

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

Complaint no. : 3258 of 2019
First date of hearing: 26.11.2019
Date of decision : 08.04.2021

1. Mr. Vivek Kalra
2. Mr. Gaurav Kalra
Both R/O: - WZ-282/A, Tihar Village,
Tilak Nagar, New Delhi-110018

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:

Sh. G.S.Jarodia
Sh. Venket Rao

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 06.08.2019 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed

that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No	Heads	Information
1.	Unit no.	T20-1204, 12 th Floor, Tower-T20
2.	Unit measuring	1691 sq. ft.
3.	Allotment letter	07.12.2012 (Page no. 23 of complaint)
4.	Date of execution of flat buyer's agreement	16.01.2013 (Page no. 29 of complaint)
5.	Payment plan	Subvention plan (Page no. 23 of complaint)
6.	Total consideration	Rs. 10,462,642.00/- (Vide statement of account on page no. 69 of complaint)
7.	Total amount paid by the complainants	Rs. 9,796,325.75/- (Vide statement of account on page no. 69 of complaint)
8.	Due date of delivery of possession as per clause 5.1	16.07.2017 (Due date is calculated from the date of

	read with clause 1.6 of the apartment buyer agreement. (Note: - 42 months from the date of sanction of the building plan or execution of agreement, whichever is later)	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	3 years 8 months 23 days.

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

Project related details		
1.	Name of the promoter	M/s BPTP Ltd.
2.	Name of the project	Park Terra
3.	Location of the project	Sector-37D, Gurugram
4.	Nature of the project	Group Housing Project
5.	Whether project is new or ongoing	Ongoing
6.	Registered as whole/phase	Phase
7.	If developed in phase, then phase no.	Not Provided
8.	Total no. of phases in which it is proposed to be developed, if any	Not Provided
9.	HARERA registration no.	299 of 2017
10.	Registration certificate	Date
		Validity
		13.10.2017
		12.10.2020



11.	Area registered	10.23 acres	
12.	Extension applied on	N/A	
13.	Extension certificate no.	Date	Validity
		N/A	N/A

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	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
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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.
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B. Facts of the complaint

4. That after going through the advertisement published by the respondent in the newspaper the complainants were in dire need of a residential apartment at Gurugram, Haryana which may have good infrastructure and all basic facilities/amenities for residential purposes.
5. That on the respondent's representation and persuasion that the respondent would provide state-of-the-art infrastructure with all basic facilities/amenities in their residential apartment situated at sector 37-D, Gurugram, Haryana and further assured the complainants that the respondent would also complete the construction of the said project and deliver the physical possession of the individual units of the same by the end of July 2016.
6. That believing and based on respondent's representation, persuasion, assurances, the complainants had applied for booking / allotment of residential apartment situated in the project namely 'Terra' located at sector 37-D, Gurugram, Haryana (Hereinafter referred as the 'said project') and made payment to the respondent of an amount of Rs. 97,96,325/- and the respondent issued receipts thereof on various dates in favour of complainants.

7. That as per clause no. 4 of the aforesaid application of advance registration, it had been undertaken by the respondent that the respondent shall offer residential apartment within period of 24 months from the date of allotment letter dated 07.12.2012 and the respondent failed to refund the entire amount.
8. That the act and conduct of the respondent has caused a lot of physical harassment, mental agony, and huge financial loss to the complainants.

C. Relief sought by the complainants:

9. The complainants have sought following relief(s):
 - (i) Direct the respondent to pay the delayed interest on the amount receipt by the respondent from the complainants in respect of flat/unit bearing no. T20-1204 in the said project.
10. 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.

11. That the complainants approached this hon'ble authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. The Hon'ble Apex Court in plethora of decisions has laid down strictly, that a

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

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

- That the complainants falsely stated that the timely payments were made by them as and when demanded by the respondent, however, as detailed in the reply to list of dates, it is submitted that the complainants made several defaults in making timely payments as a result thereof, the respondent had to issue several reminder letters and since despite several reminders the complainants failed to pay the outstanding dues. However, on the request made by the complainants, the respondent as a goodwill gesture gave extension of time to the complainants for making the outstanding dues. It is pertinent to mention that the complainants on several occasion presented cheques that were dishonoured towards the consideration amount. On several occasion the respondent verbally or in writing intimated the same to the complainants but being a customer friendly company, the respondent chose not to take legal action against the complainants and had always tried to settle

the disputes amicably. But despite repeated reminders for payment of the outstanding amounts, the respondent was compelled to issue a final demand notice dated 04.07.2018 for payment of total outstanding dues of Rs. 507177.75/- however the same remains unpaid till date.

- That the complainants had concealed the fact that they had committed defaults in making timely payments of various instalments within the stipulated time despite having clearly agreed that timely payment is the essence of the agreement between the parties. The relevant clauses are reproduced below:

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

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

b) Shall approach the Seller/Confirming Party for the refund, if any, and the Seller/Confirming Party shall refund the balance amount, if any, to the Purchase(s) without any interest within (120) One Hundred

Twenty Days from the date of sale of the Unit by the Seller/Confirming Party to any third Party."

13. That the complainants made inordinate delay in making timely payments of instalments and the delay is continuing further since the complainants have still not cleared the dues. This act of not making timely payments is in breach of the agreement which also affects the cash flow projection. Hence, the projected timelines for possession got diluted due to the defaults committed by various allottees including the complainants in making timely payments.
14. That the sole intention of the complainants are to unjustly enrich themselves at the expense of the respondent by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that in light of the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.
15. That the relief(s) sought by the complainants are unjustified, baseless and beyond the scop/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is submitted that the complainants entered into the said agreement with the respondent with open eyes and is bound by the same. The relief(s) sought by the complainants travel way beyond the four walls of the agreement duly executed between the parties. The complainants while entering into the agreement has accepted and is bound by each and every clause of the said

agreement, including clause-6.1 which provides for delayed penalty in case of delay in delivery of possession of the said unit by respondent. It is further submitted the detailed relief claimed by the complainants goes beyond the jurisdiction of this hon'ble authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainants.

16. In this regard, reference may be made to Section- 74 of the Indian contract Act, 1872, which clearly spells out the law regarding sanctity and binding nature of the ascertained amount of compensation provided in the agreement and further specifies that any party is not entitled to anything beyond the same, Therefore, the complainants, if at all, is only entitled to compensation under clause-6 of the agreement.
17. That 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 light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this hon'ble authority.
18. That as contemplated in section 13 of the Act, subsequent to the commencement of the rules, a promoter has to enter into an agreement for sale with the allottees and get the same registered prior to receipt of more than 10 percent of the cost

of the plot, or building, form of such agreement for sale has to be prescribed by the relevant state government and such agreement for sale shall specify amongst various other things, the particulars of development, specifications, charges, possession timeline, provisions of default etc.

19. By a notification in the Gazette of India dated 19.04.2017, the Central Government, in terms of Section 1 (3) of the Act prescribed 01.05.2017 as the date on which the operative part of the Act became applicable. In terms of the Act, the Government of Haryana, under the provisions of Section 84 of the Act notified the rules on 28.04.2017.
20. In terms of the rules, the government prescribed the agreement for sale and specified in rule 8 (1) that the form of the "agreement for sale" is prescribed in annexure A to the rules and in terms of section 13 of the Act the promoter is obligated to register the agreement for sale upon receipt of any amount in excess of 10 percent of the cost of the plot. Rule 8(2) provides that any documents such as allotment letter or any other document executed post registration of the project with the real estate regulatory authority between the promoter and the allottee, which are contrary to the form of the agreement for sale, Act or rules, the contents of the form of the agreement for sale, Act or rules shall prevail.
21. That rule 8 deals with documents executed by and between promoter and allottee after registration of the project by the promoter, however with respect to the documents including agreement for sale/ flat buyers agreement/plot buyers

agreement executed prior to the registration of the project which fails within the definition of "Ongoing Projects" explained herein below and where the promoter has already collected an amount in excess of 10 percent of the total price rule 8 is not applicable.

22. That the preceding para has clarified 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 has been said 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."

23. Therefore, what has not been saved under the Act and rules are sales where mere booking has been made and no legal and valid contract has been executed and is subsisting.
24. The parties had agreed under the floor buyer's agreement (FBA) to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainants had raised dispute but did not take any steps to invoke arbitration. Hence, is in

breach of the agreement between the parties. The allegations made requires proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.

25. The proposed timelines for possession were subject to *force majeure* circumstances and circumstances beyond control of the respondent. However, the complainants have indulged in selective reading of the clauses of the FBA whereas the FBA ought to be read as a whole. It is further submitted that the construction is going on in full swing and respondent is making every endeavour to hand over the possession at the earliest. However, the following are noteworthy: -
26. The proposed timelines for possession have been diluted due to defaults in making timely payment of instalments by various allottees of the project Terra including the complainants herein. In this regard, reference may be made to the following:
- The project in question was launched by respondent no. 1 in August 2012. It is submitted that while the total number of flats sold in the project "Terra" is 401, for non-payment of dues, 78 bookings/ allotments have since been cancelled. Further, the number of customers of the project "Terra" who are in default of making payments for more than 365 days are 125. Hence, there have been huge defaults in making payments of various instalments by large number of applicants.

- The projected timelines for possession are based on the cash flow. It was not in the contemplation of the respondent no. 1 that the allottees would hugely default in making payments and hence, cause cash flow crunch in the project.
- Vide clause 7.3 of the FBA, an option to cancel the allotment is available to the complainants, and however acceptance of the same is on discretion of the respondent. The project in question is at advance stage of construction. The respondent shall stand by its commitment as per the terms of FBA., respondent no. 1 had already invested huge money and at this stage cancelling the allotment is not acceptable.

F. Jurisdiction of the authority

F. I Territorial jurisdiction

32. 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.

F. II Subject matter jurisdiction

33. 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.*

G. Findings on the objections raised by the respondent.

G.1 Objection regarding untimely payments done by the complainants.

34. 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 15.05.2013, 25.06.2013, 11.04.2014, 19.05.2014, 18.06.2014, 06.11.2014, 08.12.2014, 04.06.2015, etc. The respondent has further submitted that the complainants have still not cleared the dues. 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..."

35. At the outset it is relevant to comment on the said clause of the agreement i.e., "7. **TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE**" wherein the payments to be made by the complainants have been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottees that even a single default by the allottees in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainants being in default in making timely payments, the 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(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. 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.

G. II Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

36. 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."

37. 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."

38. 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.

G. III Objection regarding complainants are in breach of agreement for non-invocation of arbitration.

39. The respondent has 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."

40. 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.

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

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

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

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities

under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

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

42. 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."

43. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and Act of 2016, instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings on the relief sought by the complainants.

Relief sought by the complainants: The complainants have sought following relief(s):

- (i) Direct the respondent to pay the delayed interest on the amount receipt by the respondent from the complainants in respect of flat/unit bearing no. T20-1204 in the said project.

44. In the present complaint, the complainants intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under: -

"Section 18: - Return of amount and compensation

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

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

45. **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 16.01.2013 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 16.07.2017. 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.

46. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the 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.

47. 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."

48. 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%.
49. 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;”

50. 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.
51. 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 agreement executed between the parties on 16.01.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by 16.07.2017. 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 16.07.2017. The respondent has failed to



handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter 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 respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 16.07.2017 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.

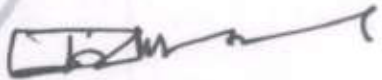
H. Directions of the authority

52. 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 complainants are entitled for delayed possession charges under section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 at the prescribed rate of interest i.e., 9.30% per annum for every month of delay on the amount paid by the complainants with the respondent from the due date of possession i.e., 16.07.2017 till the handing over of possession after obtaining occupation certificate.

- ii. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order and thereafter monthly payment of interest till handing over of possession shall be paid on or before 10th of each subsequent month.
- iii. The complainants are also directed to pay the outstanding dues, if any. Interest on the due payments from the complainants and interest on account of delayed possession charges to be paid by the respondent shall be equitable i.e., at the prescribed rate of interest i.e., 9.30% per annum.
- iv. The respondent shall not charge anything from the complainants which is not the part of the agreement.
53. Complaint stands disposed of.
54. File be consigned to registry.


(Samir Kumar)
Member


(Dr. K.K. Khandelwal)
Chairman

HARERA
GURUGRAM
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 08.04.2021

Judgement uploaded on 18.11.2021