

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

Complaint no. : 642 of 2020
First date of hearing: 13.03.2020
Date of decision : 08.04.2021

1. Chhaya Keerti Ratna
R/O: 11, Berwick Lawn, Brackens Town Road,
Swords co., Dublin, Ireland

Complainant**Versus**

1.M/s BPTP Limited
Regd. Office: - M-11, Middle Circle, Connaught
Circus, New Delhi-110001
2.M/s Countrywide Promoters Private Limited
Regd. Office: - OT-14, 3rd Floor, Next Door
Parklands, Sector-76, Faridabad, Haryana-
121004

Respondents**CORAM:**

Dr. K.K. Khandelwal
Shri Samir Kumar

**Chairman
Member****APPEARANCE:**

Smt. Vridhi Sharma
Shri Venket Rao

Advocate for the complainant
Advocate for the respondents

ORDER

1. The present complaint dated 07.02.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Description
1.	Name of the project	"Terra" at Sector-37-D, Gurugram.
2.	Nature of the project	Group Housing Towers
3.	Project area	19.74 acres
4.	DTCP license no. and validity status	83 of 2008 Issued on 05.04.2008 valid up to 04.04.2025 94 of 2011 Issued on 24.10.2011 valid up to 23.10.2019
5.	Name of the license holder for license no. 83 of 2008	Super belts Pvt. Ltd and 4 others.
6.	Name of the license holder for license no. 94 of 2011	Countrywide Promoters Pvt Ltd and 4 others.
7.	HARERA Registration number	"Terra" registered vide no. 299 of 2017 (Registered for 10.23 acres)
8.	Registration certificate	Dated 13.10.2017 valid up to 12.10.2020



9.	Date of sanction of building plan	21.09.2012(As per project details)
10.	Unit no.	T20-1404, 13 th Floor, T20 Tower (Page no. 39 of the complaint)
11.	Unit measuring	1691 sq. ft. of super area
12.	Allotment letter	07.12.2012 (Page no. 28 of the complaint)
13.	Date of execution of Flat buyer's agreement	07.12.2012 (Page no. 31 of the complaint)
14.	Payment plan	Subvention plan (Page no. 28 of the complaint)
15.	Total consideration	Rs. 10,373,864.00/- (Vide account statement on page no. 60 of the complaint)
16.	Total amount payable by the Complainant	Rs. 9,831,260.90/- (Vide account statement on page no. 60 of the complaint)
17.	Due date of delivery of possession (As per clause 1.6 of the flat buyer's agreement i.e., 42 months from the date of sanction of the building plan or execution of agreement, whichever is later.) (As per clause 5.1 of the flat buyer's agreement i.e., grace period of 180 days after the expiry of the said commitment period for making offer of possession of the said unit.)	07.06.2016 (Due date is calculated from the date of execution of the agreement as it is later from the date of sanctioning of building plan i.e., 21.09.2012) Note: Grace period of 180 days is not allowed in the present case.

18.	Occupation certificate date	Occupation certificate for this tower has not been received.
19.	Offer of possession	Not received.
20.	Delay in handing over the possession till the date of decision i.e., 08.04.2021	4 years 10 months 1 day
21.	Status of project	Ongoing

B. Facts of the complaint

The complainant has submitted as under: -

- That the complainant had made a booking in the project of the respondents namely, "Terra", located at Sector 37-D, Gurgaon, Haryana.
- That the respondent's M/s BPTP Ltd. and M/s Countrywide Promoters Pvt. Ltd. are companies incorporated under the Companies Act 1956 and claim to be one of the leading real estate companies in the country.
- That the complainant on 23.08.2012 signed the application for allotment of a unit in the project of the respondents. That at the time of booking, timely completion of the project with the promised facilities as well as timely delivery of the unit were the two key components on which the Complainant has placed all their reliance on.
- That a flat buyer's agreement was executed between the parties on 07.12.2012. That a unit/flat bearing no. T20-1404, was allotted to the complainant having a super built up area of

1,691 Sq. Ft. along with allotment letter for the said unit. That as per the agreement the possession of the said unit was to be handed over to the complainant within 42 months from the date of execution of the agreement, that is by, 07.06.2016.

7. That the layout of the building had already been approved by the appropriate authority on 21.09.2012 as per the information available on the site of the respondent's companies. Thus, the respondents were obligated to deliver the possession of the unit within 42 months from the date of execution of the agreement that is by, 07.06.2016.
8. That the said clauses are unilateral as the respondents have only tried to save themselves from compensating the complainant in case of a delay in completion of the project and in giving the possession of the flat to the complainant. That the respondents have only tried to considerably limit their own liability and impose unfair and arbitrary interest on the complainant to grab their hard-earned money.
9. That the said clauses are in contravention of the Act of 2016. That as per agreement the building plans, lay out plan and other crucial details were to be managed by the respondents solely without obtaining any consent of the complainant.
10. That the respondent's companies had raised demands without even reaching the relevant milestone and have already collected more than 90% of the sale consideration. The complainant till date has paid an amount of Rs. 98,31,260/- out of the total consideration of Rs. 1,03,73,864 /-. That the

booking has been made way back in 2012 and 90 per cent of the total consideration has already been already paid by the complainant. Despite this the respondent's companies have failed in completing the construction of the project and deliver possession.

11. That the case of the complainant is of a double jeopardy, where on one hand the complainant has been deprived of the possession of their home and on the other hand, they are being made to make the payment of interest on delayed instalment.
12. That the due date of delivering the possession of the property was in June 2016 and there has been a delay of almost 40 months and the complainant is not responsible for any delay and for any escalation charges.
13. That in pursuance of the booking so made, the complainant had made payments as and when demanded and the receipts for the same were issued by the promoter thereof. However, in one such instance where the complainant had made payment of Rs 26,42,159/- and Rs 7,59,687.30/-, a receipt for the former was issued but not for the latter, citing reasons that the latter amount had been adjusted as per their understanding with the bank and hence receipt against that amount cannot be generated. Hence, in spite of making a payment of around Rs 7,59,687.30 to the respondent's companies', no receipt recognizing the same has been issued to the complainant.



14. That the respondent company had intimated the complainant about an offer wherein it was offering 1% discount on current demand subject to clearance of total outstanding payments. That the complainant, within stipulated time frame did the same, however to the utter shock of the complainant, she hasn't witnessed any discount being awarded. That these are just predatory techniques that Real Estate Companies adopt to illicit money from allottees.
15. That the present circumstances of the complainant have constrained her to file the present complaint as she has deposited a considerable amount of money with the respondents and no possession has been granted to her till date. the complainant has been made to pay the EMIs for the loan.
16. That the respondents have never communicated with the complainant any reason for the delay in the delivery of the possession rather have sought to collect approximately the entire total sale consideration till date which shows that malafide intention of the respondents to cause delay in the possession of the unit.
17. That in above circumstances, it was just and necessary that hon'ble authority be pleased to direct the respondents to deliver immediate possession of the unit to the complainant along with an appropriate compensation at a prescribed rate of interest, on the amount already paid by the complainant to



the respondents, from the promised date of delivery of the flat till the actual delivery of the flat.

C. Relief sought by the complainant:

18. The complainant has sought following relief(s):

- (i) Direct the respondents to deliver immediate possession of the unit/flat bearing no. T20-1404, having a super built up area of 1,691 sq. ft in project named as 'Terra', located at Sector 37-D, Gurgaon, Haryana along with all the promised amenities and facilities and to the satisfaction of the complainant.
- (ii) Direct the respondents to make the payment of delay interest at prescribed rate of interest on the amount already paid by the complainant to the respondents, from the promised date of delivery of the flat till the actual delivery of the flat to the complainant.
- (iii) Restrain the respondents from increasing any super area/common area at the time of delivery the possession of unit.
- (iv) Direct the respondents to issue a receipt for the amount of Rs.7,59,687.30/- paid to them by the complainant.

15. On the date of hearing, the authority explained to the respondents/promoters 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 respondents.

The respondents have contested the complaint on the following grounds: -

19. That the respondents had applied for registration of the project in question i.e., Terra located at sector 37D, Gurugram including towers T-20 to T-25 & EWS before this hon'ble authority. Registration certificate was issued by hon'ble authority dated 13.10.2017.
20. That the present complaint liable to be dismissed, that the complainant, who is resident of Ireland, has filed the present complaint without supporting affidavit.
21. That the complainant has approached this hon'ble authority for redressal of her alleged grievances with unclean hands, i.e., by not disclosing and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of decisions had laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.
22. Reference may be made to the following instances which establish concealment/suppression/ misrepresentation on the part of the complainant:



- That the complainant has misrepresented that a receipt of Rs. 7,59,687.00/- was not issued to the complaint. In this context, it is pertinent to mention that at the time of booking the complainant had made a payment of Rs. 6,00,000.00/- for the basic selling price (BSP) and Rs. 50,000.00/- as advance. A receipt dated 23.08.2012 was issued in this regard. As per the agreed payment plan, the respondents issued demand letter dated 22.10.2012 upon reaching the milestone 'within 45 days of booking.' The complainant made the payment of Rs.11,62,109.60/- towards BSP, Rs. 72,163.00/- towards CPC and 1,65,711.40/- towards DC. A receipt dated 05.11.2012 was issued in this regard. Thereafter, as per agreed payment plan, the respondents issued demand letter dated 08.11.2012 upon reaching the milestone 'start of construction'. The complainant made a partial payment of Rs.59,342.00/- towards DC and Rs.10,888.00/- & Rs. 1,15,398.00/-towards CPC on 05.02.2013 and the bank made the partial payment of Rs. 24,61,505.30/- towards BSP and Rs. 2,30,653.70/- towards DC on 14.02.2013. Receipts dated 05.02.2013 and 14.02.2013 respectively were issued in this regard. It is pertinent to mention here that on the amount paid by the bank, the respondents have borne the pre-EMI interest of Rs. 7,59,687.00/-as per the terms and conditions of the TPA.

- That the complainant has misrepresented that she was eligible for the discounts of 1% that the respondents were offering via email dated 19.10.2016. the respondents were offering a 1% discount on current demand subject to clearance and the special benefit of the discount was applicable only if the dues are remitted within the stipulated timeframe of 19.10.2016 to 24.10.2016. the complainant deposited her dues on 27.10.2016, hence, she was never eligible for the discount that the respondents were offering its customers.
- That the complainant has concealed from this hon'ble authority that the BSP discount of Rs. 88,778.00/- was given to the complainant by the respondents. Thus, the net BSP charged from the complainant is less than the original amount of the unit.
- That the complainant further concealed from this authority that the respondents vide demand letters as well as numerous emails has kept updated and informed the complainant about the milestone achieved and progress in the developmental aspects of the project. The respondents vide emails have shared photographs of the project in question. However, it is evident that the respondents have always acted bonafidely towards its customers including the complainant, and thus, have always maintained a transparency in reference to the

project. In addition to updating the complainant, the respondents on numerous occasions, on each and every issue/s and/or query/s upraised in respect of the unit in question has always provided steady and efficient assistance. However, notwithstanding the several efforts made by the respondents to attend to the queries of the complainant to their complete satisfaction, the complainant erroneously proceeded to file the present vexatious complaint before this authority against the respondents.

23. That the agreements were executed prior to implementation of Act of 2016 and rules shall be binding on the parties and cannot be reopened. The rules published by the State of Haryana, an explanation is given at the end of the prescribed agreement for sale in annexure A of the rules in which it has been clarified that the developer shall disclose the existing agreement for sale in respect of ongoing project and further that such disclosure shall not affect the validity of such existing agreement executed with its customers.
24. That the relief sought by the complainant are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties which forms a basis for the subsisting relationship between the parties. The complainant entered into the said agreement with the respondents with open eyes and are bound by the same.

25. That the relief claimed by the complainant goes beyond the jurisdiction of this hon'ble authority under the Act of 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainant. That having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainant is blowing hot and cold at the same time which is not permissible under law as the same is in violation of the '*Doctrine of Aprobate & Reprobate*.' Therefore, in the light of the settled law, the reliefs sought by the complainant in the complaint under reply cannot be granted by this hon'ble authority.
26. That the parties had agreed under clause-17 of the flat buyer agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainant has raised dispute but did not take any steps to invoke arbitration. Hence is in breach of the agreement between the parties.
27. That the proposed timelines for possession being within 42 months from the date of sanction of building plans or execution of the FBA, whichever is later, along with 180 days of grace period was subject to *force majeure* circumstances, timely payments, and other factors. However, the complainant has indulged in selective reading of the clauses of the FBA whereas the FBA ought to be read as a whole. That the construction is going on in full swing and respondents are

making every endeavour to hand over the possession at the earliest.

- That the parties had, vide clause 5.1 of the FBA [clause G (1) of the application form], duly agreed that subject to force majeure and compliance by the complainant of all the terms and conditions of the FBA, the respondents propose to hand over possession of the flat to the complainant within 42 months from the date of sanction of building plans or execution of the FBA, whichever is later, along with 180 days of grace period.
- That vide clause G.2 of the application form, which was later reiterated vide clause 6.1 of the FBA, if respondents fail to give possession, respondents shall be liable to pay the complainant compensation calculated @Rs. 5/-per sq. ft. for every month of delay.
- That the project in question was launched by the respondents in august 2012. It is submitted that while total number of flats sold in the project Terra is 401, for non- payment of dues, 78 bookings/ allotments have since been cancelled. Further, the number of customers of the project Terra who are in default of making payments for than 365 days are 125.

28. 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 based on these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority**E. I Territorial jurisdiction**

29. 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

30. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd. (complaint no. 7 of 2018)* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. The said decision of the authority has been upheld by the Haryana Real Estate Appellate Tribunal in its judgement dated 03.11.2020, in appeal nos. 52 & 64 of 2018 titled as *Emaar MGF Land Ltd. V. Simmi Sikka and anr.*

F. Findings on the objections raised by the respondents.

- F. I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.**



31. Another contention of the respondents are that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....."

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

32. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

33. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable

under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F. II Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

34. The respondents had raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

"17. Dispute Resolution by Arbitration

All or any disputes arising out of 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 shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being in force. A sole Arbitrator, who shall be nominated by the Seller/Confirming Party's managing director, shall hold the arbitration proceedings at Gurgaon. The Purchaser(s) hereby confirms that he shall have no objection to this appointment and the Purchaser(s) hereby confirms that he shall have no objection to such appointment and the Purchaser(s) confirms that the Purchaser(s) shall have no doubts as to the independence or impartiality of the said arbitrator and

shall not challenge the same. The arbitration proceedings shall be held in English language and decision of the arbitrator including but not limited to costs of the proceedings/award shall be final and binding on the parties.

35. 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.
36. 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 Appellate 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."

37. 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."

38. 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 1986 and Act of 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.

Relief sought by the complainant: The complainant had sought following relief(s):

- (i) Direct the respondents to deliver immediate possession of the unit/flat bearing no. T20-1404, having a super built up area of 1,691 sq. ft in project named as 'Terra', located at Sector 37-D, Gurgaon, Haryana along with all the promised amenities and facilities and to the satisfaction of the complainant.
- (ii) Direct the respondents to make the payment of delay interest at prescribed rate of interest on the amount already paid by the complainant to the respondents, from the promised date of delivery of the flat till the actual delivery of the flat to the complainant.

(iii) Restrain the respondents from increasing any super area/common area at the time of delivery the possession of unit.

(iv) Direct the respondents to issue a receipt for the amount of Rs.7,59,687.30/- paid to them by the complainant.

39. In the present complaint, the complainant intends 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."

40. Clause 5.1 read with clause 1.6 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

"Clause 5.1- The Seller/Confirming Party proposes to offer possession of the unit to the Purchaser(s) within the Commitment period. The Seller/Confirming Party shall be additionally entitled to a Grace period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said unit.

Clause 1.6 "FBA" "Commitment Period" shall mean, subject to Force Majeure circumstances; intervention of statutory authorities and

Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC), stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyers Agreement, whichever is later."

41. At the inception it is relevant to comment on the pre-set possession clause of the flat buyer's agreement wherein the possession has been subjected to in numerous terms and conditions, force majeure circumstances and in numerous terms and conditions. The drafting of this clause is not only vague but so heavily loaded in favour of the promoter that even a single default by the allottee in fulfilling obligations, 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 dotted lines.

42. **Admissibility of grace period:** The promoters had proposed to hand over the possession of the apartment within a period of 42 months from the date of sanction of the building plan or execution of flat buyer's agreement, whichever is later. The flat buyer's agreement was executed on 07.12.2012 and the building plan was approved on 21.09.2012. The flat buyer's agreement being executed later, the due date is calculated from the date of execution of flat buyer's agreement. The said period of 42 months expires on 07.06.2016. Further it was provided in the flat buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondents are claiming this grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondents-promoters had completed the said project within this span of 42 months and had started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoters have not offered the possession within the time limit prescribed by the promoters in the flat buyer's agreement nor has the promoter offered the possession till date. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoters at this stage.

43. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges. 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.

44. 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. The Haryana Real Estate Appellate Tribunal in **Emaar MGF Land Ltd. vs. Simmi Sikka** observed as under: -

"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas the promoter was entitled to interest @ 24% per annum compounded at

the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal 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 Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 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."

45. 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., 08.04.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
46. The definition of term 'interest' as defined under section 2(z) 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;"*

47. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters who is the same as is being granted to the complainant in case of delayed possession charges.
48. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondents are in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5.1 read with clause 1.6 of the flat buyer's agreement executed between the parties on 07.12.2012 the possession of the subject apartment was to be delivered within stipulated time i.e., by 07.06.2016. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 07.06.2016. The respondents had failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents to fulfil



its obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondents are established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 07.06.2016 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

49. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 07.06.2016 till the handing over of possession after obtaining the occupation certificate.
 - ii. The arrears of such interest accrued from 07.06.2016 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay




shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.

- iii. The complainant is also directed to pay the outstanding dues, if any. Interest on the due payments from the complainant and interest on account of delayed possession charges to be paid by the respondents shall be equitable i.e., at the prescribed rate of interest i.e., 9.30% per annum.
- iv. The respondents shall not charge anything from the complainant which is not part of the builder buyer agreement.

50. Complaint stands disposed of.

51. File be consigned to registry.


(Samir Kumar)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 08.04.2021

Judgement uploaded on 18.11.2021