

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

Complaint no. : 2195 of 2018  
First date of hearing: 19.03.2019  
Date of decision : 03.09.2019

1. Shri Navneet Kumar
2. Smt. Suman Choudhary(Suman Dhillon)  
Both R/o Flat No. E-2-001, Vatika India  
Next, Sector- 83, Gurugram- 122001

**Complainants**

Versus

1. BPTP Limited (through managing  
director/director/authorized  
representative)  
Registered office at: M-11, First Floor,  
Middle Circle, Connaught Circus, New  
Delhi-110001
2. Countrywide Promoters Pvt. Ltd.  
(through managing director/ director/  
authorised representative)  
Registered office at: M-11, First Floor,  
Middle Circle, Connaught Circus, New  
Delhi-110001

**Respondents**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member  
Member**

**APPEARANCE:**

Shri Sukhbir Yadav  
Ms. Meena Hooda

Advocate for the complainants  
Advocate for the respondents

**ORDER**

1. A complaint dated 17.12.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Shri Navneet Kumar and Smt. Suman Choudhary (Suman Dhillon), against the promoters M/s BPTP Limited and anr., on account of violation of the clause 3.1 of flat buyer's agreement executed on 16.09.2010 in respect of unit described below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.
2. Since, the flat buyer's agreement has been executed on 16.09.2010 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoters/respondents in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

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ANAMIKA ANJALAWAT  
HRA Assistant





3. The particulars of the complaint are as under: -

1.	Name and location of the project	Mansions Park Prime, sector 66, Gurugram
2.	Nature of the project	Residential group housing colony
3.	Project area	11.068 acres
4.	DTCP license no.	31 of 2008
5.	Registered/ not registered	<b>Not registered</b>
6.	Unit no.	M1-404, 4 <sup>th</sup> floor, tower Mansion M
7.	Unit measuring	2764sq. ft. ( super area)
8.	Date of execution of apartment buyer's agreement	16.09.2010
9.	Payment plan annexed as annexure-III to the said agreement	Construction linked payment plan
10.	Basic sale price of the unit	Rs.10,365,000 /- (as per clause 2.1)
11.	Total sale consideration (as per statements of account as in Junr 18,2016)	Rs.1,20,41,968/- (Annx. P-13 page 111 ofcomplaint)
12.	Total amount paid by the complainant till date as per SOA (annexure P13).	Rs.1,11,82,584/-
13.	Allotment letter	23.08.2010
14.	Application for allotment	03.07.2010





15.	Due date of delivery of possession as per clause 3.1 of buyer's agreement i.e. (36 months + 180 days from the date of booking/registration of the flat.)	03.01.2014
16.	Delay in handing over possession till date of decision	5years 2 months and 29 days.
17.	Penalty clause as per flat buyer's agreement dated 16.09.2010	Clause 3.3 of the said agreement i.e. Rs.5/- per sq. ft. of the super area for every month of delay after the expiry of the 42 months.

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondents. A flat buyer's dated 16.09.2010 agreement is available on record for the aforesaid flat according to which the possession of the said flat was to be delivered by 03.01.2014. Neither the respondents have delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.5/- sq. ft. per month for the delay in handing over possession of the unit as per clause 3.3 of the said agreement duly executed between the parties.



Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 19.03.2019, 01.05.2019 and 25.07.2019 and 03.09.2019. The reply has been filed by the respondent on 07.05.2019 and has been perused by the authority.

**Facts of the complaint: -**

6. The complainants submitted that they had booked one 4 BHK flat admeasuring 2764 sq. ft. in ' Mansions Park Prime' under construction linked plan for sale consideration of Rs. 1,20,41,968/-. On 23.08.2010, respondent issued an allotment letter-cum-demand letter. A pre-printed flat buyer's agreement was executed between the parties on 16.09.2010. As per clause 3.1 of flat buyer's agreement the respondent, has to give the possession of flat "within a period of thirty six (36) months from the date of booking /

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LEGAL ASSISTANT



registration of the flat". Flat was booked on 03.07.2010 inter alia due date of possession was 03.07.2013.

7. The complainants submitted that the respondent had raised several demand from complainant as per payment plan and they paid the said demands time to time. The demand on account of "start of excavation work" was raised on 07.10.2010.
8. The complainants further submitted that he has already paid the more than 92% amount i.e. Rs. 1,11,80,798/- along with car parking and other allied charges of actual purchase price, but when complainants observed that there is no progress in construction of subject flat for a long time, they raised their grievance to respondent. Though complainants were always ready and willing to pay the remaining installments provided that there is progress in the construction of flat.
9. The complainant submitted that on 07.06.2014, respondent(s) issued a statement of account which shows total net cost of flat is Rs. 1,20,41,968/- called amount was

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LEGAL ANALYST



Rs. 1,11,80,798/- and received amount was Rs. 1,11,80,798/-.

10. The complainant submitted that since July 2013 they are regularly visiting to the office of respondent(s) as well as construction site and making efforts to get the possession of allotted flats, but all in vain, in spite of several visits by them. The complainants were never been able to understand/know the actual status of construction. Though towers seem to be built up but no progress is observed on finishing and landscaping work. It is pertinent to mention here that respondent raised the demand of "on start of cladding" on 05.06.2012, thereafter respondent fails to complete the construction and handover the possession of flat as per due date.

11. The complainants submitted that they had purchased the flat with intention that after purchase, their family will live in their own flat. It was promised by the respondent(s) party at the time of receiving payment for the flat that the possession of fully constructed flat along like basement and surface parking, landscaped lawns, club/ pool, school, EWS

etc. as shown in brochure at the time of sale, would be handed over to the complainants as soon as construction work is complete i.e. by September, 2014. Thereafter, respondent(s) assured to complainants that physical possession flat will be handover by July, 2013.

12. The complainant submitted that for the first time cause of action for the present complaint arose in September, 2010, when the unilateral, arbitrary and one sided terms and conditions were imposed on complainants. Second time cause of action arose in July, 2013, when the respondent(s) failed to handover the possession of the flat as per the flat buyer's agreement. Further, the cause of action arose in December, 2014 when the respondent(s) party failed to handover the possession of flat as per promise. Further, the cause of action again arose on various occasions, including on: a) February 2015; b) January 2016; c) June 2018, and on many times till date, when the protests were lodged with the respondent(s) about its failure to deliver the project and the assurances were given by them that the possession would be delivered by a certain time. The cause of action is





alive and continuing and will continue to subsist till such time as this hon'ble authority restrains the respondent(s) by an order of injunction and/or passes the necessary orders.

13. Complainants further submitted that they reserve their right to file complaint to adjudicating officer for compensation.
14. The complainants further submitted that they do not want to withdraw from project. Promoter has not fulfilled his obligation therefore as per obligations on the promoter under section 18(1) proviso, the promoters are obligated to pay them interest at the prescribed rate for every month of delay till the handing over of the possession.

**Issues raised by the complainants: -**

- i. Whether the developer has violated the terms and conditions of flat buyer agreement?
- ii. Whether there is any reasonable justification for delay to give possession of flats?





- iii. Whether complainant(s) are entitled for interest, for every month of delay from due date of possession till the handing over of the possession under section 18 of RERA Act.?
- iv. Whether Respondent can levy VAT on Complainants and is entitled for refund of VAT deposited to Respondent?

**Reliefs sought by the complainant: -**

- i. To pass an appropriate award directing the Respondent parties to pay interest at the prescribed rate for every month of delay from due date of possession till the handing over the possession, on paid amount (complete in all respect) (as per section 18 of Real Estate (Regulation and Development) Act, 2016).
- ii. Pass an appropriate award directing the Respondent parties to pay refund the VAT amount Rs. 1,14,106/-
- iii. Pass an appropriate award directing the Respondent parties to refrain from demand of GST.

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15/08/2018





- iv. Pass an appropriate award directing the Respondent parties to refrain from demand of cost escalation.
- v. Respondent may kindly be directed to refrain from giving effect to the unfair clauses unilaterally incorporated in the flat buyer agreement.
- vi. Respondent party may kindly be directed to complete and seek necessary governmental clearances regarding infrastructural and other facilities including road, water, sewerage, electricity, environmental etc. before handing over the physical possession of the flats.
- vii. Respondent party may kindly be directed to hand over the club house and car parking complete in all respects while handing over of the flats.
- viii. Respondent party may kindly be directed to provide for third party audit to ascertain / measure accurate areas of the flats and facilities, more particularly, as to the "super area" and "built-up area".

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11/04/2018

ix. Respondent party may kindly be directed to handover the possession of flat to the allottee immediately and not later than 6 months from the date of judgment, complete in all respects and execute all required documents for transferring/ conveying the ownership of the respective flats.

**Reply by the Respondents:**

15. The respondents submitted that the complainants approached this hon'ble authority for redressal of their alleged grievances with unclean hands, i.e. by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of decisions has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondent but also against the court and in such situation, the complaint



is liable to be dismissed at the threshold without any further adjudication.

16. In this regard, reference may be made to the following instances which establish concealment/ suppression/ misrepresentation on the part of the complainants:

- i. The complainants approached the respondents through a broker, namely "Ashwani Services" after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same. It is further submitted that complainants are investors and have booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slump in the real estate market, the complainants have filed the present purported complaint to wriggle out of the agreement.
- ii. The complainants further concealed from this Hon'ble Authority that respondents provided the complainants an additional benefit in the form of timely payment



discount (TPD) of Rs.4,25,809.81/- thereby reducing the cost of the unit purchased by the complainants.

iii. The complainants in the entire complaint concealed the fact that no updates regarding the status of the project were provided to them by the respondents. However, complainants were constantly provided construction updates by the respondents vide emails dated 29.07.2016, 07.09.2016, 20.01.2017, 15.03.2017, 24.04.2017, 24.05.2017, 23.06.2017, 29.07.2017, 08.04.2018, 07.05.2018, 15.06.2018, 08.11.2018, 21.12.2018, 19.01.2019, 23.02.2019, 22.03.2019 and 19.04.2019.

14. The respondents submitted that the relief(s) sought by the complainants are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is submitted that the complainants entered into the said agreement with the respondents with open eyes and is bound by the same. It is further submitted that the relief(s) sought by the complainants travel way

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Digitally signed by Anamika Ahalawat





beyond the four walls of the agreement duly executed between the parties. It is submitted that the complainants while entering into the agreement has accepted and is bound by each and every clause of the said agreement, including clause-3.3 which provides for delayed penalty in case of delay in delivery of possession of the said floor by the respondent.

15. The respondents submitted that the agreements that were executed prior to the registration of the project under RERA shall be binding on the parties and cannot be reopened.
16. The respondent submitted that the complaint filed by the complainants is also liable to be dismissed and the matter is required to be referred to an arbitrator as agreed between the parties vide clause-33 of the flat buyer's agreement. In view of the amendment made in section 8 of the Arbitration and Conciliation Act, 1996, the present disputes/claims are liable to be referred to Arbitration.
17. The respondent submitted that the proposed timelines for possession being within 36 months from the date of

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UGC, ASSISTANT

booking along with 180 days of grace period was subject to force majeure circumstances and circumstances beyond control of the respondents. However, the complainants have indulged in selective reading of the clauses of the FBA whereas the FBA ought to be read as a whole. It is further submitted that construction of the flat in question is complete and the respondents have already applied for grant of occupation certificate before the statutory authority and is awaiting the same. The respondents are endeavouring to offer possession of the flat in question shortly. It is further submitted as follows: -

- i. The parties had, vide clause 3.1 of the said agreement (clause 14 of the application for allotment), duly agreed that subject to force majeure and compliance by the complainants of all the terms and conditions of the agreement, the respondents proposed to hand over possession of the flat to the complainants within 36 months of booking along with a further grace period of 180 days.



- ii. Vide clause 3.3 of the flat buyer's agreement, it was further duly agreed upon between the parties that subject to the conditions mentioned therein, in case the respondents fail to hand over possession within 36 months from the date of booking/registration of the flat with 180 days as grace period, subject to force majeure clause, the OPs shall be liable to pay to the complainants compensation calculated @ Rs.5 per sq. ft. for every month of delay, the adjustment whereof shall be done only at the stage of execution of conveyance deed.
- iii. Vide clause 3.5 of the said agreement, the parties had further agreed that if the respondents fails to complete the construction of the flat due to force majeure circumstances or circumstances beyond the control of the respondents then the OPs shall be entitled to reasonable extension of time for completion of construction.
- iv. It is submitted that the building plans of the project in question were approved on 05.06.2012 and the fire

scheme (with single staircase) was approved on 27.04.2013 in terms of the approved building plans, which was then as per the regulatory requirements. In the year 2014, DTCP has granted part occupation certificate (OC) for towers D, E, F, G, H and J which are known as "Park Prime" after the fire department gave its NOC since the buildings have been constructed as per the approved fire scheme and the 2 towers i.e. tower no. A (with 2 wings MA 1 & MA 2) and tower no. B (with 2 wings MA 3 & MA 4) in the project for which occupation certificate (OC) have been applied have 140 units.

- v. It is submitted that that the fire stair case norms have been changed by the concerned department in the year 2016 whereby one additional stair case has to be provided for each tower and the said norms are being implemented with retrospective effect, therefore the department has kept the grant of OC pending for want of Fire NOC, despite the building having been constructed as per the approved fire scheme dated





27.04.2013 for the project in question. In these circumstances the respondents have given representation to The Directorate of Urban Local Bodies , Government of Haryana (who grants the Fire NOC) to consider giving the NOC with a condition that the respondents shall construct the additional stair case within one year of such NOC which will help the respondents in obtaining OC for these two remaining towers. The government granted the request on 13.06.18, however the same was granted from the date when NOC was applied i.e. on 16.07.17 and which expired on 15.07.18. Thus, the NOC was only granted for 31 days in effect. It is further submitted that since the buildings are fit for grant of OC and there are positive reports from all the departments, the respondents, on 17.07.2018, requested for an effective one year extension of Fire NOC i.e. from the date of NOC and the said request is pending with the Director, Urban Local Bodies and is under active consideration

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DIRECTOR

and there is every likelihood that the request of the respondents would be accepted.

- vi. It is submitted that that the delay in construction and giving timely possession to the complainants were also affected by delay in making timely payments by other allottees of Mansion in Park Prime.
- vii. It is submitted that that the complainants mutually agreed with the respondents with the terms and conditions of the agreement and apart from the proposed timelines for possession clause, never raised any issue with regard to any other terms contained therein. It is submitted that the respondents have been diligently working upon the project Mansions Park Prime and every endeavour is being made to offer possession of the unit in question to the complainants at the earliest.

18. The respondent submitted that the details of the construction level achieved in the tower where the unit allotted to the complainants are located are as follows:





Description of Work	Status
Structural Work	Complete
Brick Work	Complete
Internal Plaster	Complete
External Plaster	Complete
Wall Conduiting	Complete
Door Frame	Complete
Balcony Railing	Complete
Stone Flooring	Complete

19. The respondent submitted that the construction of the unit in question is complete and possession for the same shall be offered shortly. Recent photograph of the tower in which the unit in question is situated are annexed herewith and marked as annexure R7.

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ANAMIKA AHALAWAT  
UPON: 20/08/2018

**Determination of issues: -**

After considering the facts submitted by the complainants, reply by the respondents and perusal of record on file, the issue wise findings of the authority are as under:

I. With respect to **first, second and third issue** raised by the complainants as per clause 3.1 of the flat buyer's agreement dated 16.09.2010, the possession of the unit was to be handed over within 36 months plus grace period of 180 days from the date of booking/registration of the flat. In the present case, an application for allotment was executed on 03.07.2010. Therefore, the due date of handing over the possession shall be computed from 03.07.2010. Grace period of 180 days has been allowed to the respondent for the delay caused due to exigencies beyond control of respondent.

Accordingly, the due date of possession was 03.01.2014 and hence, the period of delay in delivery of possession is computed as 5 years 8 months till the offer of possession. The delay compensation payable by the respondent @





Rs.5/- per sq. ft. per month of super area for any delay in offering possession of the unit as per clause 3.3 of flat buyer's agreement is held to be unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided. It has also been observed in para 181 of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*, wherein the Bombay HC bench held that:

*"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."*

As the possession of the apartment was to be delivered by 03.01.2014, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016. As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso read with rule 15 of the Rules ibid to pay

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DEPUTY ASSISTANT

interest to the complainant, at the prescribed rate i.e. 10.45%, for every month of delay from due date of possession i.e. 03.01.2014 till the offer of possession.

II. With respect to **forth issue** raised by the complaint, the authority is of the view that the present issue does not fall within its jurisdiction. The complainant is advised to approach appropriate forum regarding the same.

**Findings of the authority:-**

20. **Jurisdiction of the authority-** The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. 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.

21. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter. The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.
22. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. 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.
23. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions of the Act and to fulfil its obligations.

24. Regarding contention of Arbitration raised by the respondent in reply, the authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.
25. Further, in ***Aftab Singh and Ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court in ***civil appeal no.23512-23513 of 2017*** and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on





all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

Arguments heard.

As per clause 3.1 of the Builder Buyer Agreement dated 16.9.2010 for unit No. M1-404, 4<sup>th</sup> Floor, Tower Mansion 1, in project " Mansions Park Prime", Sector 66, Gurugram, possession was to be handed over to the complainant within a period of 36 months + 180 days grace period from the date of booking/registration of the flat i.e. 3.7.2010 which comes out to be 03.01.2014. It was a construction linked plan. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,11,82,584/- to the respondent against a total sale consideration of Rs. 1,20,41,968/-.

It was stated by the counsel for the respondent at bar that they have applied for OC but they failed to produce any evidence in support of their contention. Respondent is directed to hand over the flat unit at the earliest.

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11/08/2018

As such, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f 03.01.2014 till the offer of possession as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

**Directions and decisions of the authority:-**

26. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:
- i. The respondent is directed to pay the interest at the prescribed rate i.e. 10.45% for every month of delay from the due date of possession i.e. 03.02.2014 till the offer of the possession by the respondent.
  - ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till





offer of possession shall be paid before 10<sup>th</sup> of each subsequent month.

- iii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period.
- iv. The promoter shall not charge anything from the complainant which is not part of the flat buyer's agreement.
- v. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.45% by the promoter which is the same as is being granted to the complainant in case of delayed possession.

27. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Real Estate (Regulation and Development) Act, 2016 by the registration branch.

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ANAMIKA AHALAWAT  
REGD. REGISTRAR


28. The order is pronounced.

29. Case file be consigned to the registry. Copy of this order will be endorsed to registration branch.

  
(Samir Kumar)

Member

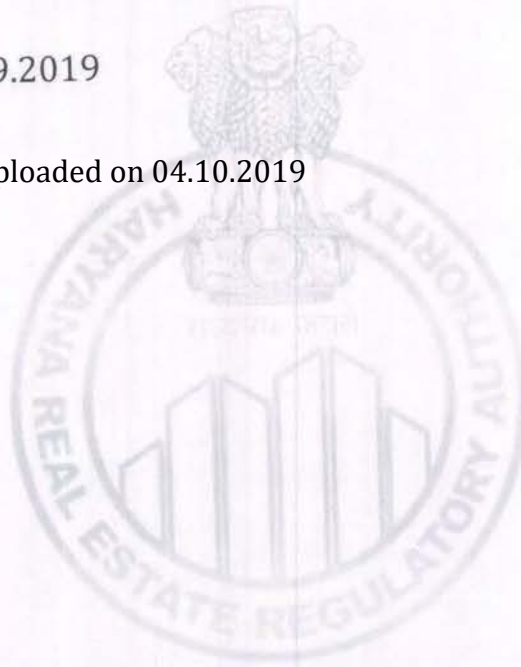
Haryana Real Estate Regulatory Authority, Gurugram

  
(Subhash Chander Kush)

Member

Dated: 03.09.2019

Judgement uploaded on 04.10.2019



**HARERA**  
GURUGRAM

**AUTHENTICATED**

ANAMIKA AHALAWAT  
JUDGE



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

Complaint no. : 2195 of 2018  
First date of hearing: 19.03.2019  
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1. Shri Navneet Kumar
2. Smt. Suman Choudhary (Suman Dhillon)  
Both R/o Flat No. E-2-001, Vatika India  
Next, Sector- 83, Gurugram- 122001

**Complainants**

Versus

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director/director/authorized  
representative)  
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**Respondents**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shri Sukhbir Yadav  
Ms. Meena Hooda

Advocate for the complainants  
Advocate for the respondents



**ORDER**

1. A complaint dated 17.12.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Shri Navneet Kumar and Smt. Suman Choudhary (Suman Dhillon), against the promoters M/s BPTP Limited and anr., on account of violation of the clause 3.1 of flat buyer's agreement executed on 16.09.2010 in respect of unit described below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.
2. Since, the flat buyer's agreement has been executed on 16.09.2010 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoters/respondents in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

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ANAMIKA ANJALAWAT  
11/01/2019





3. The particulars of the complaint are as under: -

1.	Name and location of the project	Mansions Park Prime, sector 66, Gurugram
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ANAMIKA AHILAWAT  
LICENSING ASSISTANT



15.	Due date of delivery of possession as per clause 3.1 of buyer's agreement i.e. (36 months + 180 days from the date of booking/registration of the flat.)	03.01.2014
16.	Delay in handing over possession till date of decision	5years 2 months and 29 days.
17.	Penalty clause as per flat buyer's agreement dated 16.09.2010	Clause 3.3 of the said agreement i.e. Rs.5/- per sq. ft. of the super area for every month of delay after the expiry of the 42 months.

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondents. A flat buyer's dated 16.09.2010 agreement is available on record for the aforesaid flat according to which the possession of the said flat was to be delivered by 03.01.2014. Neither the respondents have delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.5/- sq. ft. per month for the delay in handing over possession of the unit as per clause 3.3 of the said agreement duly executed between the parties.



Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 19.03.2019, 01.05.2019 and 25.07.2019 and 03.09.2019. The reply has been filed by the respondent on 07.05.2019 and has been perused by the authority.

**Facts of the complaint: -**

6. The complainants submitted that they had booked one 4 BHK flat admeasuring 2764 sq. ft. in ' Mansions Park Prime' under construction linked plan for sale consideration of Rs. 1,20,41,968/-. On 23.08.2010, respondent issued an allotment letter-cum-demand letter. A pre-printed flat buyer's agreement was executed between the parties on 16.09.2010. As per clause 3.1 of flat buyer's agreement the respondent, has to give the possession of flat "within a period of thirty six (36) months from the date of booking /

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registration of the flat". Flat was booked on 03.07.2010  
inter alia due date of possession was 03.07.2013.

7. The complainants submitted that the respondent had raised several demand from complainant as per payment plan and they paid the said demands time to time. The demand on account of "start of excavation work" was raised on 07.10.2010.
8. The complainants further submitted that he has already paid the more than 92% amount i.e. Rs. 1,11,80,798/- along with car parking and other allied charges of actual purchase price, but when complainants observed that there is no progress in construction of subject flat for a long time, they raised their grievance to respondent. Though complainants were always ready and willing to pay the remaining installments provided that there is progress in the construction of flat.
9. The complainant submitted that on 07.06.2014, respondent(s) issued a statement of account which shows total net cost of flat is Rs. 1,20,41,968/- called amount was





Rs. 1,11,80,798/- and received amount was Rs. 1,11,80,798/-.

10. The complainant submitted that since July 2013 they are regularly visiting to the office of respondent(s) as well as construction site and making efforts to get the possession of allotted flats, but all in vain, in spite of several visits by them. The complainants were never been able to understand/know the actual status of construction. Though towers seem to be built up but no progress is observed on finishing and landscaping work. It is pertinent to mention here that respondent raised the demand of "on start of cladding" on 05.06.2012, thereafter respondent fails to complete the construction and handover the possession of flat as per due date.
11. The complainants submitted that they had purchased the flat with intention that after purchase, their family will live in their own flat. It was promised by the respondent(s) party at the time of receiving payment for the flat that the possession of fully constructed flat along like basement and surface parking, landscaped lawns, club/ pool, school, EWS





etc. as shown in brochure at the time of sale, would be handed over to the complainants as soon as construction work is complete i.e. by September, 2014. Thereafter, respondent(s) assured to complainants that physical possession flat will be handover by July, 2013.

12. The complainant submitted that for the first time cause of action for the present complaint arose in September, 2010, when the unilateral, arbitrary and one sided terms and conditions were imposed on complainants. Second time cause of action arose in July, 2013, when the respondent(s) failed to handover the possession of the flat as per the flat buyer's agreement. Further, the cause of action arose in December, 2014 when the respondent(s) party failed to handover the possession of flat as per promise. Further, the cause of action again arose on various occasions, including on: a) February 2015; b) January 2016; c) June 2018, and on many times till date, when the protests were lodged with the respondent(s) about its failure to deliver the project and the assurances were given by them that the possession would be delivered by a certain time. The cause of action is





alive and continuing and will continue to subsist till such time as this hon'ble authority restrains the respondent(s) by an order of injunction and/or passes the necessary orders.

13. Complainants further submitted that they reserve their right to file complaint to adjudicating officer for compensation.
14. The complainants further submitted that they do not want to withdraw from project. Promoter has not fulfilled his obligation therefore as per obligations on the promoter under section 18(1) proviso, the promoters are obligated to pay them interest at the prescribed rate for every month of delay till the handing over of the possession.

**Issues raised by the complainants: -**

- i. Whether the developer has violated the terms and conditions of flat buyer agreement?
- ii. Whether there is any reasonable justification for delay to give possession of flats?



- iii. Whether complainant(s) are entitled for interest, for every month of delay from due date of possession till the handing over of the possession under section 18 of RERA Act.?
- iv. Whether Respondent can levy VAT on Complainants and is entitled for refund of VAT deposited to Respondent?

**Reliefs sought by the complainant: -**

- i. To pass an appropriate award directing the Respondent parties to pay interest at the prescribed rate for every month of delay from due date of possession till the handing over the possession, on paid amount (complete in all respect) (as per section 18 of Real Estate (Regulation and Development) Act, 2016).
- ii. Pass an appropriate award directing the Respondent parties to pay refund the VAT amount Rs. 1,14,106/-
- iii. Pass an appropriate award directing the Respondent parties to refrain from demand of GST.

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- iv. Pass an appropriate award directing the Respondent parties to refrain from demand of cost escalation.
- v. Respondent may kindly be directed to refrain from giving effect to the unfair clauses unilaterally incorporated in the flat buyer agreement.
- vi. Respondent party may kindly be directed to complete and seek necessary governmental clearances regarding infrastructural and other facilities including road, water, sewerage, electricity, environmental etc. before handing over the physical possession of the flats.
- vii. Respondent party may kindly be directed to hand over the club house and car parking complete in all respects while handing over of the flats.
- viii. Respondent party may kindly be directed to provide for third party audit to ascertain / measure accurate areas of the flats and facilities, more particularly, as to the "super area" and "built-up area".

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ix. Respondent party may kindly be directed to handover the possession of flat to the allottee immediately and not later than 6 months from the date of judgment, complete in all respects and execute all required documents for transferring/ conveying the ownership of the respective flats.

**Reply by the Respondents:**

15. The respondents submitted that the complainants approached this hon'ble authority for redressal of their alleged grievances with unclean hands, i.e. by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of decisions has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondent but also against the court and in such situation, the complaint



is liable to be dismissed at the threshold without any further adjudication.

16. In this regard, reference may be made to the following instances which establish concealment/ suppression/ misrepresentation on the part of the complainants:

- i. The complainants approached the respondents through a broker, namely "Ashwani Services" after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same. It is further submitted that complainants are investors and have booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slump in the real estate market, the complainants have filed the present purported complaint to wriggle out of the agreement.
- ii. The complainants further concealed from this Hon'ble Authority that respondents provided the complainants an additional benefit in the form of timely payment

discount (TPD) of Rs.4,25,809.81/- thereby reducing the cost of the unit purchased by the complainants.

iii. The complainants in the entire complaint concealed the fact that no updates regarding the status of the project were provided to them by the respondents. However, complainants were constantly provided construction updates by the respondents vide emails dated 29.07.2016, 07.09.2016, 20.01.2017, 15.03.2017, 24.04.2017, 24.05.2017, 23.06.2017, 29.07.2017, 08.04.2018, 07.05.2018, 15.06.2018, 08.11.2018, 21.12.2018, 19.01.2019, 23.02.2019, 22.03.2019 and 19.04.2019.

14. The respondents submitted that the relief(s) sought by the complainants are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is submitted that the complainants entered into the said agreement with the respondents with open eyes and is bound by the same. It is further submitted that the relief(s) sought by the complainants travel way

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beyond the four walls of the agreement duly executed between the parties. It is submitted that the complainants while entering into the agreement has accepted and is bound by each and every clause of the said agreement, including clause-3.3 which provides for delayed penalty in case of delay in delivery of possession of the said floor by the respondent.

15. The respondents submitted that the agreements that were executed prior to the registration of the project under RERA shall be binding on the parties and cannot be reopened.
16. The respondent submitted that the complaint filed by the complainants is also liable to be dismissed and the matter is required to be referred to an arbitrator as agreed between the parties vide clause-33 of the flat buyer's agreement. In view of the amendment made in section 8 of the Arbitration and Conciliation Act, 1996, the present disputes/claims are liable to be referred to Arbitration.
17. The respondent submitted that the proposed timelines for possession being within 36 months from the date of

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booking along with 180 days of grace period was subject to force majeure circumstances and circumstances beyond control of the respondents. However, the complainants have indulged in selective reading of the clauses of the FBA whereas the FBA ought to be read as a whole. It is further submitted that construction of the flat in question is complete and the respondents have already applied for grant of occupation certificate before the statutory authority and is awaiting the same. The respondents are endeavouring to offer possession of the flat in question shortly. It is further submitted as follows: -

- i. The parties had, vide clause 3.1 of the said agreement (clause 14 of the application for allotment), duly agreed that subject to force majeure and compliance by the complainants of all the terms and conditions of the agreement, the respondents proposed to hand over possession of the flat to the complainants within 36 months of booking along with a further grace period of 180 days.



- ii. Vide clause 3.3 of the flat buyer's agreement, it was further duly agreed upon between the parties that subject to the conditions mentioned therein, in case the respondents fail to hand over possession within 36 months from the date of booking/registration of the flat with 180 days as grace period, subject to force majeure clause, the OPs shall be liable to pay to the complainants compensation calculated @ Rs.5 per sq. ft. for every month of delay, the adjustment whereof shall be done only at the stage of execution of conveyance deed.
- iii. Vide clause 3.5 of the said agreement, the parties had further agreed that if the respondents fails to complete the construction of the flat due to force majeure circumstances or circumstances beyond the control of the respondents then the OPs shall be entitled to reasonable extension of time for completion of construction.
- iv. It is submitted that the building plans of the project in question were approved on 05.06.2012 and the fire

scheme (with single staircase) was approved on 27.04.2013 in terms of the approved building plans, which was then as per the regulatory requirements. In the year 2014, DTCP has granted part occupation certificate (OC) for towers D, E, F, G, H and J which are known as "Park Prime" after the fire department gave its NOC since the buildings have been constructed as per the approved fire scheme and the 2 towers i.e. tower no. A (with 2 wings MA 1 & MA 2) and tower no. B (with 2 wings MA 3 & MA 4) in the project for which occupation certificate (OC) have been applied have 140 units.

- v. It is submitted that that the fire stair case norms have been changed by the concerned department in the year 2016 whereby one additional stair case has to be provided for each tower and the said norms are being implemented with retrospective effect, therefore the department has kept the grant of OC pending for want of Fire NOC, despite the building having been constructed as per the approved fire scheme dated

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27.04.2013 for the project in question. In these circumstances the respondents have given representation to The Directorate of Urban Local Bodies , Government of Haryana (who grants the Fire NOC) to consider giving the NOC with a condition that the respondents shall construct the additional stair case within one year of such NOC which will help the respondents in obtaining OC for these two remaining towers. The government granted the request on 13.06.18, however the same was granted from the date when NOC was applied i.e. on 16.07.17 and which expired on 15.07.18. Thus, the NOC was only granted for 31 days in effect. It is further submitted that since the buildings are fit for grant of OC and there are positive reports from all the departments, the respondents, on 17.07.2018, requested for an effective one year extension of Fire NOC i.e. from the date of NOC and the said request is pending with the Director, Urban Local Bodies and is under active consideration

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and there is every likelihood that the request of the respondents would be accepted.

- vi. It is submitted that that the delay in construction and giving timely possession to the complainants were also affected by delay in making timely payments by other allottees of Mansion in Park Prime.
- vii. It is submitted that that the complainants mutually agreed with the respondents with the terms and conditions of the agreement and apart from the proposed timelines for possession clause, never raised any issue with regard to any other terms contained therein. It is submitted that the respondents have been diligently working upon the project Mansions Park Prime and every endeavour is being made to offer possession of the unit in question to the complainants at the earliest.

18. The respondent submitted that the details of the construction level achieved in the tower where the unit allotted to the complainants are located are as follows:





Description of Work	Status
Structural Work	Complete
Brick Work	Complete
Internal Plaster	Complete
External Plaster	Complete
Wall Conduiting	Complete
Door Frame	Complete
Balcony Railing	Complete
Stone Flooring	Complete

19. The respondent submitted that the construction of the unit in question is complete and possession for the same shall be offered shortly. Recent photograph of the tower in which the unit in question is situated are annexed herewith and marked as annexure R7.

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**Determination of issues: -**

After considering the facts submitted by the complainants, reply by the respondents and perusal of record on file, the issue wise findings of the authority are as under:

I. With respect to **first, second and third issue** raised by the complainants as per clause 3.1 of the flat buyer's agreement dated 16.09.2010, the possession of the unit was to be handed over within 36 months plus grace period of 180 days from the date of booking/registration of the flat. In the present case, an application for allotment was executed on 03.07.2010. Therefore, the due date of handing over the possession shall be computed from 03.07.2010. Grace period of 180 days has been allowed to the respondent for the delay caused due to exigencies beyond control of respondent.

Accordingly, the due date of possession was 03.01.2014 and hence, the period of delay in delivery of possession is computed as 5 years 8 months till the offer of possession. The delay compensation payable by the respondent @

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Rs.5/- per sq. ft. per month of super area for any delay in offering possession of the unit as per clause 3.3 of flat buyer's agreement is held to be unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided. It has also been observed in para 181 of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)**, wherein the Bombay HC bench held that:

*"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."*

As the possession of the apartment was to be delivered by 03.01.2014, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016.

As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso read with rule 15 of the Rules ibid to pay

interest to the complainant, at the prescribed rate i.e. 10.45%, for every month of delay from due date of possession i.e. 03.01.2014 till the offer of possession.

II. With respect to **forth issue** raised by the complaint, the authority is of the view that the present issue does not fall within its jurisdiction. The complainant is advised to approach appropriate forum regarding the same.

**Findings of the authority:-**

20. **Jurisdiction of the authority-** The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. 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.

21. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter. The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.
22. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. 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.
23. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions of the Act and to fulfil its obligations.

24. Regarding contention of Arbitration raised by the respondent in reply, the authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.
25. Further, in *Aftab Singh and Ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015*, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court in *civil appeal no.23512-23513 of 2017* and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on

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all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

Arguments heard.

As per clause 3.1 of the Builder Buyer Agreement dated 16.9.2010 for unit No. M1-404, 4<sup>th</sup> Floor, Tower Mansion 1, in project " Mansions Park Prime", Sector 66, Gurugram, possession was to be handed over to the complainant within a period of 36 months + 180 days grace period from the date of booking/registration of the flat i.e. 3.7.2010 which comes out to be 03.01.2014. It was a construction linked plan. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,11,82,584/- to the respondent against a total sale consideration of Rs. 1,20,41,968/-.

It was stated by the counsel for the respondent at bar that they have applied for OC but they failed to produce any evidence in support of their contention. Respondent is directed to hand over the flat unit at the earliest.

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As such, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f 03.01.2014 till the offer of possession as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

**Directions and decisions of the authority:-**

26. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- i. The respondent <sup>is</sup> ~~is~~ directed to pay the interest at the prescribed rate i.e. 10.45% for every month of delay from the due date of possession i.e. <sup>03.01.2014</sup> 03.02.2014 till the offer of the possession by the respondent.
- ii. The arrears of interest accrued so far shall be paid to the complainant <sup>is</sup> ~~is~~ within 90 days from the date of this order and thereafter monthly payment of interest till



Corrected vide order  
dated 10/01/2020





offer of possession shall be paid before 10<sup>th</sup> of each subsequent month.

- iii. Complainant <sup>are</sup> ~~is~~ directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period.
- iv. The promoter shall not charge anything from the complainant which is not part of the flat buyer's agreement.
- v. Interest on the due payments from the complainant <sup>8</sup> shall be charged at the prescribed rate of interest i.e. 10.45% by the promoter which is the same as is being granted to the complainant in case of delayed possession.

27. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Real Estate (Regulation and Development) Act, 2016 by the registration branch.

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Corrected vide  
order dated 10/01/2020.


28. The order is pronounced.

29. Case file be consigned to the registry. Copy of this order will be endorsed to registration branch.

  
**(Samir Kumar)**

Member

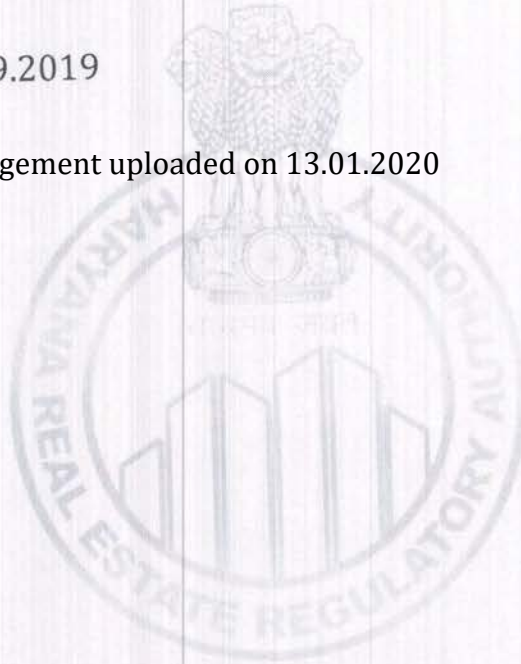
Haryana Real Estate Regulatory Authority, Gurugram

  
**(Subhash Chander Kush)**

Member

Dated: 03.09.2019

Corrected Judgement uploaded on 13.01.2020



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**ANAMIKA AHALAWAT**  
LEGAL ASSISTANT