BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2141 of 2021
First date of hearing: 09.07.2021
Date of decision : 24.08.2021

1. Manoj Malik
2. Sonal Malik
Both RR/o: - K-226, Lane W-12,
Sainik Farms, New Delhi- 110029 **Complainants**

Versus

M/s Raheja Developers Limited.
Regd. office: W4D, 204/5, Keshav Kunj,
Cariappa Marg, Western Avenue, Sainik
Farma, New Delhi- 110062
Corporate office: 3rd Floor, Raheja Mall,
Sector-47, Sohna Road, Gurugram- 122002 **Respondent**

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

APPEARANCE:
Ms. Manju Singh
Sh. Raman Yadav Advocates for the complainants
Sh. Mukul Kumar Sanwariya
Sh. Saurabh Seth
Ms. Gauri Desai Advocates for the respondent

ORDER

1. The present complaint dated 19.04.2021 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 allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Raheja's "Revanta", Sector 78, Gurugram
2.	Project area	18.7213 acres
3.	Nature of the project	Residential group housing colony
4.	DTCP license no. and validity status	49 of 2011 dated 01.06.2011 valid up to 31.05.2021
5.	Name of licensee	Sh. Ram Chander, Ram Sawroop and 4 Others
6.	RERA Registered/ not registered	Registered vide no. 32 of 2017 dated 04.08.2017
7.	RERA registration valid up to	5 Years from the date of revised Environment Clearance

8.	Unit no.	C-281, 28th floor, Tower- C [Page no. 42 of complaint]
9.	Unit measuring	2522.86 sq. ft.
10.	Date of execution of agreement to sell	02.09.2014 [Page no. 40 of complaint]
11.	Payment plan	Time linked payment plan. [as per applicant ledger page no. 72 of complaint]
12.	Total consideration	Rs.2,09,95,127/- [as per customer ledger dated 26.03.2021 at page no. 89 of complaint]
13.	Total amount paid by the complainants	Rs.1,89,20,416/- [as per customer ledger dated 26.03.2021 at page no. 89 of complaint]
14.	Due date of delivery of possession as per clause 4.2 of agreement to sell (48 months + 6 months grace period from the date of execution of agreement in respect of "Surya tower") [Page no. 53 of complaint]	02.09.2018 [Note: - 6 months grace period is not allowed]
15.	Delay in handing over possession till date of this order i.e. 24.08.2021	2 years 11 months and 22 days

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -

I. That in December 2013, Manoj Malik received a marketing call from a real estate firm namely Unizona

Realtors Pvt. Ltd. who represents himself as an authorized agent of the respondent and marketed for booking in a residential project being developed by the respondent by the name of "Revanta", sector- 78. The complainants along with the real estate agent visited the project site & the local office of the respondent. There they interacted with the marketing staff and office bearers of the respondent. The marketing staff of the respondent allured the complainants with the colourful brochure and audio-video presentation. At the time of accepting the application money, the respondent assured for the delivery of the project with several specifications i.e. Earthquake resistance structure, CCTV Surveillance at every stage, 24/7 power backup, advance firefighting/fire alarm /smoke detection system installed in the towers, complete 3 tier security.

II. That being relied on representation and assurances of the respondent the complainants booked an apartment bearing flat no. C-281 on 28th floor in tower-C admeasuring 2523 sq. ft. in the project "Revanta" marketed and developed by them under Time link and construction link payment plan for a total sale

consideration of Rs.2,06,92,387/- including basic sales price, development charges & IFMS, etc and issued a cheque of Rs.13,87,058/- on 31.12.3013 and the respondent issued a payment receipt against the payment.

III. That on 02.09.2014, pre-printed, unilateral, ex-facie, and arbitrary agreement to sell by Raheja Revanta was executed inter-se both the parties. According to clause 4.2 of the buyer's agreement, the respondent has to give possession of the said flat within forty-eight (48) months in respect of "Surya Towers" from the date of execution of this agreement to sell, therefore the due date of possession as per agreement to sell was on 02.09.2018.

IV. That on 03.05.2017, the complainants sent an email to the respondent and stated "It's been perhaps 9 months since the last video of project progress was sent. Kindly send me a video and pictures relating to the towers depicting project progress work towards outdoor, indoor, and the open spaces. Apart from this please let me know the tentative date when the possession of the apartment shall be given" to which the respondent replied on 05.05.2017 and stated "This is in reference to the email, we would like

to inform you that currently, we are not able to get the video shoot done since the structure is almost complete, and it is really hard to get the video captures from the ground level. Further information is that the internal wall partitions are under process and all workers are occupied internally. As per the letter towards revised details in Revanta, we will apply for OC by 4th quarter of 2018 then the possession will be scheduled. We have attached the picture of the tower and the revised details in Revanta for your reference". That on 18.09.2018, the complainants sent another mail to the respondent and asked reasons regarding the delay in the project from mid-2017 onwards and also asked to share the internal and external videos depicting the project construction site and also construction materials, labour, machines, and equipment at the site for them to access and evaluate the genuineness of the claim of giving the possession by the end of 2019. Thereafter many emails were exchanged between the parties, but the respondent did not give any satisfactory reply to the grievances of the complainants.

V. That as per the statement of account issued by the respondent, the complainants have paid Rs.1,89,59,934/.

It is pertinent to mention that despite paying more than 91% of the total sale consideration the unit is yet not ready for possession. That, since 2018 the complainants are contacting the respondent telephonically and sending emails and making efforts to get possession of the allotted flat/apartment, but all went in vain. Despite several telephonic conversations and email requests and personal site visits by the complainants, the respondent failed to give the complete offer of possession of the flat with all agreed amenities.

VI. That the works on other amenities, like external and internal services are not yet completed. Now it is more than 7 years from the date of booking and even the construction of the towers is not completed, it clearly shows the negligence of the builder. As per project site conditions, it seems that the project would further take more than a year to complete in all respect, subject to the willingness of the respondent to complete the project. In fact, there are clear unfair trade practices and breach of contract and deficiency in the services of the respondent party and much more a smell of playing fraud with the complainants and others and is prima facie clear on the

part of the respondent party which makes them liable to answer this authority.

VII. That the cause of action for the present complaint arose in Sep **2014**, when a unilateral, arbitrary, and ex-facie builder buyer agreement was executed between parties The cause of action again arose in **Sep 2018** when the respondent party failed to handover the possession of the flat as per the buyer agreement. The cause of action again arose on various occasions, including on a) December 2018; b) January 2019; c) April 2019 d) May 2019; e) April 2020, f) December 2020, g) January 2021, and on many times till date, when the protests were lodged with the respondent party about its failure to deliver the project and the assurances were given by it that the possession would be delivered by a certain time. The cause of action is alive and continuing and will continue to subsist till such time as this hon'ble authority restrains the respondent party by an order of injunction and/or passes the necessary orders.

VIII. That the complainants do not want to withdraw from the project. The promoter has not fulfilled his obligation therefore as per obligations on the promoter under

section 18(1) proviso, the promoter is obligated to pay the interest at the prescribed rate for every month of delay till the handing over of the possession.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s).

   i. To get possession of the fully developed/constructed flat/apartment with all amenities.

   ii. To get the delayed possession interest on the amount paid by the allottee, at the prescribed rate from the due date of possession till the actual possession of the Flat is handed over as per the proviso to Section 18(l) of the Real Estate Regulation and Development) Act, 2016.

   iii. The complainants are entitled to get an order in their favour to refrain the respondent from giving effect to unfair clauses unilaterally incorporated in the apartment buyer agreement.

5. On the date of hearing, the authority explained to the respondent/promoter on 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.

6. The respondent contested the complaint on the following grounds. The submission made therein, in brief is as under: -

i. That the present complaint is based on vague, misconceived notions and baseless assumptions of the complainant and these are, therefore, denied. The complainant has not approached this authority with clean hands and has suppressed the true and material facts. The complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. It is submitted that the instant complaint is absolutely malicious, vexatious, and unjustifiable and accordingly has to pave the path of singular consequence, that is, dismissal.

ii. That the respondent is traversing and dealing with only those allegations, contentions and/or submissions that are material and relevant for the purpose of adjudication of present dispute. It is further submitted that save and except what would appear from the record and what is expressly admitted herein, the remaining allegations, contentions and/or submissions shall be deemed to have been denied and disputed by the respondent.

iii. That the complainants booked unit no. C-281, 28th floor, tower- C, admeasuring 2523 sq. ft. in 'Raheja's Revanta' Sector -78, Gurgaon, Haryana vide application form dated 02.09.2014 issued allotment letter to the complainants.

Booking of the said allotted unit was done prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively. Although the provisions of the RERA, 2016 are not applicable to the facts of the present case in hand yet without prejudice and in order to avoid complications later on, the respondent has registered the project with the authority. The said project is registered under RERA with registration no. 93 of 2017 dated 28.08.2017. The authority had issued the said certificate which is valid for a period of five years commencing from 28.08.2017 the date of revised EC.

iv. The complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 14.2 of the buyer's agreement.

v. The complainant after checking the veracity of the project namely, 'Raheja's Revanta" had applied for allotment of unit no. C-281, vide their booking application form. The complainant agreed to be bound by the terms and conditions of the booking application form. It is pertinent to mention herein that the complainant was aware as also

stated in clause 22 of the booking application and clause 4.3 of the agreement to sell.

vi. That the evident period of 48 months for completion of construction of the said unit was contingent on the providing of necessary infrastructure in the sector by the Government and subject to force majeure conditions.

vii. That despite the respondent fulfilling all its obligations as per the provisions laid down by law, the government agencies have failed miserably to provide essential basic infrastructure facilities such as roads, sewerage line, water and electricity supply in the sector where the said project is being developed. The development of roads, sewerage, laying down of water and electricity supply lines has to be undertaken by the concerned governmental authorities and is not within the power and control of the respondent. It is further submitted that it cannot be held liable on account of non-performance by the concerned governmental authorities. The respondent company has even paid all the requisite amounts including the external development charges (EDC) to the concerned authorities. However, yet, necessary infrastructure facilities like 60-meter sector roads including 24-meter-wide road connectivity, water and sewage which were supposed to be developed by HUDA parallelly have not been developed. The latest pictures of

the project site and the area surrounding it shows no development of sector roads in sector 78, Gurugram. There is no infrastructure activities/development in the surrounding area of the project-in-question. Not even a single sector road or services has been put in place by HUDA/GMDA/HSVP till date.

viii. That the time period for calculating the due date of possession shall start only when the necessary infrastructure facilities will be provided by the governmental authorities and the same was known to the complainant from the very inception. It is submitted that non-availability of the infrastructure facilities is beyond the control of the respondent.

ix. That the respondent had also filed RTI application for seeking information about the status of basic services such as road, sewerage, water, and electricity. Thereafter, the respondent received reply from HSVP wherein it is clearly stated that no external infrastructure facilities have been laid down by the concerned governmental agencies.

x. Two high tension (HT) cables lines were passing through the project site which were clearly shown and visible in the zoning plan dated 06.06.2011. The respondent was required to get these HT lines removed and relocate such HT Lines for the blocks/floors falling under such HT lines. The respondent proposed the plan of shifting the

overhead HT wires to underground and submitted building plan to DTCP, Haryana for approval, which was approved by the DTCP, Haryana. The revised and approved Zoning plan of the area falls under HT lines. It is pertinent to mention that such HT lines have been put underground in the revised zoning plan. The fact that two 66 KV HT lines were passing over the project land was intimated to all the allottees as well as the complainant. The respondent had requested to M/s KEI Industries Ltd for shifting of the 66 KV S/C Gurgaon to Manesar line from overhead to underground Revanta project Gurgaon vide letter dated 01.10.2013. The HVPNL took more than one year in giving the approvals and commissioning of shifting of both the 66KV HT Lines. It was certified by HVPNL Manesar that the work of construction for laying of 66 KV S/C & D/C 1200 Sq. mm. XLPE Cable (Aluminium) of 66 KV S/C Gurgaon- Manesar line and 66 KV D/C Badshahpur- Manesar line has been converted into 66 KV underground power cable in the land of the opposite party project which was executed abd completed successfully by M/s KEI Industries Ltd and 66 KV D/C Badshahpur– Manesar Line was commissioned on 29.03.2015.

xi. That respondent got the overhead wires shifted underground at its own cost and only after adopting all necessary processes and procedures and handed over the

same to the HVPNL and the same was brought to the notice of District Town Planner vide letter dated 28.10.2014 requesting to apprise DGTCP, Haryana for the same. That as multiple government and regulatory agencies and their clearances were involved and frequent shut down of HT supplies was required, it took considerable time/efforts, investment and resources which falls within the ambit of the force majeure condition. The respondent has done its level best to ensure that the complex is constructed in the best interest and safety of the prospective buyers.

xii. The delay, if any, in the project has been due to the delay in grant of the necessary approvals by the competent authorities and not due to any deficiency on part of the respondent. The process of grant of the necessary approvals by the competent authorities had been beyond the control of the respondent. It has made best possible endeavor and all efforts at every stage to diligently follow with the competent authorities for the concerned approvals. In fact, it is in the interest of the respondent too to complete the project as early as possible and handover the possession of the allotted unit to the complainant. However, much against the normal practice and expectations of the respondent, at every stage, each division of the concerned authorities has taken time, which was beyond normal course and practice. It is

submitted that the construction of the structure in which the apartment is located is complete. It is further submitted that all the block work and the gypsum has also been completed. It is further pertinent to mention that as per the RERA, Haryana (Real Estate Regulatory Authority). the completion date of the project is June 2022. The respondent shall hand over the possession of the same to the complainant after getting the occupational certificate which it has already applied for with the concerned department subject to the complainant making the payment of the due installments amount as per terms and conditions of the agreement to sell.

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

a) That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as 'Raheja Atlantis', 'Raheja Atharva', 'Raheja

Shilas' and 'Raheja Vedanta' and in most of these projects a large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.

b) That the Revanta project is one of the most iconic skyscrapers in the making, a passionately designed and executed project having many firsts and is the tallest building in Haryana with highest infinity pool and club in India. The scale of the project required a very in-depth scientific study and analysis, be it earthquake, fire, wind tunneling facade solutions, landscape management, traffic management, environment sustainability, services optimization for customer comfort and public heath as well, luxury and iconic elements that together make it a dream project for customers and the developer alike. The world's best consultants and contractors were brought together such as Thorton Tamasetti (USA) who are credited with dispensing world's best structure such as Petronas Towers (Malaysia), Taipei 101(Taiwan), Kingdom Tower Jeddah (world' tallest under construction

building in Saudi Arabia and Arabtec makers of Burj Khalifa, Dubai (presently tallest in the world), Emirates palace Abu Dhabi etc.

c) That compatible quality infrastructure (external) was required to be able to sustain internal infrastructure and facilities for such an iconic project requiring facilities and service for over 4000 residents and 1200 cars which cannot be offered for possession without integration of external infrastructure for basic human life be it availability and continuity of services in terms of clean water, continued fail safe quality electricity, fire safety, movement of fire tenders, lifts, waste and sewerage processing and disposal, traffic management etc. Every customer including the complainant was well aware and was made well cautious that the respondent cannot develop external infrastructure as land acquisition for roads, sewerage, water, and electricity supply is beyond the control of the respondent.

d) That the complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that her calculations have gone wrong on account of severe slump in the real estate market, and she is now raising untenable and illegal pleas on highly flimsy and

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

e) That the respondent raised payment demands from the complainant in accordance with the mutually agreed terms and conditions of allotment as well as of the payment plan and she made the payment of the earnest money and part-amount of the total sale consideration and is bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, stamp duty, service tax as well as other charges payable at the applicable stage.

7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

8. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondents

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

9. Objection raised by the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. 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."

10. 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."

11. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself.

Further, it is noted that the 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 complainant is in breach of agreement for non-invocation of arbitration

12. The respondent had raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The clause 14.2 has been incorporated w.r.t arbitration in the buyer's agreement: -

> *"All or any disputes arising out or touching upon in relation to the terms of this Application/Agreement to Sell/ Conveyance Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereof for the*

time being in force. The arbitration proceedings shall be held at the office of the seller in New Delhi by a sole arbitrator who shall be appointed by mutual consent of the parties. If there is no consensus on appointment of the Arbitrator, the matter will be referred to the concerned court for the same. In case of any proceeding, reference etc. touching upon the arbitrator subject including any award, the territorial jurisdiction of the Courts shall be Gurgaon as well as of Punjab and Haryana High Court at Chandigarh".

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

between the parties had an arbitration clause. Therefore, by applying the same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

14. 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."

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

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the

strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

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

F.III. Objection regarding entitlement of DPC on ground of complainants being investors.

17. The respondent has taken a stand that the complainants are investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct

in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the unit buyer's agreement, it is revealed that the complainant is buyer and has paid a total price of Rs.1,89,20,416/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

18. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is

crystal clear that the complainant is an allottee(s) as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

G. Findings of the authority on the relief sought by the complainants.

Relief sought by the complainants:

G.I To get the delayed possession interest on the amount paid by the allottee, at the prescribed rate of interest from due date of possession till actual possession of the unit as per proviso to section 18(1) of the Act.

19. 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."*

20. Article 4.2 of the agreement to sell provides for handing over of possession and is reproduced below:

> **4.2 Possession Time and Compensation**
>
> *That the Seller shall sincerely endeavor to give possession of the Unit to the purchaser within thirty-six (36) months in respect of 'TAPAS' Independent Floors and forty eight (48) months in respect of 'SURYA TOWER' from the date of the execution of the Agreement to sell and after providing of necessary infrastructure specially road sewer & water in the sector by the Government, but subject to force majeure conditions or any Government/ Regulatory authority's action, inaction or omission and reasons beyond the control of the Seller. However, the seller shall be entitled for compensation free grace period of six (6) months in case the construction is not completed within the time period mentioned above....."*

21. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/ regulatory authority's action, inaction or omission and reason

beyond the control of the seller. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in making payment as per the plan 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 agreement to sell 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.

22. **Admissibility of grace period:** As per clause 4.2 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 48 months plus 6 months of grace period. It is a matter of fact that the respondent has not completed the project in which the allotted unit is situated and has not obtained the occupation certificate by September 2018. As per agreement to sell, the

construction of the project is to be completed by September 2018 which is not completed till date. It may be further stated that asking for the extension of time in completing the construction is not a statutory right nor has it been provided in the rules. Accordingly, in the present case this grace period of 6 months cannot be allowed to the promoter at this stage.

23. **Payment of delay possession charges at prescribed rate of interest:** 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.*

24. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined

by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

25. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.7/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @ 18% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the

allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

26. 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., 24.08.2021 is **7.30%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **9.30%.**

27. 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;"

28. 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.

29. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 4.2 of the agreement executed between the parties on 02.09.2014, the possession of the subject apartment was to be delivered within 48 months from the date of execution of this agreement. 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 02.09.2018. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/ promoter to fulfil its obligations and responsibilities as per the agreement to hand over the

possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the agreement to sell dated 02.09.2014 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.

30. 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 complainant are entitled to delay possession charges at rate of the prescribed interest @ 9.30% p.a. w.e.f. 02.09.2018 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. Directions of the authority

31. 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. 02.09.2018 till the handing over of possession of the allotted unit through a valid offer of possession after obtaining the occupation certificate from the competent authority;

ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;

iii. The arrears of such interest accrued from 02.09.2018 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10th of the subsequent month as per rule 16(2) of the rules;

iv. The rate of interest chargeable from the allottees 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 to sell. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of apartment buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

32. Complaint stands disposed of.

33. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 24.08.2021
Judgement uploaded on 19.10.2021