



HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	1593 of 2022
Date of filing.:	13.07.2022
First date of hearing.:	29.09.2022
Date of decision.:	08.11.2023

Rahul and Sunaina
R/o H.No. 775, W.No. 31 Gali No. 2,
New Court road,
Sonipat-131001

....COMPLAINANTS

VERSUS

Omaxe Limited
7, Local Shopping Centre
Kalkaji, New Delhi-110019

....RESPONDENT

CORAM: **Dr. Geeta Rathee Singh**
 Nadim Akhtar

Member
Member

Present: - Mr. Sudeep Singh Gahlawat, Counsel for the complainants
 through VC.
 None for the respondent.

Geeta Rathee

ORDER (DR. GEETA RATHEE SINGH - MEMBER)

1. Present complaint has been filed by complainants under Section 31 of the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred as RERA Act, 2016) read with Rule 28 of The Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

A. UNIT AND PROJECT 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 table:

S.No.	Particulars	Details
1.	Name of the project.	Omaxe Shubangan, Sector 4A, Bahdurgarh.
2.	Nature of the project.	Group housing project
4.	RERA Registered/not registered	Registration vide registration no. 202 of 2017 dated 31.12.2021
5.	Details of unit allotted.	203 second tower-15(2BHK) having an area of 930 sq. ft.
6.	Date of floor buyer agreement	21.08.2015



7.	Due date of possession	21.08.2017
8.	Possession clause in BBA (clause 40(a))	Company shall complete the development/construction of the unit/project within 18 months from the date of signing of this agreement by the buyer(s) or within an extended period of 6 months.
9.	Total sale consideration	₹ 20,30,231/-
10.	Amount paid by complainant	₹20,03,754/-
11.	Offer of possession.	No offer of possession was given

B. FACTS OF THE COMPLAINT AS STATED IN THE COMPLAINT

3. Facts of complaint are that a flat had been booked in the project of the respondent namely, "Omaxe Shubhangan" situated at Sector 4A, Bahadurgarh, Haryana by original allottee on 05.06.2012 after paying an amount of Rs. 2,50,000/-. Thereafter said flat was transferred in the name of the complainants. A builder buyer agreement was executed between the complainants and respondent on 21.08.2015 in respect of the unit bearing no. 203 second tower-15(2BHK) having an area of 930 sq. ft. The total sales consideration of the unit was fixed at ₹ 20,30,231/- against which the complainants have paid an amount of ₹20,03,754/- till date.

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4. That as per clause 40(a) of the flat buyer agreement respondent was under an obligation to handover the possession of the flat within a period of 18 month along with grace period of 180 days which expired on 21.08.2017.
5. That even after passing of more than 9.6 years from the date of booking, possession of the flat has not been handed over to the complainants. Builder buyer agreement has been drafted in a manner which is prejudice to the interest of the complainants. Clause 40(g) of the builder buyer agreement stats that in case of delay in handing over of possession, purchaser shall be entitled to compensation for delay at the rate of Rs. 5/- sq. feet of the booked super area or revised super area, whichever is less. However, clause 35 of the agreement states that developer will charge penal interest at the rate of 18% per annum on the amount outstanding up to one month from the due date of outstanding and at the rate of 24% per annum thereafter over the delayed payment. As per definition of interest provided in sub-section 2(z) of section 2 of the RERA Act, 2016, 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.


Allottee

6. That the complainants have filed complaint no. 1080 of 2018 with the Authority which was disposed off with the observations that deemed date of possession was 22.08.2017. Respondent stated that they will offer possession by December 2019, with a delay of nearly two years and four months. Respondent was directed to issue fresh statement of accounts showing amount receivables from the complainants and amount of delay interest/compensation payable by the respondent, within 30 days of uploading the order.
7. Thereafter complainants filed an execution petition bearing no. 1941 of 2019 before the Authority which was disposed off with the directions that as per order under execution, respondent was to pay complainant delay interest only for the period from deemed date of possession ,i.e, 22.08.2017 to December 2019 and said order was executed. It was ordered that in case, respondent did not offer possession to complainant by December 2019, complainants are at liberty to again approach the Authority for further delay interest from January 2020. Respondent has not offered possession of the flat to the complainants till date therefore the present complaint has been filed by the complainants.

C. RELIEF SOUGHT

8. That the complainants seeks following relief and directions to the respondent:-



- (i) In exercise of powers under Section 35, direct the Respondent to place on record all statutory approvals and sanctions of the project.
- (ii) To pay delay possession interest over the payment deposited by the complainants in terms of rule 15 of HRERA Rules, 2017, i.e. SBI MCLR + 2% w.c.f. 1st January 2020 (because the respondent already paid delay possession interest to the complainants in terms of rule 15 of HRERD Rules, 2017, i.e., SBI MCLR+2% from 22.08.2017 to 31.12.2019) to actual physical date of possession.
- (iii) To direct the respondent to handover the possession of residential flat as soon as possible.
- (iv) Any other relief as this Hon'ble Authority may deem fit and appropriate in the facts and circumstances of the present case.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

9. Learned counsel for the respondent filed detailed reply on 16.02.2023 pleading therein:

- (i) That the Respondent states that the alleged dispute ought to be referred to Arbitration under Section 8 of the Arbitration & Conciliation Act, 1996 [as amended vide the Arbitration &

Conciliation (Amendment) Act, 2015] in terms of Clause 62 of the Agreement dated 21.08.2015. The respondent prays that matter be referred to arbitration.

- (ii) That this Hon'ble Authority has no territorial jurisdiction to entertain and try the present complaint, as clause 63 of agreement dated 21.08.2015 provides that the Courts at Bhadurgarh and Delhi shall have jurisdiction in all the matters arising out of/or touching upon and/or in connection with the agreement.
- (iii) That the complainants, by way of filing present complaint, have sought interest qua delayed period, under the provisions of Real Estate (Regulation & Development) Act, 2016. In this regard, it is submitted that in the earlier complaint, i.e, Complaint No. 1080 of 2018 filed by the Complainant-Rahul before this Hon'ble Authority, the issue with regard to delayed penalty to be paid to the complainants, has already been adjudicated and it was concluded by this Hon'ble Authority that the complainants are entitled to compensation qua delay, as per Clause 40(e) of the agreement. Complainants cannot be allowed to take benefit both ways, as for period qua handing over possession, the complainants want to rely upon clauses of the agreement, but for delayed compensation, they want to ignore the terms of the agreement and want to seek interest/delayed penalty, under the provisions of RERA.



- (iv) That the present complaint is barred by limitation, as in view of order dated 05.03.2019 passed by this Hon'ble Authority in Complaint No. 1080 of 2018 (earlier filed by the Complainant-Rahul), the complainant, in the event of not having offered possession by December 2019, was granted liberty to approach this Hon'ble Authority. It is submitted that the present complaint has been filed after a period of more than two and half years from the said period (December 2019). Therefore, there is delay in filing the complaint.
- (v) In the complaint, complainants have mis-stated the fact that the terms of the agreement are unilateral in nature. In this regard, it is submitted that raising of grievance with regard to any of the clause of the agreement, as this stage, i.e, after more than 7 years of execution of agreement, is not tenable.
- (vi) That the complainants have not disclosed, in this para, that they have already received compensation with regard to delay uptill December 2019 pursuant to order dated 05.03.2019 passed by this Hon'ble Authority in Complaint No. 1080 of 2018, earlier filed by the Complainant-Rahul.
- (vii) That the unit of the complainants is near completion and the same is likely to be offered to the complainants, in near future. As far as the delayed period after December 2019 is concerned, the same is to be taken care of, when in the near future, the possession will be offered

as per the clauses/terms of the agreement and the complainants cannot be allowed to raise any claim beyond the terms and conditions of the agreement.

10. During arguments, learned counsel for the complainant reiterated the facts of his case and pressed upon further monthly interest from 01.01.2020 till the date of passing the order.

E. FINDINGS AND OBSERVATIONS OF THE AUTHORITY

Findings on the objections raised by the respondent.

E.I Objection raised by the respondent with regard to Arbitration

The respondent has raised an objection for not invoking Arbitration proceedings as per the provisions of buyer's agreement which contains a provision regarding initiation of arbitration proceedings in case of breach of agreement. Respondent has referred to clause 62 of the agreement.

The Authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this Authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Section 88 of the Act also provides that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the Authority puts reliance on catena of



judgments of Hon'ble Supreme Court, particularly in **National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. {20212} 2 SCC 506** and followed in case of **Aftab Singh and ors. V. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015** decided on 13.07.201 wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the Authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

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 further 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.



E.II Objection raised by the respondent regarding jurisdiction.

Respondent has taken an objection that this Authority does not have jurisdiction to entertain and try the present complaint as clause 63 of agreement provides that courts at Bahdurgarh shall have jurisdiction in all the matters. In this regard it is stated that Authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

E.1 Territorial Jurisdiction

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

E.2 Subject Matter Jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the


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allotees 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.

So, in view of the provisions of the Act of 2016 quoted above, the Authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by learned Adjudicating Officer if pursued by the complainant at a later stage.

E.III Objection raised by the respondent regarding limitation.

Respondent has raised the objection that complainants have filed the complaint after a period of more than 2 and a half years and therefore the present complaint is barred by limitation. It is pertinent to mention here that complainants had filed execution complaint no. 1941 of 2019 which was disposed off on 21.01.2021, thereby giving the liberty to approach the Authority with respect to further delay interest from January 2020. Said order was uploaded on 05.02.2021. Complainants have filed the present complaint on 13.07.2022 that is after one and half year of passing of final execution order. It is important to mention here that no time period was given in the order dated 21.01.2021 for filing of complaint for further monthly delay



interest. Further, cause of action survives as the respondent has not offered possession of the flat to the complainant till date. Proviso to section 18(1) of the RERA Act, 2016 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. Here in the present case, respondent cannot be absolved of his liability of paying monthly interest when it is at fault of not delivering the possession in due time.

E.IV Objection raised by the respondent that complainants cannot be allowed to take benefit both ways, by relying upon clauses of agreement for possession and for delayed payment interest as per RERA, Act 2016.

With respect to this objection of the respondent, the Authority observes that detailed reasoned order has been passed by the Authority when the case was initially decided. Present complaint has been filed by the complainant only for further monthly interest, w.e.f, 01.01.2020. Authority will pass orders only with respect to same as all the issues have already been settled in original complaint no. 1080 of 2018. Operative part of the said order is being reproduced below for ready reference:

Admittedly, deemed date of handing over of the possession was 22.8.2017. The respondent states that they will offer the possession by December, 2019. The

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respondents are directed to do the needful accordingly. If the apartment is handed over by December, 2019, it will be within a delay of nearly two years and four months. It has been held by me in complaint case No. 49/2018. Prakash Chand Arohi versus M/S Pivotal Infrastructures Pvt. Ltd. that for a reasonable delay in completing the project, the compensation as provided for in the agreement shall be paid by the developers. Accordingly, Clause 40 (e) of the agreement provides that Rs 5 per sq. ft on the built up area of the unit will be paid for the delay caused in handing over of possession. Accordingly, for the delay caused the complainant shall be compensated in accordance with the provisions of the agreement. However, if the respondents do not offer the possession by December, 2019 complainant shall be free to approach the Authority again where-after a further appropriate order shall be passed. However, since in a majority judgement in complaint case No. 113 of 2018 Madhu Sareen Versus BPTP Ltd. a separate formula for awarding compensation had been ordered, now the ratio of the majority judgement however, shall be applicable in this case till such time the majority judgement holds good.

1. Regarding area of the unit, since agreement has been executed by complainants for an area measuring 930 sq. ft. Therefore, now they cannot go back with their contractual obligations. So, the cost of the apartment shall be calculated on the basis of 930 sq. ft.

Regarding the GST charges, since the deemed date of possession was 22.08.2017 and the GST had already come into force before that, so the liability on account of statutory taxes shall be paid by the complainants.

2. Now the respondents are directed to issue a fresh statement of account showing amounts receivables from the complainant and amount of compensation payable by the respondent within 30 days of uploading of this order. The final receivables shall be calculated after duly adjusting for the amount of compensation payable by the respondents.



Disposed of. File be consigned to record room.

In light of the aforesaid observations and taking into account facts and circumstances of the case, it is observed that complainants have filed the present complaint for further delay interest with effect from 01.01.2020. Respondent in its reply has also admitted that possession has not been handed over. It has been stated by the respondent that unit is nearing completion and the same is likely to be offered to complainants in near future. However, no definite timelines have been committed by the respondent for offer of legally valid possession. Proviso to section 18 of the RERA Act, 2016 comes into play and complainants are entitled to further monthly interest from 01.01.2020 till valid offer of possession after receipt of occupation certificate to the complainants. Upon receipt of occupation certificate, respondent shall issue an offer of possession to the complainants within a period of one month. As per Section 18 of Act, interest shall be awarded at such rate as may be prescribed. The definition of term 'interest' is defined under Section 2(z) of the Act which is as under:

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

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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;

Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is as under:

“Rule 15: *“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 (NCLR) 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”..”

As per Section 19(10) of the RERA Act, it is the duty of the allottee to accept the offer of possession issued after receipt of the

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occupation certificate within a period of two months from said date. Complainants, therefore, shall be duty bound to accept the said offer of possession and to take physical possession of the said unit within a period of two months of the offer of possession issued by the respondent after receipt of occupation certificate.

11. Consequently, as per website of the state Bank of India, i.e., <https://sbi.co.in>, the highest marginal cost of lending rate (in short MCLR) as on the date of passing final order in original complaint no. 1080 of 2018 i.e. 05.03.2019 is 8.75%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e. 10.75%.
12. Hence, Authority directs respondent to pay further monthly delay interest to the complainants for delay caused in delivery of possession at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development) Rules, 2017 i.e at the rate of SBI highest marginal cost of lending rate (MCLR)+ 2 % which works out to ₹ 8,30,927/- (8.75% + 2.00%) from 01.01.2020 (date till which delay interest has already been paid) till the date of a valid offer of possession.
13. Authority has got calculated the interest on total paid amount from 01.01.2020 till the date of this order, i.e, 08.11.2023 which works out to ₹ 8,30,927/- and further monthly interest of ₹17,704/-.

14. Ld. Counsel for the complainants has also sought relief of placing on record statutory approvals and sanctions as per section 35 of RERD Act, 2016. It is observed that while disposing off original complaint no. 1080 of 2018, liberty was granted to the complainant to claim relief of further monthly delay interest only. So, now complainants should restrict their relief for which liberty was granted in the original complaint.


F. DIRECTIONS OF THE AUTHORITY

15. Hence, the Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:

- (i) Respondent shall issue an offer of possession to the complainants within a period of one month from the date of receipt of occupation certificate.
- (ii) Respondent is directed to pay upfront delay interest of ₹ 8,30,927/- (till date of order, i.e, 08.11.2023) to the complainants towards delay already caused in handing over the possession within 90 days from the date of this order and further monthly interest @ ₹17,704/- (admissible from 09.12.2023 till the date of offer of possession after receipt of occupation certificate).


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- (iii) Complainants are directed to accept the offer of possession issued by the respondent and take physical possession within a period of two months from said date. Complainant will remain liable to pay the balance consideration amount to the respondent at the time of possession offered to him.
- (iv) The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate, i.e, 10.75% which is the same rate of interest which the promoter shall be liable to pay to the allottees.
- (v) The respondent shall not charge anything from the complainants which is not part of the agreement to sell.
16. **Disposed of.** File be consigned to record room after uploading on the website of the Authority.


.....
NADIM AKHTAR
[MEMBER]


.....
DR. GEETA RATHEE SINGH
[MEMBER]