BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4094 of 2020
First date of hearing: 08.01.2021
Date of decision : 09.07.2021

1. Trilok Garg
2. Sadhna Garg
Resident of:- 773-74, Sector-14, Gurugram **Complainants**

Versus

IREO Developers
Regd. Office:- 305, 3rd Floor, Kanchan House,
Karampura Commercial Complex, New Delhi **Respondent**

CORAM:
Dr. K.K. Khandelwal **Chairman**
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Sh. Anand Dabas Advocate for the complainants
Sh. M.K. Dang Advocate for the respondent

ORDER

1. The present complaint dated 27.11.2020 has been filed by the complainants/allottees 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 thereunder 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 complainants, 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	"The Victory Valley", Sector-67, Gurgaon
2.	Licensed area	24.612 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	244 of 2007 dated 26.10.2007
	License valid up to	25.10.2017
	Licensee	KSS properties Pvt. Ltd and High responsible realtors Pvt. Ltd
5.	RERA registered/not registered	Not Registered
6.	Date of approval of building plan	29.11.2010 (Page no. 47 of the reply)
7.	Unit no.	302, 3rd Floor, Tower-D(16) (Page no. 31 of the complaint)

8.	Unit measuring	2831 sq. ft. (263 sq. mtrs. approx.) (Page no. 31 of the complaint)
9.	Date of booking	27.09.2010 (Page no. 29 of the reply)
10.	Date of allotment	08.10.2010 (Page no. 37 of the reply)
11.	Date of execution of apartment buyer's agreement	29.10.2010 (Page no. 25 of the complaint)
12.	Payment plan	Instalment payment plan (Page no. 59 of the complaint)
13.	Total consideration	Rs. 1,89,71,613.72/- (Page no. 77 of the complaint)
14.	Total amount paid by the complainants	Rs. 1,85,62,736.75/- (Page no. 77 of the complaint)
15.	Due date of delivery of possession	29.11.2013 (As per clause 13.3, possession be handed over within a period of 36 months from the approval of building plans and/or fulfillment of preconditions)
16.	Offer of possession	24.10.2017 (Page no. 68 of the reply)
17.	Occupation certificate	28.09.2017

		(Page no. 66 of the reply)
18.	Date of conveyance deed	31.10.2018 (Page no. 81 of the complaint)
19.	Delay in handing over possession till offer of possession plus 2 months i.e., 24.12.2017	4 years 25 days

B. Facts of the complaint

The complainants have submitted as under:

3. That the real estate project named "VICTORY VALLEY", which is the subject matter of present complaint, is situated at sector-67, Gurugram. Therefore, this authority has the jurisdiction to try and decide the present complaint.

4. 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. The respondent while launching and advertising any new housing project always commits and promises to the targeted consumer that their dream home will be completed and delivered to them within the agreed time, initially in the agreement while selling the dwelling unit to them. It also assured to the consumers like it did to the complainants that the respondent 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. 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 instalments of home loan like in the case of other builders in market.

5. That somewhere in the third quarter of 2010, the respondent through its marketing executives and advertisement and approached the complainants, with an offer to invest and buy a unit in the proposed project of the respondent. The respondent was going to launch the project namely, "**VICTORY VALLEY**" in the sector-67, Gurugram (hereinafter referred to as "said project"). The respondent represented to the complainants that it 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 unit on the assured delivery date as per the best quality promised by the respondent. The respondent had

further assured to the complainants that the respondent has already secured all the necessary sanctions and approvals form 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 and assured that the allotment letter and apartment buyer's agreement for the said project would be issued to the complainants within one week from booking. The complainants while relying on the representations and warranties and believing them to be true agreed to the proposal of the respondent to book the residential unit in the project of respondent.

6. That respondent arranged the visit of its representatives to the complainants, wherein it was categorically promised by the respondent's representatives that they already have secured all the sanctions and permissions from the concerned authorities and departments for the construction and sale of said project and would allot the residential unit in the name of complainants immediately upon the booking. Relying upon assurances and believing them to be true, complainants booked a residential unit bearing No. VV-D16-03-02 on 3rd

floor in tower-D-16 in the proposed project of the respondent admeasuring approximately of 2823Sq. ft./ 263 sq. mtrs. (super area) in the township to be developed by the respondent. Accordingly, the complainants have paid Rs. 16,27,825/- (rupees sixteen lac twenty-seven thousand eight hundred twenty-five only) through cheque bearing No. 124365119496 as booking amount.

7. That in the said application form, the price of the said flat was agreed at the rate of Rs. 6000/- per sq. ft. along-with other charges as mentioned in the said application form. At the time of execution of the said application form, it was agreed and promised by the respondent that there shall be no change, amendment or variation in the area or sale price of the said flat from the area or the price committed by the respondent in the said application form or agreed otherwise.

8. That the respondent took more than one month to execute the apartment buyer's agreement and finally the apartment buyer's agreement was executed on 29.10.2010. Thereafter, the respondent started raising the demand of money /instalments from the complainants, which was duly paid by the complainants as per agreed timelines.

9. That as per the clause- 13.3 of the apartment buyer's agreement dated 29.10.2010, the respondent had agreed and promise to complete the construction of the said unit and deliver possession within a period of 3 year with 180 days' grace period from the date of execution of the apartment buyer's agreement.

10. That from the date of booking and till today, the respondent had raised various demands for the payment of instalments towards the sale consideration of said unit and the complainants have duly paid and satisfied all demands raised by the respondent as per the apartment buyer's agreement without any default or delay on their part and have also fulfilled. The complainants have always been ready and willing to fulfil their part of agreement, if any pending.

11. That the complainants have paid the entire sale consideration to the respondent for the said unit. As per the statement dated 25.04.201, issued by the respondent, the complainants have already paid Rs.18,562,736.75/- (rupees one crore eighty-five lac sixty-two thousand seven hundred thirty-six rupees and seventy-five paisa only) towards total sale consideration as on today to the respondent as demanded from time to time and

now nothing major is pending to be paid on the part of complainants.

12. That the conduct on part of respondent regarding delay in delivery of possession of the said unit has clearly manifested that the respondent never had the intention to deliver the said unit on time as agreed between the parties. The above-said has also made it apparent that all the promises made by the respondent at the time of sale of involved unit were fake, frivolous and misleading. The respondent made the false promises just to induce the complainants to buy the said unit. The respondent in its advertisements had represented falsely regarding the area, price, quality and the delivery date of possession and resorted to all kind of unfair trade practices while transacting with the complainants.

13. That the respondent has committed grave deficiency in services by delaying the delivery of possession and has also committed a criminal act by fraudulently misappropriating the money paid by the complainants as sale consideration for the said unit. The respondent has also acted dishonestly and arbitrarily by inducing the complainants to buy the said unit basis its false and frivolous promises and representations about the delivery timelines aforesaid housing project.

14. That relying upon respondent's representation and believing them to be true, the complainants were induced to pay Rs.18,562,736.75/- (rupees one crore eighty-five lac sixty-two thousand seven hundred thirty-six rupees and seventy-five paisa only) as sale consideration of the unit as on today.
15. That after making a delay of about 4 years and 6 months, the respondent on multiple request/appeal by the allottees' finally offered the possession on 01.10.2018.
16. That after getting the unit handed over by respondent, the complainants applied for the conveyance deed for the said unit and the deed got registered on 20.10.2018.
17. That the respondent has acted in a very deficient, unfair, wrongful, fraudulent manner by not delivering the said unit situated in the project "VICTORY VALLEY", sector-67, Gurugram within the timelines agreed in the apartment buyer's agreement.
18. That the cause of action accrued in favour of the complainants and against the respondent on 27.09.2010 when the complainants booked the said unit, and it further arose when respondent failed /neglected to deliver the said unit within an agreed time. The cause of action is continuing and is still subsisting on day-to-day basis.

C. Relief sought by the complainants:

19. The complainants have sought following relief(s):

(i) Direct the respondent to pay interest at the applicable rate on account of delay in offering possession on the amount of Rs.18,562,736.75/- (rupees one crore eighty-five lac sixty-two thousand seven hundred thirty-six rupees and seventy-five paisa only) paid by the complainants as sale consideration for the said unit from the date of payment till the date of delivery of possession;

20. 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.

D. Reply on behalf of the respondent

The respondent has contended the complaint on the following grounds: -

i. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The apartment buyer's agreement was executed between the complainants and M/s Victory Valley Pvt. Ltd. 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.

ii. That there is no cause of action to file the present complaint.

iii. That the complainants are estopped from filing the present complaint by their acts, omissions, admissions, acquiescence and laches.

iv. That the complainants have no locus standi to file the present complaint.

v. The complaint is bad for mis-description of the respondent. There is no such company by the name of M/s Ireo Developers and the present complaint is liable to be dismissed on this ground alone. However, for the sake of abundant caution, the present reply is filed on behalf of M/s Ireo Victory Valley Pvt. Ltd. This authority does not have the jurisdiction to try and decide the present false and frivolous complaint. It is pertinent to mention that the project in question is exempted from registration under the Real Estate Regulation and Development Act, 2016 and Haryana Real Estate (Regulation and Development) Rules, 2017. The tower of the project where the unit of the complainants is situated does not come under the scope and ambit of 'on-going project' as defined in section 2(o) of the Haryana Real Estate (Regulation and Development) Rules, 2017. It was submitted that application for grant of occupation certificate for the block where the unit of the complainants is situated in the project was made before the publication of Haryana Real Estate (Regulation and Development) Rules, 2017 vide its application dated

09.02.2017 in accordance with sub code 4.10 of the Haryana Building Code, 2017. Thus, according to the provisions of the said Act and Rules, the tower where the unit of the complainants is located is not required to be registered under the said Act and Rules.

vi. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 34 of the apartment buyer's agreement.

vii. That the complainants have not approached this authority with clean hands and have intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by them maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:

A. That M/s Victory Valley Pvt. Ltd is a reputed real estate developer having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of their customers. M/s Victory Valley Pvt. Ltd and its sister concerns have developed and delivered several prestigious projects such as 'Grand Arch', 'Skyon', 'Uptown', 'Gurgaon Hills', 'The Corridors' etc. and in most of these projects large number of

families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.

B. That the complainants, after checking the veracity of the project namely, 'Ireo- Victory Valley', Gurugram had applied for allotment of an apartment vide their booking application form dated 29.09.2010.

C. That based on the said application, M/s Victory Valley Pvt. Ltd vide its allotment offer letter dated 08.10.2020 allotted to the complainants, unit no. D (16)302, Tower no. D (16), having tentative super area of 2831 sq. ft. for a sale consideration of Rs. 1,89,71,613.72/-. However, it was submitted that the sale consideration amount was exclusive of the registration charges, stamp duty charges, service tax and other charges which were to be paid by the complainants at the applicable stage. Accordingly, an apartment buyer's agreement was executed between the complainants and M/s Ireo Victory Valley Pvt. Ltd. on 29.10.2010. It is pertinent to mention herein that when the complainants had booked the unit with M/s Victory Valley Pvt. Ltd, the Real Estate (Regulation and Development) Act,

2016 was not in force and the provisions of the same cannot be applied retrospectively.

D. That the complainants made certain payments towards the instalment demands on time and as per the terms of the allotment. However, they committed defaults in subsequent instalments. It was submitted that M/s Victory Valley Pvt. Ltd had raised the payment demand towards the fifth instalment vide payment request dated 10.10.2013. However, the due amount was received from the complainants only after several reminders dated 05.11.2013 and 26.11.2013 issued by the M/s Victory Valley Pvt. Ltd.

E. That vide payment request dated 09.04.2014, M/s Victory Valley Pvt. Ltd had raised the demand of sixth instalment for net payable amount of Rs. 20,51,164.21/-. However, the same was credited towards the total sale consideration only after a reminder dated 04.05.2014 was issued by M/s Victory Valley Pvt. Ltd.

F. That vide payment request letter dated 14.11.2014, M/s Victory Valley Pvt. Ltd raised the eighth instalment demand for the net payable amount of Rs. 20,93,612.73/-. However, the complainants remitted the due amount only after

a reminder dated 10.12.2014 was sent by M/s Victory Valley Pvt. Ltd.

G. That the possession of the unit was supposed to be offered to the complainants in accordance with the agreed terms and conditions of the apartment buyer's agreement. It was submitted that clause 13.3 of the apartment buyer's agreement and clause 35 of the schedule – I of the booking application form states that possession of the unit would be offered within a period of 36 months from the approval building Plans and/or fulfilment of the preconditions imposed and 180 days' grace period. Furthermore, the complainants had further agreed for an extended delay period of 12 months from the date of expiry of the grace period as per clause 13.5 of the apartment buyer's agreement.

H. That from the aforesaid terms of the apartment buyer's agreement, it is evident that the time was to be computed from the date of receipt of all requisite approvals. Even otherwise construction can't be raised in the absence of the necessary approvals. It is pertinent to mention here that it has been specified in sub- clause (v) of clause 17 of the approval of building plan dated 29.11.2010 of the said project that the clearance issued by the

Ministry of Environment and Forest, Government of India has to be obtained before starting the construction of the project. It was submitted that the Environment clearance for construction of the said project was granted on 25.11.2010. Furthermore, in clause (v) of part-B of the environment clearance dated 25.11.2010 it was stated that approval from fire department was necessary prior to the construction of the project.

I. That it was submitted that the last of the statutory approvals which forms a part of the pre-conditions was the fire scheme approval which was obtained on 28.10.2013 and that the time period for offering the possession, according to the agreed terms of the apartment buyer's agreement, expired only on 28.04.2018. M/s Victory Valley Pvt. Ltd completed the construction of the tower in which the unit allotted to the complainants is located. It is pertinent to mention herein that M/s Victory Valley Pvt. Ltd received the occupation certificate on 28.09.2017.

J. That furthermore, M/s Victory Valley Pvt. Ltd offered the possession of the unit to the complainants vide notice of possession dated 24.10.2017 and intimated it to complete the documentation formalities and make the payment

towards the balance amount of Rs. 26,85,377/-. The part-payment out of the total outstanding amount was paid by the complainants only after reminders dated 30.11.2017, 22.12.2017 and final notice dated 24.01.2018 were sent by M/s Victory Valley Pvt. Ltd to the complainants.

K. That the complainants after making complete payment have been put in possession of the said unit vide possession letter dated 01.10.2018 and being fully satisfied with the same had executed indemnity bond cum undertaking dated 01.10.2018, conveyance deed and deed of apartment both dated 31.10.2018. The complainants had conducted their own investigations and were provided with all clarifications and information regarding the project. The complainants had even acknowledged in the conveyance deed that they have taken the possession of the apartment after having inspected and after being fully satisfied and that they would not raise any objection or claim for any reason and the same would stand waived.

L. The complainants are real estate investors who, after taking possession of the unit, want to harass and pressurize M/s Victory Valley Pvt. Ltd to submit to their unreasonable demands on highly

flimsy and baseless grounds. Such malafide tactics of the complainants cannot be allowed to succeed.

E. Jurisdiction of the authority

The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

21. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

22. 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 the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

23. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the complainants and the respondent prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

24. The authority is of the view 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. 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."*

25. 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 <u>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</u>. 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."

26. 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 and regulations made thereunder and are not unreasonable or exorbitant in nature.

F. II Objection regarding complainants are in breach of agreement for non-invocation of arbitration

27. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute and the same is reproduced below for the ready reference:

"34. Dispute Resolution by Arbitration

"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be

settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".

28. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the apartment 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.

29. 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:-*
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> > *"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."*
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> *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."

30. 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 para 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."

31. Therefore, in view of the above judgements and considering the provisions 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.

F.III Objection regarding jurisdiction of the authority to adjudicate the present complaint as the subject project is not registrable under section 3 of the Act and application for grant of occupation certificate was made before the publication of the Haryana Real Estate (Regulation and Development) Rules, 2017.

32. The respondent submitted that the project in question is exempted from registration under the Act and the rules. The tower of the project where the unit of the complainants is situated does not come under the scope and ambit of ongoing project as defined in section 2(o) of the rules. Further, it is submitted that application for the grant of occupation certificate for the block where the unit of the complainants is situated in the said project was submitted on 09.02.2017 in accordance with sub code 4.10 of the Haryana building code, 2017. Thus, according to the provisions of the said Act and rules, the tower where the subject unit is located does not

require registration. Thus, the authority does not have any jurisdiction to decide any dispute related to it. Further, the counsel for the complainants have drawn the attention of the authority towards the fact that the respondent promoter has obtained the NOC for occupation of the above referred buildings from the Director, Fire Services, Haryana, Panchkula on 16.06.2017. Further, it was stated that another approval from STP, Gurugram was obtained on 05.07.2017. The authority after considering the submissions made by both the parties is of view that the application made by the respondent promoter on 09.02.2017 was an incomplete application as the pre-requisites which were required for the same were obtained on a later date and it is a well settled law that incomplete application is no application in the eyes of the law. Accordingly, the objection of the respondent promoter stands rejected.

33. **Only that project shall be excluded from the purview of the 'ongoing project' which had received the completion certificate prior to the commencement of the Act and such project will not require registration.**
In **Emaar MGF Land Ltd. vs. Ms. Simmi Sikka**, appeal nos.52 & 64 of 2018, decided on 03.11.2020 by the Haryana Real Estate Appellate Tribunal (hereinafter referred, the Appellate Tribunal), it was observed that first proviso to section 3(1) of the Act provides that the projects which were 'ongoing' on the date of commencement of the Act and for which the completion certificate has not been issued, the promoter shall

make an application to the authority for registration of the said project within a period of three months from the date of commencement of the Act. The position further becomes clear from section 3(2)(b) of the Act that the registration of the real estate project shall not be required where the promoter had received the completion certificate for the said project prior to the commencement of the Act. Thus, if we read section 3 of the Act, between the lines, it is evident that only that project shall be excluded from the purview of the 'ongoing project' which had received the completion certificate prior to the commencement of the Act and such project will not require registration.

34. **Rules 2(1)(o)(i) and 2(1)(o)(ii) of the Haryana Real Estate (Regulation and Development) Rules, 2017 are apparently inconsistent with section 3 of the Real Estate (Regulation and Development) Act, 2016.**

In **Emaar MGF Land Ltd. vs. Ms. Simmi Sikka (Supra)** it was further observed by the Appellate Tribunal that in the rules, the purview of 'ongoing project' has been restricted. It has been provided in explanation (i) of rule 2(1)(o) that those projects for which after completion of development works an application under rule 16 of 1976 Rules (Haryana Development and Regulation of Urban Areas Rules, 1976) or under sub-code 4.10 of the Haryana Building Code was made to the competent authority on or before publication of the rules will not be 'ongoing project'. Rule 2(1)(o)(ii) of the rules further provides that the 'ongoing project' does not include

any part of any project for which part completion/completion, occupancy certificate or part thereof had been granted on or before publication of these rules. Rules 2(1)(o)(i) and 2(1)(o)(ii) are apparently inconsistent with section 3 of the Act.

35. **The provisions of section 3 of the Act will prevail over the explanations appended to rule 2(1)(o) of the rules.**

Section 3(2) of the Act provides that no registration shall be required for the projects mentioned therein. This is the only provision regarding exemption of real estate projects from the requirement of registration but under the Haryana Real Estate (Regulation and Development) Rules, 2017. Rule 2(1)(o)(i) and 2(1)(o)(ii) provide additional two categories taken out of purview of on-going project and accordingly attempted to exempt these categories of projects from the requirement of registration. This issue has been examined both by Hon'ble Punjab and Haryana High Court and the Haryana Real Estate Appellate Tribunal. In ***Emaar MGF Land Ltd. vs. Ms. Simmi Sikka*** the Haryana Real Estate Appellate Tribunal observed that-

> *"40. We are conscious of the fact that this Tribunal has no jurisdiction to declare any rule ultra vires but at the same time Article 254 of the Constitution of India mandates that the law made by the Parliament shall prevail. Article 254 of the Constitution becomes applicable in case of inconsistency between the law enacted by the Parliament and the law made by the State. Here in this case the Act has been enacted by the Parliament. The rules are subordinate legislation by the appropriate government i.e. State of Haryana. The subordinate legislation is also a legislation of the State according to Section 84 of the Act;*

thus, it cannot be stated that the provisions of Article 254 of the Constitution of India will not apply to subordinate legislation. Therefore, we are of the opinion that the provisions of Section 3 of the Act will prevail over the explanations appended to Rule 2(1)(o) of the Rules. This legal position is also illustrated from the latest authoritative pronouncement of the Division Bench of our Hon'ble High Court in a bunch of writ petitions lead case being ***CWP No.38144 of 2018 Experion Developers Pvt. Ltd. Vs. State of Haryana and others*** *decided on 16.10.2020, wherein the Hon'ble High Court has laid down as under: -*

74. The Act is intended to apply even to 'ongoing' Real Estate Projects. The expression 'ongoing project' has not been defined under the Act but under Rule 2(o) of the Haryana Rules which reads as under:

"ongoing 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.

41. It was further laid down as under: -

77. Rule 3 of the Haryana Rules talks of application for registration and Rule 4 of 'additional disclosure by Promoters of ongoing projects.' Therefore, all 'ongoing projects' i.e. those that commenced prior to the Act, and in respect of which no completion certificate is yet issued, are covered under the Act. It is plain that the legislative intent was to make the Act

applicable to not only to the projects which were to commence after the Act became operational but also to ongoing projects. The issue that arises is whether this is permissible in law?

42. *The Hon'ble High Court further laid down as under:*
-

> 78. *The decision of the Bombay High Court in* ***Neelkamal Realtors Suburban Pvt. Ltd. (supra)*** *has dealt with this issue quite extensively. The conclusion of the Bombay High Court that this retroactive application of the Act, as distinguished from retrospective effect, in relation to ongoing project is consistent with the legal position in this regard. A very conscious decision was taken that the Act should apply not only to new projects but to existing projects as well.*

43. *It was further laid down as under: -*

> 84. *The above submissions have been considered. The Statement of Objects and Reasons preceding the enactment have already been referred to. The relevant passages of the judgment of Bombay High Court in* ***Neelkamal Realtors Suburban Pvt. Ltd.*** *(supra) have also been referred to. The very concept of 'ongoing project' is unique to the Act. The legislature was conscious of the impact that the Act would have on such 'ongoing projects'. A collective reading of Section 3 with Section 2(o) and 2(zn) indicates that care was taken to specify which of the projects would stand exempted. Section 3(2)(b) of the Act is categorical that no registration of the project would be required where "the promoter has received completion certificate for real estate project prior to the commencement of this Act." It cannot thus be argued that without satisfying the above requirement or the other two contingencies in Sections 3(2)(a) and 3(2)(c) (section corrected) of the Act, a promoter can avoid*

registering an 'ongoing' project under the Act.

44. It was further laid down as under: -

86. The Act was consciously made applicable to 'ongoing projects' i.e. those for which a CC has yet not been received by the promoter. There is also no question of any violation of settled law regarding overriding of the agreements of sale entered into prior to the date of Act coming into force and Haryana Rules. Those agreements of sale would obviously be subject to the new legal dispensation put in place by the Act and the Rules. In light of the object and purpose of the Act, no comparison can be drawn with the other enactments which were subject matter of the decisions of Supreme Court relied upon by TDI."

Only those projects which had got the completion certificate before the commencement of the Act will not require registration and will certainly fall beyond the purview of the 'ongoing project'. Thus, the Hon'ble High Court has categorically laid down that as per section 3(2)(b) of the Act, the registration of a project will not be required where the promoter has already received the completion certificate for the project prior to the commencement of the Act. It is pertinent to mention here that completion certificate as defined in section 2(q) and occupancy certificate as defined in section 2(zf) of the Act are entirely for different purposes. It was further laid down that without satisfying the above requirement or the other two contingencies provided in sub-section 3(2)(a) and 3(2)(c) of the Act, a promoter cannot avoid registering an 'ongoing project'. Consequently, only those

projects which had got the completion certificate before the commencement of the Act will not require registration and will certainly fall beyond the purview of the 'ongoing project'. All other projects will require registration and will be squarely covered by the definition of the 'ongoing project'. Hence, it is held that the mandate contained in section 3 of the Act will have supremacy over the rule 2(1)(o) of the rules so far as the same is inconsistent with section 3. It is a well settled principle of law that the Act is always the creator of the rules i.e., rules are always framed by virtue of there being a provision in the Act with regard to framing of rules.

36. **There is no classification of registered or un-registered projects in the definition of the real estate projects.**
The definition of project and real estate project as defined in section 2(zj) and 2(zn) respectively will cover all the projects where the development of a building or the land into plots is carried out for the purpose of sale of the said apartment or the plot or the building. There is no classification of registered or unregistered projects in the definition of the real estate projects. In appeal no.182 of 2019 titled as **M/s Omaxe Limited Vs. Mrs. Arun Prabha,** decided on 19.12.2019 the Haryana Real Estate Appellate Tribunal observed as under: -

> *27. The necessity to enact the present Act was felt as there was no special statute to provide effective and simplicitor (sic) remedy for redressal of the grievances of the home buyers. Keeping in view the background of the Act, it has to be*

looked from the perspective harmony with the aim and objects for which it was enacted. The Act came into force w.e.f. 01.05.2016. The preamble of the Act reads as under:

> *"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

28. *It is well settled that the preamble of the statute has a guide light to ascertain the legislative intent. The preamble of the Act reproduced above shows that the Real Estate Regulatory Authority has been established for regulation and promotion of the real estate sector and to protect the interest of the consumers in real estate sector.*

29. *The project has been defined in Section 2(zj) as under:*

> *"(zj) "Project" means the real estate project as defined in clause (zn);"*

Section 2(zn) defines the real estate project as under:-

> *"(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or [apartments], as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;"*

29. The project has been defined in Section 2(zj) as under:

> *"(zj) "Project" means the real estate project as defined in clause (zn);"*

Section 2(zn) defines the real estate project as under:-

> *"(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or [apartments], as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;"*

30. The definitions reproduced above will cover all the projects where the development of a building or the land into plots is carried out for the purpose of sale of the said apartment or the plot or the building. There is no classification of registered or unregistered projects in the definition of the real estate projects.

37. In the light of the above-mentioned reasons the authority is of the view that the objection of the respondent stands rejected. The project is registrable under section 3 of the Act and the authority has complete jurisdiction to adjudicate upon any dispute related to the subject project.

G. Findings on the relief sought by the complainants.

I. **Delay possession charges:** To direct the respondent to give the delayed possession interest to the complainants.

38. In the present complaint, the complainants intend to continue with the project and are 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."*

39. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 29.10.2010, provides for handing over possession and the same is reproduced below:

> **13. Possession and Holding charges**
>
> *"**13.3** Subject to Force Majeure, as defined herein and further subject to the Allottees having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottees having complied with all formalities or documentation as prescribed by the Company, the company proposes to offer the possession of the said apartment to the allottees within a period of 36 months from the date of approval of the Building plans and/or fulfilment of the preconditions imposed thereunder ("**Commitment Period**"). The Allottees further agrees and understands that the company shall additionally be entitled to a period of 180 days ("**Grace Period**"), after the expiry of the said Commitment Period to allow for unforeseen delays in obtaining the occupation certificate etc., from the DTCP under the Act, in respect of the IREO- Victory Valley Project.*

40. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder(s)/promoter(s) and buyer(s)/allottee(s) are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder(s) and buyer(s) in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoter(s)/developer(s) to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

41. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession

has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in 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 apartment buyer's 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 his 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.

42. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 36 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 180 days grace period for unforeseen delays in obtaining the occupation certificate etc. from the DTCP under the Act.

43. Further, in the present case it is submitted by the respondent promoter that the due date of possession should be calculated from the date of fire scheme approval which was obtained on 28.10.2013, as it is the last of the statutory approvals which forms a part of the preconditions. The authority in the present case observed that, the respondent has not kept the reasonable balance between his own rights and the rights of the complainants/allottees. The respondent has acted in a pre-determined and preordained manner. The respondent has acted in a highly discriminatory and arbitrary manner. The unit in question was booked by the complainants on 27.09.2010 and the apartment buyer's agreement was executed between the respondent and the complainants on 29.10.2010. The date of approval of building plan was 29.11.2010. It will lead to a logical conclusion that the respondent would have certainly started the construction of the project. On a bare reading of the clause 13.3 of the agreement reproduced above it becomes clear that the possession in the present case is linked to the "fulfilment of the preconditions" which is so vague and ambiguous in itself. Nowhere in the agreement it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due date of possession is subjected to in the said possession clause. If the said possession clause is read in entirety the time period of handing over possession is only a tentative period for completion of the construction of the flat

in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the "fulfilment of the preconditions" has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject apartment. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and totally against the interests of the allottees must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of possession of the unit in question to the complainants.

44. **Admissibility of grace period:** The respondent promoter had proposed to hand over the possession of the apartment within 36 months from the date of sanction of building plan and/ or fulfilment of the preconditions imposed thereunder which comes out to be 29.11.2013. The respondent promoter has sought further extension for a period of 180 days after the expiry of 36 months for unforeseen delays in obtaining the occupation certificate etc. from the DTCP under the act, in

respect of the said project. As a matter of fact, there is no document that has been placed on record which shows that the promoter has applied for occupation certificate within the time limit prescribed by the promoter (i.e., on or before 29.11.2013) in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage. The same view has been upheld by the Hon'ble Haryana Real Estate Appellate Tribunal in appeal nos. 52 & 64 of 2018 case titled as ***Emaar MGF Land Ltd. VS Simmi Sikka*** case and observed as under: -

> *68. As per the above provisions in the Buyer's Agreement, the possession of Retail Spaces was proposed to be handed over to the allottees within 30 months of the execution of the agreement. Clause 16(a)(ii) of the agreement further provides that there was a grace period of 120 days over and above the aforesaid period for applying and obtaining the necessary approvals in regard to the commercial projects. The Buyer's Agreement has been executed on 09.05.2014. The period of 30 months expired on 09.11.2016. But there is no material on record that during this period, the promoter had applied to any authority for obtaining the necessary approvals with respect to this project. The promoter had moved the application for issuance of occupancy certificate only on 22.05.2017 when the period of 30 months had already expired. So, the promoter cannot claim the benefit of grace period of 120 days. Consequently, the learned Authority has rightly determined the due date of possession.*

45. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18% p.a. however, 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.*

46. 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** 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."

47. 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 09.07.2021 is 7.30% per annum. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e.,9.30 % per annum.

48. 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;"

49. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% per annum by the respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.

50. 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 28.09.2017. The respondent offered the possession of the unit in question to the complainant only on 24.10.2017, 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 he has 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., 29.11.2013 till the expiry of 2 months from the date of offer of possession (24.10.2017) which comes out to be 24.12.2017.

51. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of apartment buyer's agreement executed between the parties on 29.10.2010, the possession of the booked unit was to be delivered within 36 months from the date of approval of building plan (29.11.2010) which comes out to be 29.11.2013 along with grace period of 180 days which is not allowed in the present case. Accordingly, non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by the complainants to the respondent till offer of possession of the booked unit i.e., 24.10.2017 plus two months which comes out to be 24.12.2017 as per the provisions of section 18(1) of the Act read with Rule 15 of the rules.

H. Directions of the authority: -

52. Hence, the authority hereby passes this order and issue 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 sec 34(f) of the Act:-

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., 29.11.2013 till the offer of possession i.e., 24.10.2017 plus two months which comes out to be 24.12.2017.

ii. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order.

iii. The respondent shall not charge anything from the complainants which is not part of the buyer's agreement.

53. Complaint stands disposed of.

54. File be consigned to the 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 15.09.2021