BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2870 of 2020
First date of hearing : 13.11.2020
Date of decision : 25.08.2021

1. Rita Srivastava
2. Dileep Srivastava

Both R/o:- C 38, L.G.F, Panchsheel Enclave, New Delhi **Complainants**

Versus

1. M3M India Pvt. Ltd.
2. Martial Buildcon Pvt. Ltd.
   Address: - Office No. 1221A, Devika Tower, 12th floor, 6, Nehru Place, New Delhi-110019 **Respondents**

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

APPEARANCE:
Shri Anshul Gupta Advocate for the complainants
Ms. Shriya Takkar Advocates for the respondents

ORDER

1. The present complaint dated 06.10.2020 has been filed by the complainants/allottees in Form CRA 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 to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

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

S.No.	Heads	Information
1.	Project name and location	M3M 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.	HRERA 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.	Occupation certificate granted on	03.07.2020

8.	Approval of building plans	11.11.2013 (As submitted by the respondent on his reply, page 39 of the complaint)
9.	Provisional allotment letter dated	04.05.2011 (Page 39 of the complaint)
10.	Unit no.	SB/R/GL/08/03, Block-8, Ground floor
11.	Unit measuring	1016.71 sq. ft. (As per BBA)
12.	Date of execution of buyer's agreement	12.01.2013 (Page 50 of the complaint)
13.	Payment plan	Construction linked payment plan
14.	Total consideration	Rs. 90,62,969/- (As per statement of account on page 149 of the complaint)
15.	Total amount paid by the complainants	Rs. 89,20,177/- (As per statement of account on page 149 of the complaint)
16.	Due date of delivery of possession as per clause 15.1- 36 months from the date of approval of building plans of the commercial complex or the date of execution of this agreement, whichever is later plus 180 days grace period	11.11.2016 (The date of approval of building plan is later than the date of execution of agreement so the due date of possession is calculated from the approval of building plans) [**Note**:- Grace period not allowed]
17.	**Date of offer of possession to the compiainants**	11.07.2020 (Page 147 of the complaint)

18.	Delay in handing over possession till 11.07.2020 i.e. date of offer of possession i.e. + 2 months (11.09.2020)	3 years 10 months

B. Facts of the complaint

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

i. That based on various advertisements, assurances and promises of the respondent, the complainants had, in May 2011, booked a commercial unit in the project named "M3M Urbana", by making a payment of Rs. 10,00,000/- as booking amount. That the respondent issued the provisional allotment letter dated 04.05.2011. That the complainants were allotted commercial unit admeasuring 996.34 sq. ft. bearing unit no. SB/R/GL/08/03.

ii. That the respondent executed the builder buyer agreement on 12.01.2013. That the agreement contained various one-sided and arbitrary clauses, yet the complainants could not negotiate on any of the terms, since the respondent had already collected significant amount of money from the complainants.

iii. That the complainants paid all the 13 installments as demanded by the respondent on or before the due date. That the complainants had made a total payment of Rs. 89,20,177/- to the respondent as per the payment plan even though possession was not offered on time. That even the penultimate demand letter raised by the respondent dated 23.04.2018 on installation of services indicates

that no previous dues or interest charges are pending against the complainants as all payments were made on time.

iv. That the respondent sent a letter of possession dated 11.07.2020 received on 14.07.2020 by e-mail along with final statement of account, including an unexplained interest charge, stamp duty and with an invoice for IFMS deposit. That this was subsequently received by courier but with the one-sided Indemnity Undertaking with M3M & a Maintenance Agency, to execute before possession wherein the respondent stands indemnified of any future claims including delayed compensation.

v. That nowhere in the agreement the respondent has mentioned that the carpet area will be almost half of super area. This is outright breach of the said agreement and the rules and regulations of RERA. That Rule 4(2) of the Haryana RERA Rules, 2017 states that the promoter shall disclose the size of the apartment based on the carpet area even if sold on any other basis such as super area/ super built up area, built up area etc. That nowhere has the respondent mentioned the carpet area of the unit. Further that the statement of accounts dated 17.10.17 includes an arbitrary "demand" for "impact of increase in area" of Rs. 65,184 which was debited on 07.02.13 and paid in good faith with interest charges without any knowledge nor any explanation to complainants. That charges for increase in area cannot be collected and then provide a Unit with a 50% decrease in carpet area.

vi. That the complainants further sent multiple e-mails to various representatives of the respondent from 21.07.2020 to 01.08.2020 including the authorized signatory, the CRM of the respondent as well as to the director of the respondent to no avail as no satisfactory response was ever provided by the respondent despite repeated requests. That the turn of events borne suspicion in the mind of the complainants. That the complainants are demanding possession of unit along with removal of unnecessary charges and delay penalty from the respondent owing to the unreasonable delay in the completion of construction party. Hence the present complaint and result gross deficiency in services by the respondent.

vii. That the complainants are innocent people who have limited income with lots of liabilities and regular taxpayers. The complainants submits that the difficulties and agony before the complainants are incomparable and undeniable, lifetime savings, hard-earned money has been invested by the complainants in the respondent project, which has now resulted in perpetual anguish. The above act(s) prove gross unfair trade practice and wilful negligence on the part of the respondent, and it also reflects a gross deficiency of service for which the respondent is liable to pay compensation to the complainants because the respondent has caused mental agony, harassment, and huge financial losses to the complainants, as he had been suffering a lot of inconveniences

without any fault on his part. The complainants thus felt cheated and defrauded.

C. Relief sought by the complainants

4. The complainants have filed the present compliant for seeking following relief:

   i. To direct the respondent to remove all unnecessary charges and provide immediate possession of the commercial unit to the complainants and pay a delay penalty @ 18% per annum on amount deposited by the complainants.

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 and to plead guilty or not to plead guilty.

D. Reply by the respondent

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

   i. That the complainants have 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 complainants have 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/R/GL/08/03" in favour of the complainants vide provisional allotment letter dated 04.05.2011. It is submitted that the cost of the commercial unit was Rs. 79,70,720/- exclusive of IFMS and other charges. The complainants as per their own decision and after fully understanding their obligations opted for the construction linked payment plan. The buyer's agreement was executed between the parties on 12.01.2013. 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 complainants 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 Premium ' 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 complainants, 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 complainants 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 complainants after properly understanding each and

every clause contained in the agreement. The complainants were neither forced nor influenced by the opposite parties to sign the said agreement. it was complainants 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 **15.1** 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 approval of building plans or from the date of execution of the buyer's agreement, whichever is later plus 180 days grace period. That the revised building plans of the commercial complex were approved by the competent authorities on 11.11.2013. The construction of the project was affected on account of unforeseen circumstances beyond the control of the respondent. In the year, 2012 on the directions of the hon'ble supreme court of India, the mining activities of minor minerals (which includes sand) was regulated. The hon'ble supreme court directed framing of modern mineral concession rules. Reference in this regard may be had to the judgment of ***"Deepak Kumar v. State of Haryana, (2012) 4 SCC 629"***. The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce. Further, the respondent was faced with

certain other force majeure events including but not limited to non-availability of raw material due to various orders of hon'ble Punjab & Haryana High Court and National Green Tribunal thereby regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc.

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 15.4 of the buyer agreement. It is submitted that the under clause 15.4, 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 15.6 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 complainants can only be until the date on which the application for the OC was applied for. It is submitted that the complainants in the present case defaulted in making timely payments and thus are not entitled to any relief whatsoever.

xi. That the complainants are 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 complainants have invested in many projects of different companies which prove that the complainants are not a consumer but only an investor. Thus, it is clear that the complainants have 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 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 complainants, on whom the burden lies, to show how the complainants are a consumer.

xii. The relationship of the complainants 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 47 of the agreement which is extracted hereunder;

> *"47.1- 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 47.1 of the agreement, the captioned complaint is barred. The complainants 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 complainants have 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 complainants 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 relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

E. Jurisdiction of the authority

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

8. 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

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

F. Findings on the objections raised by the respondent

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

10. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act

states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the 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 buyer's agreement, it is revealed that the complainants are buyers and they have paid a total price of Rs. 89,20,177/- 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

promoters and complainants, it is crystal clear that the complainant is allottee(s) as the subject unit was allotted to them by the promoters. 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

11. 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.

12. 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.

13. In the present case, the counsel for the respondent on dated 25.08.2021 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 attributabie 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 complainants 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.

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

14. The agreement to sell entered into between the two side on 12.01.2013 contains a clause 47 relating to dispute resolution between the parties. The clause reads as under: -

> *47.1 Any dispute connected or arising out of this agreement or touching upon or in relation to the 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. The arbitration proceedings shall be governed by the provisions of the arbitration and conciliation act 1996 or any stator amendments/modifications to be appointed by the company, whose decision shall be final and binding upon the parties hereto. .....*

15. 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.

16. 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."

17. 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."*

18. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and 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 reliefs sought by the complainants

19. To direct the respondent to remove all unnecessary charges and provide immediate possession of the commercial unit to the complainants and pay a delay penalty @ 18% per annum on amount deposited by the complainants.

G.I Delay possession charges

20. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

> *"Section 18: - Return of amount and compensation*
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

21. Clause 15.1 of the apartment buyer agreement (in short, agreement) provides for time period for handing over of possession and is reproduced below:

> **"15.1 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 approval building plans of the commercial complex or the date of execution of agreement, whichever is later (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 commercial unit.

22. 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.

23. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the unit within 36 months from the date of approval of

building plans or from the date of execution of agreement whichever is later 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 11.11.2016. 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.

24. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18%. 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.*

25. The legislature in its wisdom in the subordinate legislation under the 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.

26. Taking the case from another angle, the complainants-allottees were 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 15.6 of the buyer's agreement for the period of such delay; whereas, as per clause 7.5 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.

27. 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%.

28. **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;"*

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

30. 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 12.01.2013 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 15.1 of the buyer's agreement executed between the parties on 12.01.2013, possession of the said unit to be delivered within a period of 36 months from the date of approval of building plans i.e. 11.11.2013 or from the date of execution of buyer's agreement i.e. 12.01.2013 whichever is later. As far as grace period is concerned, the same is disallowed for the reasons quoted above. The date of approval of building plans is later than the date of execution of agreement , so the due date of possession is calculated from the date of approval of building plans. Therefore, the due date of handing over of possession comes out to be 11.11.2016. In the present case, the complainants were offered possession by the respondent on 11.07.2020 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 complainants as per

the terms and conditions of the buyer's agreement dated 012.01.2013 executed between the parties.

31. 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 in question to the complainants only on 11.07.2020. So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months of reasonable time is being given to the complainants 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. 11.11.2016 till the expiry of 2 months from the date of offer of possession (11.07.2020) which comes out to be 11.09.2020.

32. In the present case, the counsel for the respondent on dated 25.08.2021 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 complainnat 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.

33. 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 complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 11.11.2016 till 11.09.2020 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. Directions of the authority

34. 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 the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 11.11.2016 till 11.09.2020 i.e. expiry of 2 months from the date of offer of possession (11.07.2020). The arrears of interest accrued so far shall

be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

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

iii. The rate of interest chargeable from the allottees by the promoters, 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 allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

iv. The respondents shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

35. Complaint stands disposed of.

36. 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.