

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

Complaint no. : 379 of 2020
First date of hearing: 13.03.2020
Date of decision : 08.04.2021

1. Rajeev Sehgal

R/O: - Quarter Number 6A, Sector 9, Street 1, **Complainant**
Durg, Bhilai, Chhattisgarh-490009

Versus

1. M/s BPTP Limited

Having Regd. Office at: - M-11, Middle Circle,
Connaught Circus, New Delhi-110001

2.M/s Countrywide Promoters Private Limited
Having Regd. Office at: - OT-14, 3rd Floor, Next
Floor Parklands, Sector 76, Faridabad,
Haryana- 121004

Respondents

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar

**Chairman
Member**

APPEARANCE:

Ms. Vridhi Sharma
Sh. Venket Rao

Advocate for the complainant
Advocate for the respondents

ORDER

1. The present complaint dated 31.01.2020 had been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and



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

A. Unit and project related details

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

S. No	Heads	Information	
1.	Name of the project	'Park Spacio' Sector-37 D, Gurugram	
2.	Nature of the project	Group Housing Complex	
3.	Project Area	23.814 acres.	
4.	DTCP license no.	83 of 2008 dated 05.04.2008	94 of 2011 dated 24.10.2011
5.	License validity/ renewal period	04.04.2025	23.10.2019
6.	Name of the license holder	M/s Superbelts Pvt.Ltd., & 4 others	M/s Countriwide Promoter Pvt.Ltd., & 5 others
7.	RERA registered/ unregistered	Registered	
8.	Registration certificate	Registered vide registration no. 300 of 2017 Dated 13.10.2017 valid up to 12.10.2020	



		(Registered Tower are from tower T-8 to T-13)
9.	Unit no.	Q-304, Tower-Q, 3 rd floor (Page no. 41 of complaint)
10.	Unit measuring	1225 sq. ft. super area
11.	Date of Booking	08.09.2010 (vide payment receipt on page no. 24 of complaint)
12.	Allotment letter	12.11.2010 (Page 30 of the complaint)
13.	Date of execution of apartment buyer's agreement	05.04.2011 (Page 36 of complaint)
14.	Addendum to apartment buyer's agreement	04.10.2013 (Page 70 of the complaint)
15.	Total consideration	Rs 44,06,575.00/- (vide statement of account on page 73 of the complaint)
16.	Total amount paid by the complainant	Rs 42,85,389.18/- (vide statement of account on page 73 of the complaint)
17.	Due date of delivery of possession as per clause 3.1 of the flat buyer's agreement. [Note: -36 months from the date of booking/registration of the flat + 180 days grace period for applying and obtaining OC in respect of the colony from the authority]	08.09.2013 [Note: - Grace period is not allowed]
18.	Offer of possession	Not Offered



19.	Occupation certificate	15.01.2021 (Page no. 138 of reply)
20.	Delay in handing over possession till the date of decision i.e., 08.04.2021	7 years 7 months 4 days.
Note: - The respondents have filed an affidavit which states that the sanctioned name for Tower Q (marketing name) is T-13, for which the OC has been granted on 15.01.2021		

B. Facts of the complaint

3. That the complainant had booked a residential flat in the project of the respondents namely, 'Spacio', located at sector-37D, Gurugram, Haryana. (Hereinafter referred as the 'said project'). The complainant had filed this complaint against the respondents for deficiency of services on their part wherein respondents had failed to hand over the possession of the flat to the complainant within the stipulated time period, the said project was still in its construction state. Aggrieved by the acts of the respondents, the complainant had preferred the present complaint before this hon'ble authority to direct the respondents to complete the project immediately and to deliver the peaceful possession of the flat along with delay penalty charges.
4. That it is pertinent to mention that the respondent no. 2 is the sister concern company of the respondent no. 1, both the companies have their respective registered offices at the different places. Though there is no difference in both the companies and differences, if any, only exist on paper. It is



further submitted that the hon'ble authority ought to see both the companies as one for the purpose of the adjudication of the present complaint.

5. That the complainant was approached by the respondent's company's agents and representatives who made tall claims regarding their project, its viability, various amenities it promised etc. The complainant was lured into by the respondent's representations and decided to apply in the project of the respondents. The buyer's including the complainant were lured with various features some of which are as highlighted below: -
- Excellent location and superior connectivity – located in close proximity to the NH8 and upcoming Dwarka Expressway.
 - Intricately designed & aesthetically curated layout plan established with the aim of offering buyers "more in less".
 - The community comes equipped with all basic amenities needed for a modern lifestyle like 100% power back-up and round-the-clock security.
 - A club equipped with an Olympic length swimming pool, a leisure pool, an indoor and outdoor gymnasium, a restaurant, a spa, squash court, etc.
6. That the respondents and the representations made by their agents/ representatives regarding the amenities and the assurance of delivery of possession within the promised time frame, the complainant made an application for the booking an apartment in the said project. The complainant also made a payment of Rs. 3,20,418/- (including service tax of Rs. 8,043/-

-) as booking amount along with the application. The respondent no. 1 subsequently issued receipts for payment of Rs. 3,20,418/- on 08.09.2010.
7. That pursuant to making the application for booking, the respondent no. 1 issued an allotment cum demand letter whereby the complainant was allotted Q-304, tower-Q super area admeasuring 1225 sq. ft. (Hereinafter referred as the 'said unit') . It is pertinent to mention that between 18.10.2010 to 13.01.2011 i.e., after booking the apartment and prior to execution of the agreement, the respondents demanded, and the complainant paid a sum of Rs. 10,08,826/- to the respondents. Thus, the complainant paid a total of Rs. 13,29,244/- before the execution of the flat buyer's agreement.
8. That the complainant had already paid an amount of Rs. 13,29,244/- before the execution of the agreement; the respondents drew an unfair and arbitrary agreement which was totally one sided, illegal, unfair, unjust and arbitrary. All the clauses regarding possession, compensations etc. were drawn in their own favour and the complainant had no say in anything whatsoever. The complainant was denied fair scope of compensation in the agreement in case of delay of possession and was levied heavy penalty in case of delay in payment of instalments. The complainant had no other option than to put his signature on the dotted lines having already made substantial payments to the respondents.
9. That the arbitrary and unfairness of the flat buyer's agreement can be derived from the clauses 2.14 and 3.3. As per the clause



2.14, the corporate debtor had the right to terminate the agreement forfeit the earnest money or to charge interest @ 18% p.a. in the case of default in the payment of the instalment by the applicants on the other hand as per the clause 3.3 of the agreement in the case of delay in the completion of the project, the corporate debtor was liable to pay a meagre compensation @ Rs. 5 per sq. ft. every month of delay after expiry of 42 months. The clause 2.14 and 3.3 of the flat buyer's agreement are reproduced below: -

"2.14. The Seller / Confirming Party and the Purchaser(s) hereby agree that 15% of the Sale Consideration on the Super Area of the Flat shall constitute the 'Earnest Money'. Timely payment of each instalment of the total sale consideration i.e. basic sale price and other charges as stated herein is the essence of this transaction/ agreement. In case payment of any instalment as may be specified is delayed, then the Purchaser(s) shall pay interest on the amount due @ 18% p.a. compounded at the time of every succeeding instalment or three months, whichever is earlier. However, if the Purchaser(s) fails to pay any of the instalments with interest within three (3) months from the due date of the outstanding amount, the Seller/ Confirming Party may at its sole option forfeit the amount of Earnest Money and other charges including late payment charges and interest deposited by the Purchaser(s) and in such an event the Allotment shall stand cancelled, this agreement shall stand terminated and the Purchaser(s) shall be left with no right, lien or interest on the said Flat and the Seller/ Confirming Party shall have the right to sell the said Flat to any other person. In the event, the Purchaser(s) wants to surrender the allotment, for any reason whatsoever at any point of time, then the Seller/ Confirming Party at its sole discretion may cancel/ terminate this Agreement and after forfeiting the earnest money as stated hereinabove may refund the balance amount to the Applicant without any interest after deduction of any interest amount, due or payable, and any other amount of a non-refundable

nature including brokerage charges paid by the Seller/Confirming Party to the broker."

"Compensation

3.3. *Subject to remittance and adherence to the terms and conditions of this Agreement by the Purchaser(s) and subject to clause 10 herein, if, the Seller / Confirming Party fails to offer possession of the Flat within a period of 42 months from the date of booking/registration of the Flat it shall be liable to pay to the Purchaser(s) compensation equivalent to the Holding Charges calculated @ 5 (Rupees Five Only) per sq. ft. for every month of delay thereafter until the actual date fixed by the Seller/Confirming Party for handing over of possession which both parties agree that the same is reasonable estimate of the damages that the Purchaser(s) may suffer and the Purchaser(s) agrees that it shall have no rights whatsoever for the delay in offering the possession of the Flat to the Purchaser(s). The adjustment of such compensation shall be done only at the time of execution of the Conveyance Deed. The Purchaser(s) agrees and confirms that in the event of the Seller/Confirming Party abandoning the construction and development of the Flat, this Agreement shall terminated as if it has been terminated with mutual consent, and subject to the Purchaser(s) not being in default of any of the terms of this Agreement, the Seller/Confirming Party shall refund the Sale Consideration without any interest thereon to the Purchaser(s) other than Non-Refundable Amount."*

10. That on 14.06.2012 respondent no. 1 sent a letter to the complainant requesting for payment of interest @ 18% p.a. due to late payment of the instalments. As per the clause 3.1 of the agreement the delivery of possession of the unit was to be handed over to the complainant within 36 months from the date of booking/registration of the flat. In the instant case, the apartment was booked vide application dated 04.09.2010 along with the booking amount, therefore the respondent company was supposed to deliver the possession of the



apartment by 04.09.2013. There had been a delay of more than 6 years.

11. That the complainant sent an email on 14.10.2019 to the respondents seeking an update on the project. The complainant had not received any reply from the respondents.
12. That the respondents even after delay of more than 6 years had neither offered the possession nor paid any money to compensate such long and inordinate delay. Thus, in the present the circumstances, the complainant is left with no other option to file the present complaint for granting them the immediate possession of the apartment along with compensation for the delay.
13. That the builder/developer is supposed to deliver the possession of the apartment within a reasonable period of time from the booking of the apartment. The law was laid by the Hon'ble Apex Court in "**Fortune Infrastructure and Ors versus Trevor D'Lima and Ors**" had held that: -

"15. Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014."

14. That the hon'ble authority may direct the respondents to deliver/ hand over the immediate peaceful possession of the flat to the complainant with all the amenities and facilities as promised and charged for.

15. That the hon'ble authority may direct the respondents to pay compensation in the form of interest @18% p.a. on the amount already paid by the complainant to the respondents, from the promised date of delivery of the flat till the actual delivery of the flat to the complainant.

C. Relief sought by the complainant:

16. The complainant had sought following relief(s):

- Direct the respondents to make the payment of delay penalty charges on the amount already paid by the complainant to the respondents, from the promised date of delivery of the flat till the actual delivery of the flat to the complainant.
- Direct the respondents to deliver immediate possession of the flat along with all the promised amenities and facilities and to the satisfaction of the complainant.

17. 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.

18. That the complainant had approached this hon'ble authority to gain undue advantage 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 about several aspects. It is further submitted that the Hon'ble Apex Court in plethora of decisions has laid down strictly, that

a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

19. That it is submitted that the complainant had approached this hon'ble authority to gain undue advantage with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of decisions has laid down strictly, that a party approaching the Court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

- The complainant had concealed from this hon'ble authority that with the motive to encourage the complainant to make payment of the dues within the stipulated time, the respondents gave additional incentive in the form of timely payment discount to the complainant and in fact, till date, the complainant had availed timely payment discount of Rs.1,09,564.19/-. It is further submitted that at the stage of booking, the



respondents offered an inaugural discount of Rs.61,250/- to the complainant.

- The complainant had further concealed from this hon'ble authority that the respondents vide demand letters as well as numerous emails attached with photographs had kept updated and informed the complainant about the progress in the developmental aspects of the project. The respondents have always maintained a transparency in reference to the project. In addition to updating the complainant, the respondents on numerous occasions, on each and every issue/s and/or query/s upraised in respect of the unit in question had always provided steady and efficient assistance. Several efforts made by the respondents to attend to the queries of the complainant to their complete satisfaction, the complainant erroneously proceeded to file the present vexatious complaint before this hon'ble authority against the respondents.
- The complainant falsely stated that the timely payments were made by the complainant as and when demanded by the respondents, however, as detailed in the reply to list of dates, it is submitted that the complainant made default in making timely payment against demand raised vide allotment cum demand letter dated 12.11.2010 as a result thereof respondent no. 1 vide reminder letter dated 29.12.2010 requested the complainant for payment of outstanding dues

amounting to Rs.60,783.60/- payable on or before 13.01.2011. Post-issuance of the said reminder letter, the complainant paid the outstanding dues, accordingly receipt dated 13.01.2011 was issued by the respondent no. 1.

20. That the complainant had falsely alleged that the clauses of duly executed FBA were one sided, unfair, unilateral, or arbitrary. The complainant never raised any objection at the stage of execution of the said FBA. The complainant only after carefully reading and understanding all the clauses of the FBA duly signed the same. It is submitted that the said issue has been raised for the first time by the complainant in the present complaint with malafide intentions. Thus, the allegations that some clauses in FBA were one sided or arbitrary, are baseless and just an afterthought. The complainant is not only estopped by conduct but also by the principles of limitation from raising such issues at this stage of the proceedings.
21. It is very well established; from the above-mentioned facts the complainant had approached this hon'ble authority with unclean hands by distorting/concealing/misrepresenting the relevant facts pertaining to the case at hand. The sole intention of the complainant was to unjustly enrich himself at the expense of the respondents by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that considering the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.

22. That the agreements that were executed prior to implementation of Act of 2016 and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented floor buyer agreement (hereinafter referred to as the "FBA") executed by the complainant out of their own free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them.
23. That in the rules published by the state of Haryana, the explanation given at the end of the prescribed agreement for sale in Annexure 'A' of the rules, it is clear 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. The explanation is extracted herein below for ready reference:
- "Explanation: (a) The promoter shall disclose the existing Agreement for Sale entered between Promoter and the Allottee in respect of ongoing project along with the application for registration of such ongoing project. However, such disclosure shall not affect the validity of such existing agreement (s) for sale between Promoter and Allottee in respect of apartment, building or plot, as the case may be, executed prior to the stipulated date of due registration under Section 3(1) of the Act."*
24. That in view of the above, it is evident that the parties are bound by the terms of the duly executed FBA.
25. That the relief(s) sought by the complainant are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the

subsisting relationship between the parties. The complainant entered into the said agreement with the respondents with open eyes and is bound by the same. The relief(s) sought by the complainant travel way beyond the four walls of the agreement duly executed between the parties. It is further submitted that the complainant while entering into the agreement have accepted and is bound by each and every clause of the said agreement.

26. That the reliefs sought by the complainant in the complaint under reply cannot be granted by this hon'ble authority. The agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is further submitted that the complainant entered the said agreement with the respondents with open eyes and was bound by the same. Therefore, considering the settled law, the reliefs sought by the complainant in the complaint under reply cannot be granted by this hon'ble authority.
27. That the parties had agreed under the 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 33 of the FBA. Admittedly, the complainant 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.

28. That the proposed timelines for possession being within 36 months from the booking/registration of flat along with 180 days of grace period was subject to force majeure circumstances, timely payments, and other factors. However, the complainant had indulged in selective reading of the clauses of the FBA whereas the FBA ought to be read as a whole.
29. That the remedy in case of delay in offering possession of the unit was also agreed to between the parties as also extension of time for offering possession of the floor. The said understanding had been achieved between the parties at the stage of entering into the transaction. The following clauses of the duly executed FBA are noteworthy-

"Clause 3.5: If the Seller/ Confirming Party fails to complete construction of the Flat within the period as mentioned in this agreement due to force majeure circumstances or some other circumstances beyond the control of the Seller/ Confirming Party, than the purchaser(s) agrees that the Seller/ Confirming Party shall be entitled to a reasonable extension of time for completion of construction of the Colony and delivery of possession of Flat to the Purchaser(s)."

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

"Force majeure" means any event or combination of events or circumstances beyond the control of the seller/confirming party which cannot (a) by the exercise of reasonable precautions and/or alternative measures be prevented, or caused to prevented, and which adversely affects a Seller's/Confirming party's ability to perform obligations under this agreement, which shall include but not limited to i) acts of God, i.e.

fire, drought, flood, earthquake, epidemics, natural disasters or deaths or disabilities; ii) Explosions or accidents, air crash and shipwrecks; iii) Strikes or lock outs, industrial disputes; iv) Non availability of cement, steel or other construction material due to strikes of manufacturers, suppliers, transporters or other intermediaries; iv) War and hostilities of war, riots or civil commotion; v) Non granting of any approval by any authority or imposition of any adverse condition or obligation in any of the approvals from any authority, including delay in issuance of any certificate/authorizations/ approvals, occupation certificate, completion certificate and/or any other certificate as may be required; vi) The promulgation of or amendment in any law, rule or regulation or the issue of any injunction, order or direction from any authority that prevents or restricts the seller/confirming party from complying with any or all the terms and conditions as agreed in this agreement; vii) any event or circumstances analogous to the foregoing."

30. That vide clause 3.3 of the FBA it was duly agreed upon between the parties that subject to the conditions mentioned therein, in case the respondents fail to hand over possession within the stipulated period, the respondents shall be liable to pay to the complainant compensation calculated @ Rs. 5/- per sq. ft. of the super area for every month of delay, the adjustment whereof shall be done only at the stage of execution of conveyance deed. The parties had agreed the penalty in case of delay in offering possession prior to entering the transaction. In case the complainant fails or defaults in making timely payment of any of the instalments, then the complainant would not be eligible for any other delay compensation.
31. That the said project had been marred with serious defaults and delays in timely payment of instalments by majority of



customers. On the one hand, the respondents had to encourage additional incentives like timely payment discounts while on the other hand, delays in payment caused major setback to the development works. Hence, the proposed timelines for possession stood diluted.

32. That the possession of the unit in question, if delayed, had been on account of reasons beyond the control of the respondents in as much as there was de-mobilization of the main contractor M/s Vascon. The work contract with M/s Vascon was foreclosed on 28.12.2012 due to slow pace of construction work being carried out by the said contractor despite advance amounts and mobilization advances being received by him. Due to this de-mobilization, it took some time to close the work order through proper documentation like closing of final executed quantities, final bills, escalation etc. The respondents thereafter awarded the balance work to a new agency M/s YFC Projects Private Ltd. who deputed their staff and manpower at the site since April 2013. However, due to default of M/s YFC Projects Private Ltd. the work contract was foreclosed and thus the balance work was assigned to two new contractors, namely, M/s Sunshine Finishes and M/s Shri Sidhi Vinayak Infrastructure who deputed their staff and manpower at the site since from March 2015. Thereafter, the two contractors started the construction of the balance work. To make sure the project is not delayed any further, the respondents had arranged funds and the work at site is going on in full swing

and shortly the respondents will be able to offer possession of units in a phased manner.

33. That the construction was also 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. Vide its order NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondents.
34. That the construction for the unit in question is nearing completion and respondents had already obtained occupation certificate on 15.01.2021. The possession of the said unit shall be handed over shortly, post-receipt of occupation certificate by the respondents.

E. Jurisdiction of the authority

E.1 Territorial jurisdiction

35. 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

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

F. Findings on the objections raised by the respondents.

F. I Objection regarding untimely payments done by the complainant.

37. The respondents have contended that the complainant has made defaults in making payments as a result thereof, the respondents had to issue reminder letters dated 29.12.2010 and only after the reminder, the complainant came forward to clear the outstanding dues against the demand letter dated 12.11.2010, accordingly receipt dated 13.01.2011 was issued by the respondents. The counsel for the respondents stressed upon clause 11.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

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

11.1 Timely payments of all amounts as per this Agreement, payable by the Purchaser(s) shall be the essence of this Agreement. If Purchaser(s) neglects, omits, ignores, defaults, delays or fails, for any reason whatsoever, to pay the seller any of the instalments or other amounts and charges due and payable by the Purchaser(s) under the terms and conditions of this agreement or by respective due dates thereof or if the purchaser(s) in any other way fails to perform, comply or observe any of the terms and conditions herein contained within the time stipulated or agreed to, the seller/confirming party shall be entitled to cancel/terminate this agreement forthwith and forfeit the booking amounts or amounts paid up to the earnest money and non-refundable amount..."

38. At the outset it is relevant to comment on the said clause of the agreement i.e., ***"11. TIMELY PAYMENT IS THE ESSENCE OF THIS AGREEMENT, TERMINATION, 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 had not exercised his discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 11.3 of the flat buyer's agreement whereby the complainant shall be liable to pay the outstanding dues together with interest @

18% p.a. to the respondents/promoters on delayed payments. In addition to this in clause 3.3 of the FBA the respondents/promoters are liable to pay compensation at 5% per sq ft. for every month of delay. As from the above-mentioned reasons it is clear that both the clauses are not equitable. However, after the enactment of the RERA Act, the position has changed. 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. 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.

39. 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."

40. 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."

41. 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.

42. The respondents have raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The

following clause has been incorporated w.r.t arbitration in the buyer's agreement:

"33. Dispute Resolution by Arbitration

All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being in force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a Sole Arbitrator who shall be appointed by the Managing Director of the Seller and whose decision shall be final and binding upon the parties....."

43. 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.

44. 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 agreement between the complainant 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 Complainant and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

45. 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."

46. 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 and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings on the relief sought by the complainant.

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

- Direct the respondents to make the payment of delay penalty charges on the amount already paid by the complainant to the respondents, from the promised date of delivery of the flat till the actual delivery of the flat to the complainant.
- Direct the respondents to deliver immediate possession of the flat along with all the promised amenities and facilities and to the satisfaction of the complainant.

47. 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."

48. Clause 3.1 of the flat buyer's agreement provides the period of handing over possession and the same is reproduced below:

"3. Possession

3.1 Subject to Clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the Seller/confirming party and any restraints/restrictions from any courts/authorities and subject to the Purchaser(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and having complied with all provisions, formalities, documentation, etc. As prescribed by the Seller/Confirming Party, whether under this Agreement or otherwise, from time to time, the Seller/Confirming Party proposes to hand over the possession of the Flat to the Purchaser(s) within a period of 36 months from the date of booking/registration of the Flat. The Purchaser(s) agrees and understands that the Seller/Confirming Party shall be entitled to a grace period of 180 (One Hundred and Eighty) days after the expiry of 36 months, for applying and obtaining the occupation certificate in respect of the Colony from the Authority. The Seller/Confirming Party shall give Notice of Possession in writing to the Purchaser with regard to the handing over of possession, whereafter, within 30 days, the Purchaser(s) shall clear all his outstanding dues and complete documentary formalities and take physical possession of the Flat. In case, the Purchaser(s) raises any issue with respect to any demand, the same would not entitle to the Purchaser(s) for an extension of the time for taking over possession of the Flat."

49. That on 04.10.2013, an addendum to flat buyer's agreement dated 05.04.2011 was made between the parties. By the said addendum the respondents made the following changes:

"It is agreed and understood among the parties that the Seller shall always maintain minimum 30 days gap between the demands to be raised for payment of consideration and charges for the Flat [Plot/Flat/Villa/Floor/Space/Shop] bearing Unit No. Q-304 in Project SPACIO."

50. 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 are 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.
51. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the said unit within period of

36 months from the date of booking. In the present complaint, the date of booking vide payment receipt of booking amount is 08.09.2010. Therefore, the due date of handing over possession comes out to be 08.09.2013. It is further provided in agreement that promoters shall be entitled to a grace period of 180 days for applying and obtaining the occupancy certificate etc. from DTCP. As a matter of fact, from the perusal of occupation certificate dated 15.01.2021 it is implied that the promoters applied for occupation certificate only on 21.01.2020 and 21.08.2020 which is later than 180 days from the due date of possession i.e., 08.09.2013. The clause clearly implies that the grace period is asked for applying and obtaining occupation certificate, therefore as the promoters applied for the occupation certificate much later than the statutory period of 180 days, he does not fulfil the criteria for grant of the grace period. As per the settled law one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoters. Relevant clause regarding grace period is reproduced below: -

"Clause 3.1The Purchaser(s) agrees and understands that the Seller/Confirming Party shall be entitled to a grace period of 180 days, after expiry of 36 months, for applying and obtaining the Occupation Certificate in respect of the Colony from the Authority....."

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

53. 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 homer 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."

54. 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%.
55. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by*

the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

56. 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.
57. 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 3.1 of the agreement executed between the parties on 05.04.2011, the possession of the subject apartment was to be delivered within stipulated time i.e., by 08.09.2013. 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 08.09.2013. 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 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., 04.09.2013 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

58. 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., 08.09.2013 till the handing over of possession.
- ii. The arrears of such interest accrued from 08.09.2013 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 directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottee by the promoters, in case of default shall be charged at the prescribed rate i.e., 9.30% by the



respondents/promoters which is the same rate of interest which the promoters shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- v. The respondents shall not charge anything from the complainant which is not the part of the agreement.

59. Complaint stands disposed of.

60. 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