

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

Complaint no. : 280 of 2020
First date of hearing: 13.03.2020
Date of decision : 08.04.2021

Mr. Virinder Kumar Ratti
R/o: - Ranjit Garh, Gali no. 2, House no. 8,
Chandigarh Road Nawanshahar,
SBS Nagar, Punjab - 144514

Complainant

Versus

1. M/s BPTP Limited
2. M/s Countrywide Promoters Ltd
Both Having Regd. Office at: - M-11, Middle
Circle, Connaught
Circus, New Delhi-110001
3. Mr. Kabul Chawla
Regd. Office: - 7, Amrita Shergill Marg, Lodhi
Garden, Lodhi Road, Central Delhi, New Delhi
110003.

Respondents

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar

**Chairman
Member**

APPEARANCE:

Sh. Chandan Singh
Sh. Venket Rao

Advocate for the complainant
Advocate for the respondents

ORDER

1. The present complaint dated 10.02.2020 has been filed by the complainant/allottee under section 31 of the Real Estate

(Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the 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	Information
1.	Unit no.	T20-902, 9 th Floor, Tower-T20 (Page no. 73 of reply)
2.	Unit measuring	1998 sq. ft.
3.	Allotment letter	07.12.2012 (Page no. 56 of reply)
4.	Date of execution of flat buyer's agreement	22.01.2013 (Page no. 64 of reply)
5.	Payment plan	Construction Linked Payment Plan (Page no. 56 of reply)
6.	Total consideration	Rs. 13,311,226.00/- (vide statement of account on page no. 58 of complaint)

7.	Total amount paid by the complainant	Rs. 13,205,867.00/- (vide statement of account on page no. 58 of complaint)
8.	Due date of delivery of possession [As per clause 5.1 read with 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.]	22.07.2016 [Due date is calculated from the date of execution of agreement being later] [Note: - Grace period is not allowed]
9.	Offer of possession	Not Offered
10.	Occupation certificate	Occupation Certificate for this tower has not been received.
11.	Delay in handing over possession till the date of decision i.e., 08.04.2021	4 years 8 months 17 days.

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

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



8.	Total no. of phases in which it is proposed to be developed if any	Not Provided	
9.	HARERA registration no.	299 of 2017	
10.	Registration certificate	Date	Validity
		13.10.2017	12.10.2020
11.	Area registered	10.23 acres	
12.	Extension applied on	N/A	
13.	Extension certificate no.	Date	Validity
		N/A	N/A
Licence related details of the project			
1.	DTCP license no.	83 of 2008 dated 05.04.2008	
2.	License validity/ renewal period	04.04.2025 and 23.10.2019	
3.	Licensed area	23.814 Acres	
4.	Name of the license holder	83 of 2008: - Countrywide Promoters Pvt Ltd and 4 Others.	
5.	Name of the collaborator	N/A	
6.	Name of the developer/s in case of development agreement and/or marketing agreement entered into after obtaining license.	N/A	
7.	Whether BIP permission has been obtained from DTCP	N/A	
Date of commencement of the project			

1.	Date of commencement of the project	Not Provided	
Details of statutory approvals obtained			
S.N.	Particulars	Approval no and date	Validity
1.	Approved building plan	21.09.2012	20.09.2017
2.	Environment clearance	15.10.2013	14.10.2020
3.	Occupation certificate date	Occupation Certificate for this tower has not been received.	

B. Facts of the complaint

4. That the complainant is resident of above-mentioned address, and the complainant is the purchaser/allottee of residential flats from respondents in the project named 'Terra' (Hereinafter referred as the 'said project'), Sector 37 D, Gurugram, Haryana.
5. The respondent no. 1 and 2 are the companies and respondent no. 3 is the managing director and directors of the respondent companies respectively, the respondents had launched the said project. For the purpose of sale and promotion of the said project, the respondents from the very beginning falsely represented that the project shall be completed in a time bound manner.
6. That the complainant relying upon the reputation of the respondents and being interested in purchasing the apartment

in the said project entered into flat buyer's agreements on date 22.01.2013.

7. That the complainants booked the unit with the respondents in the said project bearing no. T20-902, floor no. 9, in T20 tower (Hereinafter referred as the 'said unit'), by paying the amount of Rs. 6,00,000/- on 27.08.2012 and thereafter the agreement was executed on 22.01.2013. The total basic sale price of the said unit as per clause 3.1 (a) of the agreement was Rs. 10,489,500/- plus development charges @ Rs.462/- per sq. ft. on the super built up area measuring 1998 sq. ft. as per clause 2.1 of the agreement. The complainant as on today has almost paid the entire amount/price of the flat i.e., Rs. 13,205,867.00/-
8. That as per clauses of the FBA, it was specifically stated that the construction of the said unit will be completed and possession will be offered to the allottee / complainant within the commitment period, as per the definition of commitment period as defined under clause 1.6 of the agreement the commitment period is 42 months. It is relevant to mention herein that the FBA was one-sided and heavily loaded in the favour of the respondents pointing out to the grave unfair trade practices being carried out by the respondents. Thus, on bare perusal of clause 5 read with clause 1.6 of the agreement, the agreed time frame for handing over the possession of the said unit in issue to the complainant by the respondents have already expired and the entire project has been delayed

inordinately. There is no construction activity or development work going in the said project and same has come to a complete halt. That the work at the project has been delayed inordinately without any cogent justification and it is the absolute breach of the terms of the agreement by the builder, as the promised date for the possession was given by the builder i.e., 21.07.2016. It is submitted that, time was the essence of the agreement and therefore since the possession was not given by the builder within time, therefore, it is not obligatory nor feasible on the part of the complainant to take the possession after such a long delay and this amounts to frustration of agreement on part of the builder as the material term of the agreement has been breached by the builder. The time being the essence of the contract, the complainant has become duly entitled for the refund of their money along with penal interest.

9. That the said unit was purchased by the complainant for his personal use, but the respondents remained deficient in providing services. The respondents have illegally collected the money from the complainant as per payment schedule settled between the parties and have deliberately not carried out the construction work of the apartments in accordance with the same.
10. That the complainant being aggrieved against the respondents for not completing the said project and for not delivering the possession of the said unit, the complainant made number of

visits to the site and requested the respondents to handover the possession but all in vain.

11. That the complainant has at all times made payments against the demand of the respondents and as per payment schedule of the agreement.

C. Relief sought by the complainant:

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

- (i) Direct the respondents to handover the possession of the said unit to the complainant that to completed in all aspects within a time frame.
- (ii) Direct the respondents to pay the delayed possession interest @ 18% p.a.

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

D. Reply by the respondent.

14. That the respondents had diligently applied for registration of the project in question i.e., "Terra" located at sector-37D, Gurugram including towers-T-20 to T-25 & EWS before this hon'ble authority and accordingly, registration certificate dated 13.10.2017 was issued by this Hon'ble Haryana Real Estate Regulatory Authority.
15. The complainant has 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 respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

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

- That the complainant approached the respondents through a broker, namely "Nitin Bali C/o Space Management Realty Solutions Pvt. Ltd." after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same. That the complainant is an investor and has booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slump in the real estate market, the complainant has filed the present purported complaint to wriggle out of the agreement.
- That the complainant falsely stated that the timely payments were made by the complainant as and when

demanded by respondents, however, as detailed in the reply to list of dates. The complainant made several defaults in making timely payments as a result thereof, the respondents issue reminder letters for payment of the outstanding amounts.

- That the complainant has concealed the fact that he himself 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 which is evident from clause C (10) of the booking application form and clause 7.1 of the FBA.
 - That the complainant in the entire complaint concealed the fact that no updates regarding the status of the said project were provided to him by the respondents. However, the complainant was constantly provided construction updates by the respondents vide email dated 25.09.2015, 16.03.2017, 24.04.2017, 24.05.2017, 21.06.2017, 15.06.2018, 09.09.2018, 07.11.2018, 24.02.2019, 19.04.2019, 15.05.2019 etc.
17. That the complainant made inordinate delay in making timely payments of instalments and the delay is continuing further since the complainant has still not cleared the dues. The act of not making timely payments is in breach of the agreement which also affects the cash flow projections and hence, impacts the projected timelines for possession.

18. That the relief(s) sought by the complainant is unjustified, baseless and beyond the scop/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is submitted that the 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. The complainant while entering into the agreement has accepted and is bound by each and every clause of the said agreement. Therefore, in light of the settled law, the reliefs sought by the complainant in the complaint under reply cannot be granted by this hon'ble authority.
19. The parties had agreed under the flat buyer's agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainants had raised a dispute but did not take any steps to invoke arbitration. Hence, it is in breach of the flat buyer's agreement between the parties. The allegations made requires proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.
20. That the proposed timelines for possession have been diluted due to serious payment defaults in making payment of installments by various allottees of the project 'Terra' including the complainant herein.

21. That the construction was affected on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority and also on account of coronavirus (COVID 19), construction came to a halt, and it took some time to get the labour mobilized at the site. It is submitted that with respect to the construction of the tower in which the unit in question is located, work such as structural work, plaster works, MS railing work, IPS Flooring work is completed. It is further submitted that for the remaining construction, work is going at full pace at the site and the respondents are making every endeavour to handover possession of the unit at the earliest.

E. Jurisdiction of the authority

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

E.1 Territorial jurisdiction

23. 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

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

F. Findings on the objections raised by the respondents.

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

25. The respondents have contended that the complainant has made defaults in making payments as a result thereof, the respondents have to issue reminder letters dated 07.04.2014, 19.11.2015, 21.12.2015 and 18.04.2016 and only after the reminders, the complainant came forward to clear the outstanding dues against the demand letter. The counsel for the respondents stressed upon clause 7.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

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

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

26. At the outset, it is relevant to comment on the said clause of the agreement i.e. **"7. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"** wherein the payments to be made by the complainant have been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainant being in default in making timely payments, the respondents have not exercised his discretion to terminate the buyer's agreement. The attention of authority was also drawn

towards clause 7.2 of the flat buyer's agreement whereby the complainant shall be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondents have charged delay payment interest as per clause 7.2 of the buyer's agreement and has not terminated the agreement in terms of clause 7.1 of the buyer's agreement. In other words, the respondents have already charged penalized interest from the complainant on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(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 complainant are in breach of agreement for non-invocation of arbitration.

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

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

"17. Dispute Resolution

All or any disputes arising from or out to touching upon in relation to the terms of formation of this agreement or its termination, including the interpretation and validity thereof and respective rights and obligations of the parties shall be amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceeding 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. "

28. 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.

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

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

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate 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."

30. 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."

31. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant 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 complainant.

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

- (i) Direct the respondents to handover the possession of the said unit to the complainant that to completed in all aspects within a time frame.
- (ii) Direct the respondents to pay the delayed possession interest @ 18% p.a.

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

"Section 18: - Return of amount and compensation

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

.....

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

33. 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."

34. At the inception it is relevant to comment on the pre-set possession clause of the flat buyer's agreement wherein the possession has been subjected to innumerable terms and conditions, force majeure circumstances and innumerable terms and conditions. The drafting of this clause is not only vague but so heavily loaded in favour of the promoters that even a single default by the allottee in fulfilling obligations, formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoters is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
35. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the apartment within a period

of 42 months from the date of sanction of the building plan or execution of flat buyer's agreement, whichever is later. The flat buyer's agreement was executed on 22.01.2013 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 22.07.2016. Further it was provided in the flat buyer's agreement that promoters shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondents are claiming this grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondents-promoters have completed the said project within this span of 42 months and had not offered the possession of the said unit till the date of judgement, the promoters have not offered the possession within the time limit prescribed by the promoters in the flat buyer's agreement nor has the promoters offered the possession till date. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoters at this stage.

36. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid,

by the promoters, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:
Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

37. 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."

38. 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%.
39. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoters, in case of default, shall be equal to the rate of interest which the 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;"

40. 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.
41. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondents are in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5.1 read with clause 1.6 of the flat buyer's agreement executed between the parties on 22.01.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., 22.07.2016. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 22.07.2016. The respondents have failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents to fulfil its obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondents are established.


As such the allottee shall be paid, by the promoters, interest for every month of delay from due date of possession i.e., 22.07.2016 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

42. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 22.07.2016 till the handing over of possession after obtaining occupation certificate.
 - ii. The arrears of such interest accrued from 22.07.2016 till the date of order by the authority shall be paid by the promoters to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoters to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
 - iii. The complainant is directed to pay the outstanding dues, if any. Interest on the due payments from the complainant and interest on account of delayed possession charges to be paid by the respondents shall be equitable i.e., at the prescribed rate of interest i.e., 9.30% per annum.

- iv. The respondents shall not charge anything from the complainant which is not the part of the agreement.
43. Complaint stands disposed of.
44. File be consigned to registry.


(Samir Kumar)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 08.04.2021

Judgement uploaded on 18.11.2021


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