BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint No. :	**33 of 2020**
First date of hearing:	**24.01.2020**
Date of decision :	**08.04.2021**

Smt. Neelima Khanna R/o: - 4596, Charkhe-Walan Street, Chawari Bazar, Delhi-110006	**Complainant**

Versus

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

CORAM:

Dr. K.K. Khandelwal	**Chairman**
Shri Samir Kumar	**Member**

APPEARANCE:

Sh. Amit Dwivedi with complainant in person	Advocate for the complainant
Sh. Venket Rao	Advocate for the respondent

ORDER

1. The present complaint dated 06.01.2020 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 there under or to the allottee as per the agreement for sale executed inter se.

A. **Unit and project related details**

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

S. No	Heads	Information
1.	Unit no.	101, 1st Floor, Tower-T6
2.	Unit measuring	1760 sq. ft.
3.	Revised super area as per offer of possession	1811 sq. ft. [Page no. 58 of complaint]
4.	Allotment letter	18.12.2012 [Page no. 21 of complaint]
5.	Date of execution of apartment buyer's agreement	03.12.2012 [Page no. 23 of complaint]
6.	Payment plan	Construction linked payment plan. [Page no. 21 of complaint]
7.	Total consideration	Rs.93,37,923.30/- [As per statement of accounts page 152 of reply]
8.	Total amount paid by the complainant	Rs. 79,64,313.16/- [As per statement of accounts page 152 of reply]
9.	Due date of delivery of possession as per clause 3.1 of the flat buyer's agreement	**03.12.2015** [**Note:** - Grace Period is not allowed]

	(**Note:** - 36 months from the date of execution of agreement plus 180 days of grace period for filing and obtaining occupation certificate)	
10.	Offer of possession	26.10.2019 [Page no. 149 of reply]
11.	Occupation certificate	20.09.2019
12.	Delay in handing over possession till date of offer of possession i.e., 26.10.2019 plus 2 months i.e., 26.12.2019	4 years 23 days.
	Note: - The respondent has filed an affidavit (nomenclature) which states that the sanctioned name for T6 (marketing name) is T-18, for which the OC has been granted on 20.09.2019.	

3. The particulars of the project namely, "Park Generations" 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 Generation
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	Phases
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.	07 of 2018	
10.	Registration certificate	Date	Validity
		03.01.2018	30.11.2018
11.	Area registered	7.1 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 and 94 of 2011 dated 24.10.2011	
2.	License validity/ renewal period	04.04.2025 and 23.10.2019	
3.	Licensed area	43.558 acres	
4.	Name of the license holder	Super Belts Pvt. Ltd. and others	
5.	Name of the collaborator	Not Provided	
6.	Name of the developer/s in case of development agreement and/or marketing agreement entered into after obtaining license.	Not Provided	
7.	Whether BIP permission has been obtained from DTCP	Not Provided	
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.	Revised building plans	07.02.2017	06.02.2022
3.	Revised building plans	04.12.2017	03.12.2022
4.	Environment clearance	15.10.2013	14.10.2020
5.	Revised Environment clearance	20.07.2016	19.07.2023
6. (a)	Occupation certificate date	11.07.2017	
	Tower No.	Primary School	
(b)	Occupation certificate date	09.10.2018	
	Tower No.	T-16, T-17, T-19, EWS, Convenient Shopping	
(c)	Occupation certificate date	20.09.2019	
	Tower No.	T-14, T-15, T-18, EWS	
(d)	Occupation certificate date	20.09.2019	
	Tower No.	T-4, T-5, T-6	

B. Facts of the complaint

4. That the complaint has been filed by the complainant Ms. Neelima Khanna through her brother and authorised general power of attorney holder Mr. Rajiv Mehrotra as the complainant herself is residing with her husband at Abu Dhabi, UAE and thereby not in a position to pursue and follow the

proceedings before the present hon'ble forum on regular basis.

5. That the respondent had extensively advertised about its project, park generations situated at sector-37D, Gurugram, Haryana (hereinafter referred as the 'said project') across various media channels and had inter alia promised the timely completion of construction and handing over of possession. The said project was advertised by the respondent as a multi storied housing project consisting of housing units of various sizes, lifts, parks, open spaces, passages and services for water supply, sewerage disposal, irrigation, etc.

6. That based upon the representations made by the respondent, the complainant approached the respondent in the year 2012 and applied for the allotment of a 3-bedroom, lifestyle room, hall kitchen residential unit having an approximate covered area of 1760 sq. ft. in the said project in the year 2012. It is pertinent to mention herein that the respondent had painted a rosy picture of the said project and had induced the complainant to apply for the allotment of the desired residential unit mentioned above soon.

7. That at the time of making the application, the complainant herein opted for the construction linked payment plan (CLPP) wherein the payments towards the sale consideration were to be made by the complainant to the respondent in instalments, as per the different stages of construction. The flat buyer's agreement dated 03.12.2012 (hereinafter referred as the 'FBA') was executed between the complainant and respondent

herein and also with M/s Countrywide Promoters Pvt. Ltd. & Ors. This agreement contained all terms and conditions to be followed by the buyer, complainant herein, and seller, respondent herein. In the said agreement, time of giving possession was of utmost important and constituted essential part of the said agreement. It was specifically mentioned at para 3 of the said agreement that the possession of the said unit was to be provided within 36 months from the date of execution of the said agreement with a grace period of 180 days, that the complainant was to get possession of the applied unit latest by 03.12.2015.

8. That the complainant was allotted a residential unit bearing no. T6-101, having approximately 1760 sq. ft. of area along with proportionate undivided interest in the land beneath as well as rights of usage of common areas and facilities in the said residential unit in the said project at a sale consideration of Rs. 62,74,400/- inclusive of other charges mentioned in paragraph 2 under the head 'sale consideration' and other conditions of the flat buyer's agreement dated 03.12.2012 vide an allotment letter dated 18.12.2012 issued by the respondent to the complainant.

9. That the complainant has always been in full compliance of the terms of the said agreement, and the same is inter alia reflected by all the instalments paid by the complainant to the respondent as and when demanded by the respondent. The complainant has paid the respondent a total of Rs. 79,64,313.16/- towards the sale consideration of the said unit,

which is more than 99% of the total sale consideration of the said unit including all applicable charges as per the said agreement.

10. That the respondent had been in utter breach of the terms of the said agreement and has violated the essential part of the said agreement dated 03.12.2012 that was to give possession of the said unit within 36 months of the execution of the said agreement that is latest by 03.12.2015.

11. That the default on the part of the respondent in the performance of its essential obligation under the said agreement that was to handover the possession of the said unit to the complainant within the time prescribed under the said agreement has caused grave and severe financial loss to the complainant, more o in view of the fact the complainant has invested her life savings in the said project. The modus operandi of the respondent has always been non-transparent and arbitrary to say the least during the course of this whole described transaction. Feeling aggrieved by the said conduct of the respondent, the complainant started writing emails to the respondent which were always replied in evasive manner. In an email dated 07.12.2016, the respondent assured too handover over possession by December 2017 but even that assurance turned out to be empty. On 23.02.2018, the brother and authorized GPA holder of the complainant wrote to the respondent to cancel the said booking and return all the money paid till date with interest and compensation for mental harassment, but such requests fell on deaf ears and the

complainant could not get any respite from the respondent whatsoever.

12. That on 26.10.2019 the complainant received via email a frivolous and false 'offer of possession' from the respondent which raised illegal demands of further payments from the complainant. The complainant replied on email and stated that this 'offer of possession' is a guise being put up the respondent in the light of the present complainant having been filed.

13. That the complainant had purchased the said unit from the respondent based on the representation made by the respondent and the undertaking given by the respondent in the said agreement that possession of the unit shall be handed over to the complainant within three years from the date of execution of the said agreement. The respondent was liable, in terms of the said agreement, to handover possession of the said unit to the complainant latest by 03.12.2015. However, the respondent has miserably failed in adhering to the time limits as a result of which the complainant has suffered grave financial loss and mental harassment. In light of the aforesaid facts and circumstances, the complainant herein was constrained to approach the adjudicating officer under section 18 of the Real Estate (Regulation and Development) Act, 2016 and seeking refund of the amount paid along with interest from the date of payments to the respondent.

C. Relief sought by the complainant:

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

(i) Direct the respondent to pay interest at the prescribed rate for every month of delay till the actual handing over of the possession of the said unit to the complainant.

15. 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.**

16. That the complainant himself is defaulter and non-compliant with section 19 (6), 19 (7) and 19 (10) of the Real Estate (Regulation and Development) Act, 2016.

17. That it is stated the complainant has defaulted in making timely payment of instalment raised by the respondent in accordance with the payment plan opted by the complainant, same is evident from the reminder letter dated 19.02.2020, furthermore the same is still in arrears. Upon completion of construction and upon getting/securing occupancy certificate from competent authority, the respondent has issued the offer of possession letter dated 26.10.2019 and even post that the respondent made follow up with the complainant to seek due payments. To avoid the payment liability, the complainant approached the hon'ble authority to waiver of demands and to get unjustified reliefs. The delay in competition of project, if any, do not give any entitlement to the complainant to hold the due payments and sought possession of unit without making entire sale consideration. This is an arm-twisting tactic

adopted by the complainant to get the possession of unit without making payment of entire sale consideration.

18. That the complainant 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 complainant is liable to be dismissed at the threshold without any further adjudication.

19. In this regard, reference may be made to the following instances which establish concealment/ suppression/ misrepresentation on the part of the complainant:

   - The said project has been marred with serious defaults in timely payment of instalment by majority of other customers, hence the proposed timelines for possession stood diluted. It is submitted that on one hand where the project in question got delayed due to non-timely payment of the instalment, the respondent on the other hand with an intent to encourage the complainant to make payments of the instalment raised within stipulated time, the respondent had offered additional incentive in the form of timely payment discount (TPD)

to its allotter including the complainant. The complainant has concealed from this hon'ble authority, that till date, the complainant has availed TPD amounting to Rs. 2,20,322.40/- towards allotted unit. After serious defaults, the respondent vide OOP letter again offered TPD to the complainant.

- That the complainant further has concealed from this hon'ble authority that the respondent being a customer centric organization vide demand letters as well as numerous emails have kept updated and informed the complainant about the milestone achieved and progress in the development aspects of the project. The respondent vide emails have shared updated photographs of the project in question. The detailed construction program chart clearly showing development of the project in terms of phase-wise, occupation certificate specifications were also shared with the complainant. However, it is evident to say that the respondent has always acted bonafidely towards its customers including the complainant, and thus, has always maintained a transparency in reference to the project in question. In addition to updating the complainant, the respondent on various occasions have contacted the complainant and invited him to visit office of the respondent situated at New Delhi in order to have clarifications and discussions on the issue(s)/query(s) raised on receipt of OOP letter. It is stated the

respondent has been continuously in touch with the complainant via telephonically and meetings at office of the respondent, thereby it is evident to say that the respondent has been taking adequate steps in regard to amicable settlement of queries raised by the complaint vide present complaint.

- The complainant further has also concealed from this hon'ble authority that the respondent vide OOP dated 26.10.2019 has duly offered a compensation amounting to Rs. 3,55,240/- towards unit in question.

20. From the above stated, it is very well established, that the complainant has approached this hon'ble authority with unclean hands by distorting/misrepresenting material facts pertaining to the case in hand. It is further submitted that the complainant's sole intention is to unjustly enrich himself at the expense of the respondent by filing complaint consisting of frivolous and facetious allegations 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.

21. That 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 becomes applicable. In terms of the Act, the Govt. of Haryana, under the provisions of section 84 of the Act notified in the rules on 28.07.2017.

22. That in terms of rules, the government prescribed the agreement for sale and specified the same in Annexure 'A' of the rule 8(1) of the rules which clearly specifies that the form of the 'agreement for sale' is prescribed in Annexure 'A' to the rules. 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.

23. That the 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 buyer agreement/plot buyer agreement executed prior to the registration of the project which falls within the definition of 'Ongoing projects' explained herein below and where the promoter ahs already collected an amount in excess of 10 percent of the total price rule 8 is not applicable.

24. That it is clarified 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 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. 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."*

25. That the relief(s) sought by the complainant is unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainant entered into the said agreement with the respondent with open eyes and is bound by the same. That 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 have accepted and is bound by each and every clause of the said agreement, including clause 3.3 which provides for delayed penalty in case of delay in delivery of possession of the said flat by the respondent.
26. That while entering into the agreement , the complainant had the knowledge that there may arise a situation whereby the possession could not be granted to the complainant as per the commitment period and in order to protect and/or safeguard the interest of the complainant , the respondent has provided reasonable remedy under clause 3.3 and the complainant

having accepted to the same in totality, cannot claim anything beyond what has been reduced to in writing between the parties.

27. In this regard, reference may be made to section-74 of the Indian Contracts 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 complainant, if at all, are only entitled to compensation under clause 3 of the agreement.

28. 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 complainant is 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 complainant in the complaint under reply cannot be granted by this hon'ble authority.

29. That the parties had agreed under the FBA to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration.

30. That the project "Park Generations" had been marred with serious defaults in timely payment of instalments by majority of customers, due to which, on the one hand, the respondent had to encourage additional incentives like TPD while on the other hand, delays in payment caused major setback to the

development works. Hence, the proposed timelines for possession stood diluted.

31. That the possession of the unit in question had been delayed on account of reasons beyond the control of the respondent. It is submitted that the construction was affected on account of the NGT order dated 10.11.2016 prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It was submitted that vide its order dated 10.11.2016, NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondent.

32. That the construction has been completed and the occupation certificate for the same has been received where after, the respondent has already offered possession to the complainant. However, the complainant being investors do not wish to take possession as the real estate market is down and there is no sale in the secondary market, this has initiated the present frivolous litigation.

E. Written arguments by the complainant dated 05.10.2020.

33. That present complaint has been filed in relation to the unit T6-101, 3-bedroom, lifestyle room, hall kitchen having an area of 1760 sq. ft bought under 'Construction Linked Plan' situated at the project 'Park Generations', referred to as "the said unit"

herein after, being developed by the respondent. Admittedly, possession of the said was to be handed over by December 2015 as per the flat buyer's agreement dated 03.12.2012, hereinafter "the said Agreement". That the complainant has paid 99.3% of the total net cost of the said unit i.e., Rs. 79,64,313.64/- in form of instalments from 16.08.2011 to 29.01.2014. As on today, there is delay of more than five years in handing over the possession of the said unit.

34. That during the hearing, this hon'ble authority formulated some common issues for arguments and has heard arguments on the said issues in detail on 18.12.2020, 19.02.2021 and 24.02.2021. The issues under discussion are as following:

   - Effect of unilateral increase in the surface area;
   - Builder's right to impose cost escalation and developmental charges and its extent;
   - Maintainability of advance maintenance cost;
   - Imposition of GST, VAT and Service Tax;
   - Clauses which make a 'flat buyer's agreement' unfair and exploitative.
   - Definition of valid offer of possession and till when the delay penalty is to be given and at what rate.

35. In the following part of the present submissions, each of the aforesaid issues will be discussed separately.

- **Effect of unilateral increase of surface area:**

  - The spirit of the Real Estate (Regulation and Development) Act, 2016, herein after referred to as

"the said Act", has been to bring efficiency and transparency in the real estate sector, both words find mention in the preamble of the said Act. The Act has made a very precise effort to free the innocent home buyer from the whims and caprices of the unscrupulous promoters. With the aforesaid jurisprudence a reference to section 14 of the said Act has been drafted.

- A cursory reading of the said section would show that the said section puts a bar on change of the specifications and layout of the common areas, apartments after approval of the sanctioned plan. Proviso to section 14 (2) provides the scope for "Minor additions or alterations" which should be necessitated by the recommendation of the expert opinion and duly intimidated to the homebuyer. However, explanation of the said proviso specifically mentions certain exclusions which do not fall under category of the said definition of "Minor additions or alterations". 'Structural change including an addition to the area or change in height' falls under the said exclusions. Hence, as per the mandate of the said Act addition to the surface could not be made moreover, after years of allotment and payment of entire dues without consent of the concerned homebuyer. Vide the ostensible 'Offer of Possession' dated 26.10.2019, surface area of the said unit has been increased from 1760 sq. ft. to 1811

sq. ft. For that reason alone, the said offer of possession is non-est in the eyes of law. The said letter affects no rights and liabilities between the parties.

- **Builders right to impose cost escalation and developmental charges and its extent**:

❖ **No one is allowed to take advantage of his/her own wrong**. In relation to the said unit, there is already a delay of six years in handing over of the said unit. If the complainant were to be charged for inflationary adjustments from present day, then it would amount to unjust enrichment of promoter based on his own wrongs causing immense injustice. When this hon'ble authority dealt with the present issue at hand in ***Virender Singh Vs BPTP Ltd in CC/693/2019***, the following conclusions were arrived at:

> *"16. Delay in completion of the project is entirely attributable to the respondent. The complainant has made the payment within time. However, it is a matter of fact that the cost inflation index continues to increase with the passage of time and the complainant must not remain oblivious of this universal true fact. Hence, the complainant is held entitled to bear 50% of the amount towards cost escalation."*

❖ Even clause 12.12 of the said stipulated agreement stipulated that 5% variation in the cost is to be absorbed by the promoter. However, shockingly in the said ostensible 'offer of possession' dated 26.10.2019, a whopping cost of Rs.690,660/- towards the cost escalation and Rs.6,82,880/- towards the development charges have been imposed upon the complainant

without any rhyme or reason. Such demand is not only illegal and liable to be quashed but is also a textbook example of illegal demand by the builder.

- **Maintainability of advance maintenance cost:**

❖ When this hon'ble authority dealt with the present issue at hand in ***Virender Singh Vs BPTP Ltd in CC/693/2019***, the following conclusions were arrived at:

> *"17. Demand for Rs.64612/- towards advance maintenance charges is illegal and accordingly set aside."*

❖ The tendency to charge the homebuyer for maintenance of an apartment and project of which he/she has not been given possession of despite passage of years is unfortunately has become a practice of almost all promoters. Such advance maintenance charges add insult to the injury of the home buyers. Vide the said ostensible 'offer of possession' dated 26.10.2019, following cost under the head of maintenance cost has been imposed on the promoter: 'Sewage treatment plant charges' of Rs.16,027/-, 'Club membership charges' of Rs.1,00,000/- , 'ECC+FF+PBIC charges' of Rs.1,81,000/- . Again, such charges have been imposed on the complainant without any explanation or backed by the authority of any law. These charges are illegal and are liable to be quashed.

- **Imposition of GST, VAT and service tax:**

- That Goods and Services Tax (GST) came into effect on 01.07.2017. Admitted, possession of the said unit was to be offered on or before 03.12.2015. Hence, the 'deemed possession' would be considered on 03.12.2015 and then, GST was not in force. The said tax is not applicable to the present dispute at hand and a demand of Rs.1,44,350/- towards a tax which is not applicable to the present dispute at hand is illegal and is liable to be quashed. The applicability of Service Tax and VAT as per law is not denied however, the promoter in the interest of transparency may be asked to explain the basis of these charges and furnish a fresh demand with detailed explanations. The present demands are inflated excessively and are liable to quashed.

- **<u>Clauses which make a 'flat buyer's agreement' unfair and exploitative:</u>**

- The Hon'ble Supreme Court of India has time and again condemned the arbitrary, unfair and one-sided nature of the agreements which the builders compel the innocent home buyers to enter into and apex court has gone beyond the mandate of these agreements to restitute the innocent homebuyers. In a recent judgment dated 24.08.2020 in ***Wg. Cdr. Arifur Rehman Khan Vs. DLF Southern Homes Pvt. Ltd.*** The Apex Court has reiterated the aforesaid view and held in paragraph 24 as following:

"24. A failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within a contractually stipulated period amounts to a deficiency. There is a fault, shortcoming or inadequacy in the nature and manner of performance which has been undertaken to be performed in pursuance of the contract in relation to the service. The expression "service" in Section 2 (1) (o) means a service of any description which is made available to potential users including the provision of facilities in connection with (among other things) housing construction. Under Section 14(1) (e), the jurisdiction of the consumer forum extends to directing the opposite party inter alia to remove the deficiency in the service in question. Intrinsic to the jurisdiction which has been conferred to direct the removal of a deficiency in service is the provision of compensation as a measure of restitution to a flat buyer for the delay which has been occasioned by the developer beyond the period within which possession was to be handed over to the purchaser. Flat purchasers suffer agony and harassment, as a result of the default of the developer. Flat purchasers make legitimate assessments in regard to the future course of their lives based on the flat which has been purchased being available for use and occupation. These legitimate expectations are belied when the developer as in the present case is guilty of a delay of years in the fulfillment of a contractual obligation. To uphold the contention of the developer that the flat buyer is constrained by the terms of the agreed rate irrespective of the nature or extent of delay would result in a miscarriage of justice. Undoubtedly, as this court held in ***Dhanda****, courts ordinarily would hold parties down to a contractual bargain. Equally the court cannot be oblivious to the one-sided nature of ABAs which are drafted by and to protect the interest of the developer. Parliament consciously designed remedies in the CP Act 1986 to protect consumers. Where, as in the present case, there has been a gross delay in the handing over of possession beyond the contractually stipulated debt, we are clearly of the view that the jurisdiction of the consumer forum to award just and reasonable compensation as an incident of its power to direct the removal of a*

deficiency in service is not constrained by the terms of a rate which is prescribed in an unfair bargain."

- ❖ The law laid down in the aforesaid judgment is applicable to the present complaint. As per the clause 2.11 of the said agreement the delay in payment by the complainant has be made good by a payment of interest of 18% per annum compounded quarterly on the delayed amounts by the complainant. However, in clause 3.3 of the said agreement delay in grant of possession by the Respondent is to be compensated by providing a delay penalty of Rs 5 per sq. ft per month. A simple comparison of clause 2.11 and 3.3 of the said agreement shows the unfair, biased and one-sided nature of the said agreement. The said example is not exhaustive and is just another clause of the said one-sided and unjust agreement. Binding down the homebuyers to the terms of the said unjust agreement would cause immense injustice and irreparable losses to homebuyers.

- **<u>Definition of valid offer of possession and till when the delay penalty is to be given and at what rate:</u>**
  - ❖ A valid offer of possession could only be made after getting an approval of competent authorities in the form of occupancy certificate and completion certificate. The said valid offer of possession cannot contain terms which are outrightly in violation of the said Act. Increasing surface areas vide the ostensible possession letter dated 26.10.2019 was one of such

prohibited acts. That clause alone made the said letter illegal and non-est in law. Further, the said letter dated 26.10.2019 imposed advance maintenance charges which are illegal in nature. It imposed taxes which are not backed by the law of land. Such an offer of possession in violation of the law of the land is no offer of possession and cannot affect any right and liabilities among the parties. Hence, to the date no valid offer of possession has been given to the complainant and the delay penalty is liable to be charged till the date of actual handing over of the possession. The rate of delay interest payable by the promoter in case of default has been provided for the said Act explicitly which in fact is codification of various case laws laid down by the apex court.

36. 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.

F. Jurisdiction of the authority

37. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F. I Territorial jurisdiction

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

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

G. Findings on the objections raised by the respondent.

G.I Objection regarding untimely payments done by complainant.

38. The respondent has contended that the complainant has made defaults in making payments as a result thereof, the respondent had to issue a reminder letter dated 19.02.2020. Clause 11.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

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

11.1 (a) (i) Timely Payments of each instalment of the total sale consideration i.e., basic sale price and other charges as stated herein is the essence of this transaction /agreement. In case payment of any instalment as demanded by the Seller/Confirming party is delayed on any account whatsoever or partial payment of the instalment is made, then the Purchaser (s) shall pay interest on the amount due @ 18% p.a. compounded quarterly. However, if the Purchaser(s) fails to make complete payment of any of the instalments with interest within 3 months from the due date if the outstanding amount, the seller/confirming party may at its sole discretion forfeit the amount of Earnest money, interest accrued (weather paid or not) om all delayed payments till the date of termination and any other amount of non - refundable nature including brokerage charges paid by the Seller/Confirming Party to the broker in case the booking is done through a broker and in such an event the Allotment shall stand cancelled and the Purchaser(s) shall be left with no right, lien or interest on the said Flat and the Seller/ Confirming Party shall have the right to sell the said flat to any other person (a) (ii) The Seller/ Confirming Party shall also be entitled to terminate/ cancel the allotment in the event of default of any of the terms and conditions of this application/agreement."

39. At the outset, it is relevant to comment on the said clause of the agreement i.e., *"11. TIMELY PAYMENT IS THE ESSENCE OF AGREEMENT, TERMINATION, AND FORFEITURE"* wherein the payments to be made by the complainant had 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 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 respondent has not exercised his discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 11.3 of the flat buyer's agreement whereby the complainant shall be liable to pay the outstanding dues together with interest @ 18% p.a. 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 11.3 of the buyer's agreement and has not terminated the agreement in terms of clause 11.1 of the buyer's agreement. In other words, the respondent has 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 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 complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent which is the same as is being granted to the complainant in case of delay possession charges.

G. II Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to the registration of the project under RERA.

40. The respondent has raised a contention that the agreements that were executed prior to the registration of the project under RERA shall be binding on the parties and cannot be reopened. When, both the parties being signatory to a duly executed FBA and out of free will and without any undue influence or coercion, the terms of FBA would be binding so agreed upon between them.

41. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written that were executed prior to the registration of the project under RERA or 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."

42. 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."*

43. 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 complainant is in breach of agreement for non-invocation of arbitration.

44. 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:

> *"33. Dispute Resolution by Arbitration*
> *All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a Sole Arbitrator who shall be appointed by the Managing Director of the seller and whose decision shall be final and binding upon the parties. The Purchaser(s) hereby confirms that he shall have no objection to this appointment of the Sole Arbitrator by the Managing Director of the Seller, even if the person so appointed, as a Sole Arbitrator, is an employee or advocate of the Seller/Confirming Party or is otherwise connected to the Seller/ Confirming Party and the Purchaser(s) confirms that notwithstanding such*

> *relationship/connection, the Purchaser(s) shall have no doubts as to the independence or impartially of the said Sole Arbitrator. The Courts at New Delhi and Delhi high Court at New Delhi alone shall have the jurisdiction."*

45. 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.

46. 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."*

47. 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."*

48. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act,1986 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.

H. Findings on the relief sought by the complainant.

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

    i. Direct the respondent to pay interest at the prescribed rate for every month of delay till the actual handing over of the possession of the said unit to the complainant.

50. 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."*

51. Clause 3.1 of the flat buyer's agreement provides for handing over of possession and is reproduced below:

> *"3.1 Subject to Force Majeure, as defined in clause 10 and further subject to the purchaser(s) having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this Agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp Duty and other charges and also*

subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the physical possession of the said unit to the purchaser(s) within a period of 36 months from the date of execution of the Flat Buyers Agreement (Commitment Period).The Purchaser(s) further agrees and understands that the Seller/Confirming Party shall additionally be entitled to a period of 180 days (Grace Period) after the expiry of the said commitment period to allow for finishing work and filing and pursuing the Occupancy Certificate etc from DTCP under the Act in respect of the Project "Park Generations".

52. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 36 months from the date of execution of agreement. In the present complaint, the date of execution of agreement is 03.12.2012. Therefore, the due date of handing over possession comes out to be 03.12.2015. It is further provided in agreement that promoter shall be entitled additionally to a grace period of 180 days for finishing work and filing and obtaining the occupancy certificate etc. from DTCP. As a matter of fact, from the perusal of occupation certificate dated 20.09.2019 it is implied that the promoter applied for occupation certificate only on 28.06.2019 which is later than 180 days from the due date of possession i.e., 15.07.2016. The clause clearly implies that the grace period is asked for filing and obtaining occupation certificate, therefore as the promoter applied for the occupation certificate much later than the statutory period of 180 days, he does not fulfil the criteria for grant of the grace period., As per the settled law one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to

the promoter. Relevant clause regarding grace period is reproduced below: -

> "Clause3.1 ....*The Purchaser(s) agrees and understands that the Seller/Confirming Party shall additionally be entitled to a grace period of 180 days, after expiry of the said commitment period to allow for finishing work and filing and obtaining the Occupation Certificate etc. from DTCP under the Act in respect of the project 'Park Generations'*

53. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate of interest on amount already paid by him 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.*

54. 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."*

55. 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%.

56. 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—*
> *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 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;"*

57. Therefore, interest on the delay payments from the complainant 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 complainant in case of delayed possession charges.

58. On consideration of the documents available on record and submissions made by both the parties, 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 3.1 of the flat buyer's agreement executed between the parties on 03.12.2012, the possession of the subject unit was to be delivered within 36 months from the date of execution of agreement i.e., 03.12.2015. Therefore, the due date of handing over possession is 03.12.2015. 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 03.12.2015. The occupation certificate has been received by the respondent on 20.09.2019 and the possession of the subject unit was offered to the complainant on 26.10.2019. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the flat buyer's agreement dated 03.12.2012 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement dated 03.12.2012 to hand over the possession within the stipulated period.

59. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 20.09.2019. The respondent offered the possession of the unit in question to the complainant only on 26.10.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the

completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 03.12.2015 till the expiry of 2 months from the date of offer of possession (26.10.2019) which comes out to be 26.12.2019.

60. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession at prescribed rate of interest i.e., 9.30% p.a. w.e.f. 03.12.2015 till 26.12.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

I. Directions of the authority

61. 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., 03.12.2015 till the date of offer of possession i.e., 26.10.2019 + 2 months i.e., 26.12.2019 to the complainant as per section 19(10) of the Act.

   ii. The arrears of such interest accrued from 03.12.2015 till 26.12.2019 shall be paid by the promoter to the allottee

within a period of 90 days from date of this order as per rule 16(2) of the rules.

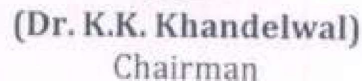
iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iv. The rate of interest chargeable from the allottee by the 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 complainant which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

62. Complaint stands disposed of.

63. 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