

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

Complaint no. : 4712 of 2020  
First date of hearing: 24.02.2021  
Date of decision : 08.04.2021

1. Ram Kumar Agarwal  
2. Vivek Agarwal

Both R/O: 61, Vrindavan Vihar, Gaganpath,  
Sriganganagar, Rajasthan -335001

**Complainants**

Versus

M/s BPTP Limited  
Regd. Office: - M-11, Middle Circle, Connaught  
Circus, New Delhi-110001

**Respondent**

**CORAM:**

Dr. K.K. Khandelwal  
Shri Samir Kumar

**Chairman  
Member**

**APPEARANCE:**

Shri Sandeep Singh  
Shri Venket Rao

Advocate for the complainants  
Advocate for the respondent

**ORDER**

1. The present complaint dated 15.01.2021 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 thereunder or to the allottee as per the agreement for sale executed inter se.

**A. Unit and project related details**

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

S. No	Heads	Description
1.	Project name and location	"Terra" at Sector-37-D, Gurugram.
2.	Project area	19.74 Acres
3.	Nature of the project	Group Housing Towers
4.	DTCP license no. and validity status	83 of 2008 Issued on 05.04.2008 valid up to 04.04.2025 94 of 2011 Issued on 24.10.2011 valid up to 23.10.2019
5.	Name of the license holder for license no. 83 of 2008	Super Belts Pvt. Ltd and 4 others.
6.	Name of the license holder for license no. 94 of 2011	Countrywide Promoters Pvt Ltd and 4 others.
7.	RERA Registration number	"Terra" registered vide no. 299 of 2017 (Registered for 10.23 acres)
8.	Registration certificate	Dated 13.10.2017 valid up to 12.10.2020
9.	Date of sanction of building plan	21.09.2012(As per project details)
10.	Unit no.	T-21-601, 6 <sup>th</sup> floor, Tower T-21 (Page no. 29 of the complaint)

11.	Measurement of unit	1691 sq. ft. of super area (Page no. 29 of the complaint)
12.	Date of Booking	22.08.2012 (Vide payment receipt on page no. 51 of the reply)
13.	Date of Allotment letter	26.09.2013 (Page no. 17 of the complaint)
14.	Date of builder buyer's agreement	18.06.2013 (Page no. 20 of the complaint)
15.	Payment plan	Construction linked payment plan. (Page no. 17 of the complaint)
16.	Total sale consideration (Basic sale price)	Rs. 1,04,62,642/- (Vide account statement on page no.50 of the complaint)
17.	Total amount paid by the allottees	Rs. 1,02,92,832.50/- (Vide account statement on page no. 50 of the complaint)
18.	Due date of delivery of possession (As per clause 1.6 of the flat buyer's agreement i.e., 42 months from the date of sanction of the building plan or execution of agreement, whichever is later.) (As per clause 5.1 of the flat buyer's agreement i.e., grace period of 180 days after the expiry of the said commitment period for making offer of possession of the said unit.)	<b>18.12.2016</b> (Due date is calculated from the date of execution of the agreement as it is later from the date of sanctioning of building plan i.e., 21.09.2012) <b>(Note: Grace period of 180 days is not allowed in the present case.)</b>
19.	Occupation certificate	Occupation certificate for this tower has not been received.
20.	Offer of possession	Not offered

21.	Delay in handing over the possession till the date of decision i.e., 08.04.2021	4 years 3 months 21 days.
22.	Status of project	Ongoing

**B. Facts of the complaint**

The complainants have submitted as under: -

3. That respondent company is the largest landowner in the area and in continuance of its exclusive ownership upon the 43 acres of land situated in Village-Basai, sector -37D, Gurgaon-Haryana, and had launched a group housing project in the name and style of 'Terra' consisting of various towers. It was represented that it is one of the most awaited projects of the respondent company and as such only a few flats are left to be booked.
4. That considering the various advertisements and overwhelming representation of the respondent, complainants decided to book a residential unit / flat vide its application dated 21.08.2012 and accordingly made the payment against the booking charges against a receipt.
5. That pursuant to booking of the flat bearing no. T21-601, floor no. 6<sup>th</sup>, situated in T21 Tower in the above-mentioned project. The specifications were revealed and basic sale price including other charges. That on several request, the respondent

company after a period of 10 months executed a flat buyer agreement dated 18.06.2013.

6. That flat buyer agreement incorporated unilateral terms and conditions favouring respondent company. According to the terms and conditions being unjustly incorporated, the basic sale price of the flat was fixed as Rs. 5,250/- per square ft. and sale consideration thus calculated to be Rs. 88,77,750/- of the project of the respondent named herein above and other charges were also enumerated. The entire sale consideration of the flat including all charges under various heads was conveyed to be Rs. 1,04,62,642/-.
7. That the flat buyer agreement further conceded the various plan schemes to be opted by the customers/buyers according to its convenience and financial capacity. That according to the terms and conditions of the flat buyer agreement the possession of the unit / flat is to be provided within a period of 42 months from the date of the execution of the flat buyer agreement and an additional 6-month grace period was kept.
8. That the respondent company had raised several demand letters for the payment of the part of the consideration amount, and in bonafide belief, the complainants had made more than 95% payment towards the cost of the flat on various dates and as per the demands raised by the respondent.
9. That despite of the payment of the 95% of the complete cost of the flat, the respondent has neither provided the possession of the flat nor developed the amenities against which the

payment has already been received in apparent contravention of the provisions of the Act of 2016.

10. That according to the terms and conditions of the flat buyer agreement, failure in making the payment of the instalment on time, the complainants were cast with a penalty /duty to pay interest @ 18% p. a. from the due date till the final settlement of amount payable. Therefore, by the same principle, in case of default by the respondent in defaulting the agreement respondent is also liable to pay interest at the rate of 18% p.a. as since the date of payment till the date of offer of possession or obtaining of occupancy certificate whichever is later.
11. That according to the terms and conditions of the flat buyer agreement, the possession was to be provided by 17.06.2017 including grace period of six months, however the respondent company was only interested in grabbing payment from the gullible customers. As such there is a delay of approximately 41 months, which is continuing due to misrepresentations and deliberate default of the respondent. Aggrieved by the continuous omissions and default committed by respondent in providing handing over the possession to the complainants as per the agreed date, the present complaint is being preferred.

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

12. The complainants have sought following relief(s):
  - (i) Direct the respondent to pay the delay penalty at the rate of 18% per annum on the amount paid from the

committed date of possession till date of actual physical possession and to handover the actual possession of the residential unit/apartment bearing no. T-21-601 in the said project.

13. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

**D. Reply by the respondent.**

14. The respondent has contested the complaint on the following grounds: -
15. That the complainants are defaulters under section 19 (6) and 19 (7) of Act of 2016 and not in compliance of these sections. The complainants cannot seek any relief under the provision of Act of 2016 or rules frame thereunder.
16. That the complainants have approached the hon'ble authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the hon'ble Apex Court in plethora of decisions had laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondent but also

against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

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

- That the complainants have concealed the fact that they 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 as is evident from the following:

Clause 7.1 of the flat buyer's agreement states as follows:

*"The timely payment of each installment 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 installments 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."*

- The complainants have made inordinate delays in making timely payments of instalments. This act of not making payments is in breach of the agreement which also affects



the cash flow projections and hence, impacts the projected timelines for possession. Hence, the proposed timelines for possession got diluted due to the defaults committed by various allottees including the complainants in making timely payments.

- That the complainants further concealed from this authority that the respondent vide demand letters as well as numerous emails has kept updated and informed the complainants about the milestone achieved and progress in the developmental aspects of the project. The respondent vide emails have shared photographs of the project in question. However, it is evident that the respondent has always acted bonafidely towards its customers including the complainants, and thus, have always maintained a transparency in reference to the project. In addition to updating the complainants, the respondent on numerous occasions, on each and every issue/s and/or query/s upraised in respect of the unit in question has always provided steady and efficient assistance. However, notwithstanding the several efforts made by the respondent to attend to the queries of the complainants to their complete satisfaction, the complainants erroneously proceeded to file the present vexatious complaint before this authority against the respondent.

18. That the agreements that were executed prior to implementation of Act of 2016 and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented flat buyer agreement dated 18.06.2013 executed by the complainants out of their own free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them. The rules published by the state of Haryana, an explanation is given at the end of the prescribed agreement for sale in annexure A of the rules in which it has been clarified that the developer shall disclose the existing agreement for sale in respect of ongoing project and further that such disclosure shall not affect the validity of such existing agreement executed with its customers.
19. That the relief sought by the complainants 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 complainants entered into the said agreement with the respondent with open eyes and are bound by the same.
20. That the relief claimed by the complainants goes beyond the jurisdiction of this hon'ble authority under the Act of 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainants. That having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the

ambit of the agreement, the complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the '*Doctrine of Aprobate & Reprobate*.' Therefore, in the light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this hon'ble authority.

21. That the parties had agreed under clause-17 of the flat buyer agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainants have raised dispute but did not take any steps to invoke arbitration. Hence is in breach of the agreement between the parties.

22. **Issues and Reliefs QUA GST, Service Tax, Electrification Charges and Cost Escalation**

- **Demand qua GST and Service tax**

That GST being indirect tax is payable by the end users/allotees as per GST regulations. That vide clause C (5) of the application form, later reiterated vide clause 1.33 read with clause 3.8 of the duly executed flat buyer agreement it was specifically agreed to between the parties that the complainants are liable to pay statutory dues including but not limited to service tax, VAT and other tax incidence that may arise. Thus, GST which has been levied by the government from 01.07.2017 is applicable and payable by each customer.

Even otherwise, indirect taxes such as GST, HVAT etc. are pass through charges which are collected by the respondent and passed on to the government.

- **Demand qua Electrification**

That the parties had agreed as per clause 3.11 of the duly executed FBA that the complainants shall be liable to pay electrification charges, as they are not included in the sale consideration, as and when demanded by the respondent or the maintenance agency.

- **Demand qua Cost Escalation**

At the outset it is submitted that the issues and reliefs regarding cost escalation is premature and baseless. However, the said charges are already agreed upon by the complainants at the stage of entering into the transaction. The undertaking to pay the abovementioned charges was comprehensively set out in the FBA.

23. That the proposed timelines for possession being within 42 months from the date of sanction of building plans or execution of FBA, whichever is later, along with 180 days of grace period was subject to *force majeure* circumstances, timely payments and other factors.

24. That the projected timelines for possession are based on the cash flow. It was not in the contemplation of the respondent that the allottees would hugely default in making payments and hence, cause cash flow crunch in the project. The construction

of the unit was going on in the full swing. However, it be noted that due to sudden outbreak of the coronavirus (COVID-19) construction came to a halt and it took some time to get labour mobilized at the site. However, the respondent is hopeful to handover the possession as early as possible.

25. That with regard to the construction of the tower in which the unit in question is located, work such as structure work, brickwork, internal & external plaster works, IPS flooring work is completed. The respondent had applied for occupation certificate for the tower in which the unit is located on 16.01.2021 and as soon as the OC is received, the respondent will be offering possession.
26. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

**E. Jurisdiction of the authority**

27. The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E.1 Territorial jurisdiction**

28. 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**

29. 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 respondent.**

**F. I Objection regarding untimely payments done by the complainants.**

30. The respondent has contended that the complainants have made defaults in making payments as a result thereof, the respondent had to issue reminder letters dated 23.08.2013 and 23.09.2013. The counsel for the respondent 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..."*

31. 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 favour of the promoter and against the allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainants being in default in making timely payments, the respondent has 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 respondent has 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 respondent has already charged penalized interest from the complainants 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 promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent which is the same as is being granted to the complainants 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.**

32. Another contention of the respondent 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."*

33. 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."*

34. 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 complainants are in breach of agreement for non-invocation of arbitration.**

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

**"17. Dispute Resolution by Arbitration**

*All or any disputes arising 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"*

36. 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.
37. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not

circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

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

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

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

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

38. 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."*

39. 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 had sought following relief(s):

- (i) Direct the respondent to pay the delay penalty at the rate of 18% per annum on the amount paid from the committed date of possession till date of actual physical possession and to handover the actual possession of the residential unit/apartment bearing no. T-21-601 in the said project.

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

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

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

*Clause 1.6 "FBA" "Commitment Period" shall mean, subject to Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC), stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyers Agreement, whichever is later."*

42. 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 promoter that even a single default by the allottee in fulfilling obligations, formalities and documentations etc. as prescribed by the



promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

43. **Admissibility of grace period:** The promoter has 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 18.06.2013 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 18.12.2016. Further it was provided in the flat buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondent is 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 respondent-promoter 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 promoter has not offered the possession within the time limit prescribed by the promoter in the flat buyer's agreement nor has the promoter offered the possession till date. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

44. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

**Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]**

- (1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

*Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

45. 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."*

46. 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%.

47. 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;"*

48. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

49. 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 respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5.1 read with clause 1.6 of the flat buyer's agreement executed between the parties on 18.06.2013 the possession of the subject apartment was to be delivered within stipulated time i.e., by 18.12.2016. 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 18.12.2016. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent to fulfil its obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 18.12.2016 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**

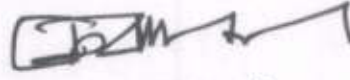
50. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure

compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is 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., 18.12.2016 till the handing over of possession after obtaining the occupation certificate.
- ii. The arrears of such interest accrued from 18.12.2016 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10<sup>th</sup> of the subsequent month as per rule 16(2) of the rules.
- iii. The complainants are also directed to pay the outstanding dues, if any. After adjustment of interest for the delayed period
- iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/ promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- v. The respondent shall not charge anything from the complainants which is not part of the builder buyer agreement.

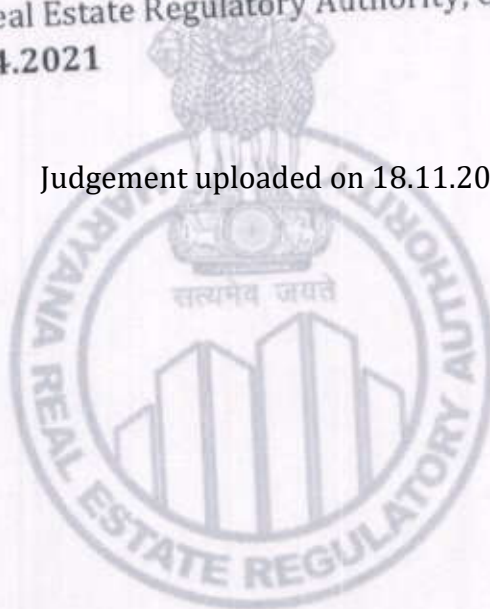
51. Complaint stands disposed of.
52. File be consigned to registry.

  
**(Samir Kumar)**  
Member

  
**(Dr. K.K. Khandelwal)**  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram  
Dated: 08.04.2021

Judgement uploaded on 18.11.2021



**HARERA**  
**GURUGRAM**