

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

Complaint no. : 3115 of 2020
First date of hearing: 08.01.2021
Date of decision : 09.07.2021

Major Baldev Chaman
S/o Sh. Narender Chaman,
R/o: - F-903, Lagoon Ambience Island,
NH-8, Gurugram- 122002

Complainant

Versus

1. M/s Raheja Developers Limited.
2. Realcare Building Maintenance Services
Private Limited.
Both Having Regd. office: W4D, 204/5,
Keshav Kunj, Western Avenue, Sainik Farma,
New Delhi- 110062

Respondents

CORAM:

Dr. K.K Khandelwal
Shri Samir Kumar
Shri Vijay Kumar Goyal

Chairman
Member
Member

APPEARANCE:

Sh. Rishabh Jain
Sh. Mukul Kumar Sanwariya

Advocate for the complainant
Advocate for the respondent no. 1

ORDER

1. The present complaint dated 26.10.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation

of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Raheja Mall", Sector-47 Gurugram.
2.	Project area	2.718 acres
3.	Nature of the project	Commercial Colony
4.	DTCP license no. and validity status	455 of 2006 dated 27.01.2006 valid till 26.01.2012.
5.	Name of licensee	Smt. Bishan Devi
6.	RERA Registered/not registered	Unregistered
7.	Unit no.	shop/commercial and office space no. LG- 044B [Page 31 of complaint]
8.	Unit measuring	451.24 sq. ft.
9.	Date of execution of agreement to sell	09.09.2010 [Page 30 of complaint]
10.	Payment plan	Construction linked payment

		plan. [Page 50 of complaint]
11.	Total consideration	Rs.23,19,824.84/- plus registration charges [as per payment plan Page 49 of complaint]
12.	Total amount paid by the complainant	Rs.26,17,038/- [as per detail of cheque page 60 of complaint]
13.	Due date of delivery of possession as per clause 4.2 of the agreement to sell: 30 months from the date of execution of agreement. [Page 36 of complaint]	09.03.2013
14.	Date of offer of possession of the shop	09.09.2010 [Page 65 of complaint]
15.	Delay in handing over possession till offer of possession i.e. 09.09.2010	No delay

B. Fact of the complaint

- The respondent no. 1/promoter/developer published very attractive brochure highlighting the commercial project, 'Raheja's Mall' at sector- 47, Gurugram, Haryana. The respondent claimed to be one of the best and finest in construction and one of the leading real estate developers of the country in order to lure prospective customers to buy shops in the project. There were fraudulent misrepresentations, incorrect and false statements in the brochure. The complainant invites attention of the Haryana

Real Estate Regulatory Authority, Gurugram to section 12 of the Act, 2016. The project was launched in 2006 with the promises to deliver in time and huge funds were collected over the period by the respondent no. 1.

4. The complainant was approached by the representatives of the developer. The sale representatives claimed the project as the world class project. The complainant was invited to the sales office and was lavishly entertained, and promises were made to him that the project is complete including parking and other common area facilities. The complainant was impressed by their statements and oral representations and ultimately lured to pay Rs.5,51,000/- via cheque no. 032289 as booking amount, duly acknowledged by the respondent no. 1, for the shop on 5th July 2010. It is further submitted that the agreement to sell for the shop was executed between the complainant and the respondent no. 1 on 09.09.2010 and the complainant paid the balance of Rs.20,66,038/- towards the total consideration of Rs.26,17,038/- for the shop including stamp duty, legal charges, registration charges and deed charges to the respondent no. 1 while receiving payments, the respondent no. 1 failed to issue acknowledgement receipts for the payment made by the complainant. But the

complainant got acknowledged, from the respondent no. 1, all the cheques with payment header on back side of it.

5. The complainant has submitted that the respondent no. 1 delivered the possession of the shop no. LG-044B measuring 451.24 square feet on 09.09.2010 to the complainant.
6. The complainant has further submitted that the respondent no. 1 was duty bound to execute the conveyance deed in favour of the complainant but till date the respondent no. 1 has failed to execute the conveyance deed for the shop. This is violation of section 11 (4) (f) read with section 17 of the Act, 2016 since September 2010. Instead of executing the conveyance deed, the respondent no. 1 along with maintenance agencies, and at present respondent no. 2, started raising unlawful, arbitrary, and unjustified bills towards the shop bought by the complainant. The respondents have fetched enough money in the name of maintenance charges without maintaining the project premises. Neither has the conveyance deed been executed despite numerous requests, nor have the maintenance bills been rectified.
7. The complainant has submitted that the shop of the complainant is located on the outer side wing of the Raheja's Mall, which is uncovered area. So, due to shop's location, no

air conditioning is available for the customers, it being an open area. Even after persistent requests, the respondent no.1 has not made any effort to rectify the maintenance bills as the maintenance charges for the commercial area inside the closed dome and out-side are the same, whereas under no circumstances, it can be assessed same. The complainant paid heavy charges on the account of air conditioning in the premise. Further, in the name of maintenance charges, the respondents were not making any effort to maintain the premises.

8. The respondent no.1 has failed to mark the exclusive car parking area for the shop bought by the complainant. He was promised, as his shop is on the ground floor, that the cost of car parking is inclusive of the cost and the area outside his shop will be the area reserved for his car parking. Ultimately, the complainant even after complying with all the demands of the respondent no. 1 is made to feel as tenant of his own shop.
9. The complainant has submitted that he had paid Rs.45,100/- on the account of interest-bearing maintenance security (IBMS) in the year 2010 but no interest is being paid to him by the respondents since then, contrary to the terms and conditions of the agreement.

10. The complainant has further submitted that after a delay of more than nine years and six months after receiving the total consideration, the respondent no. 1 has failed to execute the conveyance deed for the shop, bought by him. The complainant approached the respondent no. 1 many times and pleaded for execution of conveyance deed of his shop as per the commitments in the agreement. The respondent no. 1 did not submit any justified response to his letters, emails, telephone calls and personal visits seeking information about the status of the execution of conveyance deed for his shop.
11. The complainant has submitted that the respondent no. 1 has in an unfair manner siphoned off funds meant for the project and utilised the same for his own personal benefits at no cost and left the complainant high and dry to his own fate. The respondent no.1 being builder and developer, whenever in need of funds from banks or investors ordinarily has to pay heavy interest. However in the present scenario, the respondents have utilised funds collected from the complainant and other such buyers for their own good and utilised this huge amount in some other projects being developed and maintained by the respondents, and due to which this project is in a miserable condition.



12. The complainant has lost confidence and in fact has no trust left in the developer/builder as the respondents have deliberately and wilfully indulged in undue enrichment, by cheating him besides being guilty of indulging in unfair trade practices and deficiency in service and then remaining non-responsive to the requisitions of the complainant.
13. That the respondents have cheated the complainant knowingly and have taken monies by deception, made fraudulent representations and deliberate false written promises. The fraudulent behaviour of the respondents also attracts criminal liability under the Indian Criminal dispensation system. The conduct of the respondents is suspect, wilfully unfair, and arbitrary, deficient in every manner and scandalous. The complainant has lost faith, confidence, and trust in the respondents as they are continuously deceptive and non-responsive.
14. The complainant has further submitted that equity demands that such unscrupulous developers/sellers/builders, who after taking complete cost of the commercial space do not perform their part of obligations and should not be spared. A strong message is required to be sent to such developers /promoters that the Haryana Real Estate Regulatory Authority, Gurugram is not helpless in such type of matters.

C. Relief sought by the complainant:

15. The complainant has sought following relief(s)

- I. To direct the respondent no. 1 to execute a legitimate and lawful conveyance deed of the shop bought by the complainant.
- II. To direct the respondent no.1 to pay interest for every month of delay, since September 2010, on the amount which the complainant paid for the charges for stamp duty, legal charges, registration charges and deed charges and additional charges for the aforesaid shop, at the rate prescribed by the Act, 2016 till the respondent no.1 executes a registered conveyance deed in the favour of the complainant.
- III. To direct the respondents to rectify the defects/anomalies in the maintenance bills raised by maintenance agencies and the respondent no. 2 and issue justifiable, legal, and lawful maintenance bills.
- IV. To direct the respondent no.1 to pay interest on Rs.45,100/- since September 2010 on the amount of interest-bearing maintenance security (IBMS), which was deposited in September 2010 by the complainant, as per the prescribed rules of Act, 2016.
- V. To direct the respondents to mark a separate exclusive car parking slot for the shop bought by the complainant.

16. The respondents have filed reply on 24.03.2021. However, neither respondent no. 2 put in appearance nor plead any reply.
17. On the date of hearing, the authority explained to the respondent/promoter of the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent no. 1.

18. The respondent no. 1 has contested the complaint on the following grounds.
- i. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. It is submitted that the instant complaint is absolutely malicious, vexatious, and unjustifiable and accordingly has to pave the path of singular consequence, that is, dismissal. The booking of the commercial unit was made prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively. Although the provisions of the RERA Act, 2016 are not applicable to the facts of the present case in hand yet without prejudice and in order to avoid complications later on,

the respondent has registered the project with the RERA authority.

- ii. That license no. 455 of 2006 dated 27.01.2006 was issued in favour of M/s Raheja Developers Limited for an area measuring 2.718 acres for the development of the commercial project situated in Sector 47, Gurugram. It is submitted that said project has already been developed and completed by the promoter and subsequently, occupation certificate has also been issued by the Directorate of Town and Country Planning, Haryana on 25.01.2010 and 12.01.2012 with respect to the said project.
- iii. That the said project does not fall under the definition of "ongoing" project" as per Rule 2(o) of the Haryana Real Estate (Regulation & Development) Rules, 2017 and therefore, the said project is precluded from registration under the provisions of the said Rules. The relevant provision of the said Rules is reproduced below: -

"2(o) "on going project" means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st May, 2017 and where development works were yet to be completed on the said date, but does not include:
(i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub code 4.10 of

the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or before publication of these rules and

(ii) that part of any project for which part completion/completion, occupation certificate or part thereof has been granted on or before publication of these rules."

- iv. Therefore, in view of the above provisions, the said project falls outside the purview of RERA as occupation certificate was granted to prior to the publication of rules, 2017.
- v. The respondent no. 1 has submitted that it had traversing and dealing with only those allegations, contentions and/or submissions that are material and relevant for the purpose of adjudication of present dispute. It is further submitted that save and except what would appear from the records and what is expressly admitted herein, the remaining allegations, contentions and/or submissions shall be deemed to have been denied and disputed by the respondent.
- vi. That the complainant booked the shop bearing no. LG-044B, measuring 451.24 sq ft. in Raheja Mall at Sector - 47, Gurugram, Haryana vide application form dated 06.07.2010. It is submitted that the booking of the said allotted shop was done prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

vii. The respondent no. 1 has submitted that the application for booking, the shop which was allotted to the complainant was commercial shop no. LG-044B, measuring 451.24 sq ft. in Raheja Mall for a total sale consideration of Rs.26,17,038/-, it is submitted that the total sale consideration amount was exclusive of the registration charges, stamp duty, service tax and other charges which are to be paid by the complainant at the applicable stage and the same was known to the him from the very inception. It is further submitted that an agreement to sell was executed between parties on 09.09.2010 and the application form dated 06.07.2010 contained all the terms and conditions providing full disclosure of all the material terms and conditions, which were thereafter incorporated in the inter-se agreement.

viii. The respondent no.1 has submitted that the present complaint is seeking interest and compensation for alleged delay in executing conveyance deed of the office/shop space booked by the complainant. The complaints pertaining to possession, compensation and refund are to be decided by the adjudicating officer under section 71 of the Real Estate (Regulation and

Development) Act, 2016 read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 and not by this authority. The present complaint is liable to be dismissed on this ground alone.

- ix. The respondent no.1 has further submitted that only such allottees, who have complied with all the terms and conditions of the office space buyer's agreement including making timely payment of installments are entitled to receive compensation under the buyer's agreement. As per the statement of account dated 25.01.2021 the outstanding amount including the delayed maintenance charges payable by the complainant to the respondent are Rs.12,25,804/-.
- x. That the respondent has filed the present reply as per the provisions of Real Estate (Regulation and Development) Act, 2016. The complainant has neither any locus standi nor cause of action to file the present complaint.
- xi. That this hon'ble authority does not have the jurisdiction to decide interest as claimed by the complainant. It is submitted that in accordance with section 71 of RERA, 2016 read with Rules 21(4) and 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, the

authority shall appoint an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard. It is submitted that even otherwise, it is the adjudicating officer as defined in section 2(a) of RERA, 2016 who has the power and the authority to decide the claim of the complainant.

- xii. The Hon'ble Haryana Real Estate Appellate Tribunal vide its judgment/order dated 02.05.2019, in the matter of appeal no. 06 of 2018, titled as Sameer Mahawar Vs. MG Housing has held that this hon'ble authority has no jurisdiction to adjudicate upon the issues regarding refund, interest and compensation. The Hon'ble Haryana Real Estate Appellate Tribunal has also held that for avoidance of the situation of multiplicity of litigation and conflicting findings, there should not be two forums to adjudicate issues arising through the same cause of action. The comprehensive complaint filed under sections 11, 12, 13, 19 should not be treated as "Independent Relief". In view of the above, it is abundantly clear that the complainant has sought, interest with respect to the conveyance of the said unit in the said project and hence, is liable to be dismissed.

- xiii. The respondent no.1 has submitted that the outstanding sum of Rs.1,79,701/- towards the stamp duty, legal fee and registration charges are pending. It is submitted that the conveyance deed has not been registered as the complainant has not been able to pay the outstanding amount. The complainant has made a booking at his own free will and only after reading, understanding, and verifying the terms and conditions stipulated in the documents executed by him. It is submitted that the complainant was aware from the very inception that the commercial space in the said project was to be completed and the possession of the same was to be handed over to him strictly as per the terms of the allotment. The complainant only after being satisfied and only after getting all the information and clarifications as sought by him from the respondent had made a booking in the said project. It is submitted that the complainant gave post-dated cheque dated 21.11.2010 for the stamp duty, registration and legal charges which was later stopped by the complainant.
- xiv. The respondent no. 1 has further submitted that after persistent requests, the respondent no. 2 has not made any effort to rectify the maintenance bills as the

maintenance charges for the commercial area inside the closed dome and out-side is same, whereas in no circumstances, it be assessed the same. It is denied that the complainant paid heavy charges on account of air conditioning in the premise. It is further denied that in the name of maintenance charges, the respondents are not making any efforts to maintain the premise. It is further denied that the complainant was promised the cost of the car parking is inclusive in the cost, and the area outside the shop will be the area reserved for his car parking. It is denied that complainant had also paid Rs.45,100/- on the account of Interest-bearing Maintenance Security (IBMS) in 2010 but no interest is being paid to the complainant by the answering respondent since then, contrary to the terms and conditions of the agreement. It is submitted that the complainant has been charged as per the maintenance agreement. Further all the other shop owners in the same vicinity as of the complainant have been charged with the same standard amount as it is uniform for all the allottees. It is further submitted that the car parking is free for every allottee in the Raheja mall. It is further submitted that no cause of action arises, and this

authority has no jurisdiction to hear the matter as it does not fall under the definition of ongoing project as the occupational certificate was received in 2010.

- xv. That the respondent no. 1 has always worked in accordance with the terms and conditions mentioned in the agreement to sell and application form. It is submitted that as per clause 34 of the booking application form, the complainant had admitted and acknowledged that the respondent shall endeavor to complete the construction of the shop in question within 30 months from the date of the execution of the agreement to sell or sanction of building plans and environment clearance whichever is later but subject to force majeure and circumstances beyond the reasonable control of the respondent and that it shall handover the shop to the complainant only after obtaining the certificate for occupation.

19. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

20. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka v/s M/s EMAAR MGF Land Ltd. (complaint no. 7 of 2018)*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. The said decision of the authority has been upheld by the Haryana Real Estate Appellate Tribunal in its judgement dated 03.11.2020, in appeal nos. 52 & 64 of 2018 titled as ***Emaar MGF Land Ltd. V. Simmi Sikka and anr.***

F. Findings on the objections raised by the respondents

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

21. Objection raised by the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has

provided for dealing with certain specific provisions/situations in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

22. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

23. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F. II objection regarding agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement.

24. The agreement to sell entered into between the two sides on 09.09.2010 contains a clause 13 relating to dispute resolution and the clause reads as under: -

"All or any disputes arising out or touching upon in relation to the terms of this Application/Agreement to Sell/Conveyance Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at the office of the seller in New Delhi by a sole arbitrator who shall be appointed by mutual consent of the parties. If there is no consensus on appointment of the Arbitrator, the matter will be referred to the concerned court for the same. In case of any proceeding, reference etc. touching upon the arbitrator subject including any award, the territorial jurisdiction of the Courts shall be Gurgaon as well as of Punjab and Haryana High Court at Chandigarh".

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

26. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable,

notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...
56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

27. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court ***in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018*** has upheld the aforesaid judgement of NCDRC and 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. The relevant paras are of the judgement passed by the Supreme Court are reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer

Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings of the authority on the relief sought by the complainant.

- (a). To direct the respondent no.1 to execute a legitimate and lawful conveyance deed of the shop bought by the complainant.

Whether the respondent no. 1 is liable to execute a legitimate and lawful conveyance deed for the shop bought by the complainant?

28. Section 11 of the Real Estate (Regulation and Development) Act, 2016 provides certain functions and duties of the promoters. In the same section under sub clause (f) of clause (4) provides that it's the duty of the promoters to execute a



registered conveyance deed of an apartment, plot or building as the case may be in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottee's or competent authority as the case may be as provided under section 17 of the Act. It is not in dispute that the complainant is an allottee of a unit allotted by a promoters/builder and he is in possession of the same. On the basis of occupation certificate dated 25.01.2010 he took possession on 09.09.2010. But despite of a lapse of more than 10 years, the promoter/builder has failed to execute a conveyance deed of the said unit. The title of the said unit can only be perfected by executing a conveyance deed which is the statutory right of the complainant. No doubt, the complainant approached this authority after a period of 10 years for the execution of conveyance deed of the allotted unit but in view of statutory obligations, there is no bar for issuance of directions in this regard. Hence, in view of provisions of section 11(4)(f) and section 17 of the Act, 2016, the respondent/promoter is directed to execute the conveyance deed of the allotted unit in favour of the complainant within a period of one month from the date of payment of necessary charges such as stamp duty and registration charges to be paid by him if not paid earlier.

(b). Whether the complainant is entitled for interest on the amount paid for stamp duty, legal charges, registration charges and the amount of IBMS from the respondent /builder by way its September 2010?

29. While filing the claim petition, specific plea was taken by the claimant that he paid to the respondent/builder charges for stamp duty, registration deed charges, legal charges, and additional charges for the allotted unit in September 2010. Neither the conveyance deed of the allotted unit has been executed in his favour by the respondent/builder nor the amount, so received has been returned. A perusal of agreement to sell dated 09.09.2010 entered upon by both the parties shows that the claimant agreed to purchase the allotted unit for a sum of Rs.22,05,209.86/- @ Rs.4887 per sq. ft. of super area. The amount of interest-bearing maintenance security was payable extra to the amount mentioned above besides one car parking space to be identified and allotted by the respondent at the time of handing over of possession of the allotted unit. A payment plan of the allotted unit (annexure- A) was attached with the agreement to sell which includes that the total amount to be payable by the allottee to the builder as Rs.23,19,824.84/- + registration charges. In pursuant to these documents the complainant paid to the

respondent/builder a sum of Rs.26,17,038/- upto 09.09.2010 against total sale consideration as agreed upon. So, it means that the allottee paid a sum of Rs.2,97,213.16/- as extra amount which includes a sum of Rs.45,100/- being the amount of interest-bearing maintenance security and the remaining amount towards other charges etc. No doubt as per article 11 of the agreement to sell, the charges for stamp duty and other expenses are to be borne by the purchaser for the execution of conveyance deed but a part of the amount has been already received by the respondent on 09.09.2010. The conveyance deed of the allotted unit was to be executed by the builder in favour of the allottee within a reasonable time, after the completion of the construction of the premises and subject to the payment to be made by him to the developer as per Article 11.3. But that was not done despite a lapse of more than 10 years of handing over of possession which was admittedly handed over on 09.09.2010. So in such situation, the respondent/builder has violated the terms and conditions of the agreement to sell and the provisions of section 11(4)(f) and 17 of the Act, 2016 and illegally retained the amount taken from the allottee beyond the amount of total sale consideration. So, it is liable to pay interest on that amount as prescribed under the Act with effect from

10.12.2020 (after adding a reasonable period for execution of conveyance deed) up to the date of execution of conveyance deed.

30. It is not disputed that the respondent/builder also raised a demand of Rs.45,100/- from the complainant /allottee under the head of interest-bearing maintenance security and that amount was paid by him in September 2010. Though that amount was received by the builder but as per article 6.1 of the agreement to sell, the same was to be kept in a fixed deposit with State Bank of India and was to carry a simple yearly interest as applicable. Though the claimant is stated to be regularly paying towards the maintenance of the allotted unit and common areas, but the respondent/builder has failed to account for the amount of IBMS and transfer the same to the association of allottees. The respondent/builder placed on file a copy of maintenance service agreement entered into between it and respondent no. 2. But the claimant is ready to pay amount due, if any, after adjustment of his amount of IBMS inclusive of interest. So, before charging any amount from the complainant towards maintenance of the allotted unit, the respondent/builder is also directed to account for the amount of IBMS adjust the interest accrued thereon towards maintenance charges



would allow to raise any demand in this regard thereafter respondent no. 2.

H. Directions of the authority

31. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoter as per the functions entrusted to the authority under section 34(f):

- i. The promoter/respondent is directed to get the conveyance deed of the allotted unit in favour of the complainant done within a period of one month. If charges have been paid by the complainant and conveyance deed has not been done, then the interest at the prescribed rate shall be payable by the promoter to the allottee on the amount lying with the promoter.
- ii. The complainant is directed to pay arrears of amount due against maintenance charges of the allotted unit to respondent no. 2 within a period of one month. After receiving adjustment of interest amount of IBMS lying with the respondent/builder within 30 days, and the same is to be transferred to respondent no. 2 in the account of the complainant.

- iii. The respondent/promoter is directed to take necessary action as per agreement to sell regarding separate exclusive car parking sought for the allotted unit.
- iv. Even after 10 years, the maintenance of the project has not been handed over to the Association of allottees. The planning branch is directed to initiate penal proceedings against the promoter for not forming the association of allottees and not handing over maintenance of the project to the association of allottees.
- v. The promoter is directed to deposit deed of declaration filed with the Department of Town and Country Planning with the planning branch of the authority.
32. The complaint stands disposed of.
33. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 09.07.2021

Judgement uploaded on 02.09.2021