

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

Complaint no. : 943 of 2018
First date of hearing : 30.1.2019
Date of decision : 30.1.2019

Mr. Ankur Jain and Mr. Raj Kumar Jain
R/o: A-603, Unique Apartments, Plot No. 38,
Sector-6, Dwarka, New Delhi-110075

Complainant

Versus

1. M/s Selene Constructions Ltd.
2. M/s Indiabulls
3. M/s Indiabulls Housing Finance Ltd
Office: 448-451, Indiabulls House,
ground floor, Udyog Vihar, Gurugram-
122016
Also at: M-62 and 63, first floor,
Connaught Place, New Delhi-110001

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Shri Sushil Yadav
Shri Rahul Yadav
Shri Gaurav Dua

Advocate for the complainants
Advocate for respondent no. 1 and 2
Advocate for respondent no. 3

ORDER

1. A complaint dated 13.9.2018 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 Mr. Ankur Jain and Mr. Raj Kumar Jain against M/s Selena Constructions Ltd., M/s Indiabulls and M/s Indiabulls Housing Finance Ltd. in respect of apartment/unit described below in the project 'Centrum Park', on account of violation of the section 11(4)(a) of the Act ibid.

2. Since, the buyer's agreement has been executed on 15.3.2012 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, 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 contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Centrum Park", Sector-103, Gurugram, Haryana.
2.	RERA registered/ not registered	Registered
3.	RERA registration number	10 of 2018
4.	Unit no.	G2 1601
5.	Unit measuring	2875 sq. ft'
6.	Buyer's agreement executed on	15.3.2012
7.	Total sale consideration	Rs.1,16,68,125/- (annexure-P2)
8.	Total amount paid by the complainants till date	Rs.1,11,80,868/- (annexure-P2)
9.	Percentage of consideration amount	95.82%



10.	Payment plan	Subvention scheme
11.	Date of delivery of possession (3 years from the date of execution of the agreement + 6 months grace period) clause 21	15.9.2015
12.	Delay in handing over possession till date	3 years 4 months 15 days (approx.)
13.	Penalty clause as per buyer's agreement dated 15.3.2012	Clause 22 of the agreement i.e. Rs.5 per sq. ft' of the super area.

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 respondent. A buyer's agreement is available on record for the aforesaid unit. The possession of the said unit was to be delivered by 15.9.2015 as per the said agreement. Therefore, the promoter has not fulfilled his committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent has filed the reply.

Facts of the complaint

6. Complainants had booked a '4 BHK Flat, with servant quarter', having flat no. G2 1601, with an area of 2,875 square feet, in G2 tower of the project called Centrum Park, in Sector 103, Gurugram, under subvention scheme, of two years, at



the basic cost of Rs. 1,04,18,750/-, with the total cost as Rs. 1,16,68,125/- and the cost included all taxes and other costs.

7. Para no.13 of the flat buyer's agreement confirmed that:

"The Basic Price/Total Sale Price of the Unit and provision for other charges in respect of the Unit have been fixed keeping in view the normal practices, conventions and statutory requirements as of date. Should at any time hereafter there be any demands additional Taxes ... shall be charged extra"

Thus, all the liabilities towards all the then existing levies, charges, taxes were part of the basic price/total sale cost. Contrary to their own commitment, they started claiming service taxes, VAT etc. over and above the property cost (though these were already part property cost).

8. The taxes had been reduced after the date of the said agreement dated 15.3.2012 and in this way the property cost itself got reduced by 3% (from 4% to 1%), on account of the reduction in VAT but this benefit was not passed on to the complainants. The complainants had asked the respondents to provide the discount in the basic price/total sale cost.

9. The respondents were supposed to reflect the taxes by working on reverse calculations, while claiming the property cost from the complainants. That if the property cost was Rs. 100/- and the two taxes like service tax @ 2.575% and VAT



@ 4% were part of this cost of Rs. 100/- (say), the basic cost of the property comes to only Rs. 93.83/-, the service tax comes as Rs. 2.42 and the VAT comes to Rs. 3.75, making it to be a total property cost to be Rs. 100/-, including taxes. That after the VAT was declared to be reduced to 1%, the total cost of the flat Rs. 1,16,68,125/- would get reduced to Rs. 1,13,74,845.62/-. That this total cost of the property shall have the basic cost of Rs. 1,10,25,354/- and after adding the service tax @ 2.575% and VAT @ 1%, it will become 1,13,74,845.62/-. The detailed working calculations would be produced as and when desired.

10. The flat's booking was initiated by the respondent i.e. M/s Indiabulls. However, M/s Indiabulls intimated that M/s Selene Constructions Limited was working as its construction wing and so we were asked to make the payments in the name of M/s Selene Constructions Limited.
11. The complainants had paid Rs.1 lakh vide cheque no. 015258 dated 26.12.2011, towards booking the flat, as 15% of the property cost was due only on getting the allotment letter. That the complainants had been helplessly waiting for the allotment letter. That the complainants had to pay further amounts of Rs.16,51,000/-, vide cheque no.015266 dated 18.1.2012 and an amount of Rs.18,50,681/-, vide cheque no.



033083 dated 14.3.2012 without any allotment letter in-sight.

12. The complainant's agony is clearly visible vide the complainant's mail dated 21.3.2013 wherein the complainants had expressed shock of not getting any reply from the respondents, on some pretext or the other. The worst part was that even after a lapse of 15 months, they did neither provide the 'flat buyer's agreement' nor the 'allotment letter'. They were not even prepared to inform the complainants as to when was the subvention period getting over.
13. The flat buyer's agreement dated 15.3.2012 was got signed from the complainants on or after 21.3.2013, only after the respondents had received 95% of the basic cost and 100% of the other costs and only after the complainants had protested vide above mail dated 21.3.2013. Thus, the complainants remained just a toy in respondent's hand and had to sign it back-dated, as the complainant's hard earned money was at stake.
14. The complainants remained just a toy, in Respondents' hand, is also reflected by the fact that the Complainants had ended up in paying Rs. 36,01,681/- by 14.03.2012, on record, but



the respondents had shown only Rs. 1,00,000/- as the total receipt, in the flat buyer's agreement dated 15.3.2012. Likewise, the unsigned allotment letter dated 22.3.2012, on the letter head of M/s Indiabulls, was also handed over much delayed by the respondent M/s Indiabulls. Though the letter was unsigned, but the supposed signatory was M/s Selene Constructions Limited.

15. The subvention scheme was an offer from the respondents, with a total property cost of Rs.1,16,68,125/- (which got reduced to Rs. 1,13,74,845.62/-, after the reduction in VAT). Thus, respondents were bound to pay towards all the expenses, to implement the subvention (though on complainant's behalf). The complainants were forced to pay the amounts of Rs. 67,147/- towards the life insurance cover, vide cheque no. 015279 & Rs. 15,617/-, vide cheque no. 015286 dated 28.5.2012, from ICICI Bank, Dwarka, Sector 5, Delhi - 110075 branch. The respondents charged extra amounts which are duly reflected vide the respondent's letter dated 28.7.2012. That such amount should not have been charged from complainants, as all the cost had already been agreed to be in the cost of the property.

16. A blank tripartite agreement was got signed by respondent no. 3, somewhere in June 2012, under duress, as a huge



amount of complainant's savings were in the hands of the respondents. This blank tripartite agreement was then 'forged' with all wrong dates and facts, to suit them. This forged tripartite agreement defines the booking date 25.12.2013. But, complainants had no voice even to talk about it. That the complainants brought about the fact that the tripartite agreement was forged, vide letter dated 2.6.2014.

17. The respondent M/s Indiabulls had chosen the respondent M/s Indiabulls Housing Finance Limited, as the loan disbursal agency, under subvention scheme and the complainants had no choice except to take the loan from the respondent no. 3, as huge amounts were already being stuck with the respondents no. 1 & 2. The respondent no. 1, colluded with the respondents no. 2 & 3 to transfer 95% of the basic cost + 100% of all other cost between 6.6.2012 to 13.8.2012, at the stage when the structure was at around third floor level only. In this way, a total amount of Rs.1,11,80,868/-, plus extra charges, over and above the property cost, were collected much in advance, on or before 13.8.2012, much before reaching the defined stages and much against the payment plan of the agreement.



18. The respondent M/s Indiabulls had categorically confirmed to hand over the project within the subvention period of two years. That the most senior officer of the respondent M/s Indiabulls, vide official mail of the respondent dated 6.1.2012, had committed that the property was to be ready within the subvention period of 2 years, by saying that “buyers interest starts after 2 years, with ready property” and that “investor pays no interest but enjoys appreciation of a high end delivered property”. Thus, the respondents have categorically committed that the property was supposed to be ready on or before 5.1.2014.
19. The respondent M/s Selene Constructions Limited have to pay the penalty @ Rs.5/- (Rupees Five Only) per square feet (of super area) per month, towards delay in handing over the possession, from 5.1.2014 onwards and not from 15.9.2015, as per para 22 of the flat buyer’s agreement.
20. The complainants are now suspicious that the three respondents have colluded together to sign on the letter heads of the other, as reflected in the allotment letter dated 22.3.2012. That the respondents are only one but are working in the names of different companies, overlapping each other and have colluded to confuse the complainants as to whom to blame for lapses & cheating. That the authority



need to explore if the three respondents are working within the legal framework, without any cheating and the curtains have to be unveiled from their faces.

21. The built-up-area of 2,875 square feet, on ground, should be as per the norms of the Haryana Real Estate Regulatory Authority.
22. The respondents M/s Indiabulls had reflected in the brochure that the G2 tower would consist of 18 floors. However, the respondents have increased the number of floors in G2 tower to 25, vide one of the license numbers 252/2007, 50/2010 and 63/2012, quietly, without even any intimation to the complainants.
23. The respondent refused to provide any copy of any such approval, on demand. Copy of the approval for the increase in the number of floors has been sought from the planning authority, under RTI.
24. The respondents had heavily been pushing for the sale of the said project, (Centrum Park, Sector 103, Dwarka Expressway), through print media, with full page advertisement/s, including other channels and through their marketing executives, indicating a huge number of amenities, facilities, with the main emphasis, having the tagline: "Pay



just 20% on booking and save up to 83 Lakh on your apartment cost". The complainants have already paid 100% of the property cost (which is much above 20%) and so have to be compensated to get the saving of Rs. 83 Lakh, as guaranteed by the respondents.

25. The respondent i.e. M/s Selene Constructions Limited have not been able to make the tower ready for occupation, as per various stipulations, requirements, terms and conditions of the various authorities from whom they had sought the approvals. They have not yet completed the sector road, as defined in the brochure. Nonetheless, they have submitted to get the occupation certificate from the planning authority, Chandigarh, which is pending scrutiny with the District Town Planner, Gurugram, under one of the license no. 252/2007, 50/2010 and 63/2012; RERA registration no. 10/2018. Undersigned has demanded from the authority to provide the sanctioned plan, as sanctioned by them on or before 15.3.2012 and also the sanctioned plan, with the increased number of floors, as available, as of date. The complainants have also intimated to the District Town Planner that the respondent i.e. M/s Selene Constructions Limited have not fulfilled a number of stipulations, terms and conditions of



various government organizations, before submitting the request for getting the occupation certificate.

26. The respondents' ledger dated 2.9.2016, annexed herewith as **Annexure P2** confirms that the complainants have already paid an amount of Rs. 1,11,80,868/- against the total cost of the property of Rs. 1,13,74,845.62/- (as the Property cost is already reduced, after accounting for the reduction of VAT from 4% to 1%). That over and above Rs. 1,11,80,868/-, the respondent no. 3 has already charged an extra amount of Rs. 3,84,616/- from the complainants. That the bank, instruments wise details, shall be provided as and when desired. The respondents have charged the extra amounts, as brought out in the paras above. Thus, complainants have ended up in paying around Rs. 1,16,70,725/- against the total property cost of Rs. 1,13,74,845.62/-. The respondents have to refund this amount of Rs. 2,95,880/-, back to the complainants, out of the paid amounts, over and above the property cost.

27. If the respondents are unable to hand over the said flat to the complainants, as per the government norms, the complainants have every right to get back the entire paid amount of Rs. 1,16,70,725/-, alongwith 18% interest, compounded quarterly, as the cost of the money, as has



already been defined by the respondents, vide para 11 of the flat buyer's agreement.

28. The complainants had sent the notice to the respondent M/s Indiabulls and to M/s Selene Constructions Limited through complainant's advocate, for due reply, on few of the above issues. The complainants desired to get a number of compensations from the respondents, as defined in the said notice. The respondents have not yet replied to it.

29. The respondents have to pay back to the complainants, on possession of the flat, after accounting for the discounts towards:

- i) The benefits of the reduction in taxes in the flat's cost price,
- ii) Refund back of the extra amounts, as charged by them
- iii) The penalty towards delayed delivery of the flat from 6.1.2012, and
- iv) Compensation towards the mental agony/ stress
- v) The benefit of Rs. 93 Lakh, as committed by them, in leading dailies.

30. That the complainant, Ankur Jain, along with others, has appointed the complainant, Raj Kumar Jain, as his attorney, to



represent before any authority, on his behalf, through the power of attorney dated 25.5.2012.

31. The respondents have scuttled the enquiry by the economics offences wing, by saying that the complaint is pending with the authority.

32. Issues raised by the complainants

- i. Whether the respondents have failed to hand over the possession of the said flat and whether they are liable to refund back the entire paid amount of Rs. 1,16,70,725/- along with 18% interest?
- ii. Whether the respondents are liable to pay delay penalty @Rs. 5 per sq. ft' from 6.1.2012 onwards?
- iii. Whether the respondent had right to collect 95% of the basic cost of the property and 100% of the other cost against the agreed payment plan?
- iv. Whether the respondents have taken extra amounts over and above the cost of the property and are liable to refund back extra receipts?
- v. Whether the respondents forged the documents and have worked in the names of three different



companies to fix crime against any one company and thereby cheating the complainants?

- vi. Whether the respondents should provide the structural stability certificate from an independent body/ institution of repute, for increased no. of floors?

33. Relief sought

The complainants are seeking the following reliefs:

- i. To unconditionally withdraw all the false Taxes;
- ii. To pay to the complainants interest @ 18% per annum compounded on quarterly basis, on the amount/s, received by them, much before the due dates.
- iii. To pay to the complainants towards the reduction in taxes after 15.3.2012, from the flat's cost.
- iv. To refund back of the extra amounts, as charged by the respondent/s.



- v. To pay the penalty towards delayed delivery of the flat, @ Rs. 5/- per square feet per month, from 6.1.2014, till actual possession of the flat.
- vi. To pay for the compensation towards the mental agony/ stress.
- vii. To provide to the complainants, the additional saving of Rs. 83 Lakh, as guaranteed by the respondent through various advertisements.
- viii. To provide the detailed progress of the construction chart of the project, from the beginning, along with the approval of the concerned authorities, for increasing constructions of floors from 18 to 25;
- ix. To provide audited statement of accounts for the amounts paid towards taxes, EDC/ IDC.
- x. To seek the occupation certificate from the planning authority, only after completing all the stipulations, terms and conditions and only after the fulfillment of the commitments made in the flat buyers' agreement.



- xi. To develop and create of the Sector Road, as promised in the brochure.
- xii. To pay back the entire amount, as paid by the complainants to the respondents, along with 18% interest, compounded quarterly basis, if the respondents are un-able to hand over the said flat no. G2 1601, as per the norms, as laid down, under Real Estate Regulatory Authority Act.
- xiii. The respondents be penalized for illegally pressurizing the complainants to pay for more money and for not fulfilling their own commitments.
- xiv. Direct the respondent to refund the booking amount of Rs.1,93,92,034 along with interest @24% to the complainant.
- xv. Direct the respondent to refund the interest charged for delayed payment.
- xvi. Direct the respondent to pay compensation of Rs.10,00,000 for unfair trade practice, Rs.10,00,000



for mental harassment, Rs.1,00,000 for legal expenses.

- xvii. Pass any such order which this authority may deem fit and proper.

Reply on behalf of respondent no.1

34. It is submitted that that the complainants have filed the present complaint under wrong provisions of RERA Act 2016 before this hon'ble authority, however the compensation as sought in their complaint has to be adjudicated by the adjudicating officer as per the provisions as mentioned in the RERA Act 2016 & rules 2017. Hence the instant complaint is liable to be dismissed on this ground alone.
35. The present complaint is liable to be dismissed on account of misjoinder of parties as the respondent no. 2 is not a necessary party to the present complaint filed by the complainants. It is pertinent to mention here that there is no privity of contract between the complainants and respondent no. 2 and the booking and payments were made by the complainants with the respondent no. 1 only and further the flat buyer agreement was also executed between the complainants and respondent no. 1.



36. The instant compliant filed by the complainants is outside the preview of this hon'ble authority as the complainants were looking into the financial viability of the alleged project and approached the office of the answering respondent showing their interest to book a unit in the said project. Thereafter, the complainants after due diligence of their own and after fully being satisfied and understanding the terms and conditions of the agreement had voluntarily executed flat buyer agreement (hereinafter referred as "FBA") with the respondent on 15.3.2012. It is submitted that as per the FBA /Agreement duly executed between the complainants and the answering respondent, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism as detailed in the agreement.

37. Complainants with malafide intention have not disclosed the true and correct facts rather concealed the material fact from this hon'ble authority that the complainants have been not regular and not paying their installments on time as per the construction link plan opted by them. It is stated that the complainants have not come before this hon'ble authority with clean hands.



38. From the very beginning it was in the knowledge of the complainants, that there is a mechanism detailed in the FBA which covers the exigencies of inordinate delay caused in completion and handing over of the booked unit i.e. enumerated in the “clause 22” of duly executed FBA, which is at page 48 of the FBA filed by the complainants along with the complaint which is being reproduced hereunder for ready reference:

“Clause 22: In the eventuality of developer failing to offer the possession of the unit to the buyers within the time as stipulated herein, except for the delay attributable to the buyer/force majeure/vis-majeure conditions, the developer shall pay to the buyer penalty of Rs. 5/- (Rupees Five only) per square feet (of super area) per month for the period of delay”

39. The basis of the present complaint is directly contrary to the terms of the binding inter-se flat buyer’s agreement dated 15.3.2012 entered into between the parties. A bare perusal of clause 21 would reveal that the proposed period of handing over of possession under the said clause was neither “fixed” nor “cast in stone”. Insofar as the time for completion of construction is concerned, the same was never meant to be the essence of the agreement. The parties had agreed that the respondent no. 1 shall “endeavor” to complete the



construction of the apartment in question within a period of three years, with a six months grace period thereon, from the date of execution of the agreement. Therefore, any claim for compensation, whether in the nature of interest or otherwise, holding the period of three years, with a six month grace period thereon, from the date of execution of the agreement, to be fixed would be contrary to the specific understanding between the parties.

40. It is further submitted that the agreement itself envisages the scenario of delay and the compensation therefor. Therefore, the contention that the possession was to be delivered within 3 years of execution of the agreement, is based on a complete misreading of the agreement. A bare perusal of clause 22 of the agreement would make it evident that in event of the respondent no. 1 failing to offer possession within the proposed timelines, then in such a scenario, the respondent no. 1 would pay a penalty of Rs.5/- per sq. ft' per month as compensation for the period of delay.

41. It has also been agreed between the parties that the cut-off date for calculation of the period of delay would be the date



of submission of the application to the concerned statutory authority for issue of completion/part completion/occupancy/part occupancy certificate. In the present case, the necessary application was submitted by the respondent no.1 on 31.5.2018. As such, no compensation beyond the said date can in any event be prayed for or granted, as the same would render the express agreement between the parties nugatory.

42. The answering respondent has already completed the construction of the "TOWER G", and has already applied for grant of occupational certificate with respect to the alleged tower before the concerned authorities as detailed above. It is submitted that the delay in delivering the possession of the flat to the complainants was not intentional rather beyond the control of the answering respondent, since for completing a project number of permissions and sanctions are to be required from numerous government authorities which were delayed with no fault of the answering respondent, in addition to the problems related to labour/ raw material and government restrictions including National Green Tribunal which imposed a ban on carrying out constructions in Delhi-



NCR for several months, the answering respondent kept on the work moving steadily.

43. Based upon the past experiences the answering respondent has specifically mentioned all the above contingencies in the FBA dated 15.3.2012 and incorporated them in “clause 39” of FBA at page 53 annexed with the complaint by the complainant. The said “clause 39” is being reproduced hereunder for ready reference:

Clause 39: “The Buyer agrees that in case the Developer delays in delivery of the unit to the Buyer due to:-

- a. Earthquake. Floods, fire, tidal waves, and/or any act of God, or any other calamity beyond the control of developer.*
- b. War, riots, civil commotion, acts of terrorism.*
- c. Inability to procure or general shortage of energy, labour, equipment ,facilities, materials or supplies, failure of transportation, strikes, lock outs, action of labour unions or other causes beyond the control of or unforeseen by the developer.*
- d. Any legislation, order or rule or regulation made or issued by the Govt or any other Authority or,*
- e. If any competent authority(ies) refuses, delays, withholds, denies the grant of necessary approvals for the Unit/Building or,*
- f. If any matters, issues relating to such approvals, permissions, notices, notifications by the competent authority(ies) become subject matter of any litigation before competent court or,*
- g. Due to any other force majeure or vis majeure conditions,*



Then the Developer shall be entitled to proportionate extension of time for completion of the said complex.....”

44. In addition to the reasons as detailed above, there was a delay in sanctioning of the permissions and sanctions from the departments, in fact as of now no proper connectivity has been provided to the project of the answering respondent by the Haryana Government. It will also not be out of place to mention that the answering respondent has been diligently pursuing the matter with various authorities and hence no delay can be attributed on the part of the answering respondent.

45. It is trite that the onus to plead and prove the loss, injury and damages is on the person claiming the compensation/damages. In the instant case, the complainants have failed to plead/prove either by oral or documentary evidence any loss, injury and damages that may have been caused to them due to the alleged delay. Further, the complainants have failed to lead any evidence to show the loss caused to him on account of delay in delivery. In GDA vs Balbir Singh & BDA vs Syndicate Bank case, the Hon'ble



Supreme Court have given few illustrations as to what could be the possible loss due to delay in delivery.

46. It is pertinent to mention herein that the agreement that has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 15.3.2012 executed much prior to coming into force of the RERA Act, 2016 and the HA-RERA rules, 2017. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under RERA Act, 2016 has to be in reference to the agreement for sale executed in terms of said Act and said rules and no other agreement, whereas, the FBA being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA and such agreement as referred herein above. Hence, cannot be relied upon till such time the new agreement to sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainants on the basis of the new agreement to sell as per RERA, Act 2016.



47. The answering respondent has made huge investments in obtaining requisite approvals and carrying on the construction and development of 'INDIABULLS CENTRUM PARK' project not limiting to the expenses made on the advertising and marketing of the said project. Such development is being carried on by developer by investing all the monies that it has received from the buyers / customers and through loans that it has raised from financial institutions. In spite of the fact that the real estate market has gone down badly the respondent has managed to carry on the work with certain delays caused due to various above mentioned reasons and the fact that on an average more than 50% of the buyers of the project have defaulted in making timely payments towards their outstanding dues, resulting into inordinate delay in the construction activities, still the construction of the project 'INDIABULLS CENTRUM PARK' has never been stopped or abandoned and has now reached its pinnacle in comparison to other real estate developers / promoters who have started the project around similar time period and have abandoned the project due to such reasons.



48. It is a respectful submission of the answering respondent that a bare perusal of the complaint will sufficiently elucidate that the complainants have miserably failed to make a case against the answering respondent. It is submitted that the complainants have merely alleged in their complaint about delay on part of the answering respondent in handing over of possession but have failed to substantiate the same. The fact is that the answering respondent, has been acting in consonance with the duly executed FBA dated and no contravention in terms of the same can be projected on the answering respondent.

49. The complainants have made false and baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in FBA entered into between the parties. In view of the same, it is submitted that there is no cause of action in favour of the complainants to institute the present complaint.



Determination of issues

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

50. With respect to the **first and second issue**, the authority came across clause 21 of buyer's agreement. The clause regarding the possession of the said unit is reproduced below:

"21 Possession

The company has to hand over possession of the said apartment to the allottee within a period of 36 months from the date of execution of this agreement plus 6 months grace period."

Accordingly, the due date of possession was 15.9.2015 and the possession has been delayed by 3 years 4 months 15 days till now. The delay compensation payable by the respondent @ Rs.5/- per sq. ft' per month of the super area of the unit for the period of delay as per clause 22 of buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (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.”

51. The promoter is liable under section 16(a)(1) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. The prayer of the complainant regarding payment of interest at the prescribed rate for every month of delay, till handing over of possession on account of failure of the promoter to give possession in accordance with the terms of the agreement for sale as per provisions of section 16(a)(1) is hereby allowed. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant with the promoter on the due date of possession i.e. 15.9.2015 till the offer of possession is given.

52. With respect to the **third and fourth issue**, the complainant has paid Rs.1,11,80,868/- till date as against the demands raised by the respondents (annexure P-2). The complainants have made allegations regarding extra receipts being



demanded by the respondents but has not substantiated the same in material particulars.

53. With respect to the **fifth issue**, the complainant has attached an RTI annexed as annexure P-11, the reply of which has not been attached. Therefore, it cannot be ascertained as to whether the respondents have cheated the complainants.

54. With respect to the **sixth issue**, the respondent shall be put to strict proof with respect to the approved building plans from DTCP which approves the increased number of floors.

Findings of the authority

55. The application filed by the respondent for rejection of complaint raising preliminary objection regarding jurisdiction of the authority stands dismissed. 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 complainants at a later stage.

56. For the issue of arbitration clause raised by the respondent, the amendment of section 8 of the Arbitration and conciliation act does not have the effect of nullifying the ratio of 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.

57. As the possession of the apartment was to be delivered by 15.9.2015, 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.

58. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

The complainants requested that necessary directions be issued by the authority under section 37 of the Act *ibid* to the promoter to comply with the provisions and fulfil obligation.

59. In the present complaint, the complainants are seeking refund of the entire money paid till date i.e. 1,11,80,868/- along with interest @24% from the date of provisional



allotment till its realization of the payment and cancel the allotment upon entire refund.

60. However, keeping in view keeping in view the present status of the project and intervening circumstances, the authority is of the view that the developer has not produced any material proof to show that the project is on completion stage and the refund if provided to the complainant will hamper the interests of other allottees. Therefore, keeping in view the principles of natural justice and in public interest, the relief sought by the complainant is allowed.

61. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession.

The authority is of the considered opinion that the respondent has failed to deliver the possession of the said unit to the complainants by the committed date i.e. 15.9.2015 and the possession has been delayed by 3 years 4 months 15 days (approx.). Thus, the complainants are entitled to interest at prescribed rate for every month of delay till the handing over of the possession.



Decision and directions of the authority

62. 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) Counsel for the respondent has stated that occupation certification has been received vide memo no.28 dated 1.1.2019 and the copy of the same has been placed on record.
- (ii) As per clause 21 of the builder buyer agreement dated 15.3.2012, for unit no.G-2, 1601, in project "Centrum Park" Sector -103, Gurugram, possession was to be handed over to the complainant within a period of 3 years from the date of execution of buyer's agreement + 6 months grace period which comes out to be 15.9.2015. However, the respondent has not delivered the unit in time. complainant has already paid Rs. 1,11,80,868/- to the respondent against a total sale consideration of Rs.1,16,68,125/-. There is delay of 3 years, 4 months and 15 days to deliver the possession of the



unit to the complainant. Counsel for the respondent has stated that since occupation certificate has been received and they shall offer the possession within one month.

- (iii) An application on behalf of respondent no.3 has been moved for deleting of name of respondent no.3 and the same has been allowed.
- (iv) However, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 15.9.2015 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession failing which the complainant is entitled to seek refund of the amount.
- (v) 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 handing over the possession shall be paid before 10th of subsequent month. The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainant, if any.



63. Complaint stands disposed of.
64. Detailed order will follow.
65. File be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.1.2019



HARERA
GURUGRAM

