HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	398 of 2022
Date of filing.:	04.03.2022
First date of hearing.:	26.04.2022
Date of decision.:	30.04.2024

1. Sh. Varun Sharma S/o Sh. Ram Krishan Sharma
2. Mrs. Savita Sharma W/o Sh. Varun Sharma,
   Both R/o 216, Sector-16-A, Faridabad

....COMPLAINANT(S)

VERSUS

M/s BPTP Limited, through its Managing Director,
M-11, Middle Circle, Connaught
Circus, New Delhi- 110001

......RESPONDENT

CORAM: **Dr. Geeta Rathee Singh** **Member**

Chander Shekhar **Member**

Hearing: 10th

Present: - Adv. Nitin Kant Setia, Learned counsel for the Complainants through VC
Mr. Hemant Saini, Counsel for the Respondent.

Rathee

<u>ORDER</u> (DR. GEETA RATHEE SINGH - MEMBER)

1. Present complaint has been filed on 04.03.2022 by complainants under Section 31 of The Real Estate (Regulation & Development) Act, 2016 (for short Act of 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.

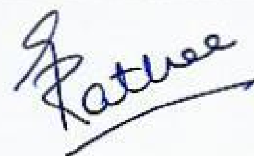
A. UNIT AND PROJECT RELATED DETAILS

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.	Park Elite Floors, Sector 75, 82 to 85, Faridabad.		
2.	Nature of the project.	Residential		
4.	RERA Registered/not registered	Not Registered		
5.	Complainants booked entire building having 3 independent floors.	H6-02-GF, area 1022 sq. ft.	H6-02-FF, area 1022 sq. ft.	H6-02-SF, area 1022 sq. ft.

6.	Allotment Letter	24.12.2009 for each floor
7.	Date of builder buyer agreements	10.08.2010 for each floor
8.	Due date of possession	21.09.2012
9.	Possession clauses in all three BBA (Clause 4.1)	Subject to Clause 13 herein or any other circumstances not anticipated and beyond the control of the seller/ confirming party or any restraints/restrictions from any courts/authorities but subject to the purchasers) having complied with all the terms and conditions of this Agreement and not being if default under any of the provisions of this Agreement including but not limited to timely payment of Total Sale Consideration and other charges and having complied with all provisions,formalities,documentat ions etc., as prescribed by the Seller Confirming Party whether under this Agreement or otherwise from time to time, the Seller/Confirming Party proposes to offer the handing over the physical possession of Floor to the Purchaser(s) **within 24 months from the date of sanctioning of building plan.** The Purchaser(s) agrees and understands that the Seller/ Confirming Party shall be entitled to a grace period of (180) one

		hundred and eighty days, after the expiry of thirty (24) months, for filing and pursuing the grant of an occupation certificate from the concerned authority with respect to the plot on which the floor is situated. The Seller/Confirming Party shall give a Notice of Possession to the Purchasers with regard to the handing over of possession and the event the purchaser(s) fails to accept and take the possession of the said floor within 30 days thereof, the purchaser(s) shall be deemed to be custodian of the said floor from the date indicated in the notice of possession and the said floor shall remain at the risk and cost of the purchaser(s).
10.	Addendum to all 3 BBA(10.08.2010)	DOP clause amended to deliver possession within **a period of twenty four (24) months from execution of floor buyer agreement or on completion of 35% of the basic sale price alongwith 20% of EDC and IDC by the purchaser(s), whichever is later.**
8.	Basic sale consideration	₹20,55,999/- for each floor
10.	Amounts paid by complainants	₹24,39,111/- for GF



		22,99,925/- for FF 22,77,128.67/- for SF
11.	Offer of possession.	None

B. FACTS OF THE COMPLAINT AS STATED IN THE COMPLAINT

3. Facts of complaint are that the complainants had booked entire building consisting of three independent floors i.e. GF-FF-SF in the project of the respondent namely "Park Elite Floors" situated at Sector 75,82 to 85, Faridabad, Haryana on 15.05.2009 upon payment of ₹ 7,50,000/- towards three floors as booking amount. Complainants were allotted unit no. H6-02-GF; H6-02-FF; H6-02-SF respectively, measuring 1022 sq. ft. each in Park Elite Floors, Parklands, Faridabad vide allotment letters dated 24.12.2009. Builder buyer agreements (herein after referred as BBA) were executed between both the parties on 10.08.2010 for each floor. As per clause 4.1 of all the builder buyer agreement the agreement possession of the unit was to be delivered within a period of twenty four (24) months from sanctioning of building plan. However, as per addendum signed on same date i.e. 10.08.2010, deemed date of possession was amended to the effect that respondent now had to deliver possession within a period of twenty four (24) months from execution of floor buyer agreement or on completion of 35% of the basic sale price

alongwith 20% of EDC and IDC by the purchaser(s), whichever is later. From the date of execution of the agreement, the deemed date of possession works out to 10.08.2012. However, respondent failed to offer possession within time period stipulated in the agreements.

4. It is submitted that builder buyer agreements were supposed to be signed immediately but due to delay on part of the respondent, builder buyer agreements got signed between the parties on 10.08.2010 i.e. after a delay of 15 months from receiving the booking amount i.e. on 15.05.2009 but the parties were acting and performing their part of the contract in the terms agreed between the parties at time of booking, making payments thereof and issuance of receipts from the side of respondent. By the time of signing of the agreements, respondent had already taken ₹ 20,69,217/- for all three floors from the complainants. However, the time began to run from the date of receipt of first payment by the respondent for the purpose of delivery of possession. In absence of any understanding between the parties, it was impossible for the respondent to demand money and it was impossible for the complainants to part with his money in pursuance of the demand raised from time to time.

5. That respondent played a mischief by collecting a huge amount of ₹ 20,69,217/- before the execution of BBAs. Till that point of time complainants were put in a one-sided arbitrary BBAs and complainants

had no choice but to yield to the demands of the respondent by signing alleged one sided and arbitrary BBAs having inequitable clauses. By signing said BBAs the starting date for determining the deemed date of possession which ought to have been taken from date of booking got arbitrarily pushed in terms of clause 4.1 stipulated in BBA i.e. 24 months which works out to 10.08.2012. Further it has been submitted that clause 4.1 of the BBA related to delivery of possession ought to be declared as illegal to the extent it stipulates that delivery of possession will be 24 months after the date of execution of BBA and be substituted and read as 24 months from the date of booking as a concluded contract between the parties came into existence on the date of booking which works out to year 2011.

6. It is submitted that even after a lapse of more than ten years from due date of delivery of possession, respondent is not in a position to offer possession of the booked floors to the complainants. The structure was raised in the year 2011 and it is lying as such from the last 10 years without any maintenance and respondent has abandoned the unit without any reason.

7. That the respondent had overcharged the complainants on account of increase in area from 1022 sq ft to 1166 sq ft. Said demand is illegal because neither there is any justification of increase of more than 10% area with the respondent nor there is any official document to show that

increased area has been sanctioned by the competent authority. Respondent is liable to refund amount of ₹ 3,09,632/- with adequate interest for using the said amounts for more than 10 years.

8. That the respondent had raised demand towards EEDC on 05.05.2012 and VAT on 10.11.2016 which was duly paid by the complainants. It is submitted that after expiry of deemed date of possession the complainants were not bound to pay any fresh demands on account of EEDC or VAT or any other statutory demands because if the builder had timely performed its part of the contract and handed over the possession in accordance with the promise made at the time of booking of the floors, the conveyance deeds would have been executed before the demands of EEDC or VAT could have been raised, therefore the respondent is liable to refund the said amount with interest.

9. That in case of delay in construction and development, the respondent had made the provision of only Rs 5 per sq of the super built up area per month as compensation to the purchaser in the BBA whereas in case of delay in payment of installments by complainants, it had provided for the delay penalty @ 18% interest. The complainant are aggrieved by such unilateral construction of the agreement as Rs 5 per sq ft is 2-3% and is thus too less compared to the exorbitant 18% rate of interest.

10. It is further stated that till date, the respondent has neither provided possession of the floors nor refunded the deposited amounts along with

interest. Therefore, complainants are left with no other option but to approach this Authority. Hence the present complaint has been filed.

C. RELIEF SOUGHT

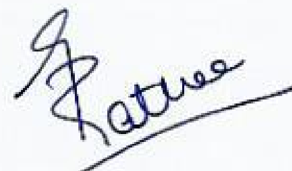
11. That the complainants seeks following relief and directions to the respondent:-

    i. Direct the respondent to handover possession of the Floor no. H6-02-GF; H6-02-FF; H6-02-SF respectively admeasuring 1022 sq ft each in BPTP Park Elite floors, Parklands, Faridabad.

    ii. Direct that the terms of BBA are one sided, prejudicial to the interest of the purchasers, arbitrary and biased and against the provisions of the RERA Act 2016.

    iii. Direct the respondent to pay delay penalty in terms of Section 18 of the Act from the date of completion of two years and six months from the date of first receipt of money i.e. 17.05.2009 till the actual legal physical delivery of possession of unit complete in all respects.

    iv. Declare that the amount collected towards increase in super area as illegal as there is no increase in the area from the one approved by the State Authorities and there is no approved



revision in building plans thereafter from the competent authorities.

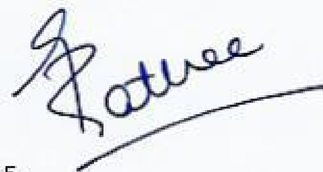
v. Direct the respondent to return the amount collected towards increase in super area for the reason that there was no increase in the area and no revised sanctioned plans showing increased area were ever supplied to the complainant.

vi. Direct the respondent to pay compensation to the tune of ₹. 5,00,000/- on account of mental agony and harassment.

vii. Direct respondent to compensate the complainants or loss of life building by 10 years as the construction of the unit was completed in year 2011-2012 and since then the unit is lying abandoned without any care or maintenance by the respondent.

viii. Any other relief which the applicant is entitled for under the Real Estate (Regulation & Development) Act,2016 and the Haryana State Real Estate (Regulation and Development) Rules, 2017.

12. During course of hearing, learned counsel for complainants further submitted that he is not pressing upon the relief clause no. (iv) and (v) with respect to increase in area and refund of amount paid in lieu of said increase.



D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

13. Learned counsel for the respondent filed detailed reply on 7.11.2023 pleading therein:

14. Respondent has admitted allotment and execution of floor buyer agreements in favour of complainants. Payments of ₹ ₹24,39,111/- for GF; ₹ 22,99,925/- for FF and ₹ 22,77,128.67/- for SF has also been admitted by the respondent at page no. 26 of reply. It is stated that in terms of floor buyer agreement dated 10.08.2010 for each unit respondent proposed to handover the possession of the unit within a period of 24 months from the execution of floor buyer agreement or 35% of the basic sale price alongwith 20% of EDC and IDC by the purchaser(s), whichever is later along with a grace period of 180 days.

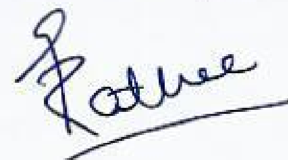
15. That builder buyer agreement with complainant was executed much prior coming into force of Real Estate (Regulation and Development) Act, 2016. (RERA Act in brief). Therefore, agreement executed prior to coming into force of the Act or prior to registration of project with RERA cannot be reopened.

16. Construction of the project was going on in full swing but it got affected due to the circumstances beyond control of the respondent such as NGT order prohibiting construction activity, ban on construction by Supreme

Court of India in M.C Mehta v. Union of India, ban by Environment Pollution (Prevention and Control) Authority and Covid-19 etc. After lifting of the ban, it took some time to mobilize the resources and begin construction of the project. Thereafter, the construction of the unit was going on in full swing, however, due to the sudden outbreak of the coronavirus (COVID 19) all the activities across the country including the construction of the projects came to a halt. Given the premise, the possession timeline has been diluted due to reasons beyond the control of the respondent builder.

17. Regarding relief pertaining to refund of amount paid by complainants on ground of increased area, it is submitted that super area of the floor shall be subject to the change/amendment i.e. increase or decrease in terms of clause 2.4 of the BBA. Initially allotted area was tentative and the same was subject to change/alteration/modification/revision. In respect of demand of EEDC, it has been submitted that said demand was raised by the respondent being a statutory demand and is passed onto the government authorities. Complainants are/were bound to remit the same and it was duly remitted without any protest.

18. Since the BBA constitutes the sole basis of subsisting relationship of parties, both the parties are lawfully bound to obey the terms and conditions enunciated therein. Respondent had raised each specific



demand strictly in consonance with the payment plan opted and agreed at the stage of booking as well as within the ambit of the clauses agreed and accepted by the complainants at the time of execution of BBA. Complainants after thorough reading and understanding of the terms and conditions mentioned in BBA signed the agreement that too without any protest and demur.

E. ARGUMENTS OF COUNSLES FOR BOTH THE PARTIES:

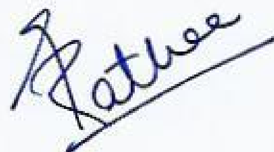
19. Counsel for complainants reiterated the facts mentioned in para 3-10 of this order. Further he stated that since last two hearing case was adjourned for arguments on application filed on 11.09.2023 by complainants seeking recalling of order dated 09.08.2023, wherein respondent had raised a technical objection stating that complainants have filed captioned complaint seeking remedy in respect to three different units for which separate three bbas are executed. He stated that since facts and circumstances for each floor may be different, therefore complainants cannot claim relief for three different floors in one complaint. To rebut the contention or objection of respondent, counsel for complainant referred to a judgment passed by Hon'ble Appellate Tribunal in Appeal **no. 132 of 2019 titled as "MVN Infrastructure Pvt. Ltd. Vs. HRERA and others"**, wherein tribunal has held that there is absolutely no legal bar in the Act and rules made thereunder to file and maintain a single

complaint for multiple plots between the same parties involving the same causes of action and relief(s) sought.

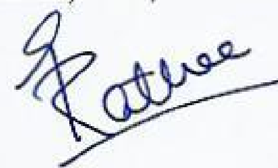
Respondent had filed reply to the said application on 07.11.2023 in registry. He stated that complainants have to comply with the statutory provisions given under the Act and CRA form which specifies that details of unit, carpet Area and fees to be deposited along with complaint. Said provisions only includes word such as "a complaint"; "a fees" which clarifies that complaint should be for single floor or unit along with all the documents. However, in present case complainants had not complied with provisions and had filed single complaint for three floors. To support his contentions, counsel for respondent relied upon judgment passed by **HRERA, Gurugram in case tilted as Dharamveer Sethi & Anr. Vs. Vatika ltd decided on 23.08.2023**, whereby it was held that complaint is not maintainable as each compliant has been filed in respect of multiple units which needs to be adjudicated separately. Similarly, another judgment passed by Rajasthan RERA, Jaipur has been refereed to, wherein complaint was dismissed as one single complaint was filed for 4 units allotted to 4 different persons. Therefore he stated that present application along with complaint be dismissed for the above stated reasons.

After hearing arguments of both the parties, Authority observes that cases referred by both the counsels pertains to different cases which may or may not relate to the merits of present case. Although Hon'ble Appellate Tribunal had very much cleared that when parties are same and suffering from same cause of action and praying for same relief. There is no bar in filing one complaint to avoid multiplicity of the litigation. Authority in interest of justice is also one with the view expressed by Hon'ble Appellate Tribunal. Hence, application of complainants is allowed and matter was ordered to be heard on merits.

20. On merits of the case, learned counsel for respondent stated that occupation certificate for unit in question has yet not been received by respondent, however complainants are willing to wait for the same. For computing the delay period, deemed date of possession be taken as per agreement dated 10.08.2010i.e 24 months plus 180 days grace period. He further stated that in case, first payment is taken into consideration for computation of deemed date of possession, then what will remain the sanctity of agreement executed between parties as agreement dated 10.08.2010 is signed in English by complainants voluntarily and in full knowledge. Further, respondent counsel stated that both parties are bound by the terms of agreement. if complainant is relying upon clause of agreement for making out a case for delay of handing over of possession than respondent had also



certain clause which bound the complainants to be abide by terms of agreement only. To further relied upon a judgment passed by **Hon'ble Apex Court in case of Bharathi Knitting Company vs DHL Worldwide Express Courier year 1996** which provides for enforcement of agreement in totality. Further, Sh.Hemant Saini, counsel for respondent stated that if complainants are only willing to stick by the relief sought by them in the captioned complaint, then two payments which were accounted or adjusted in the accounts of complainants on account of inaugural discount and timely payment discount given by respondent as a good will gesture for making timely payments to respondent were included in the amounts paid by complainants and reflected in the account of complainants though same were never actually paid by them. Therefore, while taking into consideration total amounts paid by complainants for the purpose of calculation of delay interest, these two mentioned amounts be deducted from total paid amounts by complainants. Although no details of said amounts had been stated by counsel for respondent during hearing nor has anything is provided in reply with respect to the same. Further, he also submitted that contentions stated in his reply for calming force majeure on different accounts including Covid-19 outbreak for relaxation be taken into consideration while deciding the matter on merits. He stated that Covid-19 outbreak lead to delay in handing over of possession, thus, the Covid-19



period may be taken as zero period for the purpose of calculation of delay possession interest.

F. FINDINGS AND OBSERVATIONS OF THE AUTHORITY

Findings on the objections raised by the respondent.

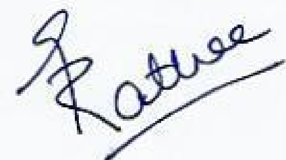
21. Objection regarding execution of BBA prior to the coming into force of RERA Act,2016.

One of the averments of respondent is that provisions of the RERA Act of 2016 will not apply on the agreements executed prior to coming into force of RERA Act,2016. Accordingly, respondent has argued that relationship of builder and buyer in this case will be regulated by the agreement previously executed between them and the same cannot be examined under the provisions of RERA Act. In this regard, Authority observes that after coming into force the RERA Act, 2016, jurisdiction of the civil court is barred by Section 79 of the Act. Authority, however, is deciding disputes between builders and buyers strictly in accordance with terms of the provisions of flat-buyer agreements. After RERA Act of 2016 coming into force the terms of agreement are not re-written, the Act of 2016 only ensure that whatever were the obligations of the promoter as per agreement for sale, same may be fulfilled by the promoter within the stipulated time agreed upon between the parties. Issue regarding opening of agreements executed prior to coming into force of the RERA Act, 2016 was already

dealt in detail by this Authority in complaint no. 113 of 2018 titled as **Madhu Sareen v/s BPTP Ltd** decided on 16.07.2018. Relevant part of the order is being reproduced below:

> *"The RERA Act nowhere provides, nor can it be so construed, that all previous agreements will be re-written after coming into force of RERA. Therefore, the provisions of the Act, the Rules and the Agreements have to be interpreted harmoniously. However, if the Act or the Rules provides for dealing with certain specific situation in a particular manner, then that situation will be dealt with in accordance with the Act and the Rules after the date of coming into force of the Act and the Rules. However, before the date of coming into force of the Act and the Rules, the provisions of the agreement shall remain applicable. Numerous provisions of the Act saves the provisions of the agreements made between the buyers and seller."*

Further, as per recent judgement of Hon'ble Supreme court in Newtech Promoters and Developers Pvt. Ltd Civil Appeal no. 6745-6749 of 2021 it has already been held that the projects in which completion certificate has not been granted by the competent Authority, such projects are within the ambit of the definition of on-going projects and the provisions of the RERA Act,2016 shall be applicable to such real estate projects, furthermore, as per section 34(e) it is the function of the Authority to ensure compliance of obligation cast upon the promoters, the allottees and the real estate agents under this Act, and the rules and regulations made thereunder,

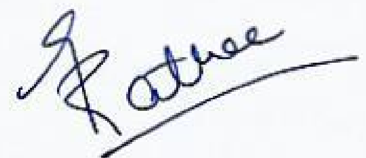


therefore this Authority has complete jurisdiction to entertain the captioned complaint.

22. **Objections raised by the respondent regarding force majeure conditions.**

Respondent has averred that the project could not be completed within the stipulated time due to force majure conditions. In this regard, Authority observes that the obligation to deliver possession within the period stipulated in the Builder Buyer Agreement i.e. 24 months from the date of execution of builder buyer agreement was not fulfilled by respondent. There is delay on the part of the respondent and the various reasons given by the respondent such as the NGT order, Covid outbreak etc. are not convincing enough as the due date of possession was in the year 2012, whereas the NGT order referred by the respondent pertains to year 2016 i.e. subsequent to the due date for handing over possession, therefore the respondent cannot be allowed to take advantage of the delay on his part by claiming the delay in statutory approvals/directions. As far as delay in construction due to outbreak of Covid-19 is concerned Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. vs Vedanta Ltd & Anr. bearing OMP (I) (Comm.) No. 88/2020 and I.A.s 3696-3697/2020*** dated 29.05.2020 has observed that:

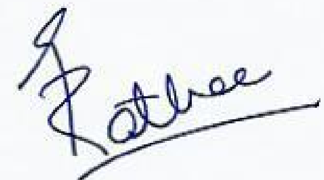
> "69. *The past non-performance of the contractor cannot be condoned due to Covid-19 lockdown in March,2020 in India. The contractor was in breach since septemeber,2019.*



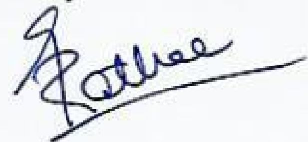
> *Opportunities were given to the contractor to cure the same repeatedly. Despite the same, the contractor could not complete the project. The outbreak of pandemic cannot be used as an excuse for non-performance of a contract for which the deadline was much before the outbreak itself.*
>
> *The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by September,2019 and is claiming the benefit of lockdown which came into effect on 23.03.2020, whereas the due date of handing over possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, Authority is of view that outbreak of pandemic cannot be used an excuse for non-performance of contract for which deadline was much before the outbreak itself.*"

So, the plea of respondent to consider force majeure conditions towards delay caused in delivery of possession is without any basis and the same is rejected.

Arguments of both parties were heard meticulously. Perusal of file reveals that complainant had applied for booking of three floors in project of respondent on 15.05.2009 by making payment of ₹7,50,000/- and thereafter ₹2,38,300/- were paid on 09.08.2009 in consonance with demand raised within 90 days of booking on account of 25% of basic sale price and ₹2,23,120/- were paid on 15.10.2009 in consonance with demand raised within 150 days of booking on account of 10% of basic sale price +20% of EDC/IDC and the builder buyer agreement was executed with the parties on 10.08.2010. Complainants have honoured all these demands fully aware of the



stage of progress for which each demand was raised. Act of payment by complainants and issuance of receipts by the respondent shows that both the parties had reached to an understanding vide which respondent received amount of ₹20,69,217/- before execution of BBA. Complainants have alleged that the date of first payment be deemed to be the date of contract rather than the date of execution/signing of the BBA between the parties and accordingly, respondent be directed to hand over possession of booked floors along with delayed possession charges at the prescribed rate of interest per annum from the date of completion of 2 years and 6 months from the date of first receipt of money payment i.e. 17.05.2009 and to declare the BBA as arbitrarily, one sided and prejudicial to the interest on the company purposer. In this regard, it is observed that a series of positive acts were performed by both the parties i.e. payment and its acceptance, nevertheless, the terms of agreement took concrete shape only after execution of builder buyer agreement on 10.08.2010. Moreover, the demand letters which were honoured by complainants to pay the amount mentioned aforesaid were in consonance with the payment plan annexed alongwith builder buyer agreements. No communication or any objection either for the delayed execution of BBA i.e. after 15 months of booking or for receipt of amount of ₹ 20,69,217/- before the execution of BBA has been placed on record.



Reliance is placed upon the judgement dated 30.09.2021 passed by Hon'ble Supreme Court in **Civil Appeal no. 1491 of 2007 titled as Placido Francisco Pinto (D) By Lrs & Anr Vs Jose Francisco Pinto & Anr.**, relevant part of which is reproduced below for reference:-

> *"26. In Roop Kumar, this Court was seized of an appeal filed by the defendant arising out of a suit for possession and for rendition of accounts. The plaintiff claimed that he entered into an agency cum-deed of license with the appellant-defendant on 15.5.1975 and the terms of such agency-cum-licensing agreement was incorporated in an agreement dated 15.5.1975. The stand of the defendant was that he was in lawful possession as a tenant under the plaintiff. The trial court decreed the suit holding that the transaction between the respondent and the appellant evidenced by an agreement dated 15.05.1975 amounts to license and not subletting. The question before the High Court was whether a relationship between the parties is that of a licensor and licensee or that of a lessor and lessee. The first appeal was dismissed. This Court held that it is general and most inflexible rule that in respect of written instruments, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It was held that in Section 92 of the Evidence Act, the legislature has prevented oral evidence from being adduced for the purpose of varying the contract, such contract can*

be proved by production of such writing. It was held that Section 91 is concerned with the 15 mode of proof of a document with limitation imposed by Section 92. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. This Court held as under:

"17. It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than oral evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence.

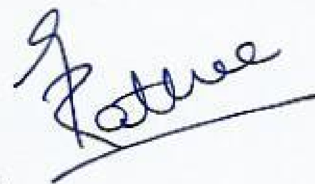
18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others,

either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.

xx xx xx

21. The grounds of exclusion of extrinsic evidence are: (i) to admit inferior evidence when the law requires superior would amount to nullifying the law, and (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and 16 final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.

22. This Court in Gangabai v. Chhabubai [(1982) 1 SCC 4 : AIR 1982 SC 20] and Ishwar Dass Jain v. Sohan Lal [(2000) 1 SCC 434 : AIR 2000 SC 426] with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties." (Emphasis Supplied)



> *27. A perusal of the above judgment would show that the oral evidence of a written agreement is excluded except when it is sought to be alleged the document as a sham transaction".*

Fact remains that complainants and respondent with mutual consent executed the builder buyer agreement on 10.08.2010. Complainants have not raised any objection to the execution of said builder buyer agreement till filing of present complaint nor did they approached any other forum for redressal of this grievance of forceful execution of BBA. Since, the date of booking i.e 15.05.2009 complainants remained silent with respect to the builder buyer agreement which was signed by them, meaning thereby that complainants themself accepted the said builder buyer agreements and made further payments also to respondent without any protest. Oral pleadings of the complainants cannot be relied upon without any documentary evidence over and above the duly executed builder buyer agreement dated 10.08.2010. Further, it is observed that builder buyer agreements are a core document for determining the rights and obligations of both the parties. An agreement duly executed by parties with their consent cannot be ignored in totality for declaring the whole of document as arbitrary and unreasonable. Also, the terms of agreement attained finality only when the builder buyer agreement was signed by both the parties. The BBA was the subsequent document to the

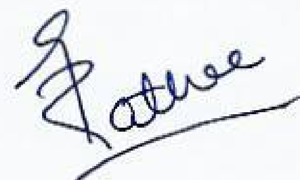
booking/allotment vide which all the terms of the agreement were crystallized with the consent of both the parties. However, a distinction can be made between the reasonable and unreasonable clauses of BBA for deciding the rights of the allottee in terms of the prevalent laws. In view of aforesaid discussion, the relief of awarding the delay interest from 24+6 months from date of first payment towards total sale consideration of unit and to declare the entire BBA as one-sided, prejudicial to the interest of the purchasers, arbitrary and biased is rejected. Reliance is placed upon the judgment dated 07.09.2022 passed by Hon'ble Supreme Court in **Special Leave Petition (Civil) no. 15989 of 2021 titled as Babanrao Rajaram Pund vs M/s Samarth Builders & Developers & Anr.**, relevant part of which is reproduced below for reference:-

> *"27. There is no gainsaying that it is the bounden duty of the parties to abide by the terms of the contract as they are sacrosanct in nature, in addition to, the agreement itself being a statement of commitment made by them at the time of signing the contract. The parties entered into the contract after knowing the full import of the arbitration clause and they cannot be permitted to deviate therefrom.*
>
> *28. It is thus imperative upon the courts to give greater emphasis to the substance of the clause, predicated upon the evident intent and objectives of the parties to choose a specific form of dispute resolution to manage conflicts between them. The intention of the parties that flows from*

the substance of the Agreement to resolve their dispute by arbitration are to be given due weightage."

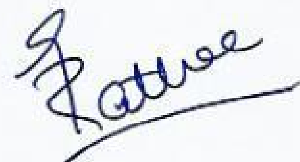
At the outset, it is relevant to comment with regard to clause of the agreement where the possession has been subjected to completion of 35% of basic sale price alonwgith 20% of EDC/IDC, the drafting of this clause is vague and uncertain and heavily loaded in favour of the promoter. Incorporation of such clause in the builder buyer agreement by the promoter is just to evade the liability towards timely delivery of unit and to deprive the allotee of his right accruing after delay in delivery possession.

23. **Finding w.r.t grace period**: The promoter had agreed to handover the possession of the floors within 24 months from the date of execution of floor buyer agreements or on completion of 35% of the basic sale price alongwith 20% of EDC and IDC by the purchaser(s), whichever is later. The agreement further provides that promoter shall be entitled to a grace period of 180 days after expiry of 24 months for filing and pursuing the grant of occupation certificate with respect to the unit in question. Since; the later clause of completion of 35% of the basic sale price alongwith 20% of EDC and IDC by the purchaser(s) is vague, ambiguous and arbitrary, the date of execution of floor buyer agreement is taken as the date for calculating the deemed date of possession. As a matter of fact, the promoter did not apply to the concerned Authority for obtaining



completion certificate/occupation certificate within the time limit prescribed by the respondent/promoter in the floor buyer agreement i.e immediately after completion of construction works within 24 months. Thus, the period of 24 months expired on 10.08.2012. As per the settled principle no one can be allowed to take advantage of its own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter.

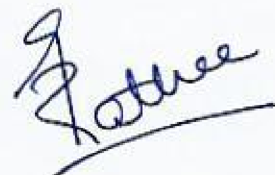
24. The facts set out in the preceding paragraph demonstrate that construction of the project had been delayed beyond the time period stipulated in the buyer's agreement. The Authority observes that the respondent has failed to fulfill its obligation stipulated in BBA dated 10.08.2010. Possession of the floors should have been delivered by 10.08.2012. Even now, after a lapse of 10 years, respondent is not in a position to offer possession of the unit since respondent company is yet to apply for occupation certificate in respect of the unit. Fact remains that respondent in his written statement has not specified the timeline within which possession of booked unit will be offered to the complainants. Complainants, however, do not wish to withdraw from the project and is rather interested in getting the possession of his unit. Learned counsel for the complainants has clearly stated that complainants are ready to wait for possession of floor after completion of construction and receipt of occupation certificate. In the circumstances, the provisions of Section 18 of the RERA Act of 2016 clearly come into play



by virtue of which while exercising the option of taking possession of the unit, the allottee is entitled to and respondent is liable to pay, interest for the entire period of delay caused at the rates prescribed. The respondent in this case has not made any offer of possession to the complainant till date. So, the Authority hereby concludes that the complainant is entitled for the delay interest from the deemed date i.e., 10.08.2012 up to the date on which a valid offer is sent to them after receipt of occupation certificate. 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(za) 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.*
>
> *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"..."*

25. 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 date i.e. 30.04.2024 is 8.85%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e. 10.85%.

26. Hence, Authority directs respondent to pay delay interest to the complainant 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 as on date works out to 10.85% (8.85% + 2.00%) from the due date of possession i.e 10.08.2012 till the date of a valid offer of possession.

27. Authority has got calculated the interest on total paid amount for each unit from due date of possession i.e. 10.08.2012 till the date of this order i.e. 30.04.2024 which works out as per detail given in the tables below:

H6-02-GF

Sr. No.	Principal Amount (in ₹)	Deemed date of possession or date of payment whichever is later	Interest Accrued till 30.04.2024 (in ₹)
1.	24,04,897.27/-	10.08.2012	30,61,118/-
2.	24,711/-	23.11.2016	19,951/-
3.	9,504/-	23.03.2021	3207/-
Total:	24,39,112.27./-		30,84,276/-
Monthly interest:	24,39,112.27/-		21,752/-

H6-02-FF

Sr. No.	Principal Amount (in ₹)	Deemed date of possession or date of payment whichever is later	Interest Accrued till 30.04.2024 (in ₹)
1.	22,67,022.80/-	10.08.2012	28,85,622/-
2.	23,399/-	23.11.2016	18,891/-
3.	9,504/-	23.03.2021	3,207/-
Total:	22,99,925.80/-		29,07,720/-
Monthly interest:	22,99,925.80/-		19,619/-

H6-02-SF

Sr. No.	Principal Amount (in ₹)	Deemed date of possession or date of payment whichever is later	Interest Accrued till 30.04.2024 (in ₹)
1.	22,44,456.67/-	10.08.2012	28,85,898/-
2.	23,168/-	23.11.2016	18,705/-
3.	9,504/-	23.03.2021	3,207/-
Total:	22,77,128.67/-		28,72,388/-
Monthly interest:	22,77,128.67/-		20,307/-

28. In the captioned complaint, complainant has sought delay interest for delay caused in delivery of possession of three units. Complainant has paid a total amount of ₹ 24,39,112.27/- for shop no. H6-02-GF, ₹ 22,99,925.80/- for shop no. H6-02-FF and ₹22,77,128.67/- for shop no. H6-02-SF. However, few receipts attached by the complainant are not clear, as to which payment receipt is made towards which of the three units due to which it is difficult to corroborate payment in respect of the individual units. Complainant has claimed to have made part payment for each unit till May 2012 and then in the year 2016 and 2021. Further the respondent vide statement of accounts dated 23.03.2021 annexed as Annexure C-8 has agreed to having received the said amount as mentioned in respective table above. Therefore, considering the payment receipts and the statement of

accounts dated 23.03.2021 it is inferred that complainant has made part payment of ₹24,04,897.27/- till May 2012 for unit H6-02-Gf, part payment of ₹22,67,022.80/- till May 2012 for unit H6-02-Ff and part payment of ₹22,44,456.67/- till May 2012 for unit H6-02-Sf which is accordingly reflected in the table displayed above for the purpose of calculation of delay interest. The interest is calculated as per the details mentioned in table displayed in para 28 of this order.

29. At the time of filing of complaint, complainants have also prayed for relief with respect to increase in area and refund of amount paid in lieu of said increase vide relief clause no. iv and v. However, at the time of hearing learned counsel for the complainants stated that he is not pressing these reliefs.

30. The complainants are seeking compensation to the tune of ₹ 5,00,000/- on account of mental agony and harassment and compensation for loss of life of building by 10 years as the construction of the unit was completed in the year 2011-12 and since then the unit is lying abandoned without any care or maintenance by the respondent. It is observed that Hon'ble Supreme Court of India in Civil Appeal Nos. 6745-6749 of 2027 titled as *"M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of U.P. & ors."* (supra,), has held that an allottee is entitled to claim compensation & litigation charges under Sections 12, 14, 18 and Section 19 which is to be

decided by the learned Adjudicating Officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the learned Adjudicating Officer having due regard to the factors mentioned in Section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainants are advised to approach the Adjudicating Officer for seeking the relief of litigation expenses.

G. DIRECTIONS OF THE AUTHORITY

31. 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:

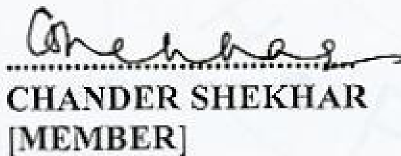
    (i) Respondent is directed to pay upfront delay interest of ₹30,84,276/- (till date of order i.e 30.04.2024) to the complainants towards delay already caused in handing over the possession within 90 days from the date of this order and further monthly interest @ ₹ 21,752/- till the offer of possession after receipt of occupation certificate for Unit No. H6-02-GF; ₹ 29,07,720/- (till date of order i.e. 30.04.2024) 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 @ 19,619/- till the offer of possession

after receipt of occupation certificate for Unit No. H6-02-FF and ₹ 28,72,388/- (till date of order i.e 30.04.2024) 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 @ 20,307/- till the offer of possession after receipt of occupation certificate for Unit No. H6-02-FF.

(ii) Complainants will remain liable to pay balance consideration amount to the respondent at the time of possession offered to them.

(iii) The respondent shall not charge anything from the complainants which is not part of the agreement to sell.

32. The case is **disposed of**. File be consigned to record room after uploading on website of the Authority.



CHANDER SHEKHAR
[MEMBER]

DR. GEETA RATHEE SINGH
[MEMBER]