BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : **5778 of 2019**
First date of hearing: **24.01.2020**
Date of decision : **10.08.2021**

1. Alok Sharma
2. Anju Sharma
Both R/O: - 74 - B, Vikas Nagar, Pakhwal Road, Near Geeta Mandir, Ludhiana-141013 — **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. Abhay Jain and Rishabh Jain — Advocate for the complainants
Sh. Venket Rao — Advocate for the respondent

ORDER

1. The present complaint dated 12.12.2019 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 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 upto 17.02.2020
5.	Name of the licensee	Shyam and 4 others.
6.	RERA Registered or not registered.	**Not registered**
7.	Date of Booking	21.05.2010 (Vide payment receipt on page no. 49 of the reply)
8.	Date of builder buyer's agreement	01.02.2011 (Page no. 55 of the reply)
9.	Unit no.	MA2-404, Unit 4, Tower M (Page no.63 of the reply)
10.	Measurement of unit	2764 sq. ft. of super area (Page no. 63 of the reply)
11.	Revised Unit Area	3044 sq. ft. of super area (Page no. 132 of the reply)
11.	Payment plan	Construction linked payment plan. (Page no.88 of the reply)

12.	Date of offer of possession	06.03.2020 (Page no. 132 of the reply)
13.	Date of Occupation Certificate	14.02.2020 (Page no. 129 of reply)
	Note: - As per the affidavit (nomenclature) 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. 14,661,628.86/- (vide statement of accounts page no. 135 of the reply)
15.	Amount paid by the complainants	Rs. 10,138,603.00/- (vide statement of accounts on page no. 135 of the reply)
16.	Due date of delivery of possession	21.05.2013 (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., 06.03.2020+ 2 months i.e., 06.05.2020	6 years 11 months 15 days.

B. Facts of the complaint

The complainants have submitted as under: -

3. That the complainants, Alok Sharma and his wife Anju Sharma (hereinafter referred to as "the complainants"), are peace loving and law-abiding citizens of India, who nurtured hitherto an un-realized dream of having their own house in upcoming society with all facilities and standards, situated around serene and peaceful environment. The grievance of the

complainants relates to breach of contract, false promises, gross unfair trade practices and deficiencies in the services committed by the respondent in regard to the flat no MA2-404, Tower M, measuring 2764 square foot of super area (hereinafter referred to as "said unit") booked by the complainants, paying their hard earned money, in the project called 'Mansions Park Prime' (hereinafter referred to as "the project"), situated in sector 66, village Maidawas, Gurugram, Haryana.

4. That the respondent is a company duly incorporated under the Companies Act, 1956 and is being sued through its Chairman cum Managing Director.

5. That the respondent is carrying out business as builder, promoter and colonizer and is inter alia engaged in development and construction activities.

6. That the respondent collected a huge amount from gullible and naïve buyers including the complainants from 2010 to 2016 and kept on promising the complainants for the delivery of possession of the said unit on time. The complainants paid, as and when demanded by the respondent, a total of Rs.1,01,38,603/- for the said unit. Even after taking 100 percent payable cost of the said unit, the respondent has not yet offered the legitimate possession of the said unit till date.

7. That the genesis of the present complaint lies in the gross indifference, refusal and failure of the various obligations on the part of the respondent. The respondent initially enticed

various customers including the complainants to pay their hard-earned money.

8. That the respondent fraudulently, unlawfully and illegally increased the super area of the flat and also demanded huge cost escalation of the flat without providing any justified explanations of such charges. The respondent superstitiously and with mala-fide intention increased the super area of the said unit as it had neither informed nor sought permission from the complainants.

9. That even after a delay of more than 6 years 6 months, the respondent has failed to offer the legitimate possession of the flat to the complainants till date.

C. Relief sought by the complainants.

10. 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 and not to charge holding charges including any other relief.]

(i) Direct the respondent to pay interest for every month of delay in offering the possession of the flat since 21.05.2013 to the complainants, on the amount taken from the complainants for the sale consideration and additional charges for the aforesaid flat with interest

at the prescribed rate as per the Act, 2016 till the respondent hands over the legal and rightful possession of the flat.

(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.

11. 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.

12. That the complainants 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.

13. 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 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.

14. 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 01.02.2011 executed by the complainants 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.

15. 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.

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

- That the complainants in their complaint have concealed the material fact that possession along with delay compensation has already been offered to them on 06.03.2020. Instead of clearing the outstanding and taking possession of their units and getting the conveyance deed executed, the complainants have filed this frivolous complaint.
- That the respondent with the motive to encourage the complainants to make payment of the dues within the stipulated time, also gave additional incentive in the form of Timely Payment Discount (TPD) to the complainants and in fact, till date, the complainants have availed TPD of Rs. 2,82,640.41/-. That the respondent at the stage of booking, offered an inaugural discount on Basic Sale Price (BSP) amounting to Rs. 483,009.00/-.

Thus, the net BSP charged from the complainants is less than the original amount of the unit.

- That the complainants have further concealed from this hon'ble authority that the respondent being a customer centric organization 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. However, 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 hon'ble authority against the respondent.

17. From the above, it is very well established, that the complainants have approached this hon'ble authority with unclean hands by distorting/ concealing/ misrepresenting the

relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the complainants is to unjustly enrich themselves at the expense of the respondent by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that in light of the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.

18. It is submitted that the relief(s) sought by the complainants are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainants entered into the said agreement with the respondent with open eyes and is bound by the same. That the relief(s) sought by the complainants travel way beyond the four walls of the agreement duly executed between the parties. The complainants while entering into the agreement has accepted and is bound by each and every clause of the said agreement, including clause-3.3 which provides for delayed penalty in case of delay in delivery of possession of the said floor by the respondent. That having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of

the agreement, 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 light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this hon'ble authority.

19. 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.

20. Issues And Reliefs Qua Super Area and Cost Escalation are beyond the agreed clauses of the agreement – Untenable and cannot be granted:-

a. **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.

b. **Demand qua Cost Escalation**

- That the parties had duly agreed regarding cost escalation at the stage of entering into the transaction vide Clause 34

of the application form, which understanding was reiterated vide Clause 12.11 of the duly executed FBA.

- It is clarified that while offering possession, the respondent vide annexure "E" attached to the offer of possession dated 06.03.2020 duly explained the basis for calculation of the cost escalation. The respondent has considered the cost escalation for the period ending till April 2014, on the basis of clause 12.11 of the FBA and no further escalation has been charged beyond April 2014.
- In terms of the aforesaid clause of the FBA, CPWD base index of 2009 has been applied for calculating the cost escalation on the total budgeted cost of the project till April 2014, which is within the agreed delivery timeline as per the terms of the agreement.
- In terms of the FBA, the actual cost escalation was arrived at Rs.723.44 sq. ft. However, considering the faith shown by the complainants for so long in the respondent, the respondent, as a special one-time gesture "Subject to payment within due date as provided under the offer of possession", decided to charge only Rs.613 per sq. ft. towards cost escalation post discount of Rs.110.44 per sq. ft.

21. That the proposed timelines for possession being within 36 months from the booking/registration of flat along with 180 days. The remedy in case of delay in offering possession of the unit was also agreed to between the parties as also extension

of time for offering possession of the 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), Clause 36 (force majeure) had been agreed upon between the parties under the terms and conditions documented in the application form.

22. 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.

23. 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.

24. 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.

25. 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.

E. Jurisdiction of the authority

26. 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.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

28. 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 respondent.

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

29. 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 the complainants out of his/her 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.

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

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing*

Committee and Select Committee, which submitted its detailed reports."

31. 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."*

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

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

33. 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) hereby confirms that he shall have no objection to this appointment of the Sole Arbitrator by the Managing Director of the Seller, even if the person so appointed, as a Sole Arbitrator, is an employee or advocate of the Seller/Confirming Party or is otherwise connected to the Seller/Confirming Party and the Purchaser(s) confirms that notwithstanding such relationship/connection, the Purchaser(s) shall have no doubts as to the inde-pendence or impartiality of the said Sole Arbitrator. The courts at New Delhi and Delhi High Court at New Delhi alone shall have jurisdiction.*

34. 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.

35. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the*

Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

36. 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 on 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."

37. 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.

G. Findings on the relief sought by the complainants.

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

G.I Delay possession charges: - Direct the respondent to pay interest for every month of delay in offering the possession of the flat since 21.05.2013 to the complainants, on the amount taken from the complainants for the sale consideration and additional charges for the aforesaid flat with interest at the prescribed rate as per the Act, 2016 till the

respondent hands over the legal and rightful possession of the flat.

38. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

> *"**Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> *..............................*
>
> > *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

39. Clause 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 <u>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.</u> 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....."*

40. 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 dotted lines.

41. **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 21.05.2010. Therefore, the due date of handing over possession comes out to be 21.05.2013. It is further provided

in agreement that promoter shall be entitled to a grace period of 180 days for applying and obtaining the occupancy certificate etc. from DTCP. As a matter of fact, from the perusal of occupation certificate dated 14.02.2020 it is implied that the promoter applied for occupation certificate only on 17.05.2017 which is later than 180 days from the due date of possession i.e., 21.05.2013. The clause clearly implies that the grace period is asked for applying and obtaining occupation certificate, therefore as the promoter applied for the occupation certificate much later than the statutory period of 180 days, he does not fulfil the criteria for grant of the grace period., 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. Relevant clause regarding grace period is reproduced below: -

> "Clause3.1 ......*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.......*"

42. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at prescribed rate. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been

prescribed under Rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

43. 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.

44. 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%.

45. **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;"*

46. 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.

47. 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 01.02.2011, the possession of the subject unit was to be delivered within 36 months from the date of booking i.e., 21.05.2010. Therefore, the due date of handing over possession is 21.05.2013. 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 21.05.2013. The 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 06.03.2020. 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 01.02.2011 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 01.02.2011 to hand over the possession within the stipulated period.

48. 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 06.03.2020, 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., 21.05.2013 till the expiry of 2 months from the date of offer of possession (06.03.2020) which comes out to be 06.05.2020

49. 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. 21.05.2013 till 06.05.2020 as per provisions of section 18(1) of the Act read with Rule 15 of the rules.

H. Directions of the authority

50. 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., 21.05.2013 till the date of offer of possession i.e., 06.03.2020 + 2 months i.e., 06.05.2020 to the complainants.

ii. The arrears of such interest accrued from 21.05.2013 till 06.05.2020 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 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 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 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.

51. Complaint stands disposed of.

52. File be consigned to registry.

HARERA GURUGRAM

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.08.2021

Judgement uploaded on 01.10.2021