BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2391 of 2019
First date of hearing: 26.11.2019
Date of decision : 08.04.2021

Mr. Anil Sachdeva
R/O: - AN-3 and 3A, Shalimar Bagh,
Delhi- 110098 **Complainant**

Versus

1.M/s BPTP Limited
2.M/s Countrywide Promoters Private Limited
Regd. Office: - M-11, Middle Circle, Connaught
Circus, New Delhi-110001 **Respondents**

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

APPEARANCE:
Smt. Vridhi Sharma along with complainant in person — Advocate for the complainant
Sh. Venket Rao — Advocate for the respondents

ORDER

1. The present complaint dated 21.06.2019 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.	1602, 16th Floor, Tower-T20
2.	Unit measuring	1998 sq. ft.
3.	Date of execution of flat buyer's agreement	27.12.2012 [As alleged by the complainant the date of the FBA is 27.11.2012 but it is not placed on record. Hence, in view of payments made the date of the FBA is being taken as 27.12.2012]
4.	Allotment letter	07.12.2012 [Page 47 of complaint]
5.	Payment plan	Time/ Construction linked plan. [Page 47 of complaint]
6.	Total consideration	Rs. 1,32,06,331/- [As per SOA on page no. 84 of complaint]
7.	Total amount paid by the complainant	Rs. 1,31,49,374/- [As per SOA on page no. 84 of complaint]

8.	Due date of delivery of possession as per clause 5.1 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)	**27.06.2016**
9.	Offer of possession	Not offered
10.	Occupation certificate	Occupation Certificate for this tower has not been received.
11.	Delay in handing over possession till the date of decision i.e. 08.04.2021	4 years 9 months 12 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	
Details of statutory approvals obtained			
S.N.	**Particulars**	**Approval no and date**	**Validity**
1.	Approved building plan	21.09.2012	20.09.2017
2.	Environment clearance	15.10.2013	14.10.2020

3.	Occupation certificate date	Occupation Certificate for this Tower has not been received.

B. Facts of the complaint

The complainant has submitted as under: -

4. That the complainant is a law-abiding citizen of India. It is submitted that the complainant had made the booking of the flat for residential purpose and is the allottee of the flat in the project of the respondents and is aggrieved by the failure on the part of the respondents to deliver the flat till date as the booking was done in the year 2012. The total sale consideration of the unit booked by the complainant was Rs. 1,32,06,331/- and out of which the complainant had made the payment of Rs. 1,31,149,374.15/- in favour of the respondent's company. Hence being aggrieved with the conduct of the respondent company the complainant had approached this hon'ble authority seeking redressal of his grievance and direction to the respondent company to deliver the immediate and peaceful possession of the unit booked along with delay penalty charges.

5. That the respondent no. 1 is a public limited company and is a sister concern of the respondent no. 1. Both the companies in collaboration with each other had launched the subject project. It is submitted that the respondent no. 2 is a subsidiary company of the respondent no. 1 and for the purpose of liability, both the companies are jointly and severally liable to

the complainant. There is no difference in both the companies and if there is any difference the same is only on papers. The respondents had launched the project, "Terra" located at the Sector 37-D, Gurgaon, Haryana in the year 2011.

6. That the complainant was approached by the respondent company's agents and representatives who made tall claims regarding their project, its viability, various amenities etc. It is submitted that the complainant was lured into by the respondent's representations and decided to apply in the project of the respondent company. The respondent company promised various facilities and lured the complainant with its luxurious features. The respondents claimed that the project "Terra" is one of their most prestigious projects. The respondents further claimed that the project has connectivity point with upcoming metro stations in the vicinity. The prime features as projected by the respondent company are as follows 60-meter-wide road, high tech security, dedicated parking, modular kitchen with piped gas, wooden flooring, ultra-modern toilets, eco-friendly project, landscaped gardens, club house, etc.

7. That the complainant was lured by the abovementioned features and hence decided to make application for the booking in the project of the opposite party. That the complainant had filed the application form on 31.08.2012 and had made the payment of Rs. 7,00,000/- in form of booking amount vide cheque no. 006369 drawn on Axis Bank dated 31.08.2012.

8. That the complainant had chosen a construction linked payment plan and made his payments on time and as per demand. It is submitted that the respondents have provided the payment plan along with the allotment letter. It is submitted that as per the payment plan the total cost of the apartment booked was Rs. 1,32,06,331/-. Further, the complainant made all his payments within time, as and when raised. The complainant strictly abided by the payment plan and never defaulted. It is submitted that the complainant was intimated by the respondent company that if there would be any delay in making the payment by the complainant, he would have to bear penal charges to the tune of 18 percent per annum.

9. That after the issuance of the allotment letter, the respondents entered into the flat buyer agreement for the abovementioned unit with the complainant on 27.11.2012. It is pertinent to mention here that the copy of the buyer's agreement was not traceable by the complainant and after lots of search and efforts the complainant realized that the same been misplaced/lost. Therefore, the complainant vide e-mail dated 28.02.2019 requested the respondent company to send a scanned copy of the buyer agreement which was executed between the parties on 27.11.2012. It is submitted that the respondent company thereafter sent the buyers agreement to the complainant wherein the date on the agreement had been wrongly mentioned as 14.03.2019 by the respondent company

instead of being 27.11.2012 the date on which the buyer agreement was originally executed between the parties.

10. That the respondents had assured the complainant to deliver the possession of the abovementioned unit within commitment period, subject to *force majeure* circumstances. The relevant "commitment period" is defined under the clause 1.6 of the agreement. It is submitted that the respondents, as per the assurance/promise in the flat buyer agreement, were supposed to deliver the flat within a period of 42 months from the execution of the agreement which is 27th November 2012. Hence, clearly the respondents were supposed to deliver the possession of the subject unit by 27th May 2016. The respondents having clearly failed in the delivery of the flat to the complainant within the promised time frame and therefore they are bound to compensate the complainant with the delay charges on the money of the complainant from the due date of possession till the actual date of delivery. Also, the respondents had never communicated the reasons behind the delay to the complainant. It is submitted that the respondents being a developer are bound to provide the status update regarding the construction to the complainant, which they have never done.

11. That the complainant till date have paid an amount of Rs. 1,31,49,374.15/- out of the total consideration of Rs. 1,32,06,331/-. That on the perusal of various clauses of the agreement executed between the parties represents that the present agreement is unilateral and arbitrary where the

respondents have an upper hand in the entire transaction. As per the agreement the respondents had the authority to impose an exorbitant rate of interest on the complainant to the tune of *18% on delayed payments* whereas, the respondents were only liable to pay a meagre amount in case of delayed possession to the tune of Rs. *5 per sq. ft.* of the super build-up area of the flat. The said clauses are also in clear contravention of the provisions of the Real Estate (Regulation and Development) Act, 2016 which has clarified the position that the interest payable by the promoter in case of default shall be the same as the interest payable by the allottees in case of any default made by them.

12. That this a case when the respondents has misused its dominant position resulting in the mental, physical and financial harassment to the complainant. It is submitted that the buyer agreement is nothing but an abuse of the dominant position by the respondents and hence ought not to be referred for the purpose of calculating the delay compensation of the buyer/complainant by this authority.

13. That the delay in the delivery of the flat is solely due to the negligence of the respondent company. It is submitted that the respondent company have never informed the complainant about any force majeure circumstances which has evidently led to the halt in the construction. It is submitted that there is enough information in the public domain which suggest that the respondents have deliberately not completed the present

project and have hoodwinked the money paid by the complainant into some other projects of theirs.

14. That the present circumstances of the complainant have constrained him to file the present complaint as he had deposited a considerable amount of money with the respondents and no possession has been granted to him till date. Thus, in order to seek immediate delivery of possession along with compensation the complainant has preferred the present complaint. It is submitted that the complainant has requested the respondents several times personally and orally for the redressal of his grievances, but the respondents have never responded to the requests of the complainant to complete the construction of the project and deliver the peaceful possession of the apartment booked.

15. That the complainant is entitled to immediate possession along with compensation for delay. It is submitted that the complainant has been deprived from the use of his flat for several years. It is submitted that during such time the complainant has been mentally and physically harassed by the respondents having been made to run from pillar to post. Therefore, this hon'ble authority needs to grant immediate possession along with compensation for delay as prayed by the complainant.

C. Relief sought by the complainant:

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

(i) Direct the respondents to deliver immediate possession of the apartment bearing no. T-20-1602 in project terra located in sector 37-D Gurugram, Haryana along with all the promised amenities and facilities and to the satisfaction of the complainant.

(ii) Direct the respondents to make the payment of delayed possession charges @18% on the amount already paid by the complainant to the respondents, from the promised date of delivery of the flat till the actual delivery of the flat to the complainant.

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

D. Reply by the respondents.

18. That the complainant 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 respondents but also against the court and in such

situation, the complainant is liable to be dismissed at the threshold without any further adjudication.

19. That the complainant approached the respondents through a broker, namely "Raheja Associates" after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same. It is further submitted that complainant is an investor and had booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slumps in the real estate market, the complainant has filed the present purported complainant to wriggle out of the agreement.

20. That the complainant falsely stated that the timely payments were made by the complainant as and when demanded by respondent no. 1, however, as detailed in the reply to list of dates, it is submitted that the complainant made several defaults in making timely payments as a result thereof, respondents had to issue reminder letters for payment of the outstanding amounts.

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

> *"Timely payment of instalments as per the payment plan shall be the essence of this transaction. It shall be incumbent on the applicant(s) to comply with the*

terms of payment and other terms and conditions of allotment. The applicant(s) acknowledges failure to adhere to the payment schedule and failure to make full and timely payment impacts the Company's ability to fulfil its reciprocal promises and obligations to the Applicant(s) and other customers and consequently prejudicially affects as well as results in the waiver and extinguishment of the Applicant's rights under these Terms and Conditions and the Flat Buyer's Agreement, including but not limited to the right to claim any compensation for delay in handing over possession of the Unit, the right to require the Company to perform any of its obligations within a given time frame and the cancellation of allotment amongst other rights. Accordingly, in the event that the Applicant(s) fails to strictly adhere to these Terms and Conditions and the Flat Buyer's Agreement, such action shall amount to a voluntary, conscious and intentional waiver and relinquishment of all rights and privileges of these Terms and Conditions and the Flat Buyer's Agreement and could at the option of the Company be treated as termination/cancellation of allotment and the Applicant(s) could at the option of the Company cease to have any right, title or interest whatsoever in the unit and shall also be liable to forfeiture of earnest money deposit, non-refundable amounts in terms of clause E herein 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."

22. That the complainant made inordinate delay in making timely payments of instalments and the delay is continuing further since the complainant has still not cleared the dues. 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 complainant in making timely payments.

23. That the complainant in the entire complaint concealed the fact that no updates regarding the status of the project were provided to him by the respondent no. 1. However, complainant was constantly provided construction updates by the respondents vide emails on various dates.

24. That the sole intention of the complainant is to unjustly enrich himself at the expense of the respondents by filing this frivolous complaint which is nothing but gross abuse of the due process of law.

25. That the relief(s) sought by the complainant is unjustified, baseless and beyond the scop/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is submitted

that the complainant entered into the said agreement with the respondents with open eyes and is bound by the same. The relief(s) sought by the complainant travel way beyond the four walls of the agreement duly executed between the parties. The complainant while entering into the agreement has accepted and is bound by each and every clause of the said agreement, including clause-6.1 which provides for delayed penalty in case of delay in delivery of possession of the said floor by respondent no. 1. It is further submitted the detailed relief claimed by the complainant 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 complainant.

26. 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 complainant, if at all, is only entitled to compensation under clause-6 of the agreement.

27. That 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"*. In this regard, the respondents reserve their light to refer to and rely upon decisions of the Hon'ble Supreme

Court at the time of arguments, if required. 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.

28. 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.

29. 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 28.07.2017.

30. 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.

31. 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.

32. 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."*

33. 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.

34. 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.

35. The complainant had raised dispute but did not take any steps to invoke arbitration. Hence, is in breach of the agreement between the parties. The allegations made requires proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.

36. The proposed timelines for possession were subject to *force majeure* circumstances and circumstances beyond control of the respondents. However, the complainant has 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 respondents no. 1 is making every endeavour to hand over the possession at the earliest. However, the following are noteworthy: -

37. 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 complainant 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 complainant, and however acceptance of the same is on discretion of the respondents no. 1. The project in question is at advance stage of construction. The respondents 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.
- At the stage of booking, it was clearly agreed between the parties that in case the project is delayed and the complainant is entitled for delay payment penalty @ 5/- per sq. ft. per month for the period of delay, that the same shall be payable only at the time of execution of

conveyance deed and further that the complainant shall not be entitled to seek any other compensation as is evident from a bare reading of clause 6.1 of the flat buyer's agreement reads as under:

> *"**Clause 6.1:** - Subject to the conditions contained this Agreement, if the seller/confirming party fails to offer the possession of the said unit to the purchaser(s) within the commitment period and after expiry of grace period thereof it shall be liable to pay to the purchaser(s) the compensation @ Rs. 5/- per sq. ft. per month calculated on super built up area of the unit ("Delay compensation") for every month of delay until the actual date fixed by the seller/confirming party to make offer for possession of the said unit to the Purchaser(s). In the event the purchaser has delayed in making payment of any of the instalment as agreed herein, irrespective of the fact that such delay has been condoned and the payment has been accepted along with interest by the seller/confirming party, the purchaser(s) waives his right to seek the Delay Compensation."*

38. That this hon'ble authority issued a registration certificate dated 13.10.2017 having its validity from 13.10.2017 to 12.10.2020. Hence project completion timeline stands extended till 12.10.2020. There is no delay in completion of project as respondents have time till 12.10.2020 to complete the project. The said period is yet to be expired. The instant complaint is pre-mature in nature as the completion period is not over/lapsed. As RERA allows higher rate of compensation to the buyers other than the compensation/delay penalty agreed between the buyer and promoter in buyer's agreement, in the same manner RERA permits builders to declare extended time period to complete the project at the time of registration of respective project with RERA. Hence, till the

project completion timelines declared by the promoter to RERA are not exhausted, no complaint be entertained on account of delay in possession.

F. Jurisdiction of the authority

F. I Territorial jurisdiction

44. 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

45. 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 respondents.

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

46. The respondents have contended that the complainant has made defaults in making payments as a result thereof, the respondents had to issue reminder letters dated 02.09.2013, 04.10.2013, 06.11.2013, 07.04.2014, 09.05.2014, 05.08.2015, 04.09.2015, 05.10.2015, 18.04.2016, 05.01.2017, 17.02.2017, 22.06.2017, 27.12.2017, 10.07.2018 and only after the reminder letters the complainant came forward to clear the dues. The counsel for the respondents stressed upon clause 7.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

> *"7. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"*
>
> *7.1 The timely payment of each instalment of the Total Sale Consideration i.e., COP and other charges as stated herein is the essence of this transaction/Agreement. In case the Purchaser(s) neglects, omits, ignores, defaults, delays or fails, for any reason whatsoever, to pay in time any of the instalments or other amounts and charges due and payable by the Purchaser(s) as per the payment schedule opted or if the Purchaser(s) in any other way fails to perform, comply or observe any of the terms and conditions on his/her part under this Agreement or commits any breach of the undertakings and covenants contained herein, the Seller/Confirming Party may at its sole discretion be entitled to terminate this Agreement forthwith and forfeit the amount of Earnest Money and Non-Refundable Amounts and other amounts of such nature..."*

47. At the outset it is relevant to comment on the said clause of the agreement i.e., *"7. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"* wherein

the payments to be made by the complainant has 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 complainant being in default in making timely payments, the respondents have not exercised his discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 7.2 of the flat buyer's agreement whereby the complainant shall be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondents have charged delay payment interest as per clause 7.2 of the buyer's agreement and has not terminated the agreement in terms of clause 7.1 of the buyer's agreement. In other words, the respondents have already charged penalized interest from the complainant on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the 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 respondents 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 coming into force of the Act.

48. Another contention of the respondents are 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."

49. 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."

50. 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 are in breach of agreement for non-invocation of arbitration.

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

> *"17. Dispute Resolution 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."

52. 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.

53. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New

Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

54. 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."*

55. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and Act of 2016, instead of going in for an arbitration. Hence,

we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings on the relief sought by the complainant.

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

(i) Direct the respondents to deliver immediate possession of the apartment bearing no. T-20-1602 in project terra located in sector 37-D Gurugram, Haryana-along with all the rights, titles and interests without any delay or default in terms with the flat buyer's agreement.

(ii) Direct the respondents to make the payment of delayed possession charges @18% on the amount already paid by the complainant to the respondents, from the promised date of delivery of the flat till the actual delivery of the flat to the complainant.

56. The complainant was allotted unit no. T20-1602, 16th floor in the said project by the respondents/promoters, and which led to issuance of letter of allotment dated 07.12.2012. It has come on record, that prior to allotment of the unit the complaint had already deposited Rs. 7,00,000/- and Rs. 14,41,098/- on 04.09.2012 and 31.10.12 respectively against the total sale consideration of Rs. 13,206,331.00/-. It is alleged by the complainant that the respondent/promoters entered into the flat buyer's agreement with him on 27.11.2012. However, a

copy of the same has not been placed on record. It is pleaded by the complainant that he lost that document and wrote to the respondent/promoters to send him a scanned copy of the same on 28.02.2019 and whereas, he was forced to execute a fresh BBA on 14.03.2019. It is highly improbable, that when he had already paid a substantial amount of the sale consideration towards the allotment of the unit, then he would enter into a flat buyer's agreement. In fact, the second flat buyer's agreement is nothing but to make out a case for extension of period to complete the project and to avoid payment of the delayed possession charges.

It is pleaded on behalf of the respondent/promoters that on 27.11.2012, they sent the flat buyer's agreement to the complainant for signatures and the same was not received back. Though, payments against the allotted unit continued to be made but no flat buyer's agreement was executed between the parties, and which led to its execution only on 14.03. 2019. No doubt on the basis of allotment of the unit on 07.12.2012 the complainant continued to make payments and paid a substantial amount against the total sale consideration of Rs. 13,206,331.00/- but he had already Rs. 7,00,000/- and Rs. 14,41,098/- on 04.09.2012 and 31.10.12 respectively. So, it led to issuance of letter of allotment of allotted unit on 07.12.2012. That there is also a letter dated 27.11.2012 written by the respondents/promoters to the complainant for the execution of the flat buyer's agreement between the parties thought the same has not been the light of the day up to now. So, now the

moot question to be decided is as to what the date of execution of the flat buyer's agreement in the face of document should be dated 14.03.2019 purported to be the flat buyer's agreement executed between the parties. The respondents/promoters had already received more than 10% of the total sale consideration up to 27.11.2012, when they wrote a letter for execution of the flat buyer's agreement to the allottee.

Though, the existence of the same is disputed by the respondent/promoters but it is to be presumed that the same was executed between the parties after 27.11.2012 and the date in this regard is to be presumed as 27.12.2012 (after adding a reasonable period of 1 month for execution of that document between the parties) and is held to be the date of execution of the FBA between the parties.

57. 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."*

58. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the apartment within a period

of 42 months from the date of sanction of the building plan or execution of flat buyer's agreement, whichever is later. The flat buyer's agreement was executed on 27.12.2012 as per the reasons mentioned above 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 27.06.2016. Further it was provided in the flat buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondents are claiming this grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondents/promoters 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 promoters in the flat buyer's agreement nor has the promoters offered the possession till date. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

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

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

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.: Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

60. 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."

61. 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%.

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

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

64. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondents are in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5.1 read with clause 1.6 of the agreement executed between the parties on 27.12.2012, the possession of the subject apartment was to be delivered within stipulated time i.e., by 27.06.2016. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 27.06.2016. The respondents have failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents/promoters to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondents 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., 27.06.2016 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

65. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the function entrusted to the authority under section 34(f):

i. The complainant is 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 complainant with the respondents form the due date of possession i.e., 27.06.2016 till the handing over of possession after obtaining occupation certificate.

ii. The arrears of interest accrued so far shall be paid to the complainant 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 complainant is also directed to pay the outstanding dues, if any. Interest on the due payments from the complainant and interest on account of delayed possession charges to be paid by the respondents shall be

equitable i.e., at the prescribed rate of interest i.e., 9.30% per annum.

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

66. Complaint stands disposed of.

67. File be consigned to registry.

(Samir Kumar)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 08.04.2021