

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

Complaint no.: 5877 of 2022
Date of filing: 29.08.2022
Date of Decision:- 15.11.2023

1. Renu Gupta
2. Vinit Gupta
3. Sunil Gupta

Address: - PC1/201, Essel Towers, MG Road,
Gurgaon, Haryana

Complainants

Versus

1. Essel Housing Projects Private Limited
Address:- Suncity Business Tower, 2nd floor,
Golf Course Road, Sector-54, Gurugram
2. PNB Housing Finance Limited
Address:- 9th floor, Antriksh Bhawan, Kasturba
Gandhi Marg, New Delhi

Respondents

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Shri Garvit Gupta
Shri S.K. Goyal

Advocate for the complainants
Advocate for the respondent no. 1

ORDER

1. The present complaint has been filed by the complainants 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. Project and unit related details

2. The particulars of the project, the details of 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. N.	Particulars	Details
1.	Name of the project	"Platinum Towers" Sector 28, Gurugram, Haryana
2.	Nature of the project	Group housing project
3.	RERA Registered/ not registered	272/2018/04 dated 16.05.2018 valid upto 31.12.2023
4.	Allotment letter	27.11.2018 (Page 38 of the complaint)
5.	Tripartite agreement	21.12.2018 (Page 84 of the complaint)
6.	Unit no.	1002 tower no. platinum F (Page 53 of the complaint)
7.	Super area	2777 sq. ft. (Page 53 of the complaint)
8.	Date of flat buyer's agreement	07.12.2018 (As per page no. 50 of the complaint)

9	Possession clause 7.1	<i>"7.1 The Promoter/Landowner(s), as the case may be, assure to hand over possession of the unit/apartment for residential usage alongwith parking, if applicable as per agreed terms and conditions on or before December 2021 unless there is delay due to "force majeure", Court orders...."</i>
10.	Due date of possession	June 2022 (Grace period of 6 months allowed as per HARERA notification no. 9/3-2020 dated 26.05.2020 for the project having completion date on or after 25.03.2020) Note: In the proceedings dated 15.11.2023, the due date of possession was inadvertently mentioned as December 2021.
11.	Total sale consideration	Rs. 58,26,3,300/- (As per page 53 of the complaint)
12.	Amount paid by the complainants	Rs. 4,94,10,457/-
13	Occupation certificate	04.01.2023 (Page 25 of the reply)
14.	Offer of possession and payment of final instalment and other charges	04.03.2023

B. Facts of the complaint

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

- i. That the respondent no.1 is a company incorporated under the Companies Act, 1956 and respondent no.2 is a financial institution incorporated under Companies Act, 1956 and in the present case has indulged in granting finance to the complainants for the purchase of the unit in question.
- ii. That the respondent no.1 offered units for sale in a Group Housing Project known as 'Platinum Towers'(hereinafter, project") comprising of multi-storied apartments, residential units, car parking spaces, recreational facilities, gardens etc., situated in Sector 28, Gurugram, Haryana.
- iii. That the complainants received a marketing call from the office of respondent no.1 in the month of June, 2018 about the said project. The complainants were interested in the aforesaid project on account of publicity given by the respondent no.1 through various means like various brochures, posters, advertisements etc. The marketing staff of the respondent no.1 painted a very rosy picture of the project and made several representations with respect to the innumerable world class facilities to be provided by the respondent no.1 in their project and also assured timely delivery of the unit.
- iv. That the complainants, induced by the assurances and representations made by the respondent no.1, decided to book a residential unit in the project. On receiving the application form complainants realized that the recitals contained in the said application form were wholly one sided, unilateral, arbitrary, illegal, unfair and biased in favour of the respondent no.1 and

- were totally un-balanced and unwarranted and were against the provisions laid down in Real Estate (Regulation and Development) Act, 2016.
- v. That the complainants have stated their objections regarding the arbitrary and unilateral clauses of the application form to respondent no.1. The complainants were left with no other option but to sign the one sided application form. On the basis of the application, the respondent no.1 allotted unit no. 1002 having carpet area of 2777 sq. ft. on 10th Floor in Tower no. Platinum F, along with two car parking slots. It was decided that the total price of the unit was Rs.5,82,63,300/- along with car parking charges of Rs.5,00,000/- and IFMS charges.
- vi. The provisions of the agreement were on the face of it were illegal, absurd, unilateral, arbitrary, unconscionable and not valid. A bare perusal of the clauses highlights the one-sided arbitrary agreement and the abuse of dominant position. The complainants objected to the arbitrary and unilateral clauses of the agreement to respondent no.1. It is pertinent to mention herein that prior to the signing of the agreement, complainants had made payment of Rs.55,58,319/- out of the consideration amount of Rs.5,82,63,300. Since, the complainants had already paid a considerable amount, they were left with no other option but to accept the lopsided and one-sided terms of the agreement. The complainants felt trapped and had no other option but to sign the dotted lines. Hence the agreement for sale dated 07.12.2018 was executed.

- vii. That respondent No.1 also persuaded the complainants to avail a home loan under subvention scheme plan specifically from respondent No.2 in order to make timely payments for the unit and on the basis of good reputation and goodwill of respondent No. 2, the complainants availed a housing loan facility. It was stated and categorically assured by respondent no.1 to the complainants that the scheme meant 'No-Pre-EMI till possession' and that the same would be borne and payable by respondent no.1 to respondent no.2.
- viii. That the complainants availed the home loan facility from respondent no.2 and a tripartite agreement was shared by the respondents with the complainants. The terms of the said tripartite agreement were also one sided, unjust, and arbitrary and same were offered to the complainants as standard form of contract. It is pertinent to mention that respondent no.2 entered into standard form of contract with all the allottees of the project who applied for loan with respondent no. 2, except for change in date of allotment and loan amount and other individual characteristics of units, all allottees of project were required to sign on dotted lines of tripartite agreement, and the complainants had no say in matter of contractual terms and these loan terms were offered to the complainants on "take it or leave it basis", thus terms of the said tripartite agreement were heavily inclined towards respondent no.1.
- ix. That as per the assurances given by respondent no.1 in terms of the allotment letter cum agreement, the terms were devised in

such a manner that respondent no. 1 was liable to pay the interest and EMI to respondent no. 2 till the offer of possession of unit to the complainants. Respondent no. 2 was fully aware of the facts and circumstances of the said mechanism and after due diligence granted loan to the complainants. Thus the liability to pay EMI's and interest to respondent no.2 was solely the obligation of respondent no.1.

- x. It is pertinent to note that loan amount of Rs.4,40,00,000/- was sanctioned by respondent no.2 to the complainants. That respondent no.1 kept on raising payment demands despite giving no clarification with respect to the due date to handover the possession. The complainants made the entire payment strictly as per the terms of the allotment and there was no default in making timely payment towards the instalment demands by the complainants.
- xi. That it is pertinent to mention herein that despite its assurances that the payment towards the Pre- EMI amount would be made by respondent no.1 till offer of possession, it made payment towards the Pre- EMI amount till March, 2021 only and stopped making payment thereafter. The complainants confronted the representatives of respondent no.1 and asked for a copy of the tripartite agreement that was signed between the complainants and the respondents. When the complainants perused the schedule of the said agreement, which was earlier intentionally left blank by respondent no.1 under the pretext that the same was to be filled later after completion of documentation

formalities, noticed that respondent no.1 with malafide motives had instead of defining the period till offer of possession, unilaterally stated the same as 'upto 31/3/2021'. It thus became clear, that all the assurances and representations made by respondent no.1 were false and was aimed to mislead the complainants. The complainants addressed their concerns to the management of respondent no.1 who assured the complainants that since the agreement has already been signed and submitted to respondent no.2, the same could not have been altered and that, on account of its lapse, respondent no.1 would deposit the Pre-EMI amount to be paid to respondent no.2 directly in the bank account of the complainants on monthly basis and deposited Pre-EMI amount for three months i.e from April 2021 to June 2021 in the bank accounts maintained by the complainants for the period beyond 31.03.2021.

- xii. That however, respondent no.1 suddenly out of its own free will, stopped making payment towards the Pre-EMI amount to the complainants and respondent no.2 started deducting the same from the complainants. The respondent no.1 again deliberately, mischievously, dishonestly and with malafide motives cheated and defrauded the complainants. Yet again, the complainants met the representatives of respondent no.1 and made it clear to them that as per the assurances given by them at the time of getting the tripartite agreement signed and further disposal of the Pre-EMI amount after March, 2021, respondent no.1 was to adhere to its obligations and it cannot unilaterally wriggle out

the same on account of its convenience, whims and fancies. The respondent no.1 admitted the lapse on its part and assured that the non-disbursal of the Pre-EMI amount to the complainants was temporary and was on account of lack of cash flow with respondent no.1 and sought some time to rectify its defects. Since, the due date to complete the project was near and more than 90% of the amount had already been deposited, the complainants were left with no other option but to give a last chance by waiting and believing the representations of respondent no.1. However, the assurances of respondent no.1 turned out to be false yet again. The complainants sent emails dated 22.09.2021, 22.10.2021, 22.11.2021 and 11.02.2022 to respondent no.1 reminding it repeatedly to honour its obligations and to make the payment to respondent no.2 and also to adjust the amount which had been deducted by respondent no.2 towards the Pre- EMI.

- xiii. That, it is pertinent to mention here that despite having made the agreement for sale dated 07.12.2018 containing terms very much favourable as per the wishes of the respondent no.1, it miserably failed to abide by its obligations there under. The respondent/promoter no.1 even failed to perform the most fundamental obligation of the agreement which was to handover the possession of the flat within the promised time frame.
- xiv. That as per Clause 7.1 of the agreement for sale , the possession of the unit was to be handed over by the respondent no.1 on or

before December 2021. Relevant Para of Clause 7.1 of the agreement for sale is reproduced hereunder:

"7.1...The Promoter/Landowner(s), as the case may be, assure to hand over possession of the unit/apartment for residential usage alongwith parking, if applicable as per agreed terms and conditions on or before December, 2021 unless there is delay due to "force majeure", Court orders..."

- xv. That since the time period to handover the possession stated by respondent no.1 in the agreement for sale had lapsed, the complainants requested the respondent no.1 telephonically, and by visiting the office of the respondent no.1 to update them about the date of handing over of the possession. The representatives of the respondent no.1 assured the complainants that the possession of the unit would be handed over to them very shortly as the construction was almost over. The respondent no.1 has continuously been misleading the allottees including the complainants by giving incorrect information and timelines within which it was to hand over the possession of the unit to the complainants. The respondent no.1 had represented and warranted at the time of booking that it would deliver the unit on time. However, the failure of the respondent no.1 company has resulted in serious consequences being borne by the complainants.
- xvi. That furthermore, the fact that respondent no.1 is indulging in gross illegalities and is acting in contrary to the agreed terms of the allotment, is evident from a bare perusal of the reminder dated 04.03.2022 to one of the payment demands. A bare perusal of the said reminder reveals that respondent no.1 has

demanded Rs.6,72,122/- as interest amount on the net payable amount of Rs.20,60,604/-. The interest charged by respondent no.1 was exorbitant as the same was beyond the prescribed rate as provided by law and agreed as per the agreement for sale. Furthermore, when the complainants requested respondent no.2 to disburse the pending amount, it was informed to them that the same was not done as respondent no.2 was not convinced with the construction status of the project developed by respondent no.1. Thus, the complainants had to bear the non-adherence of the contractual obligations of respondent no.1.

xvii. The respondent no.1 after the lapse of the due date has demanded the payment towards the 9th and 10th instalment vide demand letter dated 05.08.2022 for net payable amount of Rs.92, 63,865/-. Even as per clause 9.2 of the agreement for sale, the said demand is illegal and the complainants are fully entitled to stop making further payments to respondent no.1. Rather, respondent no.1 is threatening the complainants that it would not only terminate the allotment but also forfeit heavy amount in case the payment demanded by respondent no.1 is not paid. The non-completion of the project and demanding excessive amount is not attributable to any circumstance except the deliberate lethargy, negligence and unfair trade practices adopted.

xviii. That it is noteworthy to mention that the respondent no. 1 has failed to do anything worthwhile despite receiving substantial amount of money. As such, the complainants are suffering from double whammy, i.e. substantial amount has already been

disbursed by respondent no.2 and the stipulated time has expired still the possession of the unit is nowhere in sight and on the other hand, the complainants have paid an amount of Rs.76, 61,860/- to respondent no.1 and are also paying the Pre-EMIs factoring the principal and the interest to respondent no. 2. It is pertinent to mention that a total amount of Rs.38, 74,554/- as Pre-EMIs has been paid to respondent no.2 by the complainants, till August 2022.

- xix. That an amount of Rs.4,94,10,457/- has been paid till date towards the total sale consideration of the unit. The complainants believed that the money collected by respondent no. 1 from the complainants and respondent no.2 would be utilized in a manner that would commensurate to the stage of construction and further that the complainants would be provided with timely updates regarding the construction work at site.
- xx. That the grievances of the complainants relates to breach of contract, false promises, gross unfair trade practices and deficiencies in the services. There exists a prime facie case against respondent no. 2 by illegally raising the pre-EMI's to the complainants knowing that the said unit was purchased under the subvention scheme and it is the liability of respondent no.1 to pay the EMI's till offer of possession.
- xxi. That to the further surprise and dismay of the complainants, all promises of respondent no. 1 turned out to be false and absolutely misleading as even after considerable lapse of time

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and despite of many follow-ups, respondent no. 1 failed to keep pace with development of the project and the said project is far from completion and it will not be able to deliver the possession anytime soon. It is abundantly clear that the respondent no.1 has cheated the complainants, fraudulently and dishonestly with a false promise to complete the construction of the project within the stipulated period.

- xxii. That due to the fault of the respondent, the complainants have been deprived of roof over their head for a long time and have been suffering badly. The complainants visited the project site in August, 2022 and were shocked to see that no construction activity was going on there and the work has been at standstill. The actual ground reality at the construction site is way different than what the respondent no.1 had claimed to the complainants.
- xxiii. That the cause of action for the present complaint is recurring one on account of the failure of the respondent no.1 to perform its obligations within the agreed time frame. The cause of action again arose when the respondent no.1 failed to hand over the possession and compensation for delay on its part and finally about a week ago when the respondent no.1 refused to compensate the complainants with the delayed possession interest amount, compensation, adjustment of the deducted Pre-EMI amount and with assurance that only respondent no.1 would be bound to make payment towards the same to respondent no.2. The complainants reserve their right to approach the appropriate Forum to seek compensation.

C. The complainants are seeking the following relief:

4. The complainants have sought following relief(s):

- i. Direct the respondent no.1 to pay delayed possession charges.
- ii Direct respondent no.1 to hand over possession of the unit in a habitable condition.
- iii. Direct respondent no.1 to make payment towards the pre- EMI to respondent no. 2 till the offer of possession.
- iv. Direct respondent no.1 to adjust the amount of Rs.38,74,554/- deducted from the bank accounts of the complainants towards the pre-EMI after July, 2021 along with interest ,till the date of disposal of the complaint with the amount payable by the complainants towards the total sale consideration.

D. Reply filed by the respondent No. 2

5. The respondent had contested the complaint on the following grounds:

- i. That the authority does not have the jurisdiction to entertain the present complaint against the respondent as Section 31 of the act mandates filing of complaint for any violation or contravention of the provisions of the act or rules and regulations made there under only against any promoter, allottee or real estate agent and the respondent does not fall under any of those categories and consequently is incapable of committing any violation or contravention of the provisions of the Act as the provisions contain duties and obligations only of the three entities mentioned above viz., promoters, allottees and real estate agents.

- ii. It is further submitted that the authority will be exceeding its jurisdiction as conferred by the act in entertaining the present complaint against the respondent. Therefore, any relief against the respondent is illicit and beyond the defined jurisdiction of the RERA.
- iii. According to Section 37 of the Real Estate (Regulation and Development) Act, 2016 (*hereinafter referred to as "the Act"*), the authority is empowered to issue directions to an allottee, a real estate agent or a promoter.

Section 37 of the Act is being reproduced hereunder for ready reference. -

"The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned."

- iv. Furthermore, Section 36 only empowers the authority to issue interim order only against promoters, real estate agents and allottees. For the purpose of interpretation of the above-mentioned provision, the doctrine of *ejusdem generis* becomes relevant. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. The section lists out the persons or entities to which the authority may issue directions. The general statement that such directions shall be binding on all concerned ,applies only to same kind of persons or entities specifically listed.

- v. It is also to mention that what cannot be done directly, the same cannot be done indirectly. It is settled principle of law and as also observed in the case of *Jagir Singh vs. Ranbir Singh, AIR 1979 SC 381* as well as *State of Tamil Nadu & others vs. K. Shyam Sunder & others, Civil Appeal Nos.6015-6027/2011, decided on August 09, 2011* that what cannot be done directly, is not permissible to be done obliquely. Meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of ***quandoaliquid prohibetur prohibetur at omne per quoddevenituradillud*** which means that authority will be exceeding its jurisdiction in entertaining the present complaint against the respondent.
- vi. That further the present complaint is seeking relief against the respondent which is beyond the jurisdiction of the authority. The same is liable to be dismissed with heavy cost, in the light of Order VII Rule 11 of the Civil Procedure Code, 1908, which grants the power to the court to dismiss the plaint/complaint. The aforementioned contours of the judgment specifically dispense that there is a duty upon the court to determine the complaint/plaint in the correspondence of Order VII Rule 11 of CPC and if it appears that the same is in contravention to Order VII Rule 11, then the complaint/plaint shall be liable to dismissed. Therefore, it becomes absolutely lucid that the present complaint is liable to be dismissed as it is not able to establish any cause of action against the respondent and furthermore, the relief sought

in the contours of the complaint is beyond the jurisdiction of the authority.

- vii. Grievance in regard to respondent no.1: It is submitted that the instant complaint is preferred by the complainants before the authority primarily against the promoter M/s Essel Housing Projects Ltd. (Respondent No. 1) in respect of the apartment/unit booked in the project "Platinum Towers" situated at Sector 28, Gurugram, Haryana, for failure on the part of respondent no. 1 to deliver the unit within the prescribed time limit. Hence, the complainants has prayed to respondent no. 1 to adjust the amount deducted from the complainants towards the Pre-EMI along with interest @ 12% p.a. till the date of disposal of the complaint with the amount payable by the complainants towards the total sale consideration.
- viii. That it is submitted that the complainants had booked a unit in the project of respondent no. 1. As the complainants were falling short of finance, the complainants approached the respondent seeking extension of a loan facility, which, after necessary assessment, was duly sanctioned for an amount of Rs. 4,40,00,000/-. It is submitted that the complainants have grievances with respondent no. 1 regarding delivery of the unit even after making payments. It is therefore submitted that the respondent cannot be made a party to the present case.
- ix. That, at the time of purchase of the property by the complainants, the respondent no. 1 was granting an interest subvention on the loan availed where under the complainants would receive the pre-

EMI from the builder/promoter until possession of the unit was delivered. It is submitted that the complainants by their own will opted for subvention scheme being offered by respondent no. 1. It is further submitted that the complainants have duly read all the terms and conditions of the subvention scheme and agreed to the same and thereby respondent no. 1 and the complainants approached respondent no. 2, in furtherance to which the tripartite agreement was entered into, however, subject to terms and conditions of the loan agreement.

- x. That it is relevant to point out that the complainants with their own free consent had approached the respondent to avail the loan facility in order to get financial assistance to purchase the unit/apartment in the project. Further, a mere perusal of the loan agreement read with the tripartite agreement, makes it evident that it is the duty of the borrowers/complainants to pay the EMIs to respective loan amount and the ultimate liability to pay the entire outstanding amount was always envisaged to be that of the borrowers/complainants.
- xi. It is submitted that the complainants were fully aware of the terms and conditions at the time of executing the tripartite agreement and was also aware of the fact that the respondent is just providing financial assistance to the complainants. It is further submitted that the grievances related to the amount deducted from the bank account of the complainants and related issues are subject matter between respondent no. 1 and the complainants.

- xii. That it is submitted and stated that the complainants in an arbitrary manner are manipulating the fact of the case in order to evade their obligations under the loan agreement and the tripartite agreement. The complainants have failed to realize that the role of the respondent is solely confined to providing financial assistance in furtherance of the loan agreement to purchase the respective unit/apartment and the respondent has fulfilled all its obligations under the loan agreement and the tripartite agreement.
- xiii. That it is pertinent to mention that the respondent is a financial institution and had advanced a loan facility to the complainants for purchase of a unit/apartment after being approached by the complainants for the mentioned intention and on the representation made by the complainants that the builder/promoter (respondent no 1) is of their choice and that they have satisfied themselves with regards to integrity and capability of the builder for quality construction and the builder's ability and efficiency in timely completion and delivery of the project.
- xiv. That further, at the time of executing the tripartite agreement, the complainants represented, and such representation being a continuing representation since the execution of the tripartite agreement, that their obligation to repay the loan shall be distinct and independent obligation more particularly independent of any issues/concern/dispute of whatsoever nature between the complainants and respondent no. 1. The complainants even

undertook that subsequent to the disbursements as requested by them, there would be no repayment default for any reason whatsoever including but not limited to any concern/issues by and between the borrowers and the builder/developer.

- xv. That the complainants are bound by the terms and conditions of the loan agreement read with the most important terms and conditions executed with the respondent and the tri-partite agreement entered into between the complainants and the respondents.

The relevant recitals/clauses of the tripartite agreement are as follows:

Recital B: *The borrower have represented that the Builder is of their choice and that they have satisfied themselves with regard to integrity, capability for quality construction of the Builder and Builder's ability for timely competition and on time delivery of the project.*

Recital D: *The Borrower are short of finance for purchasing the Property hence in order to make up their finance for the purchase approached PNBHFL for grant of Housing Loan. The Borrower under the provisions of The Borrower under the provisions of the housing loan scheme framed by the PNBHFL have applied to PNBHFL for a loan for the purchase of the Property and PNBHFL Schedule I to the Borrower (hereinafter referred to as the "Loan") subject to the terms and conditions applicable to the loan for Purchase of Property. The Borrower have represented that they have not availed any loan from anywhere.*

Recital E: *The Builder hereby offers interest subvention for the loan extended by PNBHFL to the Borrower to purchase the Property which the Borrower accepts. The Builder's liability for payment of interest on the loan amount disbursed/to be disbursed by PNBHFL will be for initial period as mentioned in Schedule I from the date of loan disbursement in respect of the above said property, (hereinafter referred to as "Subvention Period").*

Recital F: *PNBHFL has considered the said request with a clear understanding and an irrevocable undertaking by the Borrower that subsequent to the disbursements as requested by the Borrower, there would be no repayment default for any reason whatsoever including but not*

limited to any concern/issues by and between the Borrower and the Builder/Developer.

Recital G: *"The Borrower have represented and such representation being a continuing representation that Borrowers obligation to repay the loan shall be a distinct and independent obligation more particularly independent of any issues/concern/dispute of whatsoever nature between the Borrower and Builder."*

- xvi. It is submitted that from the perusal of the actual factual scenario and in the facts and circumstances of the instant Complaint, it is evident that the complainants have wilfully agreed to the terms and conditions of the agreements, and they cannot make the respondent a party to the present *lis* which is primarily against respondent no. 1 and also when there is no cause of action against the respondent.
- xvii. That it is well established principle that the terms of the agreement are binding between the parties. The Hon'ble Supreme Court in the case of "**Bharti Knitting Co. vs. DHL Worldwide Courier (1996) 4 SCC 704**" observed that a person who signs a document containing contractual terms is normally bound by them even though he has not read them, and even though he is ignorant of their precise legal effect. It is seen that when a person signs a document which contains certain contractual terms, then normally parties are bound by such contract; it is for the party to establish exception in a suit. When a party to the contract disputes the binding nature of the signed document, it is for him or her to prove the terms in the contract or circumstances in which he or she came to sign the documents.

E. Reply filed by the respondent No. 1

6. The respondent had contested the complaint on the following grounds:
- i. That the complaint filed by the complainants before the Authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainants have misdirected themselves in filing the above captioned complaint before this Authority as the reliefs being claimed by the complainants cannot be said to have even fallen within the realm of jurisdiction of this Authority.
 - ii. That the respondent no.1 has issued letter of offer of possession dated 04.03.2023 vide email and speed post along with tax invoice-cum-demand letter. Until and unless the amount claimed in the demand letter is not paid the complainants are not entitled to possession of the unit. Occupation Certificate dated 04.01.2023 was granted by the DTCP, Haryana. That the complaint is neither maintainable nor tenable in the eyes of law as well as on facts both. The complainants have not approached the Authority with clean hands and they, with a view to illegally claim the money have filed the present complaint.
 - iii. The bare perusal of the tripartite agreement clearly reveals that the answering respondent was liable to pay payment of interest on the loan amount borrowed by the complainants from the respondent No.2 only for the subvention period i.e. upto 31.3.2021 clearly mentioned in the said agreement and thereafter the answering respondent had no liability to make payment of any amount of interest in any manner as falsely claimed by the complainants. The excess amount paid by the answering

respondent after the subvention period, i.e. 31.03.2021, was only paid as a grace to the complainants only for three months and the complainants cannot be allowed to take any undue benefit of the same in any manner. The complainants instead of honestly and earnestly accepting the same for three months are raising false claim illegally and malafidely without having any right, title or interest to do so and the complaint is liable to be dismissed summarily. That the alleged claim of delay in handing over the possession of the unit is also not sustainable in the eyes of law as well as on facts both as the alleged delay claimed by the complainants cannot be said to have committed on account of any default of the answering respondent.

- iv. It is well within the notice and knowledge of the complainants and everybody in the vicinity that more than 2 years period lapsed on account of pandemic COVID-19 and even the Hon'ble Supreme Court has deducted the said period from the limitation. Even the HARERA had granted a period of 6 months in completion of the construction owing to the pandemic COVID-19 vide order dated 26.05.2020. Again, a period of three months in completion of construction was extended w.e.f 01.04.2021 to 30.06.2021 by HARERA Gurugram. Besides this, the construction activities of the project in question were stopped on account of orders of Hon'ble Supreme Court passed in **WP(Civil) 13029/1985 titled "M.C. Mehta Vs Union of India & Ors." dated 04.10.2019** directing to stop the construction, demolition activities forthwith in Delhi and NCR region failing which the local

administration as well as the municipal authorities shall be penalized. The said directions were again extended vide order dated 09.12.2019 partially lifting the ban on construction clearly stating that no construction should be permitted during night time 6PM to 6AM and the said restrictions imposed vide order 04.11.2019 was recalled by the Hon'ble Supreme Court vide order dated 14.02.2020. Unfortunately again the Hon' ble Supreme Court in writ petition (Civil) 1135/2020 "**Aditya Dubey (Minor) & Anr. Vs. Union of India & Ors.**" vide order dated 24.11.2021 reimposed the ban on the construction activities in the NCR till further orders. In the similar manner the commission of Air Quality management in NCR and adjoining area vide direction No.44 dated 16.11.2021 stopped the construction and demolition activity in NCR till 21.11.2021, vide direction No.51 dated 17.12.2021, the said authority further continued the stoppage of construction work till further review by the commission in view of order of Hon'ble Supreme Court in Aditya Dubey's Case (Supra) and vide direction No.52 dated 20.12.2021 the said authority permitted the construction and demolition activity in NCR on terms and conditions stated therein. It is worthwhile to mention that there had been a scarcity of labour, building material and other infrastructure for completion of construction of the project during the entire period of two years of COVID-19, however with sincere, honest and earnest efforts the respondent No.1 completed the construction of the project in the earliest possible time, obtained the occupation certificate on 04.01.2023 and

offered the possession of the unit to the complainants vide letter dated 04.03.2023, hence under any circumstances the delay, if any, in completion of construction of the project cannot be attributed to the answering respondent, nor it was owing to any fault of the answering respondent and the same being beyond the control of the answering respondent on account of force majeure which is duly covered and agreed by the complainants in agreement for sale Annexure-C3 vide clause No.7.1. Hence the complaint is liable to be dismissed.

- v. That the present complaint is bad for mis-joinder and non-joinder of necessary parties. That the alleged claim of the complainants is totally, frivolous, bogus, malafide, concocted and a false complaint has been filed illegally to invoke the jurisdiction of this Authority illegally and unauthorisedly which otherwise is not available to the complainants.

F. Jurisdiction of the authority

7. The respondent has raised a preliminary submission/ objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding the rejection of the complaint on ground of jurisdiction stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

F.I Territorial jurisdiction

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by 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.

F.II Subject-matter jurisdiction

9. Section 11(4)(a) of the Act 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) The promoter shall-

- (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.

10. 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 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 complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I Objection regarding force majeure conditions:

- 11.** The respondent/promoter has raised the contention that the construction of the tower in which the unit of the complainants are situated, has been delayed due to force majeure circumstances such as due to orders passed by the Environment pollution (prevention & Control) Authority, lockdown due to covid-19 pandemic and economic crisis etc. In the instant complaint, the due date of handing over of possession comes out to be December 2021 and grace period of 6 months on account of force majeure has already been granted in this regard and thus, no period over and above grace period of 6 months can be given to the respondent- builder. Therefore, there is no reason why this benefit cannot be allowed to the complainants/allottees who is duly affected during above such adverse eventualities and hence a relief of 6 months will be given equally to both the complainants/allottees, and the respondent and no interest shall be charged by either party, during the COVID period i.e., from 01.03.2020 to 01.09.2020.

G. Findings on the relief sought by the complainant

- G.i. Direct the respondent no.1 to pay delayed possession charges.
- G.ii. Direct respondent no.1 to hand over possession of the unit in a habitable condition.
- G.iii. Direct respondent no.1 to make payment towards the pre- EMI to respondent no. 2 till the offer of possession.
- G.iv. Direct respondent no.1 to adjust the amount of Rs.38,74,554/- deducted from the bank accounts of the complainants towards the pre-EMI after July, 2021 along with interest ,till the date of

disposal of the complaint with the amount payable by the complainants towards the total sale consideration.

12. In the present complaint, the complainants intend to continue with the project and seeking delay possession charges at prescribed rate of interest on amount already paid by them as provided under the proviso to section 18(1) of the Act which 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."

13. Clause 7 of the buyer's agreement (in short, the agreement) dated 07.12.2018, provides for handing over possession and the same is reproduced below:

7.1 Schedule for possession of the said unit

"The Promoter/Landowner(s), as the case may be, assure to hand over possession of the unit/apartment for residential usage alongwith parking, if applicable as per agreed terms and conditions on or before December 2021 unless there is delay due to "force majeure", Court orders...."

14. The Authority as per notification no. 9/3-2020 dated 26.05.2020 for the projects having completion date on or after 25.03.2020, has already allowed the grace period of 6 months from 01.03.2020 to 01.09.2020. Therefore, the due date of possession comes out to be June 2022.
15. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are 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.

16. 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.
17. 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., 15.11.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75% per annum.
18. 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;"*

19. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.75% p.a. by the respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.
20. On consideration of the circumstances, the evidence and other record and submissions made by the parties, 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. It is a matter of fact that buyer's agreement executed between the parties on 07.12.2018, the possession of the booked unit was to be delivered on December 2021 as per the possession clause. The Authority as per notification no. 9/3-2020 dated 26.05.2020 for the projects having completion date on or after 25.03.2020, has already allowed the grace period of 6 months from 01.03.2020 to 01.09.2020. Therefore, the due date of possession comes out to be June 2022. Accordingly, 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 complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 10.75% p.a. for every month of delay on the amount paid by them to the respondent from the due date of possession i.e., June 2022 till the 04.05.2023 i.e., expiry of 2 months from the date of offer of possession (04.03.2023).

21. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 04.01.2023. However, the respondent offered the possession of the unit in question to the complainants only on 04.03.2023. So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition.

G.iii. Direct respondent no.1 to make payment towards the pre-EMI to respondent no. 2 till the offer of possession.

G.iv. Direct respondent no.1 to adjust the amount of Rs.38,74,554/- deducted from the bank accounts of the complainants towards the pre-EMI after July, 2021 along with interest ,till the date of disposal of

the complaint with the amount payable by the complainants towards the total sale consideration.

22. A tripartite agreement ("TPA") dated 21.12.2018 was executed between the allottee, builder and financial institution. The allottees have alleged that builder shall pay all the Pre-EMIs/EMI's to the financial institution till 31.03.2021.
23. The relevant clause of the tripartite agreement is reproduced hereunder for ready reference:

E. The Builder hereby offers interest subvention for the Loan extended by PNBHFL to the Borrower to purchase the Property which the Borrower accepts. The Builders liability for payment of interest on the loan amount disbursed/to be disbursed by PNBHFL will be for initial period as mentioned in Schedule I from the date of loan disbursement in respect of the above said Property, (hereinafter referred to as "Subvention Period".

As per Schedule I the subvention period upto 31.03.2021.

24. So, in such circumstances the authority observes that the respondent/builder is obligated to pay Pre EMI's/EMI's till the 31.03.2021 as per schedule I of the tripartite agreement. Therefore, the respondent is directed to pay the Pre EMI's to the complainant as per schedule I of the tripartite agreement dated 21.12.2018, if any.

H. Directions of the Authority:

25. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i. The respondent is directed to pay the interest at the prescribed rate i.e., 10.75 % per annum for every month of delay on the amount paid by the complainants from June 2022 till the 04.05.2023 i.e., expiry of 2 months from the date of offer of possession (04.03.2023). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
 - ii. The complainants are directed to pay outstanding dues, if any, after adjustment of delay possession charges/interest for the period the possession is delayed. The rate of interest chargeable from the complainants/allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75% 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. Also, the amount of Pre-EMI paid by the complainants to the bank on behalf of the respondent shall be adjusted towards the outstanding dues to be paid by the complainants to the respondent.
 - iii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.
26. Complaint stands disposed of.



HARERA
GURUGRAM

Complaint no. 5877 of 2022

27. File be consigned to the registry.

Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.11.2023



HARERA
GURUGRAM