

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

**Complaint no. : 385 of 2019**  
**First date of hearing: 22.10.2019**  
**Date of decision : 10.08.2021**

1.Kirit Mugatrai Joshipura  
2.Anjani Joshipura  
Both R/O: - 4033, Sector D, Vasant Kunj, **Complainants**  
Pocket-4, New Delhi-110001

**Versus**

1.M/s BPTP Limited  
2.M/s Countrywide Promoters Pvt. Ltd  
Both having its regd. office at: - M-11, **Respondents**  
Middle Circle, Connaught Circus, New  
Delhi-110001

**CORAM:**

Shri Samir Kumar  
Shri Vijay Kumar Goyal

**Member**  
**Member**

**APPEARANCE:**

Sh. Pawan Kumar Ray Advocate for the complainants  
Sh. Venket Rao Advocate for the respondents

**ORDER**

1. The present complaint dated 28.01.2019 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.	Name of the project	'Park Terra' Sector-37D, Gurugram
2.	Nature of the project	Group Housing Towers
3.	Project Area	19.74 acres
4.	DTCP license no.	83 of 2008 dated 05.04.2008 valid up to 04.04.2025 94 of 2011 dated 24.10.2011 valid up to 23.10.2019
5.	Name of the license holder for license no. 83 of 2008	Super Belts Pvt. Ltd and 4 others
6.	Name of the license holder for license no. 94 of 2011	Countrywide Promoters Pvt. Ltd and 6 others
7.	HARERA registration no.	299 of 2017 Registered for 10.23 acres



8.	Registration certificate	Dated 13.10.2017 valid up to 12.10.2020
9.	Unit no.	T23-501, 5 <sup>th</sup> floor, T-23 (Page no. 35 of the complaint)
10.	Unit measuring	1,691 sq. ft (Page no. 35 of the complaint)
11.	Allotment letter	06.12.2012 (Page no. 41 of the reply)
12.	Date of execution of flat buyer's agreement	22.04.2014 (Page no. 30 of the complaint)
13.	Payment plan	Subvention Plan (Page no. 41 of the reply)
14.	Total consideration (Basic Sale Price)	Rs. 88,77,750.00/- (Page no. 35 of complaint)
15.	Total amount paid by the complainants	Rs. 98,77,069.00/- (As per payment receipts on page no. 57 to 69 of complaint and page no. 114 of reply)
16.	Date of sanction of building plan	21.09.2012
17.	Due date of delivery of possession [As per clause 5.1 read with clause 1.6 of the flat buyer's agreement i.e., 42 months from the date of sanction of the building plan or execution of agreement, whichever is later.]	22.10.2017 [Due date is calculated from the date of execution of the agreement as it is later from the date of sanctioning of building plan i.e., 21.09.2012] <b>Note: - Grace Period is not allowed.</b>



18.	Occupation certificate date	Occupation certificate for this tower has not been received.
19.	Offer of possession	Not offered
20.	Delay in handing over possession till the date of decision i.e., 10.08.2021	3 years 9 months 19 days.

**B. Facts of the complaint**

The complainants have submitted as under: -

3. That the complainants Sh. Kirit Mugatria Joshipura and Smt. Anjani Joshipura are law abiding citizens of India who are both residents of flat no. 4033, pocket-4, Vasant Knnj, Delhi and have booked a unit in the project "Terra" located at sector 37-D, Gurgaon.
4. That complainant no.1 applied for the allotment of the unit in the project of the respondents vide his application dated 21.08. 2012. That the respondents further assured the complainant of timely possession of the unit as per the promises made by them. That relying on such assurances of the respondents the complainant proceeded with the allotment by depositing the booking amount with the respondents.
5. That the flat buyer's agreement was executed between the parties on 22.04.2014 which is after 2 years of the booking of unit T23-501 on 5<sup>th</sup> floor (Hereinafter referred as the 'said unit') having the super area of 1691 sq. ft.



6. That as per the above-mentioned agreement the possession was to be granted within 42 months of the execution of the FBA, that is, the possession was to be handed over by 22.10.2017 but the complainants till date have not received the possession of the same and have preferred the present complaint before the hon'ble authority for the grant of immediate possession along with the compensation for delay cause herein.
7. That no possession has been handed over to the complainant till date nor the stage of construction of the project has been intimated to the complainant which has constrained them to file the present complaint.
8. That the complainant no.1 had further requested the respondents to add the complainant no. 2's name as the allottee in the present allotment. The request of the complainants was granted by the respondents on 07.06.2017 and changes in the records of the respondents and endorsement of the complainant no.2's name in the agreement was done by the respondents.
9. That the complainants have diligently been paying the instalments as per demands raised by the respondents and till date have made a payment of Rs. 93,79,816.50/-
10. That the respondents have further abused their dominant position in the agreement by levying an exorbitant rate of interest @18% on the delayed payments made by the

complainants, whereas the respondents have comparatively limited their own liability of paying compensation on delayed possession. That the respondents are only liable to pay a mere compensation of @Rs. 5 per sq. ft. to the complainants in case of delay in possession.

11. That the said clause is also in clear contravention of the provisions of The Real Estate (Regulation and Development) Act, 2016 which has clarified the position that the interest payable by the promoter in case of default shall be the same as the interest payable by the allottee in case of any default made by them.
12. That the complainants cannot be expected to endlessly wait for the possession. This principle has been settled by the Hon'ble Apex Court in the case of the *Fortune Infrastructure and Ors. v/s Trevor D'limo and Ors.* and in the present case it is essential that the authority direct the respondents to immediately deliver the possession of the said unit to the complainants along with the necessary and just compensation for delay @18%.

**C. Relief sought by the complainants:**

13. The complainants have sought following relief(s):
  - (i) Direct the respondents to grant immediate possession of the unit bearing no. T23-501 to the complainants along with compensation for delay @18% or at a prescribed rate of interest as deemed to be fit by the hon'ble authority.

14. On the date of hearing, the authority explained to the respondents/promoters 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 respondents.**

15. That the respondents have diligently applied for registration of the project in question i.e., "Terra" located at sector-37D, Gurugram including tower-T-20 to T-25 & EWS before this authority and accordingly, registration certificate no. 299 of 2017 dated 13.10.2017 to 12.10.2020 was issued by the hon'ble authority.

16. The complainants have approached this hon'ble authority for with unclean hands, i.e., by concealing and misrepresenting facts material to the present purported complaint. It is further submitted that the Hon'ble Apex Court in plethora of decisions had laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

17. Reference may be made to the following instances which establish concealment/suppression/ misrepresentation on the part of the complainants:

- The complainants have misrepresented the fact that being lured by representations made by the respondents, the complainant no. 1 applied for allotment of a unit in the project 'Terra'. That the complainant no. 1 after conducting due diligence and out of his own volition approached the respondents through his broker and desire to booking/allotment of unit in the project 'Terra'. On being completely well within knowledge of the terms and conditions, submitted booking form after affixing his signatures and paid Rs.6,00,000/- towards registration amount.
- That the complainant no. 1 has started default in making timely payment of the demand raised by the respondents as per agreed payment plan. The complainants further have also concealed reminder notices served for payment of the outstanding amount.
- The complainants have further concealed that they were given an inaugural discount of Rs. 750/- per sq. ft. on the basic sale price (BSP) thus the net BSP charged from the complainants is Rs. 5250/- per sq. ft.
- The complainants have further concealed from this authority that the respondents vide demand letters as



well as numerous emails have shared and kept updated the complainants in regard to stages and progress in the development and construction of the project as well as the unit in question. The complainants have also concealed from this authority that as a goodwill gesture the respondents have granted a special credit discount amounting to Rs. 51,306/- towards unit in question.

18. That the relief(s) sought by the complainants are unjustified, baseless and beyond the scope/ambit of the FBA duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is further submitted that the complainants have entered into the said FBA with the respondents with open eyes and is bound by the same. It is further submitted that the relief(s) sought by the complainants travel way beyond the four walls of the FBA duly executed between the parties. It is submitted that the complainants while entering into the FBA has accepted and is bound by each and every clause of the said FBA, including clause-6.1 which provides for delayed penalty in case of delay in delivery of possession of the said unit by the respondents.
19. That the detailed relief claimed by the complainants goes beyond the jurisdiction of this hon'ble authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainants.

20. It is further submitted that, the above submission implies that while entering into the FBA, the complainants had the knowledge that there may arise a situation whereby the possession could not be granted to the complainants as per the commitment period and in order to protect and/or safeguard the interest of the complainants, the respondents have provided reasonable remedy under clause-6.1, and the complainants having accepted to the same in totality, cannot claim anything beyond what has been reduced to writing between the parties.
21. In this regard, reference may be made to section-74 of the Indian Contracts Act, 1872, which clearly spells out the law regarding sanctity and binding nature of the ascertained amount of compensation provided in the FBA and further specifies that any party is not entitled to anything beyond the same. Therefore, the complainants, if at all, is only entitled to compensation under clause-6.1 of the FBA.
22. That having agreed to the above, at the stage of entering the FBA, and raising vague allegations and seeking baseless reliefs beyond the ambit of the FBA, the complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the '*Doctrine of Aprobate & Reprobate*'. Therefore, in the light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this authority.

23. That agreements that were executed prior to the registration of the project under RERA shall be binding on the parties and cannot be re-opened. Section 13 of the Real Estate (Regulation and Development) Act, 2016 ("Act") is extracted herein below for ready reference:

*"13. (1) A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.*

*(2) The agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed."*

24. That as contemplated in section 13 of the Act, subsequent to the commencement of the rules, a promoter has to enter into an agreement for sale with the allottees and get the same registered prior to receipt of more than 10 percent of the cost of the plot, or building. Form of such agreement for sale has to be prescribed by the relevant state government and such agreement for sale shall specify amongst various other things,

the particulars of development, specifications, charges, possession timeline, provisions of default etc.

25. By a notification in the Gazette of India dated 19.04.2017, the central government, in terms of section 1 (3) of the Act prescribed 01.05.2017 as the date on which the operative part of the Act became applicable. In terms of the Act, the government of Haryana, under the provisions of section 84 of the Act notified the rules on 28.07.2017.
26. In terms of the rules, the Government prescribed the agreement for sale and specified the same in **Annexure A** of the rule 8(1) of the rules which reads as under:

*"8 (1) The agreement for sale shall be as per Annexure 'A'.  
(2) Any application letter, allotment letter or any other document signed by the allottees, in respect of the apartment, plot or building, prior to the execution and registration of the agreement for sale for such apartment, plot or building, as the case may be, shall not be construed to limit rights and interests of the allottees under the agreement for the sale or under the Act or the rules for the regulations made thereunder."*

27. That rule 8 (1) clearly specifies that the form of the "agreement for sale" is prescribed in Annexure 'A' to the rules and in terms of section 13 of the Act the promoter is obligated to register the agreement for sale upon receipt of any amount in excess of 10 percent of the cost of the plot. Rule 8(2) provides that any documents such as allotment letter or any other document executed post registration of the project with the RERA between the promoter and the allottee, which are contrary to



the form of the agreement for sale, Act or rules, the contents of the form of the agreement for sale, Act or rules shall prevail.

28. That the rule 8 deals with documents executed by and between promoter and allottee after registration of the project by the promoter, however with respect to the documents including agreement for sale/ buyers agreement/plot buyers agreement executed prior to the registration of the project which falls within the definition of "Ongoing Projects" explained herein below and where the promoter has already collected an amount in excess of 10 percent of the total price rule 8 is not applicable.
29. That the aforesaid view stated in the preceding para is clarified in the rules published by the state of Haryana, the explanation given at the end of the prescribed agreement for sale in Annexure 'A' of the rules, it has been clarified that the developer shall disclose the existing agreement for sale in respect of ongoing project and further that such disclosure shall not affect the validity of such existing agreement executed with its customers. The explanation is extracted herein below for ready reference:

*"Explanation: (a) The promoter shall disclose the existing Agreement for Sale entered between Promoter and the Allottee in respect of ongoing project along with the application for registration of such ongoing project. However, such disclosure shall not affect the validity of such existing agreement (s) for sale between Promoter and Allottee in respect of apartment, building or plot, as the case may be, executed prior to the stipulated date of due registration under Section 3(1) of the Act."*

30. Thus, what has not been saved under the Act and rules are sales where mere booking has been made and no legal and valid contract has been executed and is subsisting.
31. The parties had agreed under the fiat buyer's agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainants have raised a dispute but did not take any steps to invoke arbitration. Hence, it is in breach of the fiat buyer's agreement between the parties. The allegations made requires proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.
32. That it is well known fact that the projected timelines for possession are based on the cash flow. It was not in the contemplation of the respondents that the allottees would hugely default in making payments and hence, cause cash flow crunch in the project.
33. That vide clause 4.2 of the application the booking form, which was later reiterated vide clause 6.1 of the fiat buyer's agreement, it was duly agreed between the parties that subject to the conditions mentioned therein, in case the respondents fails to hand over possession within 42 months from the date of sanctioning of the building plans or execution of flat buyer's agreement, whichever is later along with 180 days of grace period, the respondents shall be liable to pay to the complainants compensation calculated @ Rs.5/- per sq. ft. for

every month of delay. The parties had agreed the penalty, in case of delay in offering possession prior to entering the transaction. Prior to entering the transaction, the parties had further agreed vide clause 6.1 of the flat buyer's agreement that in case the complainants fail or default in making timely payment of any of the instalments, then the complainants would not be eligible for delay compensation. Thus, the understanding between the parties regarding compensation for delay in offering of possession had been agreed and accepted prior to entering the transaction.

**E. Jurisdiction of the authority**

34. The respondents have raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E.1 Territorial jurisdiction**

35. As per notification no. 1/92/2017-TCP 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**

36. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

**F. Findings on the objections raised by the respondents.**

**F.1 Objection regarding untimely payments done by the complainants.**

37. The respondents have contended that the complainants have made defaults in making payments as a result thereof, the respondents had to issue reminder letters for payment of the outstanding amount. The counsel for the respondents stressed upon clause 7.1 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:

***"7. TIMELY PAYMENT ESSENCE OF CONTRACT.  
TERMINATION, CANCELLATION AND FORFEITURE"***

***7.1 The timely payment of each instalment of the Total Sale Consideration i.e. COP and other charges as stated herein is the essence of this transaction/Agreement. In case the Purchaser(s) neglects, omits, ignores, defaults, delays or fails, for any reason whatsoever, to pay in time any of the instalments or other amounts and charges due and payable by the Purchaser(s) as per the payment schedule opted or if the Purchaser(s) in any other way fails to perform, comply or observe any of the terms and conditions on his/her part under this Agreement or commits any breach of the undertakings and covenants contained herein, the Seller/Confirming Party may at its sole discretion be entitled to terminate this Agreement forthwith and forfeit the amount of Earnest Money and Non-Refundable Amounts and other amounts of such nature..."***



38. At the outset, it is relevant to comment on the said clause of the agreement i.e. "7. *TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE*" wherein the payments to be made by the complainants 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 favour 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 complainants being in default in making timely payments, the respondents have not exercised their discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 7.2 of the flat buyer's agreement whereby the complainants 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 respondents have charged delay payment interest as per clause 7.2 of the buyer's agreement and has not terminated the agreement in terms of clause 7.1 of the buyer's agreement. In other words, the respondents have already charged penalized interest from the complainants 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 complainants shall be charged at the prescribed rate i.e., 9.30% by the respondents which is the same as is being granted to the complainants in case of delay possession charges.

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

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

**"17. Dispute Resolution by Arbitration**

*All or any disputes arising out of or touching upon or in relation to the terms or formation of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments, modifications or re-enactment thereof for the time being in force. A Sale Arbitrator, who shall be*

*nominated by the Seller/Confirming Party's Managing Director, shall hold the arbitration proceedings at Gurgaon. The Purchaser(s) hereby confirms that he shall have no objection to such appointment and the Purchaser(s) confirms that the Purchaser(s) shall have no doubts as to the independence or impartiality of the said Arbitrator and shall not challenge the same. The arbitration proceedings shall be held in English language and decision of the Arbitrator including but not limited to costs of the proceedings/award shall be final and binding on the parties."*

40. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy the presence of arbitration clause

could not be construed to take away the jurisdiction of the authority.

41. Further, in *Aftah 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 builder 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 Appellate 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 B of the Arbitration Act."*

42. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018*** in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018 has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

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

*cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

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

**G. Findings on the relief sought by the complainants.**

**Relief sought by the complainants:** The complainants have sought following relief(s):

- (i) Direct the respondents to grant immediate possession of the unit bearing no. T23-501 to the complainants along with compensation for delay @18% or at a prescribed rate of interest as deemed to be fit by the hon'ble authority.

44. 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."***

45. Clause 5.1 read with clause 1.6 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

***"Clause 5.1- The Seller/Confirming Party proposes to offer possession of the unit to the Purchaser(s) within the Commitment period. The Seller/Confirming Party shall be additionally entitled to a Grace period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said unit.***

***Clause 1.6 "FBA" "Commitment Period" shall mean, subject to Force Majeure circumstances, intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC), stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyers Agreement, whichever is later."***

46. At the inception it is relevant to comment on the pre-set possession clause of the flat buyer's agreement wherein the possession has been subjected to innumerable terms and conditions, force majeure circumstances and innumerable

terms and conditions. The drafting of this clause is not only vague but so heavily loaded in favour of the promoter that even a single default by the allottee in fulfilling obligations, 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.

47. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 42 months from the date of sanction of the building plan or execution of flat buyer's agreement, whichever is later. The flat buyer's agreement was executed on 22.04.2014 and the building plan was approved on 21.09.2012. The flat buyer's agreement being executed later, the due date is calculated from the date of execution of flat buyer's agreement. The said period of 42 months expires on 22.10.2017. Further it was provided in the flat buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the



said unit. In other words, the respondents are claiming this grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondents/promoters had completed the said project within this span of 42 months and has not offered the possession of the said unit till the date of judgement, the promoter has not offered the possession within the time limit prescribed by the promoter in the flat huyer's agreement nor has the promoter offered the possession till date. 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.

48. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. 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.*

49. 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.
50. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (iu 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%.
51. 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;"*

52. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same as is being granted to the complainants in case of delayed possession charges.
53. 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 respondents are 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 read with clause 1.6 of the flat buyer's agreement executed between the parties on 22.04.2014, the possession of the subject apartment was to be delivered within stipulated time i.e., 22.10.2017. 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 22.10.2017. The respondents have failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents to fulfil its obligations and responsibilities as per the flat buyer's 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 1B(1) of the Act on the part of the respondents 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., 22.10.2017 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.

**H. Directions of the authority**

54. 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 respondents are 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., 22.10.2017 till the handing over of possession.
- ii. The arrears of such interest accrued from 22.10.2017 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10<sup>th</sup> of the subsequent month as per rule 16(2) of the rules.
- iii. The complainants are 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 respondents/promoters 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 respondents shall not charge anything from the complainants 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.

55. Complaint stands disposed of.

56. File be consigned to registry.

  
(Samir Kumar)  
Member

  
(Vijay Kumar Goyai)  
Member

Haryana Real Estate Regulatory Authority, Gurugram  
Dated: 10.08.2021

Judgement Uploaded on 11.10.2021