BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

New Complaint no. : 2889 of 2020
First date of hearing: 18.12.2020
Date of decision : 10.08.2021

1. Sony K. Leons
2. Helen K. Sony
Both R/O: - 122/14, Silver Oaks Apartments, DLF Phase - 1, Gurugram-122002 **Complainants**

Versus

1. M/s BPTP Limited
Regd. Office at: - M-11, Middle Circle, Connaught Circus, New Delhi-110001 **Respondent**

CORAM:
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Sh. Rishabh Jain Advocate for the complainants
Sh. Venket Rao Advocate for the respondent

ORDER

1. The present complaint dated 22.10.2020 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 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Description
1.	Project name and location	"Mansions Park Prime" at Sector-66, Gurugram.
2.	Project area	11.068 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	31 of 2008 dated 18.02.2008 and valid up to 17.02.2020
5.	Name of the licensee	Shyam and 4 others.
6.	RERA Registered or not registered.	**Not registered**
7.	Date of Booking	15.10.2010 (Vide payment receipt on page no. 80 of the reply)
8.	Date of builder buyer's agreement	23.02.2011 (Page no. 37 of the complaint)
9.	Unit no.	MA2-802, Unit 2, Tower M (Page no. 43 of the complaint)
10.	Measurement of unit	2764 sq. ft. of super area (Page no. 39 of the complaint)
11.	Revised Unit Area (As per offer of possession)	3044 sq. ft. of super area (Page no. 72 of the complaint)
11.	Payment plan	Construction linked payment plan. (Page no.68 of the complaint)

12.	Date of offer of possession	05.03.2020 (Page no. 72 of the complaint)
13.	Date of Occupation Certificate	14.02.2020 (Page no. 194 of reply)
	Note: - As per the affidavit submitted by the respondent, the OC for Tower MA2 has been received on the above-mentioned date and it was a marketing name for that tower. The sanctioned name in the OC for Tower MA2 is Tower B.	
14.	Total sale consideration	Rs. 16,038,268.92/- (vide statement of accounts on page no.200 of the reply)
15.	Amount paid by the complainants	Rs. 11,182,293.29/- (vide statement of accounts on page no. 200 of the reply)
16.	Due date of delivery of possession	15.10.2013 (As per clause 3.1 of the builder buyer's agreement with a grace period of 6 months) **Note: Grace period of 6 months is not allowed in the present case.**
17.	Delay in handing over the possession till offer of possession is made i.e., 05.03.2020+ 2 months i.e., 05.05.2020	6 Years 6 months 20 days.

B. Facts of the complaint

The complainants have submitted as under: -

3. The respondent published a very attractive brochure, highlighting the group housing colony in 'Mansions Park Prime' located at sector 66, Gurugram, Haryana. The respondent claimed to be one of the best and finest in construction and one of the leading real estate developers of the country, in order to lure prospective customers, including the original allottee to buy flats/apartments in the Project.

There are fraudulent representations, incorrect and false statements in the brochure. The complainants invite attention of this authority to section 12 of the Act, 2016. The project was launched in 2008 with the promise to deliver the possession on time and huge funds were collected over the period by the respondent. Section 12 of the Act, 2016 is reproduced as under: -

> *"Section 12. Obligations of promoter regarding veracity of the advertisement or prospectus. –*
>
> *Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:*
>
> *Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act."*

4. That the original allottee, Mr Sudesh Khanna was approached by the sales representatives of the company, who made tall claims about the project 'Mansions Park Prime' as a world class project. The original allottee was invited to the sales office and was lavishly entertained and promises were made to him that the possession of the flat would be handed over by 1st July 2013, including that of parking, horticulture, club and other common areas. The original allottee was impressed by their oral statements and representations and ultimately lured

to pay Rs.10,36,500/- as booking amount of the said flat on 30.06.2010.

5. That the original allottee further paid, as and when demanded by the respondent, a total of Rs.31,66,973/- till 15.10.2010 but the respondent did not execute the FBA. The respondent violated section 13 of the Act, 2016 by taking more than ten per centum (10%) cost of the flat before the execution of the FBA. The total cost of the flat is Rs.1,20,41,968/- including EDC and IDC while the respondent had collected a total sum of Rs.31,66,973/-, around 26% of the total cost of the flat till 15.10.2010.

6. That the FBA for the unit number MA2-802 was executed on 23.02.2011 between the original allottee and the respondent. Thereafter, the flat was bought by the complainants and the transfer in the favour of the complainants was endorsed by the respondent on 28.05.2012. The endorsement form was further confirmed and accepted by the respondent. The date of possession as per the agreement was 01.07.2013, calculated 36 months from the date of booking/registration of the flat.

7. That the complainants paid, as and when demanded by the respondent, all instalments in time and thereby paid a total of Rs.1,11,82,734/- .It was unfair, illegal, unlawful, unethical for the respondent when it had demanded the amount from the complainants without the particular stage of construction being achieved, as the completion of the flat has been delayed by more than six years and eight months which ultimately resulted in difficulties for the complainants and many such

buyers. This is also a violation of section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016.

8. That the complainants have approached the respondent and pleaded for delivery of possession of their flat as per the FBA on various occasions. The respondent did not submit any justified reply to their letters, emails, personal visits, telephone calls, seeking information about the status of the project and delivery of possession of their Flat, thereby the respondent violated section 19 of the Act, 2016.

9. That all of a sudden on 05.03.2020 the respondent issued the offer for possession wherein it raised unjustified, illegitimate, illegal and unlawful demands for the Flat, which includes; Unjustified increase in area – Rs.10,50,000/-(approx.), Cost Escalation Charges – Rs.18,65,972/-, Electrification and STP Charges – Rs.2,48,086/-, Fire Fighting and Power Backup Charges – Rs.1,52,200/-, Value Added Tax – Rs.1,14,107/-, Service Tax – Rs.2,86,840/-, Goods and Services Tax – Rs.5,25,570/-. All the aforesaid charges have accrued due to the lapses and failures of the respondent, whereas the complainants have timely complied with all the demands raised by the respondent. The respondent instead of adjusting delay possession charges in the final demand letter (Offer for Possession dated 05.03.2020) has tried to hoodwink the complainants through frivolous and vexatious demands.

10. That the respondent has stated a contradictory statement wherein it is mentioned that the construction was completed

till 27.04.2013, whereas the application for occupation certificate was filed on 17.05.2017.

11. That the respondent has tried to cover the period of delay within the meaning of force majeure, but its failure shall not be covered within the narratives of force majeure as it includes only inevitable situations which cause hindrance, whereas at present the project has been delayed due to the failures of the respondent, and not due to any circumstances beyond its control.

12. That the respondent fraudulently, unlawfully and illegally increased the super area of the flat and also demanded huge cost escalation without providing any justified explanation of such charges. The respondent superstitiously and with mala-fide intention increased the super area of the flat as it had neither informed nor sought permission from the complainants, therefore violated section 14 of Act, 2016.

13. That the complainants approached the respondent and pleaded to revoke/cancel/withdraw the amount imposed by it illegally, unlawfully and fraudulently such as amount of (a) increased area, (b) huge cost escalation charges, (c) Electrification & STP Charges, (d) Fire Fighting & Power Backup Charges, (e) Value Added Tax, Service Tax, Goods and Services Tax being charged on the flat of the complainants. The respondent did not submit any justified response to their requisitions and personal visits seeking information.

14. That the respondent has in an unfair manner siphoned of funds meant for project and utilised same for its own benefit

for no cost. That the respondent being builder, promoter, colonizer and developer, whenever in need of funds from bankers or investors ordinarily has to pay a heavy interest per annum. However, in the present scenario, the respondent utilised funds collected from the complainants and other buyers for its own good in other projects, being developed by it.

15. That the complainants do not intend to withdraw from the project. As per the obligations of the respondent/promoter under section 18 of the Act, 2016 read with Rules 15 and 16 of the rules, 2017, it has an obligation to pay interest on the delayed possession on the amount deposited by the complainants at the rate prescribed. The respondent/promoter has neglected its part of obligations by failing to offer a legitimate, rightful, lawful and legal possession of the flat in time. The complainants reserve their right to seek compensation from the promoter for which the complainants may make a separate application to the Adjudicating Officer, in case it is required.

16. That the respondent, having collected huge amount from the complainants and other such buyers, has not utilised said funds for the construction of the flat on time as promised by them at the time of booking of the flat in 2010. If the respondent had followed the payment plan in its letter and spirit, the flat would have been completed and the delay would not have occurred so, this constitutes unfair trade practice.

17. That the cause of action is recurring in nature and subsisting and has accrued finally when the respondent had not submitted any justified response to the complainants. Thus, the complaint has been filed within time with effect from accrual of the cause of action.

C. Relief sought by the complainants.

18. The complainants have filed the present complaint for seeking following reliefs. [The complainants have prayed for the relief of delayed possession charges and other reliefs including increase in area, cost escalation, etc. Now, vide application filed on 10.08.2021 during the proceedings of the court, the counsel for the complainants prayed for pursuing only the relief of delayed possession charges, possession, not to charge holding charges and including any other relief.]

(i) Direct the respondent to pay interest for every month of delay in offering the possession of the flat since 01.07.2013 to the complainants, on the amount taken from them for the sale consideration for the flat along with additional charges, at the prescribed rate as per the Act, 2016 till the respondent hands over the possession of the flat to the complainants.

(ii) Direct the respondent to hand-over the legitimate, rightful, legal, and lawful possession of the flat to the complainants, after completing the construction of the flat and common area amenities and facilities.

(iii) Direct the respondent not to charge holding charges from the complainants.

19. 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.

20. That the complainants as well as the original allottee are defaulters under section 19 (6), 19 (7) and 19 (10) of The Real Estate (Regulation and Development) Act, 2016 and not in compliance of these sections. The complainants cannot seek any relief under the provisions of The Real Estate (Regulation and Development) Act, 2016 or rules frame thereunder.

21. The respondent upon completion of the construction and upon getting the occupancy certificate from the competent authority had issued the offer of possession letter cum final demand notice. The complainants had approached the authority for the waiver of demands and to get unjustified reliefs. The delay in completion of project, if any, does not give any entitlement to the complainants to hold the due payments and seek possession of unit without making entire sale consideration. This is an arm-twisting tactic adopted by the complainants to get the possession of unit without making the due payments. Hence, a termination letter dated 14.09.2020 was issued by the respondent whereby the allotment of unit in question was

terminated due to the default in payments made by the complainants even after repeated reminders.

22. The respondent had contended that the agreements that were executed prior to implementation of RERA Act and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented flat buyer's agreement (hereinafter referred to as the "FBA") dated 23.02.2011 executed by the original allottee out of his own free will and without any undue influence or coercion which was subsequently endorsed in favour of the complainants are bound by the terms and conditions so agreed between them.

- 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 agreements executed with its customers.

23. The complainants have approached the hon'ble authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. 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 respondent but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

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

- That the complainants have concealed from this Hon'ble Authority that via offer of possession dated 05.03.2020, the respondent has, as a goodwill gesture, provided compensation amounting to Rs. 287,122/- to them. The complainants failed to pay the demand as per the offer of possession, hence, the respondents issued reminder letters dated 16.04.2020, 28.05.2020, 29.06.2020 and 10.08.2020. Even after repeated reminders, the complainants failed to pay the final demand as per the Offer of Possession. The termination letter dated 14.09.2020 was issued by the respondent whereby the allotment of unit in question was terminated due to the default in payments made by the complainants even after repeated reminders.
- That the complainants have concealed from this Hon'ble Authority that with the motive to encourage the complainants to make payment of the dues within the stipulated time, the respondent also gave additional incentive in the form of timely payment discount to the complainants and in fact, till date, the complainants have availed timely payment discount of Rs. 319,491.80/-.

- That the complainants have further concealed from authority that the respondent vide demand letters as well as numerous emails has kept updated and informed the complainants about the milestone achieved and progress in the developmental aspects of the project. The respondent vide emails has shared photographs of the project in question. It is evident to say that the respondent has always acted bonafidely towards its customers including the complainants, and thus, has always maintained a transparency in reference to the project. In addition to updating the complainants, the respondent on numerous occasions, on each and every issue/s and/or query/s upraised in respect of the unit in question has always provided steady and efficient assistance. However, notwithstanding the several efforts made by the respondent to attend to the queries of the complainants to their complete satisfaction, the complainants erroneously proceeded to file the present vexatious complaint before this authority against the respondent.

25. The parties had agreed under clause-33 of the FBA 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 dispute but did not take any steps to invoke arbitration. Hence, is in breach of the agreement between the parties.

26. Issues And Reliefs Qua VAT/ GST & Service Charges/ Maintenance & Holding Charges/ Electrification & STP, Firefighting & Power Back-Up Charges/ Super Area and Cost Escalation are beyond the agreed clauses of the agreement – Untenable and cannot be granted: -

- It was submitted that as per clause-2 of the agreement titled as "Sale Consideration and other conditions" specifically provided that in addition to Basic Sales Price (BSP), various other cost components such as Development Charges (including EDC, IDC and EEDC), Preferential Location Charges (PLC), Club Membership Charges (CMC), Car parking Charges, Power Back-up Installation Charges (PBIC), VAT, Service Tax and any fresh incidence of tax (i.e. GST), Electrification Charges (EC), Charges for installing Sewerage Treatment Plant (STP), Administrative Charges, Interest Free Maintenance Security (IFMS), etc. shall also be payable by the complainants.

a. **Demand against HVAT:**

- That the charges qua VAT or any fresh incidence of tax were duly agreed by the complainants vide clause 6 of the application form, wherein they agreed to pay VAT and all other charges as may be communicated from time to time.
- Without prejudice to the above, it was submitted that the demand qua VAT has been partly paid without any protest and demur and accordingly the receipt for the same was also issued by the respondent. It is further

submitted that the said charges have been agreed upon by the complainants right from the beginning and despite being agreed charges, the complainants are now at such belated stage are raising contentions against the said charges with a view to gain at the expenses of the respondent. HVAT being indirect tax always payable by the end user / allotee as per applicable laws.

b. **Demand qua Service Tax and GST charges:**

- It was submitted that GST being indirect tax is payable by the end user / allottee as per GST regulations. It is further submitted that vide Clause 6 of the Application Form, later reiterated vide Clause 2.1 of the duly executed FBA (reproduced herein above), it was specifically agreed to between the parties that the complainants are liable to pay statutory dues including but not limited to service tax, VAT and other tax incidence that may arise. Thus, GST which has been levied by the Government from 01.07.2017 is applicable and payable by each customer. Even otherwise, indirect taxes such as GST, HVAT etc. are pass through charges which are collected by the respondent and passed on to the Government.

c. **Demand qua Maintenance charges and Holding charges**

- Maintenance charges are being taken in advance to ensure the proper maintenance of the complex. It is further submitted that the parties had duly agreed regarding maintenance charges at the stage of entering

into the transaction vide Clause 4 of the Application Form, which understanding was reiterated vide Clause 7.4 of the duly executed FBA.

- With regard to holding charges, it is submitted that the via clause 3.4 of the duly executed FBA the complainants were aware that they shall be liable to pay holding charges if they fail to take possession of the unit within 30 days from the date of offer of possession. Clause 3.4 of the FBA is reproduced herein below:

> *"3.4 The Purchaser(s) agrees that if after receiving the Notice Of Possession from the Seller/Confirming Party, the Purchaser(s) fails, ignores or neglects to take the possession of the Flat within 30 days from the date of Notice of Possession, then notwithstanding any other provision contained herein, the Purchaser(s) shall be liable to Holding Charges and the Flat shall remain in the custody of the Seller / Confirming Party at the sole risks and costs of the Purchaser(s). The Holding Charges shall be a distinct charge in addition to the charges as defined in Clause 2.1 herein and is not related to any other charges/consideration as provided in this Agreement."*

d. <u>Demand qua Electrification & STP and Firefighting & Power back-up charges</u>

- With regard to electrification, STP charges and firefighting charges, it is submitted that the parties had agreed as per clause 2.3 of the duly executed FBA that the complainants shall be liable to pay electrification charges, cost of installing sewerage treatment plant and additional firefighting charges as may be required or as specified by the Authorities.
- Further as per clause 2.1 of the FBA electric connection charges, firefighting charges as well as power back-up

installation charges have been quantified and are payable in addition to the basic sale price.

- As per Annexure F of the Offer of Possession dated 05.03.2020, the respondent has also explained the basis of charging for the Sewage Treatment Plant.

e. **Super Area**

The relief sought by the complainants regarding super area is untenable as it has been duly agreed upon between the parties that the super area of the flat shall be determined after completion of the construction.

f. **Demand qua Cost Escalation**

- That the parties had duly agreed regarding cost escalation at the stage of entering into the transaction vide clause 35 of the application form, which understanding was reiterated vide clause 12.11 of the duly executed FBA.
- Thus, the reliefs sought by the complainants are untenable and beyond the agreed clauses of the agreement as the same was already agreed by them without any protest or demur right from the stage of booking and they now at such belated stage are raising contentions against the duly agreed clauses of the agreement with a view to create prejudice against the respondents.

27. That the proposed timelines for possession being within 36 months from the booking/registration of flat along with 180 days of grace period was subject to force majeure

circumstances, timely payments and other factors. However, the complainants have indulged in selective reading of the clauses of the FBA whereas the FBA ought to be read as a whole.

28. 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 floor. It is pertinent to point out that the said understanding had been achieved between the parties at the stage of entering into the transaction in as much as similar clauses, being clause-14 of the application form (proposed timelines for possession) and clause-15 (penalty for delay in offering possession) had been agreed upon between the parties under the terms and conditions documented in the Application Form.

29. That the project "Mansions Park Prime" has been marred with serious defaults and delays in timely payment of instalments by majority of customers, on the one hand, the respondent had to encourage additional incentives like Timely Payment Discount while on the other hand, delays in payment caused major setback to the development works. Hence, the proposed timelines for possession stood diluted.

30. That the proposed timelines for possession was also diluted in as much as there was de-mobilization of the main contractor M/s Vascon. That due to this de-mobilization, it took some time to close the work order through proper documentation like closing of final executed quantities, final bills, escalation etc. The respondent thereafter awarded balance work to a new

Agency M/s Arcee who deputed their staff and manpower at the site since 01.09.2015, accordingly the construction of the project was duly completed within the norms of the building plan approved by DTCP vide memo dated 05.06.2012.

31. That without prejudice to the facts mentioned in the preceding paragraphs, possession of the unit in question, if delayed, has been on account of reasons beyond the control of the respondent. It is submitted that the construction was affected on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It is submitted that vide its order, NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi would be permitted to transport any construction material. Since the construction activity was suddenly stopped and after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondent.

32. The respondent submitted that the construction of project has been completed and the occupation certificate for the same has also been received where after, that it has already offered possession to the complainants. However, the complainants, being investors do not wish to take possession as the real estate market is down and there are no sales in secondary market, thus has initiated the present frivolous litigation.

F. Jurisdiction of the authority

33. The respondent has 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.

F. I Territorial jurisdiction

34. 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

35. 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 offer if pursued by the complainants at a later stage.

G. Findings on the objections raised by the respondent.

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

36. The respondent has raised a contention that the agreements that were executed prior to the implementation of the Act and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented

FBA and the same was executed by predecessor of the complainants out of his own free will and without any undue influence or coercion, the terms of FBA are bound by the terms and conditions so agreed between them.

37. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

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

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

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

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

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

40. The respondent has raised an objection that the complainants 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 by Arbitration*
> *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."*

41. 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.

42. 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."*
>
> *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."

43. 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 complainants 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."

44. 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.

H. Findings on the relief sought by the complainants.

The complainants have filed the present complaint for seeking following relief. [As amended by the complainant vide application dated 10.08.2021]

H.I Delay possession charges: - Direct the respondent to pay interest for every month of delay in offering the possession of the flat since 01.07.2013 to them, on the amount taken from the complainants for the sale consideration for the flat along with additional charges, at the prescribed rate as per the Act, 2016 till the respondent hands over the possession of the flat to them.

45. 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."

46. Clause 3.1 of the flat buyer agreement provides time period for handing over of possession and the same is reproduced below:

"3.1. POSSESSION

Subject to Clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the Seller/Confirming Party and any restraints/restrictions from any courts/authorities and subject to the Purchaser(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and having complied with all provisions, formalities, documentation etc. as prescribed by the Seller/Confirming Party, whether under this Agreement or otherwise, from time to time, the Seller/Confirming Party proposes to hand over the possession of the Flat to the Purchaser(s) within a period of 36 months from the date of booking/registration of the Flat. The Purchaser(s) agrees and understands that the Seller/Confirming Party shall be entitled to a grace period of 180 days, after expiry of 36 months, for applying and obtaining the Occupation Certificate in respect of the Colony from the Authority....."

47. 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 complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so

heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer'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 doted lines.

48. **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 booking. In the present complaint, the date of booking vide payment receipt of booking amount is 15.10.2010. Therefore, the due date of handing over possession comes out to be 15.10.2013. 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 colony. 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 15.10.2013). As per the settled law one cannot be

allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoter.

49. **Admissibility of delay possession charges at prescribed rate of interest**: The complainants are seeking delay possession charges at 18%. 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.*

50. 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.

51. 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%.

52. **Rate of interest to be paid by complainants 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;"*

53. Therefore, interest on the delay payments from the complainants 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 complainants in case of delayed possession charges.

54. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due

date as per the agreement. By virtue of 3.1 of the flat buyer's agreement executed between the parties on 23.02.2011, the possession of the subject unit was to be delivered within 36 months from the date of booking i.e., 15.10.2010. Therefore, the due date of handing over possession is 15.10.2013. 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 15.10.2013. Occupation certificate has been received by the respondent on 14.02.2020 and the possession of the subject unit was offered to the complainants on 05.03.2020. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the flat buyer's agreement dated 23.02.2011 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement dated 23.02.2011 to hand over the possession within the stipulated period.

55. 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 14.02.2020. The respondent offered the possession of the unit in question to the complainant only on 05.03.2020, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 15.10.2013 till the expiry of 2 months from the date of offer of possession (05.03.2020) which comes out to be 05.05.2020

56. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e., 9.30% p.a. w.e.f. 15.10.2013 till 05.05.2020 as per provisions of section 18(1) of the Act read with Rule 15 of the rules.

I. Directions of the authority

57. 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., 15.10.2013 till the date of offer of possession i.e., 05.03.2020 + 2 months i.e., 05.05.2020 to the complainants.

ii. The arrears of such interest accrued from 15.10.2013 till 05.05.2020 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 allottees, 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.

58. Complaint stands disposed of.

59. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.08.2021

HARERA
GURUGRAM