BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 870 of 2021
First date of hearing: 04.03.2021
Date of decision : 24.08.2021

Phool Kumari
W/o Hari Singh
R/o: - House No. 59, Sector-13,
Part-II, Hisar, Haryana- 125001 **Complainant**

Versus

M/s Raheja Developers Limited.
Regd. office: W4D, 204/5,
Keshav Kunj, Western Avenue, Sainik Farms,
New Delhi- 110062 **Respondent**

CORAM:

Shri Samir Kumar	**Member**
Shri Vijay Kumar Goyal	**Member**

APPEARANCE:

Sh. Maninder Singh	Advocate for the complainant
Sh. Mukul Kumar Sanwariya Sh. Saurabh Seth Ms. Gauri Desai	Advocates for the respondent

ORDER

1. The present complaint dated 12.02.2021 has been filed by the complainant/allottee 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 complainant, 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.	B-123, 12th floor, Tower- B [Page no. 17 of complaint]

9.	Unit measuring	1621.39 sq. ft.
10.	Date of allotment letter	09.04.2014 [page 61 of reply]
11.	Date of execution of agreement to sell	09.04.2014 [Page 15 of complaint]
12.	Payment plan	New Installment payment plan [as per applicant ledger Page 48 of complaint]
13.	Total consideration	Rs.1,33,20,723 /- [as applicant ledger dated 17.04.2020 at Page 48 of complaint]
14.	Total amount paid by the complainant	Rs.79,28,745.21/- [as applicant ledger dated 17.04.2020 at Page 48 of complaint]
15.	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 27 of complaint]	09.04.2018 [Note: - 6 Months Grace period is not allowed]
16.	Delay in handing over possession till date of this order i.e. 24.08.2021	3 years 4 months and 15 days

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint: -

   I. That the respondent had always advertised itself as a very ethical business group that lives onto its commitments in

delivering its housing projects as per promised quality standards and agreed timelines. That the respondent while launching and advertising any new housing project always commits and promises to the targeted consumer that their dream home will be completed and delivered to them within the time agreed initially in the agreement while selling the dwelling units to them. It also assured to the consumers like complainant that it has secured all the necessary sanctions and approvals from the appropriate authorities for the construction and completion of the real estate project being sold by it to them in general.

II. That in 2010, the respondent through its marketing executives and advertisements done through various medium and means approached the complainant with an offer to invest and buy a flat in its proposed project which the respondent was going to launch the project namely "**Raheja's Revanta"** in Sector-78, Gurugram. The respondent had represented to the complainant that it is very ethical business house in the field of construction of residential and commercial projects and in case, the complainant would invest in the project of respondent then it would deliver the possession of proposed flat on

the assured delivery date as per the best quality assured by it. The respondent had further assured to the complainant that it has already secured all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specifications. The complainant while relying on the representations and warranties of the respondent and believing them to be true had agreed to its proposal to book the residential flat in its project.

III. That the respondent arranged the visit thereafter through its representatives of the complainant, at the site. They also assured the same as assured to the complainant, and wherein it was categorically assured and promised by the respondent that it already has secured all the sanctions and permissions from the concerned authorities and departments for the sale of said project and would allot the residential flat in the name of complainant immediately upon booking. Relying upon those assurances and believing them to be true, the complainant booked a residential flat bearing no. B- 123 on 12th floor having super area of 1621.39 sq. ft. for total

sale consideration of Rs.1,24,21,469/- at the proposed project to be developed by respondent. Accordingly, the complainant had paid Rs.12,06,652/- through one cheque bearing no. 507103 respectively dated 27.10.2013 as booking amount.

IV. That the respondent assured the complainant that it would execute the flat buyer agreement at the earliest and at the maximum within one week. However, the respondent did not fulfil its promise and did not execute the agreement as agreed upon by it and executed it only on 09.04.2014.

V. That from the date of booking and till today, the respondent had raised various demands for the payment of installments on complainant towards the sale consideration of the said flat. She has duly paid and satisfied all those demands without any default or delay on her part. The complainant had paid the sale consideration to the respondent for the said flat. As per the record of complainant, she had already paid Rs.79,29,395/- towards the sale consideration as on today to the respondent as demanded by it, time to time.

VI. That the complainant thereafter had tried her level best to reach the representatives of the respondent to seek a satisfactory reply in respect of the said flat but all in vain. The respondent has started ignoring the complainant and had not given any reply. As per clause 4.2 of builder buyer agreement dated 09.04.2014, the promised date of delivery of said flat was 48 months with a grace period of 6 months from the date of execution of builder buyer agreement i.e. 09.10.2018 which was not complied by the respondent.

VII. That the complainant had communicated to the respondent inquiring about the status of project, but it chose not to reply anything. The complainant had also written e-mails to the respondent and its office bearers demanding the refund of her hard-earned money, paid as the sale consideration of aforesaid flat, as it had misappropriated the money for its personal use paid by the complainant. That after many attempts, finally the respondent replied to the complainant vide email dated 21st May 2019 and provided the current status of the project and also extended the date of possession to the end of year 2020, which was approximately 2 years

delayed from the original possession. The respondent had made total delay of 2 year and 3 months in delivering the possession of aforesaid flat till today i.e. the date of filling present complaint.

VIII. That he had faced all these financial burdens and hardship from her limited income resources, only because of respondent failure to fulfil its promises and commitments. The failure of commitment on the part of respondent has made the life of the complainant miserable socially as well financially as all her personal financial plans and strategies were based on the date of delivery of possession as agreed by it. Therefore, the respondent has forced the complainant to suffer grave, severe, and immense mental and financial harassment with no-fault on her part. The complainant being common person just made the mistake of relying on respondents false and fake promises, which lured her to buy a flat in its aforesaid residential project.

IX. That the cause of action accrued in favour of the complainant and against the respondent on 27.10.2013, when the complainant had booked the said flat and it further arose when respondent failed/neglected to

construct the said flat qua the project as agreed upon by it, while booking the said flat by showing rosy picture to her. The cause of action is continuing and is still subsisting on day-to-day basis as the respondent has not refunded the amount paid by the complainant or delivering the possession of said flat even after various repeated requests made by her to it in this regard.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).

    I. To direct the respondent to pay the interest at the prescribed rate of interest on the total sale consideration amounting to Rs.79,29,395/- paid by the complainant for the said flat on account of delay in delivering possession from the date of payment till delivery of said flat.

5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions 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 submissions made therein, in brief are 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 complainant booked unit no. B-123, 12th floor, tower- B, admeasuring 1621.390 sq. ft. in 'Raheja's Revanta' Sector -78, Gurgaon, (Haryana) vide application form dated 27.02.2014. The respondent vide letter dated 09.04.2014 issued an allotment letter to the complainant. The 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 i.e. 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. B-173 vide 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 service 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 this authority does not have the jurisdiction to decide on the interest as claimed by the complainant. It is submitted that in accordance with section 71 of RERA, 2016 read with Rules 21(4) and 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, the authority shall appoint an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard. It is submitted that even otherwise, it is the adjudicating officer as defined in section 2(a) of RERA, 2016 who has the power and the authority to decide the claims of the complainant.

xiv. That the complainant has 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 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......*
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> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

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 <u>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</u>. 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: -*
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> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is*

> *empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

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 complainant being investor

17. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, she is 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 a buyer and has paid a total price of Rs.79,28,745.21/- 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;"*

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 allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant.

Relief sought by the complainant: to direct the respondent to pay the interest at the prescribed rate of interest on the total sale consideration amounting to Rs.79,29,395/- paid by her for the said flat on account of delay in delivering possession from the date of payment till delivery of said flat.

18. In the present complaint, the complainant intends to continue with the project and is 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."*

19. 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......."

20. 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.

21. **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 April 2018. As per agreement to sell, the construction of the project was to be completed by April 2018 which is not complete 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.

22. **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.

23. 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.

24. 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.

25. 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%.**

26. 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;"*

27. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **9.30%** by the respondent/promoter which is the same as is being granted her in case of delayed possession charges.

28. 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 09.04.2014, the possession of the subject apartment was to be

delivered within 36 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 was 09.04.2018. 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 09.04.2014 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.

29. 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 is entitled to delay possession charges at rate of the prescribed interest @ 9.30% p.a. w.e.f. 09.04.2018 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

30. 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. 09.04.2018 till the handing over of possession of the allotted unit;

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

    iii. The arrears of such interest accrued from 09.04.2018 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules;

    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 allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. The respondent shall not charge anything from the complainant which is not the part of the agreement to sell. The respondent is not entitled to claim holding charges from the complainant/allottee 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.

31. Complaint stands disposed of.
32. 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 24.10.2021