

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

Complaint no. : 4404 of 2019
First date of hearing: 26.11.2019
Date of decision : 08.04.2021

1. Narinder Singh Malhan
R/O: 99-A, Co-Operative Party Colony Bokaro,
Steel City Bokaro, Jharkhand-827001

Complainant

Versus

1. M/s BPTP Limited
2. M/s Countrywide cs Pvt. Ltd.
Both Regd. Office: - M-11, Middle Circle,
Connaught Circus, New Delhi -110001

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

HARERA
GURUGRAM
ORDER

1. The present complaint dated 16.09.2019 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 promoters 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	Information
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.	T21-1404, 14 th floor, Tower-T21 [Page 46 of complaint]
11.	Unit measuring	1998 sq. ft. [185.619 sq. metres.]
12.	Allotment letter	15.01.2013 [Page 35 of complaint]
13.	Date of execution of flat buyer's agreement	26.02.2013 [Page 41 of complaint]
14.	Payment plan	Time construction linked payment plan. [Page 35 of complaint]
15.	Total consideration (Basic sale price)	1,26,91,846/- [Vide account statement on page no.67 of complaint]
16.	Total amount paid by the complainant	1,08,47,283.50/- [Vide account statement on page no.67 of 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 sanctioning of 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)	26.08.2016 (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.)

	period for making offer of possession of the said unit.)	
18.	Occupation certificate date	Occupation certificate for this tower has not been received.
19.	Offer of possession	Not received
20.	Delay in handing over possession till the date of decision i.e., 08.04.2021	4 years 7 months 13 days,

B. Facts of the complaint

3. That the complainant had preferred the present complaint against the respondents for directing it to deliver the possession of the apartment along with prescribed rate of interest. The complainant reserves the right to make separate application to the hon'ble adjudicating officer for compensation in the present case.
4. That the respondent's company is engaged in the business of housing construction and had already launched several big projects. The respondent's company through its agents/representatives made huge and tall claims regarding their project, BTP Terra located at the sector-37D, Gurgaon, Haryana. (Hereinafter referred as the "said project"). The project was projected to be one of its kinds and the complainant was shown a very rosy picture.
5. That the complainant is an outstation person who was living in Jharkhand at that time and even today. The complainant had solely invested his hard-earned money in the project of the respondent's company looking at its reputation and because of

its intensive marketing technique employed by the respondent's company to lure the complainant into making in their project. The prime features as projected by the respondent's company are as follows: - 60-meter-wide road, high tech security, dedicated parking, etc.

6. That the complainant made the booking in the project of the respondent's company on 13.08.2012 by payment of the booking amount. The complainant was approached by the respondent's company for investing in 3BHK apartment, later, for the reasons best known to the respondent's company, the booking of the complainant was transferred to 4BHK apartment, and the complainant was asked to shell out more money to retain his booking.
7. That on 16.08.2012, the complainant again shelled out Rs. 1 Lakh for the purpose of 4BHK apartment. The complainant was further informed that his cheque of Rs. 4 Lakh had not cleared for technical reasons, and he immediately made the payment through RTGS to the respondent's company on 03.09.2012. Although the payments were made on 16.08.2012, the complainant received the receipt of the same through email on 06.09.2012.
8. That on 26.10.2012 the complainant came to know that his payments have not yet been regularized. The complainant was shocked and only after many efforts on 11.12.2012 the complainant got his account regularized by the respondent's company. The complainant was severally harassed by the

respondent's company since day one of their relationship but had no other option than to adhere to their requests having already made huge payments.

9. That the respondent's company on 15.01.2013 issued the allotment letter to the complainant with respect to the unit. The allotment letter had been issued by the respondent's company after months from the payment of the booking amount. The complainant had no other option than to accept allotment moreover, the allotment letter issued by the respondent's company did not carry any terms of the booking or the buyer agreement to be executed.
10. That at the time of the application, the respondent's company through its agents had assured that the complainant shall receive a discount of 2.5% on the BSP of Rs. 5,250/-. That based on this assurance the respondent's company had taken the booking amount from the complainant. The complainant was assured that 1% direct deduction shall be received in the form of BSP and rest 1.5% shall come in the form of cash back to the broker, i.e., Shree shyam properties and subsequently will pass on to the complainant. Although the booking was made through the Ms Ruchi of the BPTP, they had included Shree shyam properties as the broker/agent. After constant efforts and harassment, the complainant after 8-10 months received his promised cashback from Shree shyam properties.
11. That the complainant consent was taken for the unit in the tower T-2- bearing no. 1601, though the unit which was finally

allotted to the complainant was entirely different and located in the different tower, the respondent's company also charged interest upon the complainant although the payments were made on time to the respondents.

12. That the complainant was not allowed to make any changes to the terms of the agreement. In case the complainant had made any changes to the terms of the buyer agreement, the respondent's company had threatened to forfeit the entire paid amount from the complainant. The terms of the agreement were totally in contravention to the interest of the complainant. The complainant had no other option than to put his signature on the same since any objection to the terms would have resulted in the cancellation of the agreement. As per the agreement, the respondent's company was obligated to deliver the possession of the apartment within 42 months from the signing of the agreement. The relevant clauses 5.1 and 1.6 of the agreement are reproduced as 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.

"1.6 "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..... 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 Buyer's Agreement, whichever is later".

13. That the respondents had to deliver the possession of apartment to the complainant latest by 26.08.2016. The respondent's company had till date did not offer the possession of the apartment to the complainant which is clearly against the provisions of the agreement signed between the parties and also against the settled principles of law. The completion/finishing work on the tower has not been completed till date.
14. That the complainant has already made the payment of Rs. 1,08,47,283.50/- to the respondents out of total consideration of Rs. 1,26,91,846/-. That having received almost 87-88% of the total consideration, the respondent's company ought to have delivered the possession of the apartment but contrary to their promises, the respondent's company had only shown interest in raising the demands from the complainant.
15. That the complainant already burdened with the loan instalments; it would be only appropriate that the possession of his apartment be delivered immediately. Vide email dated 15.03.2016, the respondent's company had clearly admitted that they were supposed to deliver the possession of the apartment by 26.08.2016. No reasons for delay have been provided by the respondent's company till date.
16. That during the period from 2014-15 for several months the project was on hold. Between that period also the

respondent's company continued to raise demands from the complainant. At times, the respondent's company had even failed to issue receipts of the payments to the complainant. The complainant had to write several mails to the respondent's company for the issuance of the same. Few examples of the illegal conduct on part of the respondent's company are given as below: -

- The payment made on 23.04.2015 vide NEFT SBIN915113152092 has been taken into consideration only on 20.05.2015.
- The payment for the seventh-floor casting was made on 15.10.2015, the same did not reflect in the next demand also.
- The seventh-floor casting payment was made as above, for the next demands for the 10th Floor casting did not reflect the same and the interest was being charged by the respondent's company which was illegal and arbitrary.

17. That the construction updates shared by the respondent's company was also not substantiating the actual situation on the site. The updates were not supported with the site photographs. The site photographs were not being shared, the SBI Home Finance (the company from whom the complainant had availed the loan) had to depute people from their office to verify the actual situation on the site. The situation on the site was very grim.

18. That the agreement executed between the parties was not only unilateral, the same was also arbitrary and illegal in nature. That while the respondent's company was entitled to charge 18% interest on the delayed payments, the complainant was only entitled to peanuts in comparison to the respondent's company.

19. That the Real Estate Regulation & Development Act, 2016 in rule 18 (1) clearly provides that the allottee can claim the payment of prescribed rate of interest in the form of monthly instalments if the builder fails to deliver the possession of the apartment within the promised time frame.

C. Relief sought by the complainant:

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

- (i) Direct the respondents to deliver immediate possession of the unit no. T-21-1404, project Terra, sector- 37-D, Gurugram, Haryana to the complainant along with all the promised amenities and facilities and to the satisfaction of the complainant.
- (ii) Direct the respondents to make the payment 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., 26.08.2016 till the actual delivery of the apartment 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 respondents.

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

- I. That the complainant himself is a defaulter/offender under section 19(6) and 19(7) 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 Real Estate (Regulation and Development) Act, 2016 or rules frame thereunder.
- II. That the complainant had made several defaults in making timely payment of instalments and the delay is continuing further since the complainant has still not cleared the pending dues. Two cheques submitted by the complainant on two separate occasions got dishonoured. The last payment was made by the complainant on 24.05.2016 and thereafter no payment had been made by the complainant even after repeated reminders. The complainant has, till date, not approached the respondents to clear the due amounts. The defaults were made by the complainant within the

promised possession timelines, and he expects the delivery of unit on time without making entire sale consideration.

III. Reference may be made to the following instances which establish concealment/suppression/ misrepresentation on the part of the complainant:

- That the complainant has falsely stated all the demands raised by the respondents were duly met by the complainant on time, however, as detailed in the reply to list of dates, the complainant made several defaults in making timely payments as a result thereof, the respondents had to issue several reminder letters and despite the same, complainant has failed to pay the outstanding dues amounting to Rs. 25,00,223.02/- till date.
- That the complainant committed defaults in making timely payments of various instalments within the stipulated time despite having clearly agreed that timely payment is the essence of the agreement between the parties.
- That the complainant has also concealed from this authority that the respondents was constrained to issue a termination letter via email dated 15.06.2015 to the complainant whereby the allotment of unit in question stood terminated due to several defaults in payments made by the complainant. However, as a goodwill

gesture, the respondents restored the unit in favour of the complainant.

- That the complainant on two occasions via emails dated 05.05.2016 and 20.01.2017 the respondents gave opportunity to the complainant to clear of his dues with 100% waiver of the interest amount. On one such occasion a discount of 1% on the principal outstanding amount was also offered to the complainant. However, the complainant chose not to avail this opportunity to clear his outstanding dues.
- That the complainant is misrepresenting before authority that he has paid an amount of Rs. 1,08,47,283.50/- to the respondents. The complainant has not annexed any document substantiating his claim and the receipts annexed in the complaint paper book comes up to a total of Rs. 1,03,18,119.50/-.
- 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 had 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 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 her complete satisfaction, the complainant erroneously proceeded to file the present vexatious complaint before this authority against the respondents.

- IV. 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. 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.
- V. 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.
- VI. 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.

- VII. 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. Admittedly, the complainant had raised a dispute but did not take any steps to invoke arbitration. Hence, it is in breach of the flat buyer's agreement between the parties.
- VIII. 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.

- IX. That the construction of the unit was going on in full swing. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), construction came to a halt, and it took some time to get the labour mobilized at the site. However, the respondents in hopeful to handover possession of the unit in question at the earliest possible.
- X. That regarding the construction of the tower in which the unit in question is located, work such as structure work, brickwork, internal & external plaster works, ips flooring work is completed. That around 90% of the construction regarding tower T-21 in the project Terra is complete and for the remaining construction, work is going at full pace at the site and respondents shall be handing over possession shortly.
23. 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**
24. The respondents have raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. 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

25. 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

26. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoters 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. I Objection regarding untimely payments done by the complainant.

27. The respondents have contended that the complainant made several defaults in making timely payments as a result thereof, the respondents had to issues several reminder letters and

despite the same the complainant has failed to pay the outstanding dues. The counsel for the respondents stressed upon clause 7.1 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:

"7. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"

7.1 The timely payment of each instalment of the Total Sale Consideration i.e., COP and other charges as stated herein is the essence of this transaction/Agreement. In case the Purchaser(s) neglects, omits, ignores, defaults, delays or fails, for any reason whatsoever, to pay in time any of the instalments or other amounts and charges due and payable by the Purchaser(s) as per the payment schedule opted or if the Purchaser(s) in any other way fails to perform, comply or observe any of the terms and conditions on his/her part under this Agreement or commits any breach of the undertakings and covenants contained herein, the Seller/Confirming Party may at its sole discretion be entitled to terminate this Agreement forthwith and forfeit the amount of Earnest Money and Non-Refundable Amounts and other amounts of such nature..."

28. At the outset, it is relevant to comment on the said clause of the agreement i.e., *"7. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"* wherein the payments to be made by the complainant have 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 favour of the promoters 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 complainant 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 7.2 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 had charged delay payment interest as per clause 7.2 of the buyer's agreement and has not terminated the agreement in terms of clause 7.1 of the buyer's agreement. In other words, the respondents had 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(z) of the Act provides that the rate of interest chargeable from the allottee by the promoters, in case of default, shall be equal to the rate of interest which the promoters 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.

29. Another contention of the respondents is 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."

30. 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."

31. 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 are in breach of agreement for non-invocation of arbitration.

32. 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:

"17. Dispute Resolution by Arbitration

All or any disputes arising from or out of or touching upon or in relation to the terms or formation of this Agreement or its termination, including the interpretation and validity 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 & Conciliation Act, 1996, or any statutory amendments, modifications or re-enactment thereof 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 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"

33. 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.

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

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

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

...
56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the

Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

35. 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."

36. 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 no. T-21-1404, project Terra, sector- 37-D, Gurugram, Haryana to the complainant along with all the promised amenities and facilities and to the satisfaction of the complainant.
- (ii) Direct the respondents to make the payment 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., 26.08.2016 till the actual delivery of the apartment to the complainant.

37. 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."

38. 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."

39. 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 innumerable terms and conditions, force majeure circumstances and innumerable terms and conditions. The drafting of this clause is not only vague but so heavily loaded in favour of the promoters that even a single default by the allottee in fulfilling obligations, formalities and documentations etc. as prescribed by the promoters 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 promoters 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.
40. **Admissibility of grace period:** The promoters have 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 26.02.2013 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 26.08.2016. Further it was provided in the flat buyer's agreement that promoters 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 have 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 had not offered the possession within the time limit prescribed by the promoters in the flat buyer's agreement nor has the promoters 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.

41. **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 promoters, 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.

42. 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."

43. 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%.

44. 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 promoters, in case of default, shall be equal to the rate of interest which the promoters 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;"

45. 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.

46. 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 26.02.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by 26.08.2016. 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 26.08.2016. The respondents have failed to handover possession of the subject unit 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 promoters, interest for every month of delay from due date of possession i.e., 26.08.2016 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

47. 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 promoters as per the function entrusted to the authority under section 34(f):

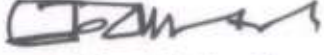
- i. The respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 26.08.2016 till the handing over of possession after obtaining the occupation certificate.
- ii. The arrears of such interest accrued from 26.08.2016 till the date of order by the authority shall be paid by the promoters to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoters to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
- 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.

48. Complaint stands disposed of.

49. 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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