

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

Complaint no. 4378 of 2019
First date of hearing: 26.11.2019
Date of decision : 08.04.2021

M/s K C Fibres Limited
Regd. office at: -BM-2A, Dilkush Industrial
Estate, GT Karnal Road, Azadpur, Delhi-
110033

Complainant

Versus

1. M/s BPTP Limited
Regd. office at: - M-11, Middle Circle,
Connaught Circus, New Delhi-110001
2. M/s Countrywide Promoters Pvt. Ltd.
Regd. office at: - OT-14, 3rd Floor, Next Door
Parklands, Sector 76, Faridabad, Haryana-
121001

Respondents

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar

**Chairman
Member**

APPEARANCE:

Smt. Vridhi Sharma
Sh. Venket Rao

Advocate for the complainant
Advocate for the respondents

ORDER

1. The present complaint dated 13.09.2019 had been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that

the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No	Heads	Information
1.	Unit no.	1904, 19 th Floor, Tower-T4
2.	Unit measuring	1470 sq. ft.
3.	Revised unit area [As per offer of possession]	1833 sq. ft. [Page no. 134 of reply]
4.	Allotment letter	25.01.2013 [Page 49 of complaint]
5.	Date of execution of apartment buyer's agreement	15.07.2013 [Page 55 of complaint]
6.	Payment plan	Construction linked payment plan. [Page 49 of complaint]
7.	Total consideration	Rs. 87,72,924.55/- [as per statement of accounts on page no. 137 of reply]
8.	Total amount paid by the complainant	Rs. 66,33,268.80/- [as per statement of accounts on page no. 137 of reply]
9.	Due date of delivery of possession as per clause 3.1 of the flat buyer's agreement	15.07.2016 [Note: - Grace period is not allowed]

	(Note: - 36 months from the date of execution of agreement plus additionally 180 days after the expiry of the said commitment period to allow for finishing work and filing and pursuing the occupation certificate in respect of project Park Generations.)	
10.	Offer of possession	26.10.2019 [Page 134 of reply]
11.	Occupation certificate	20.09.2019
12.	Delay in handing over possession till date of offer of possession i.e., 26.10.2019 plus 2 months i.e., 26.12.2019	3 years 5 months 11 days
Note: - The respondents have filed an affidavit (nomenclature) which states that the sanctioned name for T15 (marketing name) is T-4, for which the OC has been granted on 20.09.2019.		

3. The particulars of the project namely, "Park Generations" as provided by the registration branch of the authority are as under:

Project related details		
1.	Name of the promoter	M/s BPTP Ltd.
2.	Name of the project	Park Generation
3.	Location of the project	Sector-37D, Gurugram
4.	Nature of the project	Group Housing Project
5.	Whether project is new or ongoing	Ongoing
6.	Registered whole/phase as	Phases
7.	If developed in phase, then phase no.	Not Provided

8.	Total no. of phases in which it is proposed to be developed, if any	Not Provided	
9.	HARERA registration no.	07 of 2018	
10.	Registration certificate	Date	Validity
		03.01.2018	30.11.2018
11.	Area registered	7.1 acres	
12.	Extension applied on	N/A	
13.	Extension certificate no.	Date	Validity
		N/A	N/A
Licence related details of the project			
1.	DTCP license no.	83 of 2008 dated 05.04.2008 and 94 of 2011 dated 24.10.2011	
2.	License validity/ renewal period	04.04.2025 and 23.10.2019	
3.	Licensed area	43.558 acres	
4.	Name of the license holder	Super Belts Pvt. Ltd. and others	
5.	Name of the collaborator	Not Provided	
6.	Name of the developer/s in case of development agreement and/or marketing agreement entered into after obtaining license.	Not Provided	
7.	Whether BIP permission has been obtained from DTCP	Not Provided	
Date of commencement of the project			
1.	Date of commencement of the project	Not Provided	
Details of statutory approvals obtained			

S.N.	Particulars	Approval no and date	Validity
1.	Approved building plan	21.09.2012	20.09.2017
2.	Revised building plans	07.02.2017	06.02.2022
3.	Revised building plans	04.12.2017	03.12.2022
4.	Environment clearance	15.10.2013	14.10.2020
5.	Revised Environment clearance	20.07.2016	19.07.2023
6. (a)	Occupation certificate date	11.07.2017	
	Tower No.	Primary School	
(b)	Occupation certificate date	09.10.2018	
	Tower No.	T-16, T-17, T-19, EWS, Convenient Shopping	
(c)	Occupation certificate date	20.09.2019	
	Tower No.	T-14, T-15, T-18, EWS	
(d)	Occupation certificate date	20.09.2019	
	Tower No.	T-4, T-5, T-6	
7.	Completion certificate date	N/A	

B. Facts of the complaint:

4. That the complainant is a company duly registered under the provisions of the Companies Act, 1956 and is having its corporate office at A-23, industrial area, G.T. Karnal road, Azadpur, Delhi. The complainant had made the booking in the

year 2011 and possession of the unit booked was supposed to be delivered latest by January 2017 and made the payment of 95% of the total sale consideration which amounts Rs.63,88,000/-. Despite collecting 95% payment the respondent's company had miserably failed in completing the project by its scheduled time and delivering the possession by January 2017. Being aggrieved with the conduct of the respondents, the complainant has approached before this hon'ble authority seeking immediate possession of the unit booked along with delay penalty charges.

5. That the complainant was approached by the respondent company's agents and representatives who made tall claims regarding their project, its viability, various amenities it promised etc. As such the complainant decided to apply in the project of the respondents. The respondents promised various facilities and timely possession and claimed that park generations project is one of their most prestigious projects. The complainant was lured into investing by the respondent company and hence decided to make application for the booking in the project of the opposite party for the unit by paying a cheque of Rs.5,00,000/- vide cheque no. 121800 dated 05.09.2011 as booking amount.
6. That on the application being made by the complainant, the respondents issued the confirmation of unit selected for allotment following which the respondents entered into the flat buyer agreement for the above-mentioned unit with the complainant on 15.07.2013.

7. That the respondents deliberately delayed the execution of BBA knowing fully well that the possession will start from the date of BBA. The BBA was executed after 6 months of the allotment and excavation.
8. That the respondents had assured the complainant to deliver the possession of the above-mentioned unit within 36 months plus 180 days grace period from the date of execution of the flat buyer's agreement from the execution of the agreement which is 15.07.2013. Hence, clearly the respondents was supposed to deliver the possession of the unit by 15.01.2017.
9. That the complainant had made almost all its payments on time and availed timely payment discount. Only in one instance when the payment was delayed, the respondent company had charged 18% interest, compounded quarterly which was paid by the complainant.
10. That the respondent company collected 87.5% payment till 15.11.2014 and thereafter took 45 months to complete 7.5% work, till August 2018. There is no explanation for this delay which indicate that the respondents misrepresented the status of the construction while raising the demand notes.
11. That the delay in the delivery of the flat is solely due to the negligence of the respondent company. The respondents had never informed the complainant about any force majeure circumstances which have led to the halt in the construction. It is submitted that there is enough information in the public domain which suggest that the respondents have deliberately not completed the present project and have hoodwinked the

money paid by the allottees like complainant in developing other projects of theirs.

12. That the complainant stated as the terms and conditions of the builder buyer's agreement are unilateral, the hon'ble authority shall not take into consideration the terms and conditions of the agreement during the adjudication of the case. The relevant clause 2.11 and clause 3.3 from the flat buyer's agreement are reproduced here for the sake of the perusal of this hon'ble authority:

"2.11 That except in the case of construction linked payment plan as per Annexure-D, it shall not be obligatory on the part of the Seller/Confirming Party to send demand notices/reminders whatsoever regarding payments of instalments as may be due from the Purchaser(s), who shall be liable to pay interest on such delayed payments @ 18% Per annum Compounded Quarterly."

"3.3 Subject to the conditions contained above, the Seller/Confirming Party fails to offer the Possession of the said Flat to the Purchaser(s) within the stipulated period is shall be liable to pay to the Purchaser(s) the compensation calculated at the rate of Rs.5/- per Sq.ft of the Super Area ("Delay Compensation") for every month until the actual date fixed by the Seller/Confirming Party to hand over the possession of the said apartment to the Purchaser(s)...."

13. That the bare perusal of various clauses of the buyer's agreement it represents that the terms and conditions are unilateral and arbitrary wherein the respondents have an upper hand in the entire transaction. As per the terms and conditions the respondents had the authority to impose an exorbitant rate of interest on the complainant to the tune of 18% on delayed payments and whereas, the respondents were only liable to pay a meagre amount in case of delayed possession to the tune of Rs.

5/- per Sq. ft. per month for the period of delay. The respondents have only tried to save itself from compensating the complainant in the case of a delay in completion of the project and in giving the possession of flat to the complainant. The respondents have only tried to considerably limit its own liability and impose unfair and arbitrary interest on the complainant to grab his/her hard-earned money.

14. That the said clause is also in clear contravention of the provisions of the Act of 2016 which had clarified the position that the interest payable by the promoter in case of default shall be the same as the interest payable by the allottees in case of any default made by them.
15. That the complainant had requested the respondents to deliver the possession of the apartment along with compensation several times through emails and personally, but the respondents have failed to adhere to the request of the complainant.
16. That the complainant vide email dated 21.05.2016 requested the respondents to inform about the construction status and some specific date by which the complainant is going to get the possession of the unit booked.
17. That the respondents vide its mail dated 30.05.2016 had themselves accepted about the slow progress of construction work and further the respondents assured the complainant that they are taking several necessary measures to enhance the pace of construction and have furthered assured that the possession will be handed over by October 2017.

18. That the preceding circumstances of the complainant had constrained him to file the present complaint as the complainant has deposited a considerable amount of money with the respondents and no possession has been granted till date. Thus, in order to seek immediate delivery of possession along with compensation the complainant has preferred the present complaint.
19. That the hon'ble authority may direct the respondents to handover the immediate physical possession of the unit booked along with compensation for delay @18% per annum on the amount paid of Rs. 63,88,000 from the date of scheduled delivery till the actual date of handing over of possession.

C. Relief sought by the complainant.

20. The complainant had sought following relief(s):
- (i) Direct the respondents to deliver immediate possession of the apartment no. T4-1904 in the said project along with all the promised amenities and facilities and to the satisfaction of the complainant.
 - (ii) Direct the respondents to make the payment of interest at the prescribed rate of interest on the amount already paid by the complainant to the respondents, from the promised date of delivery of the flat i.e., 15.01.2017 till the actual delivery of the flat to the complainant.
21. 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 respondent.

22. That the complainant itself is a defaulter/offender under section 19 (6), 19 (7) and 19 (10) of the Real Estate (Regulation and Development) Act, 2016 and not in compliance of these sections. The complainant cannot seek any relief under the provision of the Act of 2016 or rules frame thereunder. The allotment of unit is liable to be terminated on the ground of non-payment of outstanding amount to the respondents.
23. That the agreements that were executed prior to implementation of Act of 2016 and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented flat buyer's agreement (hereinafter referred to as the "FBA") dated 15.07.2013 executed by the complainant out of their own free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them. It is further submitted that the collective reading of section 13 of Act of 2016 and rule 8 of the rules and explanation given at the end of 'agreement for sale' given under the rules, clearly provides that Act of 2016, HARERA rules are applicable only to the project registered under Act of 2016 and agreements executed after enactment of the Act of 2016.
24. That the complainant had approached this hon'ble authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand

and, by distorting 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 has 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. The respondents have contented on the following grounds: -

- That the complainant in his complaint had concealed the material fact that possession along with compensation had already been offered to them on 26.10.2019, however the complainant failed to clear the pending dues. Therefore, the respondents issued reminder letters dated 19.02.2020 and 02.04.2020 requesting for outstanding payment. Non-payment by the complainant of the pending dues has delayed the process of handing over of possession for the said unit.
- That the complainant had concealed from the hon'ble authority that with the motive to encourage the complainant to make payment of the dues within the stipulated time, the respondents granted rs.1,10,929.00/- towards additional incentive in the form of timely payment discount (TPD) to the complainant.
- That the complainant had also concealed from the hon'ble authority that he/she committed defaults in making

timely payment of instalments. The VAT demand was raised vide letter dated 17.11.2016, however the complainant neglected to clear the outstanding dues, thereafter respondents were constrained to send reminder emails dated 30.03.2017, 12.05.2017 and 12.10.2017 to the complainant, however the complainant failed to pay the same within stipulated time.

- That the complainant made huge defaults in making timely payments. In this context, it is submitted that in terms of the agreed payment schedule, the respondents raised demand vide letter dated 25.05.2017 payable by 09.06.2017, however the complainant failed to clear the same within the stipulated time, therefore respondents were constrained to issue reminder letters dated 22.06.2017, 11.12.2017, 07.03.2018 and 09.04.2018 still no payments were received from the complainant. Hence, the respondent issued a last and final opportunity letter dated 31.07.2018 requesting the complainant to clear the outstanding dues within a period of 15 days from the date of notice, where after the complainant made payment against receipt dated 18.08.2018.
- That the complainant concealed from the hon'ble authority that the respondents have provided regular construction updates to the complainant vide emails on various dates.
- That the complainant had also concealed from this hon'ble authority that the respondents being customer

centric company have always addressed the concerns of the complainant time and again to visit the office of the respondents in order to amicably resolve the concerns of the complainant.

25. That the parties had agreed under the flat buyer's agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. The complainant has raised dispute but did not take any steps to invoke arbitration. Hence, they are in breach of the agreement between the parties. The allegations made require proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.
26. That the relief(s) 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. That the complainant entered the said agreement with the respondents with open eyes and is bound by the same. That the relief(s) sought by the complainant travel way beyond the four walls of the agreement duly executed between the parties. The complainant while entering into the agreement has accepted and is bound by each and every clause of the said agreement, including clause-3.3 which provides for delayed penalty in case of delay in delivery of possession of the said flat/unit by the respondents.
27. That the complainant duly executed FBA wherein the complainant agreed that subject to force majeure and subject to

the complainant not being in default under any part of the agreement, including timely payment of each and every instalment of the total sale consideration, the possession of the flat to the complainant will be handed over within 36 months from the date of the execution of the FBA and a further grace period of 180 days after expiry of 36 months. The remedy in case of delay in offering possession of the unit was also agreed between the parties as also extension of time for offering possession of the unit. It is pertinent to point out that the said understanding had been achieved between the parties at the stage of entering into the transaction. The following clauses of the duly executed FBA are noteworthy.

"Clause 1.14 "Committed period" shall mean subject to force majeure, as defined herein and further subject to the purchaser(s) having complied with all its obligations under the terms and conditions of the Agreement and the purchaser(s) not being in default under any part of this agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the physical possession of the said unit to the Purchaser(s) within a period of 36 months from the date of execution of Flat Buyers Agreement.

"Clause 3.1 "Subject to force majeure, as defined in clause 10 and further subject to the purchaser(s) having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this Agreement including but not limited to the timely payment of each and every installment of the total sale consideration including DC, Stamp Duty and other charges and also subject to the Purchaser(s) having complied with all the formalities or documentation as prescribed by the seller/confirming Party, the

seller/confirming party proposes to hand over the physical possession of the said unit to the purchaser(s) within as period of 36 months from the date of execution of Flat Buyers Agreement ("Committed Period"). The purchaser(s) further agrees and understands that the seller/confirming party shall additionally be entitled to a period of 180 days (Grace Period) after the expiry of the said commitment period to allow for finishing work and filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the project "Park Generations"

"Clause 3.3 *"Subject to the conditions contained above, if the Seller/Confirming fails to offer the possession of the said Flat to the purchaser(s) within the stipulated period it shall be liable to pay to the purchaser(s) the compensation calculated at the rate of Rs. 5/- per sq. ft. of the super area ("Delay Compensation") for every month of delay until the actual date fixed by the seller/confirming to hand over the possession of the said apartment to the purchaser(s). The purchaser(s) shall not be entitled to any other compensation For Direct or Indirect Losses, interest etc. for delay in handing over the possession by the seller/confirming party".*

"Clause 10 Force Majeure: *"The Seller/Confirming Party shall not be held responsible or liable for not performing any of the obligations or undertaking provided for in this agreement if such performance is prevented due to force majeure.*

"Force majeure" means any event or combination of events or circumstances beyond the control of the seller/confirming party which cannot (a) by the exercise of reasonable precautions and/or alternative measures be prevented, or caused to prevented, and which adversely affects a Seller's/Confirming party's ability to perform obligations under this agreement, which shall include but not limited to i) acts of God, i.e. fire, drought, flood, earthquake, epidemics, natural disasters or deaths or disabilities; ii) Explosions or accidents, air crash and shipwrecks; iii) Strikes or lock outs, industrial disputes; iv) Non availability of cement, steel or other construction material due to strikes of manufacturers, suppliers, transporters or other intermediaries; iv) War and hostilities of war, riots or civil commotion; v) Non granting of any approval by any authority or imposition of any adverse condition or obligation in any of the approvals from any authority, including delay

in issuance of any certificate/authorizations/ approvals, occupation certificate, completion certificate and/or any other certificate as may be required; vi) The promulgation of or amendment in any law, rule or regulation or the issue of any injunction, order or direction from any authority that prevents or restricts the seller/confirming party from complying with any or all the terms and conditions as agreed in this agreement; vii) any event or circumstances analogous to the foregoing."

28. That the project "Park Generations" had been marred with serious defaults in timely payment of instalments by majority of customers, due to which, on the one hand, the respondents have to encourage additional incentives like TPD while on the other hand, delays in payment caused major setback to the development works. Hence, the proposed timelines for possession stood diluted.
29. That the possession of the unit in question had been delayed on account of reasons beyond the control of the respondents. It is submitted that the construction was affected on account of the NGT order dated 10.11.2016 prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It was submitted that vide its order dated 10.11.2016, NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondents.

30. That the construction has been completed and the occupation certificate for the same has been received where after, the respondents have already offered possession to the complainant. The complainant has failed to clear outstanding demand raised against offer of possession and same is pending till date.

E. Jurisdiction of the authority

31. 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

32. 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

33. 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 complainants 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. 1 Objection regarding untimely payments done by the complainant.

34. The respondents have contended that the complainant has made defaults in making payments as a result thereof, the respondents had to issue reminder letters dated 22.06.2017, 11.12.2017, 07.03.2018, 09.04.2018, 31.07.2018 and only after the reminders, the complainant came forward to clear the outstanding dues against the demand letter dated 25.05.2017, accordingly receipt dated 18.08.2018 was issued by the respondents. Clause 11.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

"11. TIMELY PAYMENT IS THE ESSENCE OF THIS AGREEMENT, TERMINATION, AND FORFEITURE"

11.1 (a) (i) Timely Payments of each instalment of the total sale consideration i.e., basic sale price and other charges as stated herein is the essence of this transaction /agreement. In case payment of any instalment as demanded by the Seller/Confirming party is delayed on any account whatsoever or partial payment of the instalment is made, then the Purchaser (s) shall pay interest on the amount due @ 18% p.a. compounded quarterly. However, if the Purchaser(s) fails to make complete payment of any of the instalments with interest within 3 months from the due date if the outstanding amount, the seller/confirming party may at its sole discretion forfeit the amount of Earnest money, interest accrued (weather paid or not) om all delayed payments till the

date of termination and any other amount of non - refundable nature including brokerage charges paid by the Seller/Confirming Party to the broker in case the booking is done through a broker and in such an event the Allotment shall stand cancelled and the Purchaser(s) shall be left with no right, lien or interest on the said Flat and the Seller/ Confirming Party shall have the right to sell the said flat to any other person (a) (ii) The Seller/ Confirming Party shall also be entitled to terminate/ cancel the allotment in the event of default of any of the terms and conditions of this application/agreement."

35. At the outset, it is relevant to comment on the said clause of the agreement i.e., "11. *TIMELY PAYMENT IS THE ESSENCE OF AGREEMENT, TERMINATION, AND FORFEITURE*" wherein the payments to be made by the complainant had been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainants being in default in making timely payments, the respondents have not exercised his discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 11.3 of the flat buyer's agreement whereby the complainant shall be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondents have charged delay payment interest as per clause 11.3 of the buyer's agreement

and has not terminated the agreement in terms of clause 11.1 of the buyer's agreement. In other words, the respondents have already charged penalized interest from the complainant on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. 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. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondents which is the same as is being granted to the complainant in case of delay possession charges.

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

36. Another contention of the respondents are that 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."

37. 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."

38. 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. III Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

39. The respondents have 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:

"33. 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 shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a Sole Arbitrator who shall be appointed by the Managing Director of the seller and whose decision shall be final and binding upon the parties. The Purchaser(s) hereby confirms that he shall have no objection to this appointment of the Sole Arbitrator by the Managing Director of the Seller, even if the person so appointed, as a Sole Arbitrator, is an employee or advocate of the Seller/Confirming Party or is otherwise connected to the Seller/ Confirming Party and the Purchaser(s) confirms that notwithstanding such relationship/connection, the Purchaser(s) shall have no doubts as to the independence or impartiality of the said Sole Arbitrator. The Courts at New Delhi and Delhi high Court at New Delhi alone shall have the jurisdiction."

40. 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.

41. 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."

42. 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."

43. 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.

44. **Relief sought by the complainant:** The complainant has sought following relief(s):

- i. Direct the respondents to deliver immediate possession of the apartment no. T4-1904 in the said project along with all the promised amenities and facilities and to the satisfaction of the complainant.
- ii. Direct the respondents to make the payment of interest at the prescribed rate of interest on the amount already paid by the complainant to the respondents, from the promised date of delivery of the flat i.e., 15.01.2017 till the actual delivery of the flat to the complainant.

45. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....
Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

46. Clause 3.1 of the flat buyer's agreement provides for handing over of possession and is reproduced below:

"3.1 Subject to Force Majeure, as defined in clause 10 and further subject to the purchaser(s) having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this Agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp Duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the physical possession of the said unit to the purchaser(s) within a period of 36 months from the date of execution of the Flat Buyers Agreement (Commitment Period). The Purchaser(s) further agrees and understands that the Seller/Confirming Party shall additionally be entitled to a period of 180 days (Grace Period) after the expiry of the said commitment period to allow for finishing work and filing and pursuing the Occupancy Certificate etc from DTCP under the Act in respect of the Project "Park Generations".

47. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 36 months from the date of execution of agreement. In the present complaint, the date of execution of agreement is 15.07.2013. Therefore, the due date of handing over possession comes out to be 15.07.2016. It is further provided in agreement that promoter shall be entitled additionally to a grace period of 180 days for finishing work and filing and obtaining the occupancy certificate etc. from DTCP. As a matter of fact, from the perusal of occupation certificate dated 20.09.2019 it is implied that the promoter applied for occupation certificate only on 28.06.2019 which is later than 180 days from the due date of possession i.e., 15.07.2016. The clause clearly implies that the grace period is asked for filing and obtaining occupation certificate, therefore as the promoter applied for the occupation certificate much later than the statutory period of 180 days, he does not fulfil the criteria for grant of the grace period., As per the settled law one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoter. Relevant clause regarding grace period is reproduced below: -

"Clause 3.1The Purchaser(s) agrees and understands that the Seller/Confirming Party shall additionally be entitled to a grace period of 180 days, after expiry of the said commitment period to allow for finishing work and filing and obtaining the Occupation Certificate etc. from DTCP under the Act in respect of the project 'Park Generations'

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

charges at the prescribed rate of interest on amount already paid by him 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.

49. 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 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 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."

50. 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%.
51. 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—
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 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;"

52. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same as is being granted to the complainant in case of delayed possession charges.
53. On consideration of the documents available on record and submissions made by both the parties, 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 3.1 of the flat buyer's agreement executed between the parties on 15.07.2013, the possession of the subject unit was to be delivered within 36 months from the date of execution of agreement i.e., 15.07.2016. Therefore, the due date of handing over possession is 15.07.2016. 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 15.07.2016. The occupation certificate has been received by the respondents on 20.09.2019 and the possession of the subject unit was offered to the complainant on 26.10.2019. The authority is of the considered view that there is delay on the part of the respondents to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the flat buyer's agreement dated 15.07.2013 executed between the parties. It is the failure on part

of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement dated 15.07.2013 to hand over the possession within the stipulated period.

54. 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 20.09.2019. The respondents offered the possession of the unit in question to the complainant only on 26.10.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 15.07.2016 till the expiry of 2 months from the date of offer of possession (26.10.2019) which comes out to be 26.12.2019.
55. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondents are established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e.,

9.30% p.a. w.e.f. 15.07.2016 till 26.12.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

H. Directions of the authority

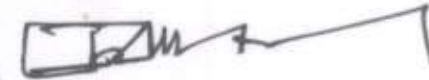
56. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 15.07.2016 till the date of offer of possession i.e., 26.10.2019 + 2 months i.e., 26.12.2019 to the complainant as per section 19(10) of the Act.
 - ii. The arrears of such interest accrued from 15.07.2016 till 26.12.2019 shall be paid by the promoter to the allottee within a period of 90 days from date of this order as per rule 16(2) of the rules.
 - iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- v. The respondents shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

57. Complaint stands disposed of.

58. 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.

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