

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

Complaint no. : 71 of 2020
First date of hearing: 13.03.2020
Date of decision : 10.08.2021

1. Mrs. Reeta Ahuja
2. Mr. Ravindra Ahuja
Both R/O: - A-23, South Extension-2, New
Delhi-110049

Complainants

Versus

1. M/s BPTP Limited
2. M/s Countrywide Promoters Private
Limited
Both Having its Regd. Office at: - M-11, Middle
Circle, Connaught Place, New Delhi-110001

Respondents

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Sh. Anuj Malhotra
Sh. Venket Rao

Advocate for the complainants
Advocate for the respondents

ORDER

1. The present complaint dated 20.01.2020 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed

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

A. Unit and project related details

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

S. No	Heads	Information
1.	Unit no.	A-151-SF, Second Floor
2.	Unit super area admeasuring	1999 sq. ft.
3.	Revised super area [As per offer of possession]	2138 sq. ft. (Page no. 144 of reply)
4.	Date of Booking	27.11.2010 (vide payment receipt on page no. 57 of reply)
5.	Date of Allotment Letter	05.09.2011 (Page no. 60 of reply)
6.	Date of execution of floor buyer's agreement	23.08.2013 (Page no. 39 of complaint)
7.	Total consideration	Rs. 10,745,073.19/- (vide statement of accounts on page no. 146 of reply)
8.	Total amount paid by the complainants	Rs. 5,040,746.92/- (vide statement of accounts on page no. 146 of reply)

9.	Due date of delivery of possession [As per clause 5.1: - 24 months from the date of sanctioning of building plan or execution of FBA, whichever is later]	23.08.2015 (Due date is calculated from the date of execution of the FBA)
10.	Date of occupation certificate	24.09.2019
11.	Offer of possession	10.10.2019 (Page no. 144 of reply)
12.	Delay in handing over possession till offer of possession plus 2 months i.e., 10.12.2019	4 years 3 months 17 days.

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

Project related details		
<p>The License no. 58 of 2010 and 45 of 2011 comprising of total land area 126.674 Acres were previously sold by the promoter by the project name i.e., Amstoria and was not registered.</p> <p>As such, the promoter has registered with the authority vide registration no.31of 2020 valid till 30.04.2024 on the same land comprising of license no. 58 of 2010 and 45 of 2011. Now, the Name of the said project is 102, Eden Estate and is registered with the Authority.</p>		
1.	Name of the promoter	M/s Countrywide Promoters Private Limited
2.	Name of the project	102 Eden Estate
3.	Location of the project	Sector-102 & 102A, Gurugram, Haryana.
4.	Nature of the project	Residential Plotted Colony

5.	Whether project is new or ongoing	Ongoing	
6.	Registered as whole/phase	Whole	
7.	If developed in phase, then phase no.	N/A	
8.	Total no. of phases in which it is proposed to be developed, if any	N/A	
9.	HARERA registration no.	31 of 2020	
10.	Registration certificate	Date	Validity
		09.10.2020	30.04.2024
11.	Area registered	126.674 acres	
	Total Plots 1028 (Out of which 28 plots for villas and 155 plots for the floors (G+3))		
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.	58 of 2010 dated 03.08.2010 and 45 of 2011 dated 17.05.2011	
2.	License validity/ renewal period	02.08.2025 and 16.05.2017	
3.	Licensed area	108.068 acres and 18.606 acres	
4.	Name of the license holder	M/s Shivanand Real Estate Pvt. Ltd. and others.	
5.	Name of the collaborator	NA	
6.	Name of the developer/s in case of development	NA	

	agreement and/or marketing agreement entered into after obtaining license.		
7.	Whether BIP permission has been obtained from DTCP	NA	
Date of commencement of the project			
1.	Date of commencement of the project	N/A	
Details of statutory approvals obtained			
S.N.	Particulars	Approval no and date	Validity
1.	Environment Clearance	12.12.2013	11.12.2020
	Revised Environment Clearance	22.07.2016	21.07.2023
2.	Occupation Certificate Date	Provided individually for the floors and plots.	
3.	Part completion certificate date	03.10.2017	
	Area	66.50 acres	

B. Facts of the complaint

The complainants have submitted as under: -

- That in the year 2010, BPTP Limited (respondent no.1) along with M/s Countrywide Promoters Pvt. Ltd. (respondent no.2) launched a real estate project namely 'Amstoria' in sector-102, Gurgaon, Haryana. (Hereinafter referred as the 'said project') and invited application for purchase of flat/apartment in the said project.

5. That on the basis of certain assurances and representations, the complainants applied for allotment/purchase of a unit in the abovesaid project.
6. That the complainants made timely payments as and when demanded by the respondent no.1 through demand letter/invoice.
7. That vide allotment letter dated 05.09.2011 bearing customer code BE 56/127959, the complainants were allotted a flat bearing unit no. A-151-SF which had a tentative built-up area of 1999 sq. ft. in the said project. The said allotted unit's super area was enhanced to final super area i.e., 2138 sq. ft vide invoice dated 10.10.2019.
8. That on 23.08.2013, after making huge payments of Rs. 50,40,747/-, the complainants were asked to into a floor buyer's agreement with the respondents for purchase of the said unit in the above mentioned project. The said agreement was duly signed by the complainants and all the respondents. It is pertinent to mention here that clause 5 of the agreement i.e., the possession clause provided that the possession of the said unit was to be handed within a period of 24 months from the date of sanctioning of building plan or execution of the FBA, whichever is later.
9. It is submitted that clause 5 of the FBA is unjust and have been drafted mischievously by the respondents and is completely one sided. It has also been observed in para 181 of '*Neelkamal Realtors Suburban Pvt. Ltd. v/s UOI and Ors.*' (W.P. 2737 of 2017), wherein the Bombay High Court bench held that:

".....Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."

10. That the condition to deliver the said unit within 24 months is qualified by another condition of 'Force Majeure', which is also defined under clause 14 of the FBA.
11. That the period of two years, if counted from the date of execution of the agreement i.e., 23.08.2013, ends on 23.08.2015. It is pertinent to mention here that as per clause 6 of the said agreement, upon being failed to deliver possession, the respondents are liable to pay the compensation to the complainants. The respondents failed to timely deliver the possession of the said unit in breach of the agreement and failed to provide any plausible reason for the same. Thus, are liable to pay the compensation to the complainants as per the schedule provided in the clause 6 of the agreement.
12. That the complainants made all the payments on time as and when demanded by the respondent no. 1 by the way of demand letter/invoice. The complainants have made the total payment of Rs. 50,40,747.21/- till date and the same is admitted by the respondent no.1 vide its invoice dated 10.10.2019 and 06.11.2019.
13. That the project of the respondents is not registered with Ld. real estate regulatory authority till date which is clear

violation of first proviso to section 3 which mandates all commercial and residential real estate projects where the land is over 500 square metres, or eight apartments, to register with the RERA for launching a project, in order to provide greater transparency in project-marketing and execution and for ongoing projects which have not received occupancy certificate on the date of commencement of the Act i.e. 01.05.2017, will have to seek registration within 3 months.

14. That it is further submitted that the respondents are in violation with the abovesaid provisions of section 3, thus are liable for the punishment under section 59 of the act for non-registration.
15. That on 10.10.2019, the respondent no. 1 arbitrarily sent an invoice letter bearing number INV1920/H003194 to complainant no. 1 offering possession of the said unit to the complainants subject to certain requirements/fulfilments which included payment of dues in accordance with 'Annexure A' i.e., statement of accounts cum invoice which was attached with the said letter. Upon perusal of the Annexure-A it came to knowledge of the complainants that the respondents are clandestinely evading from liability to pay compensation for delayed possession as per the schedule given under clause 6 of the FBA by giving loyalty bonus. The relevant para from the said Annexure-A of Invoice is reproduced hereinbelow for ready reference:

"3. The customer confirms, acknowledge and agrees that upon credit of the Loyalty bonus into the account of the customer held with the company, all the benefits inclusive of all taxes including benefit applicable under anti-profiteering provision under GST laws) as applicable /rebate/compensation and issues/claims/disputes of the customer qua the Unit and/or the project in terms of the booking application form/buyer's agreement/any legislature till date of delivery mentioned above stands settled with the Company and the customer shall not rise any claim against the company in any forum. Discount being given also takes into account benefit to be passed on to customer on account of GST Anti-profiteering."

16. That on 15.10.2019, the complainant no. 1 requested telephonically to the respondent no. 1 to pay penalty as mentioned in the clause 6 of the agreement for delay in possession.
17. That on 06.11.2019, the respondent no. 1, sent a revised invoice letter bearing number BPTP/BE56/127957, whereby the loyalty bonus of Rs.4,27,600/- was clandestinely removed and the demand of Rs. 52,76,726.217- was enhanced to Rs.61,72,325.98/-.
18. That on a perusal of the said invoice letter, the complainants noticed that the invoice letter had various discrepancies and deviations from the agreement and in order to seek clarifications, complainant no. 1 sent an e-mail dated 08.11.2019 detailing the various issues regarding the interest charged as well as the taxes charged in the invoice letter.
19. That on 09.11.2019, the complainant no.1 sent an e-mail to the respondent no. 1, requesting the respondent to provide

compensation for delayed possession in accordance with clause 6 of the flat buyer agreement.

20. That on 16.11.2019, the respondents sent a reply e-mail to the complainants, requesting a meeting in order to solve the aforesaid issues. consequently, the representatives of the complainants visited the office of respondent no. 1 on multiple occasions and were made to wait for more than 45 minutes on all such occasions. Despite the wait, the said meeting did not take place and the legal representative of the complainants had to return back after long wait in the office of the respondent no. 1.
21. That the respondents have not responded/provided the relevant information asked by the complainants vide e-mail dated 08.11.2019 and is delaying the same on one pretext or another by using delaying tactics.
22. That the complainants are even ready to take possession despite a delay of 5 years provided that they are paid a compensation amount of Rs. 29,50,440/- in accordance with the rates provided in clause 6 of the agreement to the complainants and the same is duly till the date of possession. It is also prayed that Respondents are directed not to charge other arbitrary charges other than mentioned in the agreement.

C. Relief sought by the complainants.

23. The complainants have sought following relief(s):

- (i) Direct the respondents to pay interest to the complainants for every month of delay from due date of possession i.e., 23.08.2015 till handing over of possession of the said unit under section 18 of the Act, 2016.
- (ii) Direct the respondents to register the conveyance deed in favour of the complainants.

D. Reply by the respondents.

24. That the present complaint filed by the complainants are frivolous and baseless as the respondents have received the occupation certificate for the unit in question on 29.09.2019 and accordingly, offer of possession has been issued to the complainants on 10.10.2019. The complainants have failed to make the requisite payment as per the offer of possession and have also failed to complete the documentation work required to take over possession of the unit in question. It is further submitted that the respondents have also offered DPP to the complainants in form of 'loyalty bonus' to the tune of Rs. 427, 600/- in accordance with the terms of the agreement. The respondents, vide offer of possession, have raised demands as per the duly agreed clauses of the agreement executed between the parties, however, the complainants are disputing the same and have filed this frivolous complaint before this hon'ble authority.
25. That the Act of 2016 does not only define the duties and obligations of the builder and rights of the allottee, but it also deals with the duties of the allottee. Section 19(6), 19(7) and

19(10) of the Act clearly deals with the duties of the allottee. The complainants are in the violation of section 19 (6), 19(7) and (10) of the Act of 2016. As the complainants have failed to make the timely payment of various demand called by the respondents including the last instalment of offer of possession. It is further submitted that Complainants have till date failed to accept the possession offered, therefore they are in the clear contravention of section 19(10).

26. The complainants have approached the hon'ble authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the hon'ble apex court in plethora of decisions had laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

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

- That the respondents offered an inaugural discount of Rs.2, 25,750/- to the complainants.

- That the complainants are trying to amend the provision of the flat buyer agreement which was duly executed between the parties after due diligence and research.
- The complainants have concealed from this hon'ble authority, that they have till date did not make the payment of Rs.61,72,325/- to the respondents or that the complainants have not made any payment since 2014.
- That the complainants have been an abysmal defaulter. The complainants defaulted in making the timely payments of the demand called on 11.11.2011, therefore the respondents issued the reminder letter dated 07.07.2011, 13.02.2012, 12.03.2012, even then the complainants failed to clear the payment of the outstanding due, therefore respondents issued the last and final opportunity letter dated 14.03.2012. Vide email dated 06.04.2012 duly informed the inability of the respondents to accept the partial payment of the outstanding amount due and further informed that on special consideration due date for the payment was extended till 07.04.2012 to remit the amount at earliest. The complainants despite the extension period being granted to them made the partial payment of the demand called on 11.11.2011 on 04.05.2012 after the abysmal delay of 175 days. It is submitted that the respondents issued the reminder

letters dated 29.10.2012, 04.01.2013, 28.02.2013, even then the complainants failed to clear the payment of the outstanding due, therefore respondents issued the last and final opportunity letter dated 01.03.2012, and the complainants made the payment of the said demand on 14.05.2013. The complainants have further concealed that they have till date did not make the payment of the VAT letter, therefore respondents issued the reminder letters dated 11.04.2017, 12.05.2017, 11.12.2017, 07.03.2018, 09.04.2013, 21.08.2018, 06.10.2018, 16.11.2018, 18.12.2018, 23.04.2019, 11.06.2019, 12.07.2019 and 17.08.2019. While the demand was still pending the respondents as per the payment plan opted, offered the possession on 10.10.2019. It is pertinent to mention that the complainants have till date did not make any payment therefore the respondents issued reminder letter dated 10.12.2019.

- That the complainants have falsely misrepresented that no construction activity was performed at the project site until 2017. In this context, it is submitted that vide email dated 28.10.2016, the respondents had taken various steps to expedite the project in order to deliver the project as early as possible such as: -
 - The respondents had secured project funding of over Rs. 320 crores for the projects in Faridabad and Gurgaon.

- The respondents are in the process of procuring another Rs. 495 crores for the projects in Faridabad & Gurgaon.
 - In the past year, the respondents invested over Rs. 90 crores in development of the projects to enhance the pace of construction of projects. Apart from this, the respondents also secured multiple non-fund-based facilities for development of projects.
 - Currently over 3000 workforce is deployed across sites and this number is only set to increase in the coming period.
 - The respondents have been able to successfully deliver over 585 homes since January and delivering on an average of over 80 homes a month across the projects in Gurgaon and Faridabad.
 - The complainants were also updated about development works including the civil structure of units which already stands completed and the steps being taken to ensure delivery at the earliest.
28. It is submitted 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 respondents 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-6 which provides for delayed penalty in case of delay in delivery of possession of the said plot by the respondents. That 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.

29. That the above submission implies 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 respondents have provided reasonable remedy under clause-6, and, the complainant having accepted to the same in totality, cannot claim anything beyond what has been reduced to in writing between the parties.
30. 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-6 of the agreement.



31. In terms of the Rules, the Government prescribed the agreement for sale and specified the same in 'Annexure A' of the Rule 8(1) of the Rules which reads as under:

*"8. (1) The agreement for sale shall be as per Annexure 'A'.
(2) Any application letter, allotment letter or any other document signed by the allottees, in respect of the apartment, plot or building, prior to the execution and registration of the agreement for sale for such apartment, plot or building, as the case may be, shall not be construed to limit rights and interests of the allottees under the agreement for the sale or under the Act or the rules for the regulations made thereunder."*

32. That Rule 8 (1) clearly specifies 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 RERA 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.

33. 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/ buyers agreement/plot buyers agreement executed prior to the registration of the project which falls 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.

34. The aforesaid view stated in the preceding para 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."

35. 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 as per clause 33 of the FBA. Admittedly, the complainants raised the present dispute but did not take any steps to invoke arbitration. Hence, is in breach of the agreement between the parties. The allegations made require proper adjudication by tendering evidence, cross examination, etc. and therefore cannot be adjudicated in summary proceedings.

36. That the complainants alleged that the respondents have delayed the project and even in terms of the FBA whereby the respondents agreed to handover possession within 24 months from the date of sanctioning of the building plan or execution of the floor buyer's agreement (whichever is later) with an additional grace period of 180 days, there has been exorbitant delay.
37. The complainants have further misrepresented that the penalty in case of delay agreed under the agreement is meager and that the complainants are entitled to reciprocal compensation in the form of interest from the respondents which is in utter breach of the agreed and accepted terms by the complainants at the time of booking as also reiterated in the duly executed FBA wherein it was clearly agreed between the parties that the payment of delay payment penalty @ Rs. 10/-, 20/- and/or 30/- per sq. ft. per month for the period of delay depending upon the period of delay would be a reasonable estimate of the damages that the complainants may suffer and that the complainants shall have no other rights or claims whatsoever. Clause 22 of the application for allotment and clause 6 of the agreement are reproduced herein below for ready reference-

Clause 22 of the booking application form is as under:
"In the event the Company fails to deliver the possession of the Floor/Villa to the Applicant(s) within the stipulated time period and as per the terms and conditions of the Buyer's Agreement, then the Company shall pay, to the Applicant(s), compensation at the following rates subject to the Applicant(s)

having fulfilled his part of the obligations as per the terms of allotment/Buyer's Agreement
Rs. 10 (Rupees Ten Only) per sq. ft. of the built up area of the Floor/Villa per month for the first six (6) months of delay.
ii. Rs. 20 (Rupees Twenty Only) per sq. ft. of the built up area of the Floor/Villa per month for the next six (6) months of delay.
iii. Rs. 30 (Rupees Thirty Only) for the built up area of the Floor/Villa per month for any delay thereafter."

Clause 6 of the Floor Buyer's Agreement is as under:
"Subject to the conditions contained herein, if the Seller/Confirming Party fails to offer the possession of the said Floor to the Purchaser(s) within the stipulated period it shall be liable to pay to the Purchaser(s) the compensation calculated at the following rate ("Delay Compensation") for every month of delay until the actual date fixed by the Seller/Confirming Party to hand over of the possession of the said Floor to the Purchaser(s). The Purchaser(s) shall not be entitled to any other Compensation for Direct or Indirect Losses, Interest etc. for delay in handing over the possession by the Seller/Confirming Party

Rs. 10/per sq. ft./month- (Rupees Ten Only) per sq. ft. of the built up area of the Floor per month for the first six (6) months of delay.
ii. Rs. 20/per sq. ft./month- (Rupees Twenty Only) per sq. ft. of the built up area of the Floor per month for the next six (6) months of delay.
iii. Rs. 30/sq. ft./month for the built up area of the Floor per month for any delay."

"Clause 5.6: That if the Seller/Confirming Party fails to complete the construction of the Said Colony and Floor within the period as mentioned in this Agreement due to force majeure circumstances and any other reason stated in the Agreement and any other circumstances beyond the control of the Seller/Confirming Party, then the Purchaser(s) agrees that Seller/Confirming Party shall be entitled to reasonable extension of time for completion of construction of the Colony and delivery of possession of Floor".

38. That vide clause 6 of the floor buyer's agreement it was further duly agreed upon between the parties that subject to the

conditions mentioned therein, in case the respondents failed to hand over possession within 24 months from the date of sanction of building plan or execution of FBA, whichever is later along with 180 days as grace period, the respondents shall be liable to pay to the complainants, compensation calculated @ Rs. 10 per sq. ft. for every month of delay for the first six months of delay, Rs.20 per sq. ft. for every month of delay for the next six months of delay and Rs.30 per sq. ft. for the built-up area of the floor per month for any delay.

39. That vide clause 5.6 of the FBA, the parties had further agreed that if the respondents fail to complete the construction of the unit due to force majeure circumstances or circumstances beyond the control of the respondents, then the respondents shall be entitled to reasonable extension of time for completion of construction.
40. That on 16.03.2010, DTCP, Haryana (the statutory body for approval of real estate projects) issued self-certification policy vide notification dated 16.03.2010. The respondents in accordance with the policy and other prevailing laws submitted detailed drawings and designs plans for relevant buildings along with requisite charges and fees. In terms of the said policy, any person could construct building in licensed colony by applying for approval of building plans to the director or officers of the department delegated with the powers for approval of building plans and in case of non-receipt of any objection within the stipulated time, the construction could be started. The building plans were

withheld by the DTCP, Haryana despite the fact that these building plans were well within the ambit of building norms and policies. That the respondents applied for approval of building plans under the self-certification scheme. Although the department did not object to the building plans however, to ensure that there are no legal issues/ complications later, the respondents also applied for approval of building plans under the regular scheme, which were subsequently approved.

41. That while the respondents were granted license bearing no. 58 of 2010 for setting up a residential plotted colony on land admeasuring 108.068 acres at Village Kherki Majra and Dhankot, Sector 102, 102-A, Tehsil and District, Gurgaon for which the layout was also approved, subsequently additional license bearing no. 45 of 2011 was issued by DTCP for setting up plotted colony on land admeasuring 18.606 acres and at the stage of grant of additional license bearing no. 45 of 2011 for Amstoria, layout for the entire colony was also revised vide drg. No. DTCP-5618 dated 16.09.2016, by DTCP. The revised planning of the entire colony submitted to the DTCP has affected the infrastructure development of the entire colony including 'Amstoria Floors'. The said revision in demarcation was necessary considering the safety of the allottees and to meet the area requirement for community facilities in the area. In view of the said major changes, it is imperative that the said approvals are in place before the floors are offered for possession to the various allottees. Hence, the delay if any, in

completing construction of the unit in question and offering possession to the various allottees is due to factors beyond the control of the respondents.

42. Copies of all the relevant do have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties

E. Jurisdiction of the authority

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

E. 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.

E. II Subject matter jurisdiction

45. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided

by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent.

F.1 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to the registration of the project under RERA.

46. 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.
47. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be rewritten 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."

48. 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."

49. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself.



Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F. II Objection regarding complainants are in breach of agreement for non-invocation of arbitration.

50. 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:

"33. 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 adjudicated upon and settled through arbitration by a sole arbitrator. The arbitration shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments, modifications thereto for the time being in force. The arbitration proceedings shall be held at an appropriate location at 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) shall not raise any objection on the appointment of sole arbitrator by the Managing Director of the Seller/Confirming Party.

51. 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.
52. 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 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."

53. 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."

54. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and Act of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this

authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings on the relief sought by the complainants.

G.I Delay possession charges: - Direct the respondents to pay interest to the complainants for every month of delay from due date of possession i.e., 23.08.2015 till handing over of possession of the said unit under section 18 of the Act, 2016.

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

"Section 18: - Return of amount and compensation

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

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

56. Clause 5.1 of the floor buyer's agreement provides time period for handing over of possession and the same is reproduced below:

"5.1. POSSESSION

"Subject to force majeure, as defined in clause 14 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 handover the physical possession of the said unit to the purchaser (s) within a period of 24 months from the date of sanctioning of the building plan or execution of the FBA, whichever is later. 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 filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony"

57. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottees that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoters is just to evade the liability towards timely delivery of subject unit and

to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

58. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the said unit within period of 24 months from the date of sanction of building plan or execution of the FBA, whichever is later. In the present complaint, the date of sanction of building plan is not placed on record, hence, the due date of possession is calculated from the date of execution of the agreement. Therefore, the due date of handing over possession comes out to be 23.08.2015. It is further provided in agreement that promoters shall be entitled to a grace period of 180 days for filing and pursuing the occupancy certificate etc. from DTCP. As a matter of fact, from the perusal of occupation certificate dated 24.09.2019 it is implied that the promoter applied for occupation certificate only on 03.08.2019 which is later than 180 days from the due date of possession i.e., 23.08.2015. The clause clearly implies that the grace period is asked for filing and pursuing 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: -

"Clause 5.1.....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 filing and pursuing the Occupation Certificate, etc from DTCP under the Act in respect of the entire colony."

59. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at prescribed rate. 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 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.

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., 10.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

62. **Rate of interest to be paid by complainant for delay in making payments:** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. — For the purpose of this clause—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

63. Therefore, interest on the delay payments from the complainants 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 complainants in case of delayed possession charges.

64. On consideration of the documents available on record and submissions made by both the parties, 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 5.1 of the floor buyer's agreement executed between the parties on 23.08.2013, the possession of the subject unit was to be delivered within 24 months from the date of sanction of building plan or execution of the floor buyer's agreement, whichever is later. The date of sanction of building plan i.e., is not placed on record hence, the due date of possession is calculated from the date of execution of agreement i.e., 23.08.2013. Therefore, the due date of handing over possession is 23.08.2015. 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 23.08.2015. The possession of the subject unit was offered to the complainants on 10.10.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondents to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the floor buyer's agreement dated 23.08.2013 executed between the parties. It is the failure on part of the promoters to fulfil their obligations and responsibilities as per

the floor buyer's agreement dated 23.08.2013 to hand over the possession within the stipulated period.

65. 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 24.09.2019. The respondents offered the possession of the unit in question to the complainant only on 10.10.2019, so it can be said that the complainants 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., 23.08.2015 till the expiry of 2 months from the date of offer of possession (10.10.2019) which comes out to be 10.12.2019.
66. 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 respondents is established. As such the complainants are entitled to delay possession at prescribed rate of interest

i.e., 9.30% p.a. w.e.f. 23.08.2015 till 10.12.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority


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

- i. The respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 23.08.2015 till the date of offer of possession i.e., 10.10.2019 + 2 months i.e., 10.12.2019 to the complainants.
- ii. The arrears of such interest accrued from 23.08.2015 till 10.12.2019 shall be paid by the promoters to the allottees within a period of 90 days from date of this order as per section 19(10) of the Act, 2016 and rule 16(2) of the rules.
- iii. The complainants are 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 respondents/promoters 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 respondents are directed to execute the conveyance deed in favour of the complainants within one month from the date of this order i.e., 10.08.2021.
- vi. The respondents shall not charge anything from the complainants 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.

68. Complaint stands disposed of.
69. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.08.2021

Judgment uploaded on 08.12.2021