

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

Complaint no. : 5744 of 2019
First date of hearing : 23.01.2020
Date of decision : 03.08.2021

Virender Singh
Through GPA Ms. Seema Nandal
R/o: - House No. 247/29, Ram Gopal
Colony, Rohtak, Haryana

Complainant

Versus

M/s Selene Construction Pvt. Ltd.
Regd. Office: - M-62 & M-63, First
Floor, Connaught Place, New Delhi- 110001

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Sh. Anand Dabas
Sh. Rahul Yadav

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 11.12.2019 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 as provided 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	"India Bulls Centrum Park" Sector-103, Gurugram.
2.	Project area	17.081 acres
3.	Nature of the project	Residential Complex
4.	DTCP license no. and validity status	252 of 2007 dated 02.11.2007 valid Upto 01.11.2017 50 of 2011 dated 05.06.2011 valid Upto 04.06.2019 63 of 2012 dated 19.06.2012 valid Upto 18.06.2020
5.	Name of licensee	M/s Selene Construction Pvt. Ltd. and Vindhyaachal Land Development
6.	RERA Registered/ not registered	Registered vide no. 10 of 2018 dated 08.01.2018 (phase II) 11 of 2018 dated 08.01.2018 (phase I)
7.	RERA registration valid up to	31.07.2018

8.	Date of execution of flat buyer agreement	12.07.2011 [Page no. 34 of complaint]
9.	Unit no.	G1152,15 th floor, tower G1 [Page no. 38 of complaint]
10.	Unit measuring	2875 sq. ft. (Super area)
11.	Payment plan	Construction linked payment plan [Page no. 53 of complaint]
12.	Total sale consideration	Rs.84,66,875/- [as per applicant ledger dated 09.09.2019 page no. 37 of reply]
13.	Total amount paid by the complainant	Rs.86,94,827/- [as per applicant ledger dated 09.09.2019 page 38 no. of reply]
14.	Due date of delivery of possession as per clause 21 of flay buyer agreement: - Three years with a six-month grace period thereon from the date of execution of the flat buyer agreement subject to timely payment. [page no 43 of complaint]	12.07.2014 [Note: - 6 Month grace period is not allowed]
15.	Offer of possession of the flat	09.09.2019 [Page no. 33 of reply]
16.	Detail of occupation certificate	01.01.2019 [Page no. 31 of reply]
17.	Delay in handing over possession till 09.11.2019 i.e. date of offer possession (09.09.2019) + 2 months	5 years 3 months and 28 days

B. Facts of the complaint

3. The complainant submitted that the respondent had advertised itself as a very ethical business group that lives onto its commitments in delivering its housing projects as per promised quality standards and agreed timelines. They also assured to the consumers like complainant that he has secured all the necessary sanctions and approvals from the appropriate authorities for the construction and completion of the real estate project sold by them to the consumers in general.
4. That the respondent was very well aware of the fact that in today's scenario looking at the status of the construction of housing projects in India, especially in NCR, the key factor to sell any dwelling unit is the delivery of completed house within the agreed and promised timelines and that is the prime factor which a consumer would consider while purchasing his/her dream home. respondent, therefore used this tool, which is directly connected to emotions of gullible consumers, in its marketing plan and always represented and warranted to the consumers that their dream home will be delivered within the agreed timelines and consumer will not go through the hardship of paying rent along-with the

installments of home loan like in the case of other builders in market.

5. That the complainant submitted that somewhere in the starting of 2010, the respondent through its marketing executives and advertisement through various medium and means approached the complainants with an offer to invest and buy a flat in the proposed project of respondent, which the respondent was going to launch the project namely "Indiabulls Centrum Park" in the Sector-103, Gurugram. The respondent represented to the complainant that the respondent is a very ethical business house in the field of construction of residential and commercial project and in case the complainants would invest in the project of respondent then they would deliver the possession of proposed flat on the assured delivery date as per the best quality assured by it. The respondent has further assured to the complainant that the respondent has already secured all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. The respondent had also shown the brochures and advertisement material of the said project to

the complainants given by the respondent and assured that the allotment letter and builder buyer agreement for the said project would be issued to the complainants within one week of booking to made by the complainant. The complainant while relying on the representations and warranties of the respondent and believing them to be true had agreed to the proposal of respondent to book the residential flat in the project of respondent.

6. The complainant further submitted that the respondent arranged the visit of its representatives to the complainant, and they also assured the same as assured by respondent to the complainants, wherein it was categorically promised by the respondent that they already have secured all the sanctions and permissions from the concerned authorities and departments for the sale of said project and would allot the residential flat in the name of complainants immediately upon the booking. Relying upon those assurances and believing them to be true, complainants booked a residential flat bearing no. G1152 on 15th floor, in Tower – G1 in the proposed project of the respondent measuring approximately super area of 2875 sq. ft. and covered area of 1950.20 sq.ft. in the township to be developed by respondent. It was assured

and represented to the complainants by the respondent that it had already taken the required necessary approvals and sanctions from the concerned authorities and departments to develop and complete the proposed project on the time as assured by the respondent. Accordingly the complainant has paid Rs.1,00,000/- through cheque bearing no. 310709 as booking amount.

7. That as per the clause - 21 of the said flat buyer's agreement dated 12.07.2011, the respondent had agreed and promise to complete the construction of the said flat and deliver its possession within a period of 3 year with a six (6) months grace period thereon from the date of execution of the said flat buyer's agreement.
8. That the complainant has to go abroad for an uncertain period as he has an NRI and due to urgent work, the complainant left India in 2017. That the complainant thus authorized his wife namely Ms. Seema Nandal vide General Power of attorney dated 16.03.2017 duly registered with his office of the sub- registrar Rohtak to look after and take care of the properties belonging to the complainant. The present complaint is being filed, verified, and instituted though Ms.

Seema Nandal who is duly authorized in this behalf vide General Power of attorney dated 16.03.2017.

9. That he has paid the entire sale consideration to the respondent for the said flat. As per the statement dated 04.09.2019, issued by the respondent, upon the request of the complainant, the complainant has already paid Rs.81,00,912/- towards total sale consideration as on today to the respondent as demanded time to time and now nothing major is pending to be paid on the part of complainant.
10. That he has thereafter kept running from pillar to post asking for the delivery of his home and after a much delay of 4 years and 8 months offered possession of the said unit vide their letter dated 11.09.2019.
11. That the conduct on part of respondent regarding delay in delivery of possession of the said flat has clearly manifested that respondent never ever had any intention to deliver the said flat on time as agreed. It has also cleared the air on the fact that all the promises made by the respondent at the time of sale of involved flat were fake and false. The respondent had made all those false, fake, wrongful, and fraudulent promises just to induce the complainants to buy the said flat basis its false and frivolous promises, which the respondent

never intended to fulfill. The respondent in its advertisements had represented falsely regarding the delivery date of possession and resorted to all kind of unfair trade practices while transacting with the complainant.

12. The complainant submitted that the respondent has committed grave deficiency in services by delaying the delivery of possession and false promises made at the time of sale of the said flat which amounts to unfair trade practice which is immoral as well as illegal.
13. That the cause of action accrued in favour of the complainants and against the Respondent on 02.03.2010 when the complainants had booked the said flat and it further arose when respondent failed/neglected to deliver the said flat. The cause of action is continuing and is still subsisting on day-to-day basis.

C. Relief sought by the complainant:

14. The complainant has sought following relief(s):
 - (i) to direct the respondents to pay the interest at the prescribed rate on account of delay in offering possession on Rs.81,00,912/- paid by the complainants as sale consideration for the said flat from the date of payment till delivery of possession.

15. On the date of hearing, the authority explained to the respondent/promoter about 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.
16. The respondent contested the complaint on the following grounds. The submissions made therein, in brief are as under:
 - I. That the instant complaint of the complainant is not maintainable, on facts or in law, and is as such liable to be dismissed/rejected at the thresh hold, being filed in the wrong provisions of the law.
 - II. That the allegations made in the instant complaint is wrong, incorrect, and baseless in the fact and law. The respondent denies them in toto. Nothing stated in the said complaint shall be deemed to be admitted by the respondent merely on account of non-transverse, unless the same is specifically admitted herein. The instant complaint is devoid of any merits and has been preferred with the sole motive to extract monies from the respondent; hence the same is liable to be dismissed in limini.
 - III. That the present complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The

apartment buyer's agreement was executed between both the parties 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.

- IV. That the complainant is outside the preview of this authority as the complainant looking into the financial viability of the project and its future monetary benefits voluntarily approached the respondent and showed interest to book a unit in the project to be developed by the respondent. Thereafter the complainants after fully satisfying themselves with the facts and conditions of the licenses, zoning plans and approved building plans signed the application form, and the complainant was provisionally allotted a unit bearing no. K2084 in the project of the respondent. It is pertinent to mention herein that when the complainants had booked the unit with the respondent, the Real Estate (Regulation and Development) Act, 2016 was not in force and the provisions of the same cannot be applied retrospectively.

- V. That the complainant subsequently executed a flat buyer agreement with the respondent on 12.07.2011 wherein it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional unit booked by the complainants, the same shall be settled amicably by mutual discussion failing which the same shall be settled/adjudicated through arbitration mechanism as detailed in the agreement.that, any dispute arising out of the duly executed flat buyer agreement is to be settled between the parties through mutual discussion, and upon failure of which the same is to be settled through arbitration mechanism. Thus, the complainant is contractually and statutorily barred from invoking the jurisdiction of this authority. Moreover no cause of action ever arose in favor of the complainant and against him. Further the authority has no Jurisdiction to entertain the present complaint and decide the same hence the present complaint filed by the complainants is liable to be dismissed on the very same ground.
- VI. That the relationship between the complainant and the respondent is governed by the document executed

between them i.e. flat buyer agreement dated 12.07.2011. It is pertinent to mention herein that the instant complaint of the complainant is further falsifying their claim from the very fact that, the complainant has filed the instant claim on the alleged delay in delivery of possession of the provisionally booked unit, however the complainant from the very beginning was aware, that the period of delivery as defined in clause 21 of flat buyer's agreement is not sacrosanct as in the said clause it is clearly stated that "the developer shall endeavors to complete the construction of the said building/unit" within the stipulated time.

- VII. That it is a universally known fact that due to adverse market conditions viz. delay due to reinitiating of the existing work orders under GST regime, by virtue of which all the bills of contractors were held between, delay due to the directions by the Hon'ble Supreme Court and National Green Tribunal whereby the construction activities were stopped, Non-availability of the water required for the construction of the project work & non-availability of drinking water for labour

due to process change from issuance of HUDA slips for the water to totally online process with the formation of GMDA, shortage of labour, raw materials etc., which continued for around 22 months, starting from February 2015. Due to the above-mentioned reasons, the project of them was severely affected, and it is in these above elaborated circumstances, which were beyond the control of the respondent, that the progress and construction activities, sale of various flats and spaces has not taken place as envisaged.

- VIII. The respondent has submitted that the license to develop the project, external development charges were paid to the State Government and the State Government in lieu of the EDCs was supposed to lay the whole infrastructure in the licensed area for providing the basic amenities such as drinking water, sewerage, drainage including storm water line, roads etc. That the State Government terribly failed to provide the basic amenities due to which the construction progress of the project was badly hit.
- IX. The Ministry of Environment and Forest and the Ministry of Mines had imposed certain restrictions

which resulted in a drastic reduction in the availability of bricks and availability of Kiln which is the most basic ingredient in the construction activity. The MoEF restricted the excavation of topsoil for the manufacture of bricks and further directed that no manufacturing of clay bricks or tiles or blocks can be done within a radius of 50 (fifty) kilo meters from coal and lignite based thermal power plants without mixing at least 25% of ash with soil. The shortage of bricks in the region and the resultant non-availability of raw materials required in the construction of the project also affected the timely schedule of construction of the project.

- X. That the Hon'ble Apex Court directing for suspension of all the mining operations in the Aravalli Hill range in State of Haryana within the area of approx. 448 sq. kms in the district of Faridabad and Gurgaon including Mewat which led to a situation of scarcity of the sand and other materials which derived from the stone crushing activities, which directly affected the construction schedules and activities of the project.

XI. The respondent submitted that there was no intentional delay in the construction on the part of the respondent and delay was due to the reasons detailed in the reply which were beyond its control.

- That commonwealth games were organized in Delhi in October 2010. Due to this mega event, construction of several big projects including the construction of commonwealth games village took place in 2009 and onwards in Delhi and NCR region. This led to an extreme shortage of labour in the NCR region as most of the labour force got employed in said projects required for the commonwealth games. Moreover, during the commonwealth games the labour/workers were forced to leave the NCR region for security reasons. This also led to immense shortage of labour force in the NCR region. This drastically affected the availability of labour in the NCR region which had a ripple effect and hampered the development of this Complex. As a result, it became difficult to cope up with the timelines set for the completion of the project. Such a situation was undoubtedly not foreseen which

resulted in delay in the construction scheduled of the project.

- Due to active implementation of social schemes like National Rural Employment Guarantee Act (“NREGA”) and Jawaharlal Nehru National Urban Renewal Mission (“JNNURM”), there was a sudden shortage of labour/workforce in the real estate market as the available labour preferred to return to their respective states due to guaranteed employment by the Central/State Government under NREGA and JNNURM Schemes. This created a further shortage of labour force in the NCR region. A large numbers of real estate projects, including our project were struggling hard to timely cope up with their construction schedules. Also, even after successful completion of the commonwealth games, this shortage continued for a long period of time. The said fact can be substantiated by newspaper article elaborating on the above-mentioned issue of shortage of labour which was hampering the construction projects in the NCR region. This certainly was never foreseen or even imagined while scheduling their construction activities. Due

to paucity of labour and difference in between demand and supply there were many labour disputes resulting into delay of the project.

- Due to slow pace of construction, a tremendous pressure was put on the contractors engaged to carry out various activities in the project due to which there was a dispute with the contractors resulting into foreclosure and termination of their contracts and we had to suffer huge losses which resulted in delayed timelines. That despite the best efforts, the ground realities hindered the progress of the project.
- Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to Demonetization.
- Orders passed by National Green Tribunal: In last four successive years i.e. 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. Also the Hon'ble NGT has

passed orders with regard to phasing out the 10-year-old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The contractor of respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to this, there was a delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November- December 2016 and November-December 2017. The district administration issued the requisite directions in this regard.

construction work remained very badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondent and the said period would also require to be added for calculating the delivery date of possession if any.

• **Non-Payment of Instalments by Allottees:**

Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made

resulting in badly impacting and delaying the implementation of the entire project.

• **Inclement Weather Conditions viz.**

Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavorable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions.

XII. Despite the implementation of the project being affected on account of the above-mentioned force majeure conditions, the respondent being a customer-oriented company completed the construction of the tower in which the unit allotted to the complainant is located and the respondent applied for the grant of the occupation certificate on 31.05.2018 and the same was granted by the concerned authorities on 01.01.2019.

XIII. That the respondent has already offered the possession of the unit to the complainant vide offer of possession dated 09.09.2019 to the complainant subject to

payment of the outstanding amount and submission of necessary documents. The complainant has already been given compensation of Rs.5,93,915/- towards the delayed possession to the complainant on 07.09.2019. However, till date the complainant has failed to take possession of the unit. It is pertinent to point out that the complainant not being satisfied with the amount offered in terms of the agreement has preferred the present complaint against the respondent in order to unjustly enrich themselves by filing the instant frivolous complaint.

- XIV. That the flat buyer's agreement that has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 12.07.2011 executed much prior to coming into force of the RERA Act, 2016 and the HARERA 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 flat buyer's agreement for sale executed in terms of said Act and said rules and no other agreement, whereas the flat buyer's agreement being referred to or looked into in these 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 complainant.

17. 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 submission made by the parties.

E. Jurisdiction of the authority

18. 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 respondent

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

19. Another contention of the respondent is that 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/situation 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.”

20. 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.”

21. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer 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 complainant is in breach of agreement for non-invocation of arbitration

22. The respondent had raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement: -

"All or any disputes arising out or touching upon in relation to the terms of this Application and/or Flat Buyer's Agreement including the interpretation and validity of the terms and the rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications for the time being in force. The venue of arbitration shall be New Delhi/Gurgaon and it shall be held by a sole arbitrator who shall be appointed by the Developer and whose decision shall be final and binding upon the parties. The buyer hereby confirms that he/she shall have no objection to this appointment even if the person so appointed as the Arbitrator, is an employee or advocate of the Developer or is otherwise connected to the Developer and the Buyer confirms that notwithstanding such relationship/connection, the Buyer shall have no doubts as to the independence or impartiality of the said Arbitrator. The courts at New Delhi alone shall have the jurisdiction"

23. 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 the same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

24. 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."

25. 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 is 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.”

26. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within her right 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.

F.III Objection raised by the respondent regarding force

majeure condition.

27. The obligation to handover possession within a period of thirty-six months was not fulfilled. There is delay on the part of the respondent the actual date to handover the possession in the year 2014 and various reasons given by the respondent is totally null and void as the due date of possession was in the year 2014 and the NGT Order refereed by the respondent pertaining to year 2015-2016-2017-2018 therefore the respondent cannot be allowed to take advantage of the delay on his part by claiming the delay in statutory approvals. The following reasons are given by the respondent: - (1) delay in payments by many customers (2) dispute with contractor (3) water shortage (4) lack of infrastructural support from state government (5) delay in approval by the state government (6) Inclement weather condition viz Gurugram (7) NGT Order (8) Demonetization.
28. The due date of possession in the present case as per clause 21 is 12.07.2014, therefore any situation or circumstances which could have a reason prior to this date due to which the respondent could not carry out the construction activities in the project are allowing to be taken into consideration. While considering whether the said situation or circumstances was in fact beyond the control of the respondent and hence the

respondent is entitled to force majeure circumstances, however all the pleas taken by the respondent to plead the force majeure condition happened after 12.07.2014. the respondent has not given any specific details with regard to delay in payment of installments by many allottee or regarding the dispute with contractor or about the ban on extracting ground water by the High Court in Haryana. Even no date of any such order has been given. Similar is the position with regard to the alleged lack of infrastructure support by the state government. So far as, NGT order and demonetization of Rs. 500/- and Rs. 1000/- currency notes are concerned these events are stated to have taken place in the year 2015 and 2016 i.e., the post due delivery of possession of the apartment to the complainant.

G. Findings on the relief sought by the complainant

Relief sought by the complainant: to direct the respondent to pay the interest at the prescribed rate of interest on account of delay in offering possession on Rs.81,00,912/- paid by him as sale consideration of the said flat from the due date of payment till the date of delivery of possession.

29. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as

provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”

30. As per clause 21 of the flat buyer agreement provides for handing over of possession and is reproduced below: -

“The developer shall endeavor to complete the construction of the said building/unit within a period of three years, with a six-month grace period thereon from the date of execution of these Flat Buyer’ Agreement subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to his or as demanded by the Developer...”

31. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to timely payment by the buyer(s) of total sale price payable according to the payment plan applicable to him or as demanded by the developer and all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of

such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer developer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused its dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

32. **Admissibility of grace period:** As per clause 21 of the flat buyer agreement, the possession of the allotted unit was to be offered within three years from the date of execution of the flat buyer agreement with a grace period of 6 (six) months, subject to timely payment which comes out to be 12.01.2015. As a matter of record, applicant ledger dated 09.09.2019 issued by the promoter/respondent company in favour of complainant/allottee shows that the complainant/allottee

has paid more amount than the total sale consideration. According to the payment plan, the allottee/complainant has fulfilled all certain terms and conditions of the agreement. Hence, the respondent/ promoter company fails to provide the possession of the unit within stipulated time. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

- 33. Payment of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

34. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases. The Haryana Real Estate Appellate Tribunal in **Emaar MGF Land Ltd. vs. Simmi Sikka (Supra)** observed as under: -

"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the homer buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding."

35. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **03.08.2021** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

36. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

37. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **9.30%** by the respondent/promoter which is the same as is being granted to them in case of delayed possession charges.

38. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 21 of the flat buyer's agreement executed between the parties on 12.07.2011, possession of the booked unit was to be delivered on or before 12.07.2014. Occupation Certificate has been received by the respondent on 01.01.2019 and the possession of the subject unit was offered to the complainants on 09.09.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 12.07.2011 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement dated 12.07.2011 to hand over the possession within the stipulated period.
39. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date

of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 01.01.2019. The respondent offered the possession of the unit in question to the complainant only on 09.09.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 12.07.2014 till the expiry of 2 months from the date of offer of possession (09.09.2019) which comes out to be 09.11.2019.

40. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the

complainant is entitled to delay possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 12.07.2014 till 09.11.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Direction of the authority

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

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 12.07.2014 till 09.11.2019. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iii. The rate of interest chargeable from the complainant /allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of

interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

- iv. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is debarred from claiming holding charges from the complainant/allottee at any point of time even after being part of apartment buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3899/2020 decided on 14.12.2020.

42. Complaint stands disposed of.

43. File be consigned to registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.08.2021

Judgement uploaded on 13.09.2021

(Vijay Kumar Goyal)

Member