and Forest (hereinafter referred to as the "MOEF") and the Ministry of Mines (herein after referred to as the "MOM") had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of kiln which is the most basic ingredient in the construction activity. The MOEF had published a notification dated 14.09.1999 (hereinafter referred to as the "Notification") which, amongst other restrictions, barred the excavation of topsoil for the manufacture of

bricks and further directed that no manufacturing of clay bricks or tiles or blocks be done within a radius of 50 (fifty) kilometres from coal and lignite based thermal power plants without mixing at least 25% of ash with soil. The shortage of bricks in the region also affected the time schedule of construction.

- d) That also, the newspapers vigorously reported this issue highlighting the plight of construction activities in NCR region due to directions of the Hon'ble Supreme Court which resulted into shutting down of various brick kilns.
- e) That further, another raw material i.e., the sand which is used as mixture along with cement was also not available in the vicinity of the complex due to restrictions from Mining Department imposed in the entire Aravali region and the same had to be procured from neighbouring State of Rajasthan thus resulting in delay and increased costs.
- f) That in a completely unforeseeable ruling by the Hon'ble Supreme Court of India dated 08.05.2009, the Hon'ble Court suspended all the mining operations in the Aravalli Hill range falling in State of Haryana within the area of approx. 448 sq. kms, in the district of Faridabad and Gurgaon including Mewat. This ban by the Hon'ble Apex Court, led to a situation of scarcity of the sand and other materials which were derived from the stone crushing activities which directly affected the

construction schedules and activities of the respondent company herein.

- g) That it further needs to be submitted for the due consideration of this authority that the pace of development work was also hampered in a considerable manner on account of the reasons that several projects of various builders which were stranded due to the said facts and circumstances as enumerated herein above started at more or less the same time, which resulted in, and caused a major strain on the otherwise limited necessary raw materials for the development work and their resultant shortage, and that the answering respondent company had no alternative in the said situation, but to face the same and execute the construction work for the said project in the face of the increased rates and shortage, and this very severe strain on the limited sources and its consequent shortage, in fact was a major reason for the slow development work and resultant delay for a period of more than 6 months.
- h) That it is very pertinent to mention here that like other real estate developers the respondent company was also striving hard to complete the construction and hand over the units to the allotted customers, unfortunately, Covid-19 spread over in the world including our country and due to outbreak of Covid-19 in the County and in order to prevent the outbreak of the same the Government of India had passed the directions/orders

for immediate adoption of measures to ensure social distancing in order to prevent the transmission of the virus and in the light of announcement dated 24.03.2020 by the Hon'ble Prime Minister of India declaring three week nationwide lockdown starting midnight of 24.03.2020 and subsequent order dated 24.03.2020 vide no. 40-3/2020-DM-1(A) passed by the Government of India, Ministry of Home Affairs there was a nationwide lockdown for a period of 21 days w.e.f. 25.03.2020 to 14.04.2020 which was further extended till 30.04.2020 which was further extended till 17.05.2020, which was again extended till from 18.05.2020 to 07.06.2020 by various orders passed by the Ministry of Health Affairs' Government of India.

- i) That it would not be out of place to mention here that due to the abovementioned nationwide lock down the construction work and other allied work remained completely stopped / suspended w.e.f. from the date of announcement of lockdown till date and is still continuous which has consequently put the development work behind the schedule by the further time period of approx. more than a year due to the time consumed in mobilization and rearrangement of the construction material, equipment and laborers required therefore.
- j) That the labourers in verge of the lockdown have gone back to their hometowns is not likely to comeback

instantly to resume their work which has been a bit setback for the real estate industry.

- xv. That it was submitted that the respondent company is completely committed to the said project and the complainant is levying false allegations against the respondent company with ulterior notice to earn wrong fully from the respondent company. It also agrees to bear all reasonable delay possession penalty for any delay in offering the possession of allotted units to the complainant though it may again be averred on behalf of the answering respondent that no definitive / binding agreement has been executed between the parties as yet, however in its present projections, the respondent company will be in a position to offer the possession of units to the complainant in the first quarter of 2022 subject to all just exceptions.
- xvi. That it was submitted that the construction at the site is being done in phases and is going on full swing. It is further humbly submitted that any delay in delivering the possession to the complainant cannot be attributed upon the respondent due to force majeure events, which were beyond the control of the respondent company. The respondent company even after numerous reasons which are beyond its control is trying its level best to complete the said project at the earliest and as per the current scenario would be able to handover the said unit by March 2022. It was further submitted that the respondent company as a gesture of goodwill is also willing to

adjust the delay penalty if any after taking into consideration the force majeure reasons.

- xvii. That it was submitted on behalf of respondent that it has invested a huge sum of monies in this project. The respondent company is arranging funds with great difficulties and even many customers of this project have stopped making payments of due instalments as per applicable construction linked payment plan and thus it will cause immense irreparable losses to company in case the order of payment of compensation or refund is passed the same are detrimental to the interests of hundreds of allottees who are not in the litigation and are expecting the possession of their respective units from the company at the earliest.
- xviii. That it was submitted that the complainant has levelled false and vexatious complaint against the respondent just to harass the respondent and the matter is of pure civil nature which revolves around the contractual liabilities of both the parties derived from the agreements executed by the parties.
- xix. That it was submitted that the complainant and the respondent are bound by the terms and conditions of the retail buyer agreement and therefore the dispute if any falls within the ambit of a civil dispute and all other allegations levelled by the complainant are false and baseless.
- xx. That it was submitted, that in the present reply the respondent is limiting its contentions only to the issue of maintainability of the complaint filed by the complainants before this authority. However, the respondent craves leave

before this authority to file a detailed reply addressing the merits of the case, if so required, at a subsequent stage.

- xxi. That the complaint filed by the complainants is merely a tactic to harass the respondent as the complainants were duly informed from time to time regarding the status of the project.
- xxii. That it is settled law that one who approaches the authority should approach with clean hands, which was not so in the instant case, as the complainants came to seek equity suppressed the material facts and in fact modified the facts to their advantage.
- xxiii. That the project is subject to force majeure, which includes delay in project due to reasons beyond the control of the respondent.
- xxiv. That it was submitted that the respondent has already invested the entire sum of money received by the respondent towards the said unit in the construction of the said project. Therefore, not in the position to refund the same to the complainant.
- xxv. That, the facts averred by complainant as stated in the complaint do not lay down a foundation of a genuine grievance which was sought to be addressed by the enactment of Real Estate Authority Act, 2016. The complainant is attempting to misuse the instrumentality of this Hon'ble Regulatory Authority for their vested reasons.

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

30. 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 respondent.

F1. Objection regarding complainant is in breach of agreement for non-invocation of arbitration

31. 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:

"56. Dispute Resolution by Arbitration

"All or any disputes arising out or touching upon or in Relation to the terms and conditions of the Application/Agreement, including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties, shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration 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 an appropriate location in New Delhi by a sole arbitrator, who shall be appointed by the Company and whose decision shall be final and binding upon the parties. The Allottee(s) hereby confirms that the Allottee(s) shall have no objection to this appointment by the Company even if the person so appointed as the arbitrator is an employee or advocate of the Company or otherwise is connected to the Company and the Allottee(s) confirms that notwithstanding such relation/connection, the Allottee(s) shall have no doubts as to the independence or impartiality of the sole arbitrator, appointed by the Company. It is understood that no other person or authority shall have the power to appoint the arbitrator. (The Courts at Gurgaon alone and the Punjab & Haryana High Court at Chandigarh alone shall have jurisdiction.)"

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

33. 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 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."

34. 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."

35. 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 his rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and Real Estate (Regulation and Development) 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.

1. **Delay possession charges:** To direct the respondent to give the delayed possession interest to the complainant.
36. In the present complaint, the complainant intends 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."

37. Clause 11(a) of the retail buyer's agreement dated 14.04.2014 provides the time period of handing over possession and the same is reproduced below:

"Clause 11(a) - The Company based on its present plans and estimates and subject to all just exceptions endeavors to complete construction of the Said Building/Said Unit within a period of sixty (60) months from the date of this agreement unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the Company or Force Majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total Price and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement. In case there is any delay on the part of the Allottee(s) in making of payments to the Company then notwithstanding rights available to the Company elsewhere in this contract, the period for implementation of the project shall also be extended by a span of time equivalent to each delay on the part of the Allottee(s) in remitting payment(s) to the Company."

38. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and

the right of the buyer/allottee in case of delay in possession of the unit. In pre-Real Estate (Regulation and Development) Act, 2016 period, it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

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

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

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

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

40. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature,



is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

41. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 06.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
42. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

 - (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;*
43. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
44. On consideration of the documents available on record and submissions made by both the parties regarding contravention of 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 11(a) of the retail buyer's agreement executed between the parties on 14.04.2014, the possession of the subject unit was to be handed over within a period of 60 months from the date of execution of retail buyer's agreement which comes out to be 14.04.2019. The respondent has failed to handover possession of the subject unit till date of this order. Accordingly, it is the failure of the respondent to fulfil its obligations and responsibilities as per the retail buyer's agreement executed inter-se between the parties within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 14.04.2019 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

45. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 14.04.2019 till the handing over of possession after receipt of occupation certificate as per section 18(1) read with rule 15 of the rules.

- ii. The arrears of such interest accrued from 14.04.2019 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 allottee before 10th of the subsequent month as per rule 16(2) of the rules.
 - iii. The complainant is also directed to pay the outstanding dues, if any. Interest on the due payments from the complainant and interest on account of delayed possession charges to be paid by the respondent shall be equitable i.e., at the prescribed rate of interest i.e., 9.30% per annum.
 - iv. The respondent is directed to handover the physical possession of the subject unit after obtaining OC from the competent authority.
 - v. The respondent shall not charge anything from the complainant which is not part of the builder buyer agreement.
46. Complaint stands disposed of.
47. File be consigned to registry.


(Samir Kumar)
Member

HARERA
GURUGRAM


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 06.10.2021

CR/76/2020

The counsel of the complainant has filed an application in the present complaint stating that the detailed order dated 06.10.2021 has not been uploaded on the website of the authority.

The aforesaid application was put-up before the authority for consideration and the authority has directed that the order dated 06.10.2021 shall be uploaded as the order was not uploaded by the then concerned Legal Executive inadvertently.


08-08-2023
Legal Officer
(Ajit Singh)