BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2089 of 2021
First date of hearing : 15.07.2021
Date of decision : 25.08.2021

Vibhu Gupta
Address:- House No. 6-B, Sector-14, Gurugram, Haryana **Complainant**

Versus

M3M India Pvt. Ltd.
Address:- M3M Tee Point, 6th floor, Golf Couse Road, Sector-65, Gurugram-122101 **Respondent**

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

APPEARANCE:
Gaurav Bhardwaj Advocate for the complainant
Shriya Takkar Advocate for the respondent

ORDER

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

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the 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	M3M One-Key Resi-ments a part of the commercial complex, Urbana, Sector-67
2.	Project area	8.2125 acres
3.	Nature of the project	Commercial complex
4.	DTCP license no. and validity status	(1) 100 of 2010 dated 26.11.2010 valid upto 25.11.2022 (2) 101 of 2010 dated 26.11.2010 valid upto 25.11.2022 (3) 11 of 2011 dated 28.01.2011 valid upto 27.01.2023
5.	Name of licensee	Martial Buildcon Pvt. Ltd. and 2 others
6.	RERA Registered/ not registered	Registered vide no. 35 of 2019 dated 18.06.2019 valid upto 31.12.2021 **(Area of phase for registration 2.81875 acres)**
7.	Unit no.	SB/SA/6L/01, 6th level
8.	Unit measuring	806.04 sq. ft.

9.	Date of provisional allotment letter	15.09.2014 (Page 28 of the complaint)
10.	Date of execution of Buyers Agreement	12.01.2015 (Page 36 of the complaint)
11.	Payment plan	Possession linked payment plan
12.	Total Sale consideration	Rs. 77,90,293/- (As per statement of account on page 114 of reply)
13.	Total amount paid by the complainant	Rs. 35,06,477/- (As per statement of account on page 114 of reply)
14.	Due date of delivery of possession as per clause 16.1- 36 months from the date of execution of this agreement plus 180 days grace period	12.01.2018 (Due date of possession is calculated from the date of execution of this agreement) [**Note:**- Grace period not allowed]
15.	Offer of possession	08.07.2020 (Page 90 of the complaint)
16.	Delay in handing over possession till 08.07.2020 i.e. date of offer of possession i.e. + 2 months (08.09.2020)	2 years 7 months 27 days
17.	Occupation Certificate received on	03.07.2020

B. Facts of the complaint

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

i. The complainant booked a serviced apartment in the project by paying an amount of Rs. 5,00,000/- towards the booking of the unit. Accordingly, vide provisional allotment letter dated 15.09.2014, the respondent allotted to the complainant the unit bearing no.

SB/SA/6L/01, admeasuring 806.04 sq.ft. super area for a total sale consideration of Rs. 70,48,269/-. That the respondent arbitrarily included the amount of Rs. 5,00,000/- as car parking which was not at all disclosed to the complainant at the time of booking of the unit.

ii. That thereafter, after lapse of almost 4 months from the date of booking, on 12.01.2015, a buyer's agreement was executed between the parties for the aforesaid unit bearing no. SB/SA/6L/01 admeasuring 806.04 sq. ft. That as per clause 16.1 of the said agreement dated 12.01.2015, the respondent undertook to complete construction and offer possession within 36 months from the date of execution of said agreement along with a grace period of 180 days, i.e. by 12.07.2018.

iii. That as per clause 8.5 of the agreement, upon delay in payments, the allottee could be made liable to the extent of paying 24% interest per annum. On the contrary, as per clause 16.6, upon delay in handing over possession, the respondent would be liable to pay compensation to the extent of 9% per annum on the amounts paid by the allotee for the actual time period of delay beyond the grace period until the date of notice of possession. It is submitted that such clauses of the agreement are clearly unfair and arbitrary thus making the agreement one-sided. Accordingly, the complainant pointed out these unfair clauses to the respondent, but to no avail.

iv. After 2 years on 08.07.2020 the complainant received a notice of possession for the aforesaid unit bearing no.

SB/SA/6L/01 in the said project. That the complainant due to delay in handing over the possession of the said unit requested the respondent to credit the amount of Rs.7,32,852/- as delayed possession charges. But the request of the respondent was ignored time and again. As per builder buyer's agreement it was agreed as per clause 16.6 that in case of delay in handing over of possession the respondent would be liable to make the payment of the interest @ 9% from the due date of possession till actual handing over of the possession. That the complainant despite making several requests regarding correction of demand after adjusting the amount of Rs. 7,32,852/- as interest on account of delay in handing over of the possession of the unit, refrained from responding to the request of the complainant. That the complainant on 26.08.2020 surprisedly received a pre-cancellation notice from the respondent on the ground of payment defaults, non-compliance of formalities of offer of possession pertaining to the said allotment. The complainant then approached the respondent to withdraw the said pre-cancellation notice dated 26.08.2020 and further drawn the attention of the respondent to the request letter/email seeking correction in the demand by adjusting the amount of Rs.7,32,852/- on account of delay in handing over of possession but the respondent clearly refused to do the same. That the complainant due to the said illegal, immoral and arbitrary act of sending the pre-cancellation notice dated

26.08.2020 constraint to send a legal notice on 09.09.2020 and sought rectification of demand as the complainant has nothing to pay if the amount of delayed possession compensation is credited to her account, but till date the respondent failed to do the needful.

v. It is hereby submitted that the complainant along with the other apartment buyer's regularly and repeatedly followed up with the representatives of the respondent and enquired about the project. That the complainant made payment of Rs. 35,14,999/- on 07.08.2020 against the notice of possession dated 08.07.2020 for the aforesaid unit itself except the amount of stamp duty charges and delayed possession charges of Rs. 732852/- and nothing remains due at the end of the complainant.

vi. That the respondent simply duped the complainant of their hard-earned money and life savings which have resulted into extreme financial hardship, mental distress, pain and agony to the complainant. That the present complaint has been filed in order to seek interest on the delayed possession along with possession of the said unit which the respondent has denied inspite of repeated visits of the complainant to his office and also seek other reliefs as mentioned in the relief clause of the complaint.

C. Relief sought by the complainant:

4. The complainant has filed the present compliant for seeking following relief:

i. Direct the respondent to pay delayed possession compensation at the prescribed rate from due date of possession to the actual date of handing over of possession.

ii. Direct the respondent to adjust the amount accrued as interest on account of delayed possession.

iii. Direct the respondent to handover the possession of the said unit demand maintenance charges from the date of actual handing over of possession only.

iv. Direct the respondent not to levy hefty parking charges of Rs 5,00,000/- which was not at all disclosed to the complainant at the time of booking of the unit & in the light of the judgement delivered by the hon'ble apex court.

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds.

i. That the complainant has approached this hon'ble authority with unclean hands and have tried to mislead this hon'ble authority by making incorrect and false

averments and stating untrue and/or incomplete facts and, as such, is guilty of *suppressio very suggestion falsi.* The complainant has suppressed and/or mis-stated the facts and, as such, the complaint apart from being wholly misconceived is rather the abuse of the process of law. On this short ground alone, the complaint is liable to be dismissed.

ii. The respondent provisionally allotted the unit bearing no. "SB/SA/6L/01" in favour of the complainant vide provisional allotment letter dated 15.09.2014. The buyer's agreement was executed between the parties on 12.01.2015. It is pertinent to mention that the buyer's agreement duly covers all the liabilities and rights of both the parties. That all the demands were raised as per the payment plan opted by the complainant on the achievement of the relevant construction milestone. That the present construction and development of the present segment/ phase was completed within the agreed time limit and the respondent applied to the competent authority for the grant of occupancy certificate on 12.05.2017 after complying with all the requisite formalities.

iii. That the respondent pursuant to a definitive agreement with M/s. Martial Buildcon Pvt. Ltd undertook the development on 11.375 Acres is being undertaken through M3M India Pvt. Ltd. in various phases and a commercial complex under the name and style of 'M3M Urbana' and another commercial complex under the

name and style of 'M3M Urbana Premium'. That it would also be pertinent to state here that the said commercial complex on land admeasuring 8.2125 acres consists of 9 Nos. of blocks/towers and after the completion of the construction and development of block/tower Nos. 1 (G+6), No. 2 (G+1), No. 3 (G+2), No. 4 (G+2), No. 5 (G+6), No. 6 (G+2), No. 9 (G+1) with two level basements application for the grant of occupancy certificate for the said developments was made to the competent authority. That upon completion of construction, the occupation certificate was grant/ issued by competent authority in respect of block/tower nos. 1 (G+6), No. 2 (G+1), No. 3 (G+2), No. 4 (G+2), No. 5 (G+6), No. 6 (G+2), No. 9 (G+1) with two level Basements vide memo ZP-693/SD(BS)/2017/3590 dated 23.02.2017.

iv. That pursuant to the said application there were no deficiency(ies)communicated by the competent authority i.e. DTCP, however despite, all compliances having been made the occupation certificate so applied for and requested for was not granted/received. That occupation certificate as stated hereinabove with respect to certain towers *[i.e. block/tower Nos. 7 (G+16) & 8 (G+1) and part of block/tower No. 2 (2nd floor)]* had already been applied for, which also includes the unit of the complainant, as the said block/towers were completely constructed and ready for possession and can be put to use/occupied. That the matter for grant of occupation certificate was followed up from time to time at various levels in the

office of competent authority i.e. DTCP and since no action was forthcoming, a civil writ petition bearing No. CWP No. 23839 of 2018 titled as: **Martial Buildcon Pvt. Ltd. vs. State of Haryana and Ors.** was filed in the hon'ble high court for the states of punjab and Haryana on the grounds as stated therein. Further, some of the allottees having learnt and having assessed the state of development of the blocks/towers wherein the respective units were situated and on being satisfied that the same was ready for possession and in an habitable condition, were constrained to approach the hon'ble high court for the states of Punjab and Haryana by filing a writ petition being CWP No. 6801 of 2019 titled as **Varinder Pal Singh and others Vs. state of Haryana** and others, inter alia, praying for issuance of appropriate direction to state of Haryana to consider the case of the allottees for grant of occupation certificate, possession certificate and other statutory permissions, as may be required, on the same pattern as has been considered and granted to other similarly placed colonies in terms of order dated June 17, 2016 passed in CWP No. 10770 of 2016: **M/s R P Estates Pvt. Ltd. Vs State of Haryana And ors.** and order dated March 23, 2017, passed in CWP No. 20902 of 2016: **Frontier home developers Pvt. Ltd. Vs. State of Haryana and Ors.** by the hon'ble high court.

v. That both the civil writ petitions bearing Nos. CWP No. 23839 of 2018 and CWP no.6801 of 2019 have been decided by the hon'ble high court vide order dated May

29, 2019 whereby the state authorities were directed to grant the occupancy certificates as expeditiously as possible, preferably within a period of 6 weeks from the date of receipt of the certified copy of the order.

vi. It needs to be highlighted here that the applicant/respondent suffered a state of complete helplessness at the hands of the statutory authorities, who despite the construction having been completed in all respects, without any shortcoming whatsoever in the construction, failed to grant the occupation certificate in compliance of their statutory duties. The said fact that there were no shortcomings/infirmity in the application for grant of the OC is apparent from the OC dated 03.07.2020, released for Tower 7 and 8. That the OC was also delayed due to national lockdown announced by the government of India due to COVID 19 pandemic on 24.03.2020 to be effective from the following day. That this delay of the competent authorities in granting the OC cannot be attributed in considering the delay in delivering the possession of the flat, since on the day the answering respondent applied for OC, the flat was complete in all respects. That immediately after the receipt of the occupation certificate on 03.07.2020, the respondent company sent the offer of possession dated 11.07.2020 to the complainant herein.

vii. That the buyer's agreement was entered into between the parties and, as such, the parties are bound by the terms and conditions mentioned in the said agreement.

The said agreement was duly signed by complainant after properly understanding each and every clause contained in the agreement. The complainant was neither forced nor influenced by the opposite parties to sign the said agreement. it was complainant who after understanding the clauses signed the said agreement in his complete senses. That it is trite law that the terms of the agreement are binding between the parties.

viii. That in accordance with clause **16.1** of the buyer's agreement possession of the unit was agreed to be handed over within a period of 36 months from the date of execution of the buyer's agreement, plus 180 days grace period. The construction of the said unit was completed before the said date and the same is evident from the fact that the OC for the unit was applied on 12.05.2017.

ix. Despite force majeure conditions the respondent has completed the construction of the construction within the agreed time limit and occupancy permission from the competent authority was duly applied for on 12.05.2017. That despite all compliances from the side of the respondent, the OC was not being released by the authorities until 03.07.2020. It is submitted that the delay in grant of occupation certificate by the competent authority is beyond the control of the respondent and the same is squarely covered under clause 16.4 of the buyer agreement. It is submitted that the under clause 16.4, parties have agreed that if the delay is on account of force

majeure conditions, the time for delivery of possession will be appropriately extended beyond the grace period.

x. Further the parties have agreed in clause 16.6 that in in the event of delay for reason other than 'force majeure', the allottee shall be entitled to compensation of equal to simple interest @ 9% per annum on the amounts paid by the allottee, which shall be adjusted at the time of handing over of possession/execution of conveyance deed subject to the allottee not being in default under any of the terms of the agreement. Thus, the delay compensation, if any, to be remitted/credited to the complainant can only be until the date on which the application for the OC was applied for. It is submitted that the complainant in the present case defaulted in making timely payments and thus are not entitled to any relief whatsoever.

xi. That the complainant is not a consumer and an end user since they had booked the unit in question purely for commercial purpose as a speculative investor and to make profits and gains. Further, the complainant has invested in many projects of different companies which prove that the complainant is not a consumer but only an investor. Thus, it is clear that the complainant has invested in the unit in question for commercial gains, i.e. to earn income by way of rent and/or re-sale of the property at an appreciated value and to earn premium thereon. Since the investment has been made for the aforesaid purpose, it is for commercial purpose and as such the complainant is not a consumer/end user. The

complaint is liable to be dismissed on this ground alone. Under these circumstances, it is all the more necessary for the complainant, on whom the burden lies, to show how the complainant is a consumer.

xii. The relationship of the complainant and the respondent is defined and decided by the buyer's agreement executed between both parties. It is submitted that a specific clause for referring disputes to arbitration is included in the said agreement vide clause 48 of the agreement which is extracted hereunder;

> *"48.1- Any dispute connected or arising out of this Agreement or touching upon or in relation to terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties hereto shall be resolved through the process of arbitration....."*

Hence, both the parties are contractually bound by the above condition. In view of clause 48.1 of the agreement, the captioned complaint is barred. The complainant ought to have resorted to arbitration instead of having approached this hon'ble authority with the captioned complaint. It is respectfully submitted that in light of the arbitration clause in the agreement, this hon'ble authority does not have the jurisdiction to adjudicate upon the instant complaint and ought to dismiss the same. That vide the instant complaint, the complainant has sought for interest on delayed possession qua subject unit. It is stated that the dispute and differences, if any, between the parties involves various questions of facts and law. The issues raised by the complainant cannot be addressed before this hon'ble authority and the subject matter cannot be

adjudicated without going into the facts of the case which requires elaborate evidence to be led and which cannot be adjudicated upon under the summary jurisdiction of this hon'ble authority.

7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.

E. Jurisdiction of the authority

8. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

E.II Subject matter jurisdiction

10. 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 respondent:-

F.I Objection regarding entitlement of DPC on ground of complainant being investor

11. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he 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 buyer's agreement, it is revealed that the complainant is buyers and they have paid a total price of Rs. 35,06,477/- to the promoter towards

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

F.II Objection regarding exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

12. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 12.05.2017 and thereafter the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 03.07.2020 that an incomplete application for grant of OC was applied on 12.05.2017 as fire NOC from the competent authority was granted only on 02.07.2018 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 18.01.2018. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 26.03.2018 and 27.03.2018 respectively. As such, the application submitted on 12.05.2017 was incomplete

and an incomplete application is no application in the eyes of law.

13. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. Therefore, in view of the deficiency in the said application dated 12.05.2017 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

14. In the present case, the counsel for the respondent on dated 28.05.2021 had produced a copy of order dated 03.03.2021 and tried to convince the hon'ble authority that the unreasonable delay in offer of possession is attributable to the zero period from 01.11.2017 to 11.05.2020 granted by the DTCP as per the office orders conveyed by the DTCP vide endorsement no. CC-1185-JE (VA)/2021/5226-29 dated 03.03.2021. As per terms and conditions of BBA, the possession was to be given to the complainant on 12.01.2018 which is much more before the zero period came into effect and the zero period has been accorded only in relation to

license renewal, validity of license and interest on EDC/IDC and not for the delay in obtaining OC. As such the respondent is not eligible to grant benefit of the above zero period.

F.III objection regarding agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement

15. The agreement to sell entered into between the two side on 12.01.2015 contains a clause 48 relating to dispute resolution between the parties. The clause reads as under: -

> *48.1 Any dispute arising out of or touching upon or in relation to the terms of this application and/or the Agreement including the interpretation and validity of the terms and conditions thereof and the respective rights and obligations of the Allottee(s) and/or Company shall be settled amicably by mutual discussion. In case the parties are unable to settle their disputes within 15 days, the same shall be settled through arbitration as per the Arbitralion and Conciliation Act, 1996, or any statutory amendments/modifications thereof for the time being in force, by a sole arbitrator selected from the names of two arbitrators suggested by the Company. In case the Allottee(s) delays/neglects/refuses to select one of the names from the suggested names within 15 days of intimation, the Company shall be at liberty to appoint one of the proposed persons as a sole arbitrator, whose appointment shall be final and binding on the parties. Costs of arbitration shall be shared equally by the parties. The arbitration shall be held in English language at an appropriate location in Gurgaon, Haryana.*

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 same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

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

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in*

respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

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

...

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

16. 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."*

17. 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 their rights to seek a special

remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings on the relief sought by the complainant

18. Relief sought by the complainant:

i. Direct the respondent to pay delayed possession compensation at the prescribed rate from due date of possession to the actual date of handing over of possession.

ii. Direct the respondent to adjust the amount accrued as interest on account of delayed possession.

iii. Direct the respondent to handover the possession of the said unit demand maintenance charges from the date of actual handing over of possession only.

iv. Direct the respondent not to levy hefty parking charges of Rs 5,00,000/- which was not at all disclosed to the complainant at the time of booking of the unit & in the light of the judgement delivered by the hon'ble apex court.

19. 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."

20. Clause 16.1 of the apartment buyer agreement (in short, agreement) provides for time period for handing over of possession and is reproduced below:

"16.1 POSSESSION OF THE UNIT

The company based upon its present plans and estimates, and subject to all exceptions proposes to handover possession of the unit within a period of 36 months from the date of execution of agreement (committed period). Should the possession of the unit not be given within the committed period., the allottee agrees to an extension of one hundred and eighty days(Grace Period) after expiry of the committed period. In case of failure of the Allottee to make timely payments of any of the installments as per the Payment Plan, along with other charges and dues as applicable or otherwise payable in accordance with payment plan or as per the demands raised by the company from time to time in this respect, despite acceptance of delayed payment alongwith interest or any failure on part of the Allottee to abide by any of the terms and conditions of this agreement, the time periods mentioned in this clause shall not be binding upon the company with respect to the handing over of the possession of the unit.

21. At the outset it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the

allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the doted lines.

22. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the unit within 36 months from the date of this agreement and further provided in agreement that promoter shall be entitled to a grace period of 180 days after expiry of committed period. The period of 36 months expired on 12.01.2018. As a matter of fact, the promoter has not given the valid reason for delay to complete the project within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace periods of 180 days cannot be allowed to the promoter at this stage.

23. **Admissibility of delay possession charges at prescribed rate of interest:** Section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the

handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

24. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

25. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs. 9% per annum on the amount paid by the allottee as per clause 16.6 of the buyer's agreement for the period of such delay; whereas, as per clause 8.5 of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of each outstanding payment till the date the payment is realized by the company. 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 into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

26. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 25.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

27. **Rate of interest equally chargeable to the allottee in case of default in payment:-** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
Explanation. —For the purpose of this clause—
(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

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

H. **Car parking charges:-** The complainant is seeking relief not to levy hefty parking charges of Rs. 5,00,000/- which was not at all disclosed to the complainant at the time of booking of the unit. It is pertinent to mentioned here that as per clause 3.1 of sub-clause (iii) of the builder buyer's agreement dated 12.01.2015 duly executed by both the parties, the complainant has fully agreed to pay the amount of Rs. 5,00,000/- for one car parking space, therefore they can not claim to waiver of car parking charges as it is the part of builder buyers' agreement which has been duly agreed between the parties. Therefore, the contention of the complainant that car parking charges not disclosed at the time of booking of the unit does not find any merit.

29. On consideration of the documents available on record and submissions made by both the parties it is the failure of the

promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 12.01.2015 to hand over the possession within the stipulated period. 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. By virtue of clause 16.1 of the buyer's agreement executed between the parties on 12.01.2015 possession of the said unit to be delivered within a period of 36 months from the date of execution of buyer's agreement. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over of possession comes out to be 12.01.2018. In the present case, the complainant was offered possession by the respondent on 08.07.2020 after receipt of occupation certificate dated 03.07.2020. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 12.01.2015 executed between the parties.

30. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 03.07.2020. However, the respondent offered the possession of the unit on 08.07.2020, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, they should be given 2 months' time

from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 12.01.2018 till the expiry of 2 months from the date of offer of possession (08.07.2020) which comes out to be 08.09.2020. Furthermore, the complainant is directed to take possession within two weeks from the date of this order.

31. In the present case, the counsel for the respondent on dated 28.05.2021 had produced a copy of order dated 03.03.2021 and tried to convince the hon'ble authority that the unreasonable delay in offer of possession is attributable to the zero period from 01.11.2017 to 11.05.2020 granted by the DTCP as per the office orders conveyed by the DTCP vide endorsement no. CC-1185-JE (VA)/2021/5226-29 dated 03.03.2021. As per terms and conditions of BBA, the possession was to be given to the complainant on 01.10.2017 which is much more before the zero period came into effect and the zero period has been accorded only in relation to license renewal, validity of license and interest on EDC/IDC and not for the delay in obtaining OC. As such the respondent is not eligible to grant benefit of the above zero period.

32. 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 prescribed rate of the interest @ 9.30% p.a. w.e.f. 12.01.2018 till 08.09.2020 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

I. Directions of the authority

33. 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 on the amount paid by the complainant from the due date of possession i.e., 12.01.2018 till 08.09.2020 i.e. expiry of 2 months from the date of offer of possession (08.07.2020). The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period and to take the possession of the unit within one month from the date of this order.

iii. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter

which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

iv. The respondent is right in demanding maintenance charges at the rates prescribed in the builder buyer's agreement at the time of offer of possession. However, the respondent shall not demand the maintenance charges for more than one year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the maintenance charges has been demanded for more than a year.

v. The respondent shall not charge anything from the complainant, which is not the part of the agreement, however, holding charges shall not be charged by the promoter at any point of time even after being part of agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

34. Complaint stands disposed of.

35. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 25.08.2021

Judgement uploaded on 12.11.2021.