BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4496 of 2020
First date of hearing: 08.01.2021
Date of decision : 24.08.2021

Mr. Chander Shekhar Arora
S/o Sh. Ishawar Dutt
R/o: - B-101, Vishrantika Society, Plot-5A,
Sector-3, Dwarka, New Delhi- 110078 **Complainant**

Versus

1. M/s Raheja Developers Limited.
Regd. office: W4D, 204/5, Keshav Kunj,
Kariappa Marg, Western Avenue, Sainik
Farms, New Delhi- 110062
2.Mr. Navin M Raheja
Director and Authorized Signatory
M/s Raheja Developers Limited
R/o: - 150A, Sainik Farms,
New Delhi- 110062 **Respondents**

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

APPEARANCE:
Sh. Shyamlal Kumar Advocate for the complainant
Sh. Mukul Kumar Sanwariya
Sh. Saurabh Seth
Ms. Gauri Desai Advocates for the respondents

ORDER

1. The present complaint dated 11.12.2020 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 Atharva", Sector 109, Gurugram
2.	Project area	14.812 acres
3.	Nature of the project	Residential Group Housing Colony
4.	DTCP license no. and validity status	257 of 2007 dated 07.11.2007 valid up to 06.11.2017
5.	Name of licensee	Brisk Construction Pvt. ltd and 3 others
6.	RERA Registered/ not registered	Registered vide no. 90 of 2017 dated 28.08.2017
7.	RERA registration valid up to	5 Years from the date of revised Environment Clearance
8.	Unit no.	IF 10 - 04, 3rd floor, block/tower- IF 10

		[Page no. 31 of complaint]
9.	Unit measuring	2317.00 sq. ft.
10.	Date of allotment letter	03.06.2011 [Page no. 52 of complaint]
11.	Date of execution of flat buyer agreement	03.06.2011 [Page no. 29 of complaint]
12.	Payment plan	New Installment Payment Plan [as per applicant ledger dated 16.09.2019 at page 53 of complaint]
13.	Total consideration	Rs.93,41,298 /- [as per applicant ledger dated 16.09.2019 at page 53 of complaint]
14.	Total amount paid by the complainant	Rs.82,25,032 /- [as per applicant ledger dated 16.09.2019 at page 53 of complaint]
15.	Due date of delivery of possession as per clause 4.2 24 months from the date of execution of agreement plus 6 months grace period in case of construction is not completed within the time framed mentioned above. [Page 39 of complaint]	03.06.2013 [Note: - 6 months grace period is not allowed]
16.	Delay in handing over possession till date of this order i.e. 24.08.2021	8 years 2 months and 21 days

B. Facts of the complaint

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

I. The complainant is the buyer of the Independent floors who has booked & paid almost the entire sale consideration amount in advance towards the same by entering into an agreement to sale/purchase of their respective Independent floors in the approved township/ongoing residential project started by the respondent no.1 namely M/s. Raheja developers private limited, in the name & style "Raheja Shilas Low Rise In Raheja Atharva" At Sector-109, Village: Pawala Khushrupur, District: Gurugram (Haryana). The agreement to sell/purchase dated 06.03.2010 entered into between the complainant and the respondents along with the allotment letter for the independent floor bearing No. **IF10-04** & statement of accounts (ledger) issued by the respondent no.1 showing the payment of **Rs.82,25,032/-** made by the complainant as consideration.

II. The respondents/promoter fraudulently and dishonestly, advertised in the various newspapers & publicly distributed their handbills/brochures & also through its directors, employees & agents between the year 2007-2012 till date, representing the complainants as well as public at large that it intend to construct a world class

luxury group housing project with all the modern amenities as well as green areas, to be developed by it on the project area admeasuring 14844.46 sq. meters situated at Sector-109, Gurugram (Haryana) where a buyer can live peacefully & with dignity, for which it has complied with all the requisite legal compliances & has obtained the necessary permissions/licenses, as per the local building bye-laws & other clearances as required by law and the same would be constructed within a period of thirty months from the date of booking of the residential space/agreement to sell entered into between the prospective buyers and the respondents herein which the respondents never intended to comply since beginning of the transaction.

III. That the agreement to sell/purchase was entered into between the complainant & the respondent no.1 on 03.06.2011. after payment of substantial amount of Rs.82,25,032/- towards sale consideration amount to the developer. The possession of flat was required to be handed over on 30.12.2013.

IV. Despite receiving almost the entire sale consideration amount from the complainants towards the sale of the Independent floors in the above said project the

respondents refused to hand over the possession of the fully furnished Independent floors with all the fittings & fixtures & necessary compliances as per the local building bye laws, to the complainants/other buyers/members of the association regarding which several request & representations made to the directors/promoters of the respondent/promoter.

V. The complainant has further submitted that on enquiry by the complainant and other buyer's, were shocked to know that the application in form **BR-IV(B)** dated 26.04.2017 submitted by the respondents for the issuance of occupation certificate, to the office of Director General, Town & Country Planning Haryana at Chandigarh bearing the signatures of its architect & structural engineer supervising the construction on site, was rejected by the town planner vide **Memo No. ZP-331/SD(B5)/2017/19946** dated 16.08.2017, for the reason of non-compliance of the building bye-laws which is reproduced herein for the sake of convenience of the authority:

> *"I hereby refuse permission for the occupation of the said building for reason given below: Upon site verification by DTP, Gurugram it has emerged that building applied for issuance of occupation certificate is not complete for the purpose of grant of occupation certificate. You are accordingly advised*

to complete the construction in all respect before applying for occupation certificate.".

VI. Further, the respondent no.1 has filed an appeal against the order dated 16.08.2017 passed by the office of Director Town & Country Planning, Haryana at Chandigarh, before the Principal Secretary to the Government of Haryana, Town & Country Planning Department Chandigarh, who vide its order dated 09.11.2017 was pleased to give direction to the Director Town & Country Planning (Haryana) to obtain a fresh report from the field functionaries regarding the status of construction at the site and take appropriate action on the basis of the same.

VII. That the aforesaid order dated 09.11.2017, the respondent again made a representation on 05.06.2018 after a delay of more than six months, to the office of District Town Planner(HQ) Haryana O/o Director (Town & Country Planning, Haryana Chandigarh), who vide its office order bearing **Memo No. ZP-331/AD(RA)/2018/1934 dated 29.06.2018** was pleased to direct the District Town Planner, Gurugram to re-visit the site and send the comments/report through senior Town Planner, Gurugram.

VIII. The office of District Town Planner visited the site in question for the re-inspection of the construction of the housing complex in July 2018 and submitted its detailed report to the office of senior town planner (Gurugram) vide Memo bearing no. **DTP(G)/2018/2.08.2018** dated 31.07.2018 enumerating the details of the deviations made by the respondent and for the necessary action by the competent authority.

IX. The respondents were granted licenses bearing no. 257 of 2007 dated 07.11.2007 and 14 of 2011 dated 13.02.2011 for construction of the aforesaid group housing residential complex/real estate project, has already expired, required to be renewed on 06.12.2017 /12.02.2019 respectively, however, the respondent has not taken any steps towards the renewal of the same. It is further evident from the communication bearing memo no. **STP (G)/2018/6346** dated 02.08.2018 that the building plan submitted by the respondents for the construction of the aforesaid real estate project was approved by the Director General Town & Country Planning, Government of Haryana vide its office memo no. **ZP-331/JD (BS)/2012/22993** dated 16.11.2012 was valid till 15.11.2017 and the same has expired with the

efflux of time, however, the respondent took no steps to renew the same by taking the appropriate steps.

X. The respondents for granting occupation certificate regarding the aforesaid real estate project in question, was seriously & consciously considered by the senior official of the office of Directorate of Town & Country Planning, Haryana and several opportunities has been granted to the respondent to comply the mandatory legal requirements as per the building byelaws as well as the other legal compliances/clearances. The office memo bearing no. **ZP-331/Ad (RA)/2019/21688** dated 09.09.2019 & memo no. **ZP-331/Ad (RA)/2020/2767** dated 29.01.2020, were issued by the office of District Planner (HQ) O/o Director General, Town & Country Planning Haryana, (Chandigarh) were communicated to the respondents for legal compliances but no action or reply was submitted by it.

XI. The respondents have further perpetuated the illegality in development/construction of the housing complex by not taking the environment clearance for the aforesaid project in question till date from the competent authority and is facing prosecution for the same. The Chairman, Haryana State Pollution Control Board vide its office

order bearing no. 293-95 dated 20.03.2020, has granted the approval to prosecute the respondents and its other directors/employees under section 15 read with section 19 of the Environmental Protection Act, 1986. Further sanction has been granted for the prosecution of the respondents under sections 43/44 for violation of sections 24/25 of Water Act, 1974 concerning the aforesaid real estate project. The sanction has been also granted for the prosecution of respondents under sections 38/39 for violating section 21/22 of the Air Act, 1981 vide orders dated 20.03.2020.

XII. The Haryana Real Estate Regulatory Authority, Panchkula has granted license for construction of the aforesaid on-going real estate project to the respondent vide registration no. 90 of 2017 dated 28.08.2017. The License dated 28.08.2017 itself required the respondent in clause (ii) that "The promoter shall deposit seventy percent of the amount realized from the allottee by the promoter in a separate account to be maintained in a scheduled bank to meet exclusively the cost of land and construction purpose as per provisions of section 4(2)(l)(D) of the Real Estate (Regulation & Development) Act, 2016 which further provided that the amount from the separate

account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant practicing that the withdrawal is in proportion to the percentage of completion of the project.

XIII. That the respondents did not comply the aforesaid mandatory requirements and have deliberately & intentionally not submitted the quarterly progress report as required by law for the quarters ending 30th September,2019 & 30th November,2019 and the Haryana Real Estate Regulatory Authority (Gurugram), has issued notices dated 13.11.2019, 23.12.2019, 22.01.2020 & 15.07.2020 upon the respondents to show cause as to why penal action should not be taken upon the promoters & the company. In fact the regulatory authority has imposed the Fine of Rs. Twenty-Five thousand per day upon the respondent from the date of violation till the same is rectified but the respondents have refused to comply despite the repeated opportunities granted & there is no chance of the same being complied in future also as the money received from the buyers has been diverted by the respondents for their own use instead of completing the aforesaid real estate project.

XIV. That the respondents were obliged in law to form the association or society of the allottees of the ongoing project "Raheja silas" within three months of the majority allottees having booked their apartment, however, the same was not complied.

C. Relief sought by the complainant:

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

I. To issue direction or orders or directing for payment of Interest on principal amount to the buyers on account of delayed possession as per the law @ 10.20% from the date of handing over as per the agreement to sell till the actual possession is handed over to be paid proportionately from the unutilized fund if any remains with the complainant/buyer's association and also grant adequate compensation.

D. Reply by the respondents

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

I. That the present complaint is based on vague, misconceived notions and baseless assumptions of the complainant and these are, therefore, denied. The complainant has not approached this authority with clean hands and has suppressed the true and material facts. The complaint is neither maintainable nor tenable

and is liable to be out-rightly dismissed. It is submitted that the instant complaint is absolutely malicious, vexatious, and unjustifiable and accordingly has to pave the path of singular consequence, that is, dismissal.

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

III. That the complainant booked floor no. IF10-04, in Raheja Shilas, sector 109, Gurugram vide application form dated 21.05.2011. The respondent vide letter dated 03.06.2011 issued allotment letter to the complainant. Booking of the said allotted floor 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 with RERA vide registration No. 90 of 2017 dated 28.08.2017. The authority had issued the said certificate which is valid for a period of five years commencing from 28.08.2017 the date of revised EC.

IV. That the request for grant of occupation certificate for the unit allotted to the complainants in the project was made before the publication of Haryana Real Estate (Regulation and Development) Rules, 2017, That after completion of construction of Atharva Towers and Shilas Towers, the company applied for occupation certificates. The Department of Town and Country Planning, Haryana granted two occupation Certificates consisting of all high rise Atharva towers and Shilas towers vide its letters bearing Memo No. ZP-331/SD(BS)/2014/10384 dated 20.05.2014 and Memo No. ZP-331/SD(BS)/2014/26665 dated 19.11.2014 respectively with respect to all high-rise apartments and EWS flats.

V. That the project "Raheja Atharva _ Shilas" is a residential group colony situated at Sector – 109, Gurugram consists of three components namely (a) Raheja –

Atharva towers consists of 8 high rise towers from A to H, (Atharva Towers), (b) Raheja – Shilas towers consists of three high rise towers named as T1, T2 and T3 (Shilas Towers), (c) Raheja Shilas-Independent floors (IF) which consists of low-rise floors apartment.

VI. That the complainants after checking the veracity of the project namely, 'Raheja Shilas Low Rise" had applied for allotment of floor ref. no. IF10-04 vide their booking application form. The complainants were agreed to be bound by the terms and conditions of the booking application form. It is pertinent to mention herein that the complainants were aware of the fact as same is also stated in Clause 3 of the booking application form dated 21.05.2011 and clause 4.3 of the agreement to sell dated 06.03.2010.

VII. That the construction of the tower in which the floor is allotted to the complainant is located already complete and the respondent shall hand over the possession of the same to the complainant after getting the occupational certificate which the respondents has already applied for with the concerned department subject to the complainant making the payment of the due

installments amount as per terms of the application and agreement to sell.

VIII. That the construction activity of the Raheja Shilas – Independent Floors (IF) which consists of low-rise floor apartment is already completed and only after completion of construction of the Raheja Shilas – Independent Floors (IF), the respondent applied for grant of occupation certificates to the Department of Town and Country Planning, Haryana on 05.06.2018 and the same is still pending with the department. It is submitted that the apartments are ready for delivery as is evident from the report of DTCP dated 31.07.2018. It is further submitted that the physical possession may only be offered to the complainants after obtaining occupation certificate from the concerned department.

IX. 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.

X. 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 i.e. clause 59 of the booking application form and clause 14.2 of the buyer's agreement.

XI. 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', and 'Raheja

Vedanta' and in most of 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 the respondent launched the project Raheja Atharva- in the year 2010. That the project Raheja Atharva residential group colony situated at sector – 109, Gurugram consists of three components namely (a) Raheja – Atharva towers consists of 8 high rise towers from A to H, (Atharva towers), (b) Raheja – Shilas towers consists of three high rise towers named as T1,T2 and T3(Shilas towers), (c) Raheja Shilas – independent floors (IF) which consists of low-rise floors apartment.

c) That the complainant is 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 their calculations have gone wrong on account of severe slump in the real estate market and the complainants are now raising untenable and illegal pleas on highly flimsy and baseless grounds. Such *malafide* tactics of the complainants cannot be allowed to succeed.

d) That period of 36 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.

e) 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. 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. The respondent 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.

E. Jurisdiction of the authority

6. 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

7. 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.....*
>
> *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."*

8. 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."*

9. 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

10. 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 59 of the booking application form and 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".

11. 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.

12. 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."*
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> *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."

13. 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."

14. 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

15. The respondents have taken a stand that the complainant is investors and not consumer, therefore, it is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondents 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 respondents are correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of

interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the unit buyer's agreement, it is revealed that the complainant is buyer and has paid a total price of Rs.82,25,032/- 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;"*

16. 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.

G.I To issue direction or orders or directing for payment of Interest on principal amount to the buyers on account of delayed possession as per the law @ 10.20% from the date of handing over as per the agreement to sell till the actual offer of possession.

17. 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."*

18. 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 endeavors to give possession of the apartment to the purchaser within twenty-four (24) months from the date of the execution of the Agreement and after providing of necessary infrastructure 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....."*

19. 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.

20. **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 24 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 03.06.2013. As per flat buyer agreement, the construction and development work of the project is to be completed by 03.06.2013 which is not completed till date. It may be further stated that asking for the extension of time in completing the construction is not a statutory right nor has it been provided in the rules. Accordingly, in the present case this grace period of 6 months cannot be allowed to the promoter at this stage.

21. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 10.20% p.a. however, proviso to section 18 provides that where an allottee does not intend to

withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

22. 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.

23. 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.

24. 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%.**

25. 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;"*

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

27. 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 03.06.20211, the possession of the subject apartment was to be delivered within 30 months from the date of execution of this agreement. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 03.06.2013. The respondents have failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents/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 respondents to offer of possession of the allotted unit to the complainant as per the terms and conditions of the agreement to sell dated 03.06.2011 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 allottee.

28. 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 respondents 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. 03.06.2013 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

29. 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 respondents are 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. 03.06.2013 till the handing over of possession of the allotted unit after obtaining occupation certificate from the competent authority;

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 03.06.2013 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 promoters 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 respondents /promoters 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.

30. Complaint stands disposed of.

31. 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 29.10.2021