

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

**New Complaint no. : 269 of 2019**  
**First date of hearing: 09.09.2019**  
**Date of decision : 10.08.2021**

Shri Sachin Minocha

R/O: -The Palms 901, Tower 4, South City -I  
Sector 30, Gurgaon.

**Complainant**

**Versus**

1. M/s BPTP Limited

Regd. Office at: - M-11, Middle Circle,  
Connaught Circus, New Delhi-110001

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Vijay Kumar Goyal

**Member**  
**Member**

**APPEARANCE:**

Sh. Sushil Yadav  
Sh. Venket Rao

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. The present complaint dated 23.01.2019 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 under the provision of the Act or



the rules and regulations made there under or to the allottees 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	"Astaire Gardens", Sector 70 and 70A, Gurugram, Haryana
2.	Project area	102.2 Acres
3.	Nature of the project	Residential Plotted Colony
4.	DTCP license no.	15 of 2011 dated 07.03.2011
	License valid up to	06.03.2024
	Name of the licensee	Impartial Builders Developers Pvt Ltd and 22 others.
5.	RERA registered/not registered	<b>Not Registered</b>
6.	Unit no.	E-22-GF, Ground Floor
7.	Date of booking	25.02.2011 (Page no. 32 of reply)
8.	Unit measuring	1090 sq. ft.
9.	Date of execution of flat buyer's agreement	29.03.2012 (Page no. 15 of complaint)
10.	Date of approval of building plan	03.05.2013
11.	Due date of possession (36 months from the date of sanctioning of the building plan or execution of FBA, whichever is later)	03.05.2016 <b>[Note: - Grace Period is not allowed]</b>



	(Due date has been calculated from sanction of building plan i.e., 03.05.2013)	
12.	Revised super area as per offer of possession	1149 sq. ft (Page no. 88 of reply)
13.	Total consideration	Rs. 91,95,880.45/- (As per ledger account on page no. 54 of complaint)
14.	Total amount paid by the complainant	Rs. 86,43,857.48/- (As per ledger account on page no. 54 of complaint)
15.	Offer of Possession	08.11.2017 (Page no. 55 of complaint)
16.	Occupation Certificate	19.09.2017 (Page no. 87 of reply)
17.	Delay in Handing over the possession till offer of possession i.e., 08.11.2017+ 2 months i.e., 12.01.2018	1 year 8 months 5 days.

**B. Facts of the complaint**

The complainant has submitted as under: -

3. That the respondent gave advertisement in various leading newspapers about their forthcoming project named "Astaire Gardens", sector-70A, Gurgaon promising various advantages, like world class amenities and timely completion/execution of the project etc. Relying on the promise and undertakings given by the respondent in the advertisements the complainant, booked an apartment/flat measuring ground floor 1149 sq. ft. in the aforesaid project of the respondent for total sale



consideration is Rs.82,80,564/- which includes BSP, car parking, IFMS, club membership, PLC etc.

4. That the complainant made payment of Rs. 86,43,616/- to the respondent vide different cheques on different dates, the details of which are placed on record.
5. That as per flat buyer's agreement the respondent had allotted a unit/flat bearing No. E-22 GF having super area of 1149 sq. ft. to the complainant. That as per clause 5.1 of the agreement, the respondent had agreed to deliver the possession of the flat within 36 months from the date of signing of the agreement or sanctioning of building plan whichever is later with an extended period of six months.
6. That the complainant regularly visited the site but was surprised to see that construction work was not in progress and no one was present at the site to address the queries of the complainant. It appears that respondent has played fraud upon the complainant. The only intention of the respondent was to take payments for the floor without completing the work and handing over the possession on time. The respondent mala-fide and dishonest motives and intention cheated and defrauded the complainant. That despite receiving of 95% approximately payments on time for all the demands raised by the respondent for the said unit and despite repeated requests and reminders over phone calls and personal visits of the complainant, the respondent have failed to deliver the possession of the allotted Floor to the complainant within stipulated period.



7. That due to this omission on the part of the respondent the complainant has been suffering from disruption on his living arrangement, mental torture, and agony and continues to incur severe financial losses. This could have been avoided if the respondent had given possession of the said unit on time.
8. That as per clause 6 of the agreement it was agreed by the respondent that in case of any delay, the respondent shall pay to the complainant, a compensation Rs.30/- per sq. ft. per month of the super area of the floor. It is, however, pertinent to mention here that a clause of compensation at such a nominal rate of Rs. 30/- per sq. ft per month for the period of delay is unjust and the respondent has exploited the complainant by not providing the possession of the flat even after a delay from the agreed possession plan. The respondent cannot escape the liability merely by mentioning a compensation clause in the agreement. It could be seen here that the respondent has incorporated the clause in one sided buyer's agreement and offered to pay a sum of Rs.30/- per sq. ft for every month of delay. If calculated the amount in terms of financial charges it comes to approximately @2% per annum rate of interest whereas the respondent charges 18 % per annum interest on delayed payment.
9. That on the ground of parity and equity the respondent also be subjected to pay the same rate of interest hence the respondent is liable to pay interest on the amount paid by the complainant from the promise date of possession till the flat is delivered to the complainant. The respondent has sent an offer



of possession letter dated 08.11.2017, but when the complainant visited the site, he noticed the project is not live able, hazardous, and incomplete even the basic infrastructure, landscaping, amenities are not in place.

10. That the complainant had requested the respondent several times on making telephonic calls and personally visiting the offices of the respondent to deliver possession of the flat in question along with prescribed interest on the amount deposited by the complainant, but the respondent has flatly refused to do so. Thus, the respondent in a pre-planned manner defrauded the complainant with his hard-earned huge amount of money and wrongfully gains himself and caused wrongful loss to the complainant.

**C. Relief sought by the complainant.**

11. The complainant had sought following relief:
  - Direct the respondent to handover the possession along with prescribed interest per annum from the date of booking of the flat in question.
12. 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 by the respondent.**

13. That the respondent provided delay compensation to the complainant to the tune of Rs. 3,23,770/- in form of discount of Rs.130/- per sq. ft. on the final area of the unit.

14. That the present complaint is not maintainable as there is no cause of action to file the present complaint. It is stated that the complainant by way of present Complaint is disputing the delivery of possession of the said unit by the respondent. It is stated that the demands raised upon the complainant are fair, legal, justified and are in consonance with the duly executed terms of the flat buyer's agreement and terms and conditions for application for allotment. It is a settled preposition of law that the terms of an agreement are binding on the parties. Thus, by filing the present complaint, the complainant cannot run away from the liability of paying all the legitimate charges as raised by the respondent before the possession can be actually handed over to complainant.
15. It is submitted that the complainant has approached this hon'ble authority with unclean hands i.e., by concealing and misrepresenting facts material to the present purported complaint. That the Hon'ble Supreme Court in a plethora of cases has held that anyone approaching court must come with clean hands as any concealment/misrepresentation of facts amount to fraud not only on the respondent but also on the court and as such, the complaint warrants dismissal without any further adjudication. In this regard, reference may be made to the following:



- That the complainant has concealed the respondent has completed the construction of the unit in question and offered possession of the said unit vide letter dated 08.11.2017 to the complainant. The complainant has also made the payment regarding the same against which receipt dated 08.12.2017 was issued by the respondent. The complainant rather than fulfilling all the requirements as per the offer of possession and proceeding with taking the physical possession of the unit, has filed the present complaint under reply in order to create prejudice against the respondent and to unlawfully gain at the expense of the respondent.
- That with the motive to encourage the complainant to make payment of the dues within the stipulated time, the respondent also gave additional incentive in the form of timely payment discount (TPD) to the complainant and in fact, till date, the complainant has availed TPD of Rs. 206508.65/- which was additional credit/discount granted by the respondent.
- The complainant further concealed the fact with respect to default in making timely payments of instalments against which demands, and reminders were raised vide letters dated 21/02/2012 and 11/04/2017 because of which interest accrued against the allotment.
- The complainant has misrepresented that the respondent was supposed to deliver the possession of



the unit in question by September 2015 as per the said agreement. In this context, it is submitted that the complainant has indulged in reading the terms and conditions of the agreement in a piecemeal manner, however, it should be read as a whole. That subject to force majeure circumstances and subject to purchaser having complied with all its obligations and not being in default under any part of the said agreement including but not limited to the timely payments, the respondent had proposed to hand over the possession of the said unit in question within 36 months from the date of sanctioning of the building plan or execution of FBA, whichever is later (commitment period), along with additional 180 days grace period after the expiry of the commitment period. That while the FBA was executed on 29.03.2012, the building plan of the unit in question was sanctioned on 03.05.2013. Hence, it is the date of building plan sanction which is relevant for calculating the proposed timelines for possession. It is pertinent to mention here that the project "Astaire Gardens" has been marred with serious defaults in timely payment of instalments by majority of customers including the complainant as already detailed above, due to which, on the one hand, the respondent had to encourage additional incentives like TPD while on the other hand, delays in payment caused major setback to the development works. Hence, the

proposed timelines for possession stood diluted. However, the unit in question is ready; the respondent has already obtained occupation certificate (OC) from the Competent Authority and offered possession thereof to the complainant.

- The complainant has also concealed that the respondent regularly updated the complainant herein, with regard to the construction status of the project. It is reiterated that the unit is ready, and OC had already been obtained from the competent authority. That the construction work and the developmental works along with all the amenities at the project site of respondent has been completed, to the extent of some minor constructions will be done as soon as the balance dues are cleared.
- The complainant has misrepresented that the respondent has used their position of strength in dictating open one-sided terms. It has also been misrepresented that the respondent has imposed highly arbitrary, unfair and unreasonable conditions on the complainant which had serious adverse effects and ramifications on his rights. It has been further misrepresented by the complainant that the complainant had no occasion to dispute or discuss the clauses of the agreement or any dispute thereof would have resulted in the rejection of allotment and the forfeiture of the amount other than the earnest money.

It has been further misrepresented that the complainant had no choice but to accept the unfair and abusive terms of the agreement. In this context, it was submitted that the complainant was well aware of the terms and conditions of the application for allotment before entering into the transaction. The respondent issued 2 copies of the agreement under the cover letter dated 29.05.2012, which broadly reiterated the terms and conditions of the application for allotment. No issue/ concern as sought to be raised in the complaint under reply were raised by the complainant at the stage of executing the agreement. After more than 5 years of having executed the agreement, the complainant be estopped from raising such frivolous issues both by conduct as well as limitation when the said FBA was executed by the complainant after spending considerable time reading over it, understanding it and then executing it considering the same to be a prudent commercial decision.

- That the respondent submitted that the complainant misleads the Ld. Authority on the pretext that the amount deposited by the complainant is more than 95% of the originally agreed cost as alleged. It is further stated that all the charges as demanded by the respondent are legitimate charges, which the complainant himself agreed to pay to the respondent. That the complainant by filing the complaint cannot

run away from the contractual liability of making the payment of all the legitimate charges as demanded and as agreed upon in the FBA. The respondent has complied with all the obligations as undertaken and it is the complainant who was in the utter breach of the agreement is running away from his part of the obligations undertaken by him to make the timely payment of the instalments/ demands.

16. That the complaint under reply was also liable to be dismissed and the matter is required to be referred to arbitrator as agreed between the parties vide clause 33 of the floor buyer's agreement.
17. In the light of the above, it is submitted that the relationship between the complainant and the respondent was guided by the duly executed floor buyer's agreement (hereinafter referred to as "FBA") which contains arbitration clause and in view of the amendment in Arbitration and Conciliation Act 1996 and more particularly, amendments made in Section 8 of the Arbitration and Conciliation Act 1996, the present disputes raised by the complainant are to be referred to arbitration.
18. The complainant has alleged that the project was to be delivered by September 2015 including grace period but the respondent has failed to handover possession of the unit. It is submitted that the allegations raised are baseless and false. In this context, the following are noteworthy-
  - The complainant approached the respondent in February 2011 through a broker for booking a unit

tentatively admeasuring 1090 sq. ft. and submitted a duly signed booking application along with the booking amount of Rs. 6,00,000/-.

- The parties vide clause 5 of the FBA dated 29.05.2012, duly agreed that subject to force majeure and compliance by the complainant of all the terms and conditions of the FBA, the OPs proposed to hand over possession of the flat to the complainant within 36 months from the date of sanction of the building plans or execution of the FBA, whichever is later along with a further grace period of 180 days. The remedy in case of delay in offering possession of the unit was also agreed to between the parties as also extension of time for offering possession of the floors.
- In terms of clause 5.1, the possession for the unit in question was to be handed over within 36 months from date of sanctioning of the Building Plans or execution of FBA, whichever is later along with 180 days of grace period, provided there are no defaults in making timely payments. As detailed above, it is the date of building plan sanction, which is later of the two and hence, the period of 36 months started from 03.05.2013. Further, the respondent was also entitled to a grace period of further 6 months.
- That the project of the respondent has been marred with serious defaults by its various customers in

making timely payments, hence the possession timelines were diluted.

- It is reiterated that the construction of the unit in question is complete, and the respondent have already obtained OC from the competent authority and offered possession thereto to the complainant. It is the complainant who has defaulted in clearing the dues along with submission of all necessary documents required by the respondent for registering of the conveyance/sale deed despite receipt of reminder for the same from the respondent. Thus, the contention raised by the complainant regarding delay in offering possession is baseless and misleading. Further, since the complainant is an investor and does not wish to take possession as the real estate market is down and there are no sales in secondary market, therefore he has initiated the present frivolous litigation.
- That the complaint is further untenable in view of the exaggerated claim of interest @18% p.a. It is submitted that without prejudice to the fact that the Complainant carefully read, understood, agreed and accepted the terms and conditions of the booking application form, which were reiterated in the floor buyer's agreement, pertaining to interest payable by the complainant and other buyers in case of delay in payment and penalty payable by the respondent in case of delay in possession, and after careful deliberation, signed the

same. The complainant is estopped from raising any issues alleging unfair or inequitable terms. It is further reiterated that the parties had clearly agreed vide clause 6 of the agreement that the purchasers shall not be entitled to any other compensation for Direct or Indirect Losses, Interest etc. for delay in handing over the possession. However, in utter disregard of the agreed terms, the complainant has indulged in seeking exaggerated compensation. The complainant cannot be thus allowed to seek variation of the agreed terms by overreaching the terms of duly executed agreement by means of filing the present complaint.

19. That the complainant has indulged in vexatious and speculative litigation and has claimed exorbitant compensation from the opposite party which is flagrant abuse of the process of law and thus, the complaint is otherwise liable to be dismissed.

**F. Jurisdiction of the authority**

**F. I Territorial jurisdiction**

20. 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.

## **F. II Subject matter jurisdiction**

21. 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 complainant 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.***

## **G. Findings on the objections raised by the respondent.**

### **G. I Objection regarding complainant is in breach of agreement for non-invocation of arbitration.**

22. The respondent had raised an objection that the complainant has not invoked 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:

#### ***"33. Dispute Resolution.***

*All or any dispute arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be adjudicated upon and settled through arbitration by a sole arbitrator. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto for the time being in force. The Arbitration proceedings shall be held at an appropriate location at New Delhi by a sole arbitrator who shall be appointed by the Managing Director of the Seller and whose decision shall be final and binding upon the parties.*





*The Purchaser(s) shall not raise any objection on the appointment of sole arbitrator by the Managing Director of the Seller/Confirming Party."*

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.
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 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."*

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

**G. II                      Objection regarding untimely payments done by the complainant.**

27. The respondent has contended that the complainant has made defaults in making payments as a result thereof, the respondent had to issue reminder letters dated 21.02.2012 and 11.04.2017. The counsel for the respondent stressed upon clause 12.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

*"12. TIMELY PAYMENT ESSENCE IS THE ESSENCE OF THIS AGREEMENT, TERMINATION, AND FORFEITURE"*

*12.1 Without prejudice to the rights of the Seller/Confirming Party' as per the terms of the Agreement, the Seller/Confirming Party may at its sole discretion waive the breach by the Purchaser(s) in not making timely payments as per the payment plan as opted by the Purchaser(s) on such terms, conditions and charges as may be considered appropriate by the Seller/Confirming Party including but not limited to the acceptance of the due amounts along with interest @ 18% p.a. The decision of the Seller/Confirming Party in this regard shall be final and binding upon the Parties.*

*12.2 If the Purchaser(s) intends to cancel / withdraw / surrender the allotment of its own accord, for any reasons whatsoever with or without prior approval of the Seller / Confirming Party, then in that event the Seller / Confirming Party shall be entitled to forfeit the Earnest Money along with such other charges of non-refundable nature including but not limited to the interest amount (whether already paid or payable on the delay in making timely payments), Incentive and brokerage charges paid by the Seller/Confirming Party to the broker in case the booking is done through a broker and refund will be made within (120) One Hundred Twenty Days from the date of full realization of the sale price after the sale of the Floor by the Seller/Confirming Party to any third party*

28. At the outset it is relevant to comment on the said clause of the agreement i.e., "12. TIMELY PAYMENT IS THE ESSENCE OF THIS AGREEMENT, TERMINATION AND FORFEITURE" wherein the payments to be made by the complainant have been



subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainant being in default in making timely payments, the respondent has not exercised his discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 12.1 of the flat buyer's agreement whereby the complainant shall be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondent has charged delay payment interest as per clause 12.1 of the buyer's agreement and has not terminated the agreement in terms of clause 12.2 of the buyer's agreement. In other words, the respondent has already charged penalized interest from the complainant on account of delay in making payments as per the payment schedule. However, after the enactment of the RERA Act, the position has changed. 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. Therefore, interest on the delay payments from the



complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent which is the same as is being granted to the complainant in case of delay possession charges.

## H. Findings on the relief sought by the complainant.

### H. I Delay possession charges

- **Relief sought by the complainant:** Direct the respondent to handover the possession along with prescribed interest per annum from the date of booking of the flat in question.

29. In the present complaint, the complainant intends 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."*

30. Clause 5.1 of the flat buyer agreement provides time period for handing over of possession and the same is reproduced below:

#### **"5.1. POSSESSION**

*Subject to Force Majeure, as defined in clause 14 and further subject to the Purchaser(s) having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this Agreement including but not limited to the timely payment of each and every instalment of the total sale consideration*



*including DC, Stamp Duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the physical possession of the said unit to the Purchaser(s) within a period of 36 months from the date of sanctioning of the building plan or execution of Flat Buyers Agreement, whichever is later. ("Committed Period"). The purchaser(s) further agrees and understands that the seller/confirming party shall additionally be entitled to a period of 180 days ("Grace Period") after the expiry of the said commitment period to allow for filling and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony.*

31. At the outset it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provisions of these agreements 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'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.

32. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 36 months from the date of sanctioning of the building plan or execution of flat buyer's agreement, whichever is later. In the present complaint, the buyer's agreement was executed on 29.03.2012 and the building plans were sanctioned on 03.05.2013. Therefore, the due date of handing over possession is calculated from the sanction of building plans which comes out to be 03.05.2016. It is further provided in agreement that promoter shall be entitled to a grace period of 180 days for pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the 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 03.05.2016). 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.*

**33. Admissibility of delay possession charges at prescribed**

**rate of interest:** The complainant is seeking delay possession at the prescribed rate. 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.*

34. The legislature in its wisdom in the subordinate legislation under 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."*

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., 10.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
36. **Rate of interest to be paid by complainant for delay in making payments:** 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 the complainant in case of delayed possession charges.
38. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, 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 5.1 of the agreement executed between the parties on 29.03.2012, and the building plans were sanctioned on 03.05.2013. Therefore, the due date of handing over possession is calculated from the sanction of building plans and the possession of the subject apartment was to be delivered within stipulated time i.e., by 03.05.2016 As far as grace period is concerned, the same is disallowed for

the reasons quoted above. Therefore, the due date of handing over possession is 03.05.2016. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the 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 the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 03.05.2016 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with Rule 15 of the rules.

**I. Directions of the authority**

39. 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 interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 03.05.2016 till 08.11.2017 i.e., date of offer of possession + 2 months i.e., 08.01.2018.
- ii. The arrears of such interest accrued from 03.05.2016 till 08.01.2018 shall be paid by the promoter to the allottee

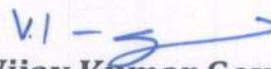
within a period of 90 days from date of this order as per Rule 16(2) of the rules.

- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the 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 delayed possession charges as per section 2(za) of the Act.
- v. The respondent shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

40. Complaint stands disposed of.

41. File be consigned to registry.

  
(Samir Kumar)  
Member

  
(Vijay Kumar Goyal)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 10.08.2021**