

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

Complaint no. : 4174 of 2020
First date of hearing: 12.01.2021
Date of decision : 20.07.2021

1. Group Captain Prabhakara Kankanady
2. Sonu Prabhakara

Address: - A-801, The Eligible CGHS Limited,
Plot No. 38, Sector-10, Dwarka, New Delhi-
110075

Complainants

Versus

1. ATS Real Estate Builders Private Limited
Address: - 711/92, Deepali Nehru Place, New
Delhi-110019

2. PNB Housing Finance Limited
Address:- 9th Floor, Antriksh Bhawan, 22
Kasturba Gandhi Marg, New Delhi-110001

Respondents

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Mr. Ankur Berry
Sh. M.K. Dang

Advocate for the Complainants
Advocate for the Respondent

ORDER

1. The present complaint dated 23.11.2020 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed



that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter-se them.

A. Unit and project related details

2. The particulars of the project, the details of 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	"ATS Marigold", Sector-89A, Gurugram
2.	Project area	11.125 acres
3.	Nature of the project	Group Housing Project
4.	DTCP license no. and validity status	87 of 2013 dated 11.10.2013 valid upto 10.10.2017
5.	Name of licensee	Dale Developers Pvt. Ltd. and Gabino Developers Pvt. Ltd.
6.	RERA Registered/ not registered	Registered vide registration no. 301/2017/317 dated 17.08.2017
	Valid upto	6 years from the date of environment clearance
7.	Date of booking	28.12.2017 (Page no. 23 of the complaint)
8.	Unit no.	4094, 9 th floor, tower 04 (Page no. 23 of the complaint)
9.	Unit measuring	1117 sq. ft.

		(Page no. 23 of the complaint)
10.	Date of execution of agreement for sale	25.01.2018 (Page no. 21 of the complaint)
11.	Due date of delivery of possession	31.08.2019 (As per clause 7.1 of the agreement for sale)
12.	Payment plan	Subvention payment plan (Page no. 46 of the complaint)
13.	Total sale consideration	Rs. 1,10,56,500/- (Page no. 46 of the complaint)
14.	Amount received from the complainants	Rs. 85,54,575/- (As per the complainant's ledger account dated 07.08.2020 on page no. 99 of the complaint) Note: - Rs. 95,09,094/- (As alleged by the complainant in his complaint)
15.	Occupation Certificate	Not obtained
16.	Offer of possession	Not offered
17.	Delay in handing over possession till the date of decision i.e., 20.07.2021	1 year 10 months 20 days

B. Facts of the complaint

3. That the present complaint is being filed by the complainants against the respondent no. 1 who has failed to comply with the written terms and conditions of the agreement for sale dated 25.01.2018 read with letter dated 30.01.2018 whereby it was agreed between the parties that the builder in accordance with



the subvention scheme offered to the complainants was bound to directly pay the pre-EMIs to the respondent no. 2, housing finance company till the offer of possession. Furthermore, the respondent company/ builder has failed to hand over the possession of unit in question as per the clause 7 of the agreement for sale. That instead of delivering the possession of the unit as promised, the respondent company has delayed and breached its set of obligations. It was further submitted that the respondent company has kept the complainants in the dark since year August 2019 by not explaining the reasons for delay or communicating the expected date of delivery of possession. Therefore, the complainants pray to this authority for directing the respondent company to directly pay the pre-EMIs to the respondent no. 2 housing finance company in terms of agreement for sale dated 25.01.2018 read with letter dated 30.01.2018. Further, the complainants pray that the authority may grant interest on the delay in offering the possession of the unit in question as per the prescribed rate of interest.

4. That the complainant no. 1 is retired Indian Air Force Officer and the complainants have invested their hard-earned money in the project of respondent company believing that the promises made by the respondent company would be fulfilled and the complainants will get the possession of the unit by 31.08.2019 as also the respondent company/ builder will pay the pre-EMIs to the respondent no. 2, housing finance company in accordance with agreement for sale dated 25.01.2018 read with letter dated 30.01.2018. It was



submitted that the complainants are running from pillar to post to get the respondent company/ builder to pay the pre-EMIs as was promised to the complainants by the respondent company under the subvention scheme offered at the time of booking and in terms of agreement dated 25.01.2018 read with letter dated 30.01.2018.

5. That the complainants have been eagerly waiting to move to their dream home, but the project has been delayed by the respondent company, thereby adding to the misery of the complainants without any intimation as to the expected date of possession. The repeated request for timely payment of pre-EMIs and communication of expected date of possession to the complainants seem to have fallen on deaf ears of the respondent company and they kept raising demands which the complainants paid on time fearing the money deposited by them would be lost.
6. That respondent no.1 namely, M/s ATS Real Estate Builders Private Limited is a company registered under the Companies Act, 1956 having its registered office at 711/92, Deepali, Nehru Place, New Delhi- 110019 and corporate office at ATS tower, plot no.16, sector- 135, Noida. The Respondent company claims to be a leading name in the Real Estate Sector. That the present complaint is qua the project under the name and style of 'ATS Marigold' situated in sector 89A, Gurugram, Haryana. The respondent no.2, housing finance company namely, PNB Housing Finance Limited (PNBHFL) is promoted by Punjab National Bank (PNB) and is financing sale of

apartment of complainants in terms of the subvention plan offered by the respondent company/ builder.

7. That in the year of 2018, the complainants lured by the brochures and catalogues shown by the officials/representatives of the respondent company/ builder decided to buy an apartment in the project, ATS Marigold of the respondent company which was promoted by the respondent company as one of its kind, allowing the complainants a hassle free payment plan, namely, subvention scheme under which the respondent company/ builder assured the complainants that the pre-EMIs will be borne by the respondent company/ builder till the offer of possession to the complainants. Also, at the time of booking, assurances were given by the respondent company/ builder that the possession will be given on or before 31.08.2019. Thus, the complainants believed that they would be delivered the possession of the unit by 31.08.2019 (as per agreement for sale) but till date the complainants are unaware about the expected date of possession as the same has not been communicated by the builder to the complainants. Further, despite the non-expiry of the Subvention period in accordance with the scheme offered by the respondent company/ builder, the respondent no. 2 has transferred the ECS in the name of the complainants despite the fact that both the respondents has assured the complainants that as the project was approved by the respondent no. 2, they shall face no problems or hardship by opting for subvention scheme as the complainants will become the owner of the apartment only by paying a small

amount and that their EMI will begin only upon possession and not any time before handing over of possession by respondent company/ builder. This was the highlight of the scheme offered to the complainants (also reproduced in letter dated 30.01.2018 which forms part and parcel of agreement dated 25.01.2018) and on the basis of which the complainants made the booking.

8. That in the beginning, the complainants made do payments as and when demanded by the respondent company. But since Jan 2019, the respondent company/ builder resorted to delayed payments which has resulted in accumulation of ECS bounce and overdue charges in respect of the loan account of the complainants.
9. That as per clause 7.1 of agreement for sale, the respondent company/ builder was required to deliver the possession of the apartment of the complainants on or before 31.08.2019. The respondent company/ builder failed to deliver the possession on the said date nor did the respondent company/ builder communicate the revised date of possession to the complainants.
10. That respondent company/ builder requested the complainants to apply for moratorium for 3 months (moratorium 1.0) vide email dated 03.04.2020. The complainants on 03.04.2020 in good faith and in accordance with the request made by the respondent company/ builder wrote to the respondent housing finance company for moratorium of 3 months (moratorium 1.0) in the hope that the said amount will be cleared by the respondent company/

builder and this amount accrued on account of moratorium will be paid by the respondent company/ builder after the lapse of three months of moratorium. Surprisingly, respondent company/ builder while in direct contact with the lending bank extended the moratorium for another 3 months (moratorium 2.0) without prior consultation with the complainants. As on date the respondent company/ builder has refused to pay the amount accrued on account of moratorium from March 2019 to 31 August 2019 (6 months). The amount accrued during the last 6 months (period of moratorium) has now been added to the principal loan amount of the complainants by the bank and resultantly the pre-EMI of the complainants has also increased.

11. That respondent company/ builder was constantly chasing the complainants for payments in terms of the agreement despite the request of the complainants to give him some time for arranging necessary funds as he had incurred medical expenses on account of his heart disease and on account of the COVID-19 situation.
12. That further, complainants have also in good faith and while honouring the terms of agreement dated 25.01.2018 read with letter dated 30.01.2018 on request of respondent company/ builder liquidated his investment at loss and made payment of rs. 9,47,359/- (along with TDS of Rs. 7159) on 31.07.2020 by online transfer upon request by the respondent company/ builder during the pandemic period hoping that respondent company/ builder would also act in good faith and continue to



pay the pre-EMIs in accordance with agreement dated 25.01.2018 read with Letter dated 30.01.2018.

13. That various written communications have been sent by the complainants to respondent company/ builder for corrective action in respect of the breach of agreement read with letter, but respondent company/ builder has been deliberately ignoring the requests of the complainants to honour the agreement.
14. That various communications have been sent collectively by group of ATS Marigold homebuyers to respondent company/ builder. The respondent company/ builder has mischievously denied honouring the registered agreement with the buyers.
15. It is pertinent to mention that despite timely payments by the buyer as and when demanded by the respondent company/ builder, the respondent company/ builder has failed to honour his obligations under the agreement for sale. However, the only intent of the respondent company/ builder seemed to indulge in wrongful gain.
16. It is pertinent to mention that the only reason why the complainants decided to invest in the project was in lieu of the promises and immense importance laid down by the respondent herein with regard to the timely possession of the project which subsequently turned out to be false thereby causing immense hardship, both physical and mental, to the complainants. The respondent company/ builder has miserably failed to keep up the promises made to complainants on account of non-payment of pre-EMIs in terms of the subvention scheme and by not informing the

complainants about the expected date of completion of the project through any written communication despite repeated requests having been made the complainants have been kept in the dark.

17. That as of today the whole world is hit with the epidemic caused due to COVID-19 and every government and individual in the country is struggling for their livelihood and it is a saying that year 2020 is a year of survival where everybody should try to survive, and this is what is happening in the world where now every country is facing financial crunch. Resultantly, individuals are struggling for their livelihood and at one hand the complainants are a class of victims due to the situation created by the spread of corona virus and on the other side complainants are suffering at the hands of respondent company/ builder. Furthermore, respondent company/ builder, despite payment of almost 85-90% sale consideration has added to the misery of the homebuyers by acting in breach of the agreement for sale and the understanding between the complainants and the respondent company/ builder in these difficult times. Also, respondent housing finance company has also, despite approving the scheme offered by the respondent company/ builder at the time of extending the loan facility, is now proceeding against the settled understanding between the parties in the present crisis which has impacted each and every individual in its own way.

18. That it is settled law that the state and state established machinery for dispensation of justice is the custodian of the welfare and well-being of its citizens. State and state



established machinery for dispensation of justice being the custodian of welfare of borrowers against lucrative schemes offered and approved by the banks in association with the builder is bound to protect the interests of the complainants especially in view of the prevalent circumstances. The arbitrary actions of respondent company/ builder in the present circumstances when there is a constant fight for survival, has put the complainants under additional financial liability which otherwise in accordance with the agreement between the complainants, respondent housing finance company and the respondent company/ builder was to be incurred by respondent company/ builder. Furthermore, respondent housing finance company has even before the expiry of the subvention period started to chase the complainants for payment of pre-EMI due to the actions and inaction of the respondent company/ builder.

19. That the subvention scheme as offered by the respondent company/ builder was also communicated to respondent housing finance company and it is incomprehensible as to how the basic understanding of the subvention scheme offered by respondent company/ builder which was duly approved and financed by respondent no. 2 could have changed in violation of the written terms and conditions of the subvention scheme which categorically required respondent housing finance company to bear the pre-EMIs till offer of possession and make timely payments directly to the housing finance company every month.

20. That the respondent company/ builder has failed to honor the terms and conditions of the agreement for sale signed between the parties. The respondent company/ builder though failed to deliver possession as per the BBA. Further, the respondent company/ builder ignored the request of the complainant regarding the payment of pre-EMIs directly to the respondent no. 2. It is respectfully submitted that the dual burden of payment of pre-EMIs and rental accommodation is exceeding the pension which is received by the first complainant who also has to look after his heart ailment, the studies of his son and maintain his family. Hence, the respondent company be directed to make payments with immediate effect.
21. That the complainants are aggrieved by the malicious and high headed behavior of the respondent company/ builder, who has kept accepting the money deposited by the complainant without delivering on their promises in terms of agreement for sale dated 25.01.2018 and letter dated 30.01.2018. Further, the offer of possession was to be made to the complainants on or before 31.08.2019, but the complainants as on date have been kept in the dark and have not been made aware about the expected date of completion of their apartment. The complainant cannot be expected to suffer due to the negligence and arrogant actions of the respondent company which is apparent from the facts submitted herein above.
22. That on the basis of the above raised submissions it can be concluded that the respondent company having failed to complete the construction of the unit in question in time and delay in handing over the possession of the unit of the



complainants in accordance with the agreed terms of BBA and have committed grave unfair practices and breach of the agreed terms between the parties. That under Section 18 of the Real Estate (Regulation and Development) Act, 2016 which has been reproduced herein below: The respondent company being in utter violation of section 18 of the Real Estate (Regulation and Development) Act of 2016 the complainants have the right to get interest on the delayed possession at the prescribed rate of interest from the due date of delivery i.e., from 31.08.2019 till, date of offer of possession. Also, the builder in terms of the agreement for sale dated 25.01.2018 read with letter dated 30.01.2018 is liable to pay the pre-EMIs till offer of possession. सत्यमेव जयते

C. Relief sought by the complainants: -

- 1) Direct the respondent to pay the pre-EMIs directly to the bank in terms of the subvention scheme offered under the agreement for sale dated 25.01.2018 read with letter dated 30.01.2018 till offer of possession.
 - 2) Direct the respondent to pay interest at the prescribed rate per annum on the delay in handing over the possession from 31.08.2019 till the date of possession in view of the violation of section 18 of the Real Estate (Regulation and Development) Act, 2016.
23. 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 No. 1:

24. The respondent has contested the complaint on the following grounds:

- I. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed.
- II. That the respondent has filed the present reply within the period of limitation as per the provisions of Real Estate (Regulation and Development) Act, 2016.
- III. That there is no cause of action to file the present complaint.
- IV. That the complainants have no locus standi to file the present complaint.
- V. That the complaint is not maintainable for the reason on account of clause 34 of the buyer's agreement.
- VI. That even as per clause 23 of the tripartite agreement dated 30.01.2018 entered between the parties, this authority does not have the jurisdiction to adjudicate the present complaint.
- VII. That the complainants have not approached this authority with clean hands and have intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by them 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 no. 1 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 in and around NCR region such as

ATS Greens-I, ATS Greens-II, ATS Village, ATS Paradiso, ATS Advantage Phase-I & Phase-II, ATS One Hamlet, ATS Pristine, ATS Prelude & ATS Dolce and in these projects 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 complainants after checking the veracity of the project namely, 'ATS Marigold', sector 89A, Gurugram had applied for allotment of a residential unit and agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint. It is submitted that based on the application of complainants, the respondent no. 1 company vide its allotment of the unit bearing no. 4094, 9th floor, tower no. 04 having super built up area of 103.78 sq. meter.
- C. That based on it and on the receipt of the requisite amount, the respondent no. 1 sent copies of the buyer's agreement to complainants which was signed and executed by them on 25.01.2018. Complainants had booked the unit in question and had executed the apartment buyer's agreement on her own free will and after reading, understanding and verifying the terms and conditions stipulated thereto.
- D. That the possession of the apartment was supposed to be offered to the complainants in accordance with the

agreed terms and conditions of clause 7.1 of the buyer's agreement.

E. That it is pertinent to mention herein that the implementation of the said project was hampered and most of the work was stalled due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of the respondent, and which have affected the materially affected the construction and progress of the project. Some of the force majeure events/conditions which were beyond the control of the respondent no. 1 and affected the implementation of the project and are as under:

- (i) **Orders passed by environmental bodies:** In last two years, several environmental bodies have been passing orders to protect the environment of the country and especially the NCR region. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The contractor of respondent no.1 could not undertake construction for 3-4 months in compliance of such orders. Due to following, there was a further delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour.
- (ii) **Non-payment of instalments by allottees:** Several other allottees were in default of the

agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project. The time period covered by the above-mentioned force majeure events is required to be added to the time frame mentioned above. respondent no.1 cannot be held responsible for the circumstances which were beyond its control.

- F. That the complainants were short of finance for purchasing the property hence in order to make up their finance for the purchase approached respondent no.2 for grant of the housing loan and accordingly entered into a tripartite agreement dated 30.01.2018. As per recital E of the tripartite agreement, the liability of respondent no.1 for payment of interest on the loan amount disbursed by respondent no.2 was for the period mentioned in schedule 1 i.e till 31st August 2019 or offer of possession whichever was earlier.
- G. That the complainants have made part-payment out of the total sale consideration and are bound to make payment towards the remaining due amount along with applicable charges at the appropriate stage.
- H. That respondent no.1 has already completed the construction of the tower in which the unit allotted to the complainants is located and it shall soon apply for the grant of the occupation certificate. It is pertinent to

mention here that only finishing work in the said tower in question is left and is being undertaken by respondent no.1 currently.

- I. That the complainants are real estate investors who had invested their money in the project of respondent no.1 with an intention to make profit in a short span of time. However, their calculations have gone wrong on account of slump in the real estate market, and they are now deliberately trying to unnecessarily harass, pressurize and blackmail respondent no.1 to submit to their unreasonable demands.

25. 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 submission made by the parties.

E. Jurisdiction of the authority

The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

26. 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

27. 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 complainants at a later stage.

F. Findings on the objections raised by the respondents.

F1. Objection regarding complainants are in breach of agreement for non-invocation of arbitration

28. The respondent no. 1 submitted that 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 and the same is reproduced below for the ready reference:

"34. Dispute Resolution

"All or any disputes arising out or touching upon or in relation to the terms and conditions 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 settled through the adjudicating officer appointed under the Act."

29. 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.

30. 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."

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

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by

Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

32. 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 Real Estate (Regulation and Development) 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 regarding relief sought by the complainants.

Delay possession charges: To direct the respondent to give delayed possession interest to the complainants.

33. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges at prescribed rate of interest on amount already paid by them as provided under the proviso to section 18(1) of the Act which 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."

34. Clause 7.1 of the agreement for sale (in short, the agreement) dated 25.01.2018, provides for handing over of possession and is reproduced below:

"7 Possession of the Apartment for Residential Usage:

"7.1 The Promoter assures to hand over possession of the Apartment for Residential usage along with Car Parking (if applicable), on or before 31st August 2019, unless there is delay due to "force majeure", Court orders, Government policy/ guidelines, decisions affecting the regular development of the real estate project. If, the completion of the project is delayed due to the above conditions, then the Allottee agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the Apartment for residential usage."

35. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottees are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay



in possession of the unit. In pre-Real Estate (Regulation and Development) Act, 2016 period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

36. The respondent promoter has proposed to handover the possession of the subject unit on or before 31.08.2019.
37. Further, the authority in the present case observed that, the respondent has not kept the reasonable balance between his own rights and the rights of the complainants/allottees. The respondent has acted in a pre-determined and preordained manner. The respondent has acted in a highly discriminatory and arbitrary manner. The unit in question was booked by the complainants on 28.12.2017 and the agreement for sale was executed between the respondent no. 1 and the complainants on 25.01.2018. It will lead to a logical conclusion that that the respondent would have certainly started the construction of the project. On a bare reading of the clause 7.1 of the agreement reproduced above, it becomes clear that the possession in the present case was to be handed over on or before 31.08.2019.
38. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charge and 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.

39. 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.
40. 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., 20.07.2021 is @7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., @9.30%.
41. 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;"*

42. 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.
43. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 7.1 of the agreement for sale executed between the parties on 25.01.2018, the possession of the subject unit was to be delivered within stipulated time i.e., on or before 31.08.2019. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent no. 1 to fulfil its obligations and responsibilities as per the agreement for sale to hand over the possession within

the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottees are entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession i.e., 31.08.2019 till handing over of possession after the date of receipt of valid occupation certificate as per section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

44. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the function entrusted to the authority under sec 34(f) of the Act:

- i. The respondent no. 1 is directed to pay the interest at the prescribed rate i.e., 9.30 % per annum for every month of delay on the amount paid by the complainants from due date of possession i.e., 31.08.2019 till handing over of possession after receipt of occupation certificate as per section 18(1) read with rule 15 of the rules.
- ii. The respondent no. 1 is directed to pay arrears of interest within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
- iii. The complainants are also directed to make payment/arrears if any due to the respondent no. 1 at the equitable rate of interest i.e., 9.30% per annum.

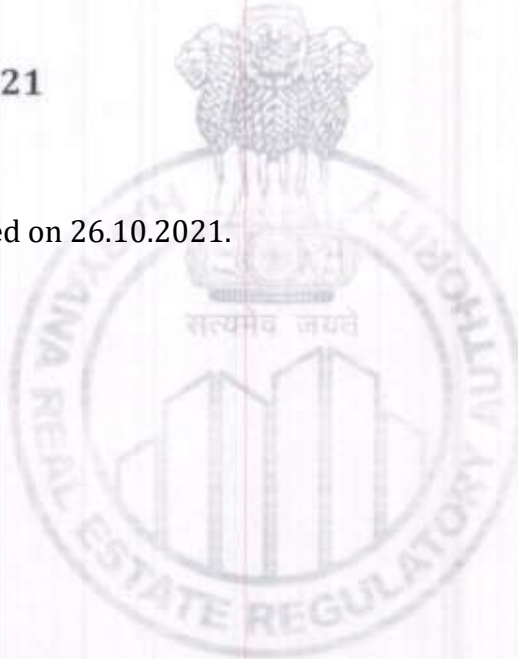
- iv. The respondent no. 1 shall not charge anything from the complainants which is not part of the buyer's agreement.
45. Complaint stands disposed of.
46. File be consigned to the registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Dated:20.07.2021

Judgement uploaded on 26.10.2021.



HARERA
GURUGRAM