



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

Complaint no. : 1879 of 2019  
First date of hearing: 10.10.2019  
Date of decision : 08.04.2021

1. Mr. Navneet Basant Kumar Kampani  
2. Mrs. Meenakshi Kampani  
Both R/O: - L-66C, Saket, New Delhi-110017

**Complainants**

Versus

1.M/s BPTP Limited  
2.M/s Countrywide Promoters Private Limited  
Both Having regd. office at: - M-11, Middle  
Circle, Connaught Circus, New Delhi-110001

**Respondents**

**CORAM:**

Dr. K.K. Khandelwal  
Shri Samir Kumar

**Chairman  
Member**

**APPEARANCE:**

Sh. Sushil Yadav  
Sh. Venket Rao

Advocate for the complainants  
Advocate for the respondents

**HARERA**  
**ORDER**  
**GURUGRAM**

1. The present complaint dated 03.05.2019 has been filed by the complainants/allottees 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No	Heads	Information
1.	Unit no.	T21-1604, 16 <sup>th</sup> Floor, Tower T-21
2.	Unit measuring	1998 sq. ft super area
3.	Date of Allotment Letter	15.04.2013 (Page no. 55 of reply)
4.	Date of execution of flat buyer's agreement	29.05.2013 (Page no. 69 of reply)
5.	Payment plan	Subvention Plan (Page no. 55 of reply)
6.	Total consideration	Rs. 14,065,471.00/- (vide payment schedule on page no. 56 of reply)
7.	Total amount paid by the complainants	Rs. 13,279,648.30/- (vide payment receipts on page no. 61,64,71,75 of complaint and page no. 148,156,159,162 of reply)
8.	Due date of delivery of possession as per clause 5.1 read with clause 1.6 of the apartment buyer agreement. (Note: - 42 months from the date of sanction of the building plan or execution of agreement,	<b>29.11.2016</b> (Due date is calculated from the date of execution of agreement being later) (Note: - Grace period is not allowed)



	whichever is later plus 180 days of grace period for applying and obtaining occupation certificate)	
9.	Offer of possession	Not offered
10.	Occupation certificate	Occupation certificate for this tower has not been received.
11.	Delay in handing over possession till the date of decision i.e. 08.04.2021	4 years 4 months 10 days.

3. The particulars of the project namely, "Park Terra" 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 Terra	
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 as whole/phase	Phase	
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.	299 of 2017	
10.	Registration certificate	Date	Validity
		13.10.2017	12.10.2020
11.	Area registered	10.23 acres	
12.	Extension applied on	N/A	



13.	Extension certificate no.	Date	Validity
		N/A	N/A
<b>Licence related details of the project</b>			
1.	DTCP license no.	83 of 2008 dated 05.04.2008	
2.	License validity/ renewal period	04.04.2025 and 23.10.2019	
3.	Licensed area	23.814 Acres	
4.	Name of the license holder	Countrywide Promoters Pvt Ltd and 4 Others.	
5.	Name of the collaborator	N/A	
6.	Name of the developer/s in case of development agreement and/or marketing agreement entered into after obtaining license.	N/A	
7.	Whether BIP permission has been obtained from DTCP	N/A	
<b>Date of commencement of the project</b>			
1.	Date of commencement of the project	Not Provided	
<b>Details of statutory approvals obtained</b>			
S.N.	Particulars	Approval no and date	Validity
1.	Approved building plan	21.09.2012	20.09.2017
2.	Environment clearance	15.10.2013	14.10.2020
3.	Occupation certificate date	Occupation certificate for this tower has not been received.	



**B. Facts of the complaint**

The complainants have submitted as under: -

4. That the respondents advertised in various leading newspapers about their forthcoming project named "Terra", in sector- 37-D, Gurugram (Hereinafter referred as the 'said project') promising various advantages, including world class amenities and timely completion/execution of the project. Relying on such promises and undertakings made by the respondents in the aforementioned advertisements, the complainants booked an apartment/flat measuring 1998 sq. ft. in the said project for total sale consideration of 14,065,471/- which included basic sale price, car parking, IFMS, club membership, PLC etc.
5. That the complainants made a payment of Rs. 13,279,648/- to the respondents via different cheques on different dates. As per the flat buyer's agreement (Hereinafter referred as 'the FBA') the respondents allotted a unit/flat bearing No. T21-1604 having super area of 1998 sq. ft. (hereinafter referred to as the 'said unit') to the complainants. That as per clause no. 5.1 of the FBA, the respondents had agreed to deliver the possession of the said unit within 42 months from the date of signing of the FBA or sanctioning of building plan, whichever is later, with an extended grace period of six months.
6. That over the years, the complainants regularly visited the said unit site but was repeatedly surprised to see that construction work as stipulated in the FBA was not in progress, and there was no one present at the unit site to address such of the



complainant's concerns. Following such incidents and in review of all correspondence between the complainants and the respondents, it is evident that the complainants were subject to a fraud and severe misrepresentation by the respondents. The respondent's only intention was to continue to take payments for the said unit, without completing the aforementioned development and handing over possession in time. The respondent's mala-fide and dishonest motives and intention to defraud the complainants is evident through their lack of co-operation in this matter. Despite receiving approximately 95% of the payments on time for the said unit and despite repeated requests and reminders over phone calls and personal visits from the complainants, the respondents had failed to deliver the possession of the allotted unit to the complainants within stipulated period.

7. That it becomes evident that the construction of the block in which the said unit was booked with a promise of delivery on 29.05.2017, by the respondents, but was never completed on time for the reasons best known to the respondents, clearly depicts the respondent's ulterior motive to fraudulently extract money from respondent's ulterior motive to fraudulently extract money from innocent people such as the complainants, and many others alike.
8. That owing to such fraudulent acts by the respondents, the complainants have been suffering from disruption in their living arrangement, mental torture and agony and also continues to incur severe financial losses. This could have been



avoided if the respondents had fulfilled their obligations as per the FBA and given possession of the said unit on time. As per clause no. 6 of the FBA, it was agreed by the respondents that in case of any delay, the respondents shall pay the complainants a compensation @ Rs. 5/- per sq. ft. per month of the super area of the unit. It is however, pertinent to mention here that a clause of compensation at such a nominal rate of Rs. 5/- per sq. ft. per month for the period of delay is unjust and inequitable as the respondents have exploited the complainants by not providing the possession of the said unit even after a delay from the agreed possession plan. The respondents cannot escape all liability merely by stipulating a compensation clause in the FBA, especially as the delay in handing over possession to this extent would represent a breach of a material term of the FBA, for which a remedy so minimal is not equitable and severely unjust. If we were to calculate the amount in terms of financial charges, the result would be approximately @ 2% per annum rate of interest whereas the respondent's charges 18% per annum interest on any delayed payment. This further goes to represent the disparity of remedies, which both parties are allowed under the biased and one-sided FBA.

9. That on the ground of parity and equity the respondents should also be subjected to pay the same rate of interest, i.e., that of 18% per annum, since the breach of the possession term has been materially averse to the complainant's position. Therefore, the respondents should be liable to pay interest o



the amount paid by the complainants from the promise date of possession till the date on which the said unit is actually delivered to the complainants.

10. That the complainants have made several requests to the respondents through telephone calls and several personal visits to the respondent's office to request them to deliver the possession of the said unit, along with the prescribed interest on the amount deposited by the complainants. However, in keeping with their uncooperative attitude towards the matter, the respondents have clearly refused to do so. The facts of the case make it clear that the respondents, in a pre-planned manner defrauded the complainants with their hard-earned money to wrongfully extract money for their own benefit and cause wrongful loss to the complainants.

**C. Relief sought by the complainants:**

11. The complainants have sought following relief(s):

(i) Direct the respondents to handover the possession of the said unit along with prescribed interest per annum from the date of booking of the said unit, to the date of actual delivery of the said unit.

12. 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.**

13. That the complainants 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. 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 complainants is liable to be dismissed at the threshold without any further adjudication.
14. In this regard, reference may be made to the following instances which establish concealment/ suppression/ misrepresentation on the part of the complainants:
15. That the complainants approached the respondents through a broker, namely "Focus Consultants" after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same. It is further submitted that complainants are investors and had booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slumps in the real estate market, the complainants have filed the present purported complainants to wriggle out of the agreement.



16. That the complainants falsely stated that the timely payments were made by the complainants as and when demanded by respondents. However, as detailed in the reply to list of dates, it is submitted that the complainants made several defaults in making timely payments as a result thereof, the respondents had to issue reminder letters for payment of the outstanding amounts.
17. That the complainants have concealed the fact that they themselves 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. The relevant clauses are reproduced below: -

"Clause C (10) of the booking application form is as under:  
*Timely payment of instalments as per the payment plan shall be the essence of this transaction. It shall be incumbent on the applicant(s) to comply with the terms of payment and other terms and conditions of allotment. The applicant(s) acknowledges failure to adhere to the payment schedule and failure to make full and timely payment impacts the Company's ability to fulfil its reciprocal promises and obligations to the Applicant(s) and other customers and consequently prejudicially affects as well as results in the waiver and extinguishment of the Applicant's rights under these Terms and Conditions and the Flat Buyer's Agreement, including but not limited to the right to claim any compensation for delay in handing over possession of the Unit, the right to require the Company to perform any of its obligations within a given time frame and the cancellation of allotment amongst other rights. Accordingly, in the event that the Applicant(s) fails to strictly adhere to these Terms and Conditions and the Flat Buyer's Agreement, such action shall amount to a voluntary, conscious and intentional waiver and relinquishment of all rights and privileges of these*



*Terms and Conditions and the Flat Buyer's Agreement and could at the option of the Company be treated as termination/cancellation of allotment and the Applicant(s) could at the option of the Company cease to have any right, title or interest whatsoever in the unit and shall also be liable to forfeiture of earnest money deposit, non-refundable amounts in terms of clause E herein below."*

"Clause 7.1 of the FBA is as under:

*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 Purchase(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 Purchase(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 Amount and other amounts of such nature. In the event the Seller/Confirming Party exercise its right to terminate the present agreement, the Purchaser(s):*

*a) Shall be left with no right or interest on the said unit and the Seller/Confirming Party shall have the absolute right to sell the said unit to any other third party.*

*b) Shall approach the Seller/Confirming Party for the refund, if any, and the Seller/Confirming Party shall refund the balance amount, if any, to the Purchase(s) without any interest within (120) One Hundred Twenty Days from the date of sale of the Unit by the Seller/Confirming Party to any third Party."*

18. That the complainants made inordinate delay in making timely payments of instalments and the delay is continuing further since the complainants has still not cleared the dues. This act of not making timely payments is in breach of the agreement which also affects the cash flow projection. Hence, the projected timelines for possession got diluted due to the



defaults committed by various allottees including the complainants in making timely payments.

19. That the complainants in the entire complaint concealed the fact that no updates regarding the status of the project were provided to them by the respondents. However, complainants were constantly provided construction updates by the respondents vide emails on various dates.
20. That the sole intention of the complainants is to unjustly enrich himself at the expense of the respondent no. 1 by filing this frivolous complaint which is nothing but gross abuse of the due process of law.
21. That the relief(s) sought by the complainants are unjustified, baseless and beyond the scop/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is submitted that the complainants entered into the said agreement with the respondents with open eyes and is bound by the same. The relief(s) sought by the complainants travel way beyond the four walls of the agreement duly executed between the parties. The complainants while entering into the agreement has accepted and is bound by each and every clause of the said agreement. Therefore, in the light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this hon'ble authority.
22. The parties had agreed under the floor buyer's agreement (FBA) to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for



arbitration as per clause 17 of the FBA. Admittedly, the complainants had raised dispute but did not take any steps to invoke arbitration. Hence, is in breach of the agreement between the parties. The allegations made requires proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.

23. The proposed timelines for possession have been diluted due to defaults in making timely payment of instalments by various allottees of the project Terra including the complainants herein. In this regard, reference may be made to the following:

- The project in question was launched by respondent no. 1 in August 2012. It is submitted that while the 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 more than 365 days are 125. Hence, there have been huge defaults in making payments of various instalments by large number of applicants.
- The projected timelines for possession are based on the cash flow. It was not in the contemplation of the respondents that the allottees would hugely default in making payments and hence, cause cash flow crunch in the project.

24. That the construction was affected on account of the NGT order prohibiting construction (structural) activity of any kind



In the entire NCR by any person, private or government authority and also on account of coronavirus (COVID-19), construction came to a halt and it took some time to get the labour mobilized at the site. That respect to the construction of the tower in which the unit in question is located, work such as structural work, plaster works, MS railing work, IPS flooring work is completed. The remaining construction work is going at full pace at the site and the respondents are making every endeavour to handover possession of the said unit at the earliest.

**E. Jurisdiction of the authority**

**E. I Territorial jurisdiction**

30. 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**

31. 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 complainants.**

32. The respondents have contended that the complainants have made defaults in making payments as a result thereof, the respondents had to issue reminder letters dated 28.06.2013, 29.07.2013, 28.08.2013, 19.11.2013, 24.12.2013, 28.01.2014, 06.03.2014, 07.04.2014, 09.05.2014, 09.06.2014, 18.08.2014, 17.09.2014, 17.10.2014, 20.11.2014, 22.12.2014, 27.01.2015, 26.02.2015, 02.04.2015, 05.05.2015, 04.06.2015, 08.07.2015, 09.11.2015, 09.12.2015, 21.01.2016 and 20.02.2016. The respondents have further submitted that the complainants have still not cleared the 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..."*

33. 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 complainants 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 favor of the promoters and against the allottees that even a single default by the allottees 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 7.2 of the flat buyer's agreement whereby the complainants 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 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 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(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 complainants shall be charged at the prescribed rate i.e., 9.30% by the respondents which is the same as is being granted to the complainants in case of delay possession charges.

**F. II Objection regarding complainants are in breach of agreement for non-invocation of arbitration.**

34. 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."*

35. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.



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

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -  
"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

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

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

37. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court in case titled as *M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018* has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

*"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

38. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special



remedy available in a beneficial Act such as the Consumer Protection Act 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 complainants.**

**Relief sought by the complainants:** The complainants have sought following relief:

- (i) Direct the respondents to handover the possession of the said unit along with prescribed interest per annum from the date of booking of the said unit, to the date of actually delivery of the said unit.

39. In the present complaint, the complainants intend 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."***

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 29.05.2013 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 29.11.2016. 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 had completed the said project within this span of 42 months and had started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoters have not offered the possession within the time limit prescribed by the promoters in the flat buyer's agreement nor has the 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 complainants are seeking delay possession charges. However, 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 complainants 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 complainants 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 agreement executed between the parties on 29.05.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by 29.11.2016. 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 29.11.2016. The respondents have failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents/promoters to fulfil its obligations and responsibilities as per the 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 is established. As such the allottees shall be paid, by the promoters, interest for every month of delay from due date of possession i.e., 29.11.2016 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**

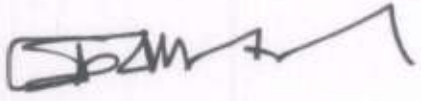
47. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the function entrusted to the authority under section 34(f):

- i. The complainants are entitled for delayed possession charges under section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 at the prescribed rate of interest i.e., 9.30% per annum for every month of delay on the amount paid by the complainants with the respondents from the due date of possession i.e., 29.11.2016 till the handing over of possession after obtaining occupation certificate.
- ii. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order and thereafter monthly payment of interest till handing over of possession shall be paid on or before 10<sup>th</sup> of each subsequent month.
- iii. The complainants are also directed to pay the outstanding dues, if any. Interest on the due payments from the complainants 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 complainants which is not the part of the 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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