

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

Complaint no. : 1094 of 2021  
First date of hearing: 04.05.2021  
Date of decision : 20.07.2021

Arun Kumar

**Both RR/o:** - H.no.2199, Sector 46, Gurugram

**Complainant**

**Versus**

Ashaina Landcraft Realty Private Limited

**Address:** - 3H, Plaza M6, Dist. Center Jasola, New Delhi-110025

**Respondent**

**CORAM:**

Shri Samir Kumar

Shri Vijay Kumar Goyal

**Member**

**Member**

**APPEARANCE:**

Shri. Anil Sura

Shri. S.M. Ansari

Advocate for the Complainant

Advocate for the Respondent

**ORDER**

1. The present complaint dated 10.03.2021 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 them.

**A. Unit and project related details**

2. The particulars of the project, the details of 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.	Project name and location	The Center Court, Sector 88, Gurugram
2.	Project area	14.025 acres
3.	Nature of the project	Residential Group Housing Colony
4.	DTCP license no. and validity status	46 of 2013 dated 08.06.2013 Valid up to 14.09.2018
5.	Name of licensee	M/s Gabino Developers Pvt. Ltd. M/s Mandisa Developers Pvt. Ltd. Sh. Ranbir Singh & Sh. Ajay
6.	RERA Registered/ not registered	<b>Registered vide registration no. 46 of 2017 dated 11.08.2017</b>
7.	Valid up to	30.06.2020
8.	Date of booking	08.06.2013 (As alleged by the complainant on page no. 02 of the complaint)
9.	Unit no.	A-1916, 19 <sup>th</sup> floor, Tower-T5 (As per page no. 31 of the complaint)
10.	Unit measuring	1565 sq. ft. (As per page no. 31 of the complaint)
11.	Date of execution of builder buyer's agreement	16.09.2014 (As per page no. 29 of the complaint)



12.	Payment plan	Construction linked payment (As per page no. 65 of the complaint)
13.	Due date of delivery of Possession (As per clause 11.2, the Company and the Allottee making timely payments, shall endeavor to complete the construction work of the said Apartment/ Building thereof withing a period of 42 months and a grace period of 6 months from the date of this Agreement)	16.03.2018 (Calculated from the date of agreement)  <b>Note: - Grace period is not allowed.</b>
14.	Total Consideration	Rs. 99,85,585/- (As per page no. 65 of the complaint)
15.	Amount received from the complainant	Rs. 97,93,723.14/- (As per statement of account dated 12.06.2021 on page no. 190 of the reply)
16.	Occupation Certificate	Not obtained
17.	Offer of possession	Not offered
18.	Delay in handing over possession till the date of decision i.e., 20.07.2021	3 years 4 months 04 days

### B. Facts of the complaint

3. That the respondent launched a multi-storeyed residential group housing project under the name and style of "The Centre Court" in Sector-88A, Village Harsar, Pataudi Road, Gurgaon, comprising of residential apartments/units in various towers, penthouses, villas, community hall, EWS units etc.

4. That the complainant came under the allurement & inducement of the respondent, booked a residential apartment under their aforesaid scheme vide registration of their application form and deposited a sum of Rs. 5,00,000/- as advance vide cheque no.-600148 dated 08.06.2013.
5. That the respondent started demanding payments/installments from the complainant on frequent basis and the complainant thus deposited a sum of Rs.3,50,000/- vide cheque dated 09.09.2013, a sum of Rs.5,00,000/- vide cheque dated 22.10.2013, a sum of Rs.3,00,000/- vide cheque dated 21.12.2013, a sum of Rs. 1,92,139/- vide cheque dated 03.05.2014 and these payments were duly acknowledged by the respondent as advance payment from the complainant.
6. That after waiting for a period of more than one year and extracting a huge amount of money from the complainant, the respondent finally executed an "Apartment Buyer Agreement" dated 16.09.2014, whereby the respondent allotted an apartment Type A, bearing no. A-1916 on the 19<sup>th</sup> floor of Tower no.- T5, having super built up area of 145.44 sq. mtr. (1565 sq. ft.), along with one reserved car parking space in its project. That as per the apartment buyer agreement, it was supposed to be a type-A unit with 2BHK+study+two toilets for a total sale consideration for Rs.91,56,370/- not including electric meter connection charges, water, sewage and drainage connection charges.
7. That it is pertinent to mention that, as per the clause 11.1 of the apartment buyer agreement, it was assured by the opposite party at the time of booking



of the apartment that possession of the all the apartments including the complainant will be handed over within 42 months from the date of agreement, claiming that the respondent is a renowned name in the field of construction and is known to handover the possession of the project on time. Apart from above said amounts, the complainant also paid various amount through different cheques as per page no. 07 and 08 of complaint.

8. That from 2013, the complainant was asked to pay amount on regular basis towards the said project and the complainant made total payment worth Rs.97,93,721/-, but there is no progress on the said project despite the regular payments being made by the complainant on the demands of the respondent. After waiting patiently since 2013 and seeing no prospect of any kind of progress in the said project, the complainant met the officials of the respondent a number of times, but no satisfactory reply was given by the officials. It is nothing but malpractices applied by the builders/ respondent and one of their illegal means of unlawful enrichments on their part on account of its consumers including the complainant.
9. That the complainant along with other owners time and again reminded the respondent to complete the project in time and to provide possession of the their apartment despite paying the demanded amount within time but to no avail as the respondent has completely failed to complete the project within the stipulated time. That even after a lapse of approximately two years from the stipulated date of delivery of possession, the respondent has failed to

handover the possession of his apartment although the complainant has performed his part of the contract in time bound manner.

10. That because of the delay and latches and wrongful acts on the part of respondent, the complainant is the only aggrieved party as the respondent is beneficiary party on all accounts. The above lack lustre attitude of the respondent in demanding payments without completing the work as well as without fulfilling its promises and assurances made at the time of soliciting the complainant to book the said premises including timely offer of possession and quality of construction to be provided to its customers.
11. That the respondent is not considering the loss accrued to the complainant on account of their fault. It is submitted that the complainant is entitled to receive the loss due to delay on the part of respondent as the aforesaid loss is directly connected due to the persistent and continuing deficiency in service on the part of the respondent. However since the completion of the said project is not in sight in near future, thus the complainant is further entitled to the damages on account of harassment, mental agony, litigation charges which was initiated on account of fault of the respondent alone, along with compensation towards anger, anguish, frustration and sadness along with interest @18% per annum. It is submitted that the complainants are seeking interest of his whole deposited amount from the committed date of possession along with compensation from the opposite party.



12. That it is apparent that the respondent with malafide intention are using the huge hard-earned money of the complainant to gain undue profit to it and to cause undue loss to them. The complainant is left with no alternative but to seek asylum of this authority for redressal of his grievances.
13. That in the present circumstances the complainant is seeking interest on the account of delay in possession and refund of amount for the decreased area and hence present complaint at this stage. The cause of action for filing the present complaint arose on 15.03.2018 wherein agreeing, the respondent failed to hand over the physical possession of the said apartment. The cause of action thereafter arose from time to time when the respondent despite repeated requests, failed to complete the construction or to handover the possession to the complainant. The cause of action for filing the present complaint is recurring and continuous. Hence the present complaint is filed within the period of limitation. Because as per the clause 11.1 of the apartment buyer agreement, the respondent was bound to hand over the physical possession of the apartment on and up to 15<sup>th</sup> March 2018. That at the time of booking of said apartment, the respondent had represented and assured the complainant that the said project would be completed, and the possession of the unit would be given to the complainant as per terms mentioned in the apartment buyer's agreement and because of the delay in handing over of the possession, the complainant have suffered a huge financial loss on their investment.

14. That the complainant had invested a substantial amount in the project of the respondent in a hope that it would complete the project in time and hand over the possession of their apartment. This has resulted in an increased financial burden on the complainant aggravated further by the respondent refusal to pay penalty on account of delay in handing over possession of the apartment to complainant and the respondent is liable to pay the same.
15. That in the interest of justice, this authority should pass strict and stringent orders against errant promoters and developers who take huge investments from innocent investors and then deny them the right to take possession as agreed at the time of sale causing financial loss and wholly avoidable harassment. The purpose and legislative intent behind setting up this authority should also be kept into consideration while deciding the present complaint as the respondent has not only treated the complainant unfairly but many other such buyers.
16. That not only the purpose of purchasing the apartment is frustrated due to the delay but the investment made for the same which could have been made elsewhere by the complainant or any other similarly placed buyers is also wasted. The complainant therefore is also eligible to get an interest on the investment made by them in the respondent's project.

**D. Relief sought by the complainant: -**

- i. Direct the respondent to deliver the physical possession of apartment no.: A-1916 on 19<sup>th</sup> floor of tower T5, in project named as "The Center Court"



Sector-88A, Dwarka Expressway, Gurgaon, duly completed in all respects to the complainant within 60 days.

- ii. Direct the respondent to pay the interest at the prescribed rate of interest on the whole amount deposited by the complainant till the actual physical possession of the apartment is handed over after completing the project in all respects and till its further realization to the complainant
  - iii. Direct the respondent to provide all the facilities and amenities as per the sanctioned lay-out plan and broacher, as committed by them at the time of booking of the apartment.
17. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

**E. Reply by the respondent**

34. The respondent has contested the complaint on the following grounds:
- (i) That the complaint filed by the complainant is baseless, vexatious and is not tenable in the eyes of law therefore, the complaint deserves to be dismissed at the threshold. At the outset it is submitted that the present complaint lacks any cause of action to approach this authority and as such the same deserves to be dismissed at the very threshold. The present complaint is filed with oblique motives without any merits. The allegations and averments in the complaint are false and frivolous and hence, there is no cause of action in the captioned complaint.

- (ii) That the complainant being an investor approached the respondent out of his own free will and volition through broker namely "Prop. Tiger Realty Private Limited" and submitted the "Expression of Interest" dated 08.06.2013 expressing his willingness to book an apartment in the forthcoming/upcoming projects in Gurgaon and made payment of Rs. 5,00,000/- vide cheque bearing no. 600148 dated 08.06.2013 drawn on ICICI Bank.
- (iii) That pursuant thereof, the complainant was duly informed vide letter dated 22.03.2014 of the respondent that all major regulatory approvals have been received with respect to the project namely "The Center Court" situated at sector 88A, village Harmaru, Pataudi Road, Gurugram, Haryana (hereinafter referred to "Project").
- (iv) That the project "The Center Court" at Sector 88A, Dwarka Expressway, Gurugram is being developed by the respondent. In due compliance of the provisions of Act of 2016, the aforementioned project has been registered under RERA having Registration no. 46 of 2017. The respondent is duly following all the mandates and provisions of the Act of 2016 without any failure.
- (v) That, upon being satisfied including understanding of all the terms and conditions about the entire project conditions, the complainant had submitted/ executed the application form on 03.05.2014 opting for construction link payment plan and also paid an amount of Rs. 1,92,139/-



vide cheque bearing no. 131098, dated 03.05.2014 drawn on South Indian Bank.

- (vi) That based on the expression of interest and above said application, respondent issued the letter of provisional allotment dated 16.09.2014 and provisionally allotted flat bearing no. A-1916, 19th floor, Tower-T-5, having super built up area 145.44 Sq. Mtr (1565 Sq. ft.) in the said project (hereinafter referred to as "said flat"). Further, on 16.09.2014 an apartment buyer's agreement (hereinafter referred to as "agreement") was executed between the complainant and the respondent herein.
- (vii) That the said allotment letter and the said agreement also contained the schedule of payment plan and the complainant was under an obligation to adhere to the said payment plan. However, the complainant has frequently, defaulted to adhere to the said payment plan. It is most respectfully submitted before this authority that despite receiving various reminders and demand letter(s) sent by the respondent demanding the outstanding payments, complainant has failed to adhere to the said payment plan opted. It is submitted that the said act amounts to breach of terms of the said agreement.
- (viii) That it is most respectfully submitted that since the complainant has failed to make the payment of the due instalments in terms of the payment plan as opted thus, he has violated the terms of clause 3.4 of the apartment buyer agreement.

- (ix) That as per clause 11.2 of the apartment buyer agreement subject to timely payment by the allottee as well as subject to force majeure, the construction of the apartment was to be completed within 42 months plus 6 months grace period from the date of the execution of the agreement. It is pertinent to mention herein that the construction of the project was stopped several times during the year 2016, 2017, 2018 and 2019 by the order of EPCA, HSPCB, NGT and the Hon'ble Supreme Court of India. It is most respectfully submitted that due to the increase in the level of pollution in the NCR region, the Hon'ble Supreme Court vide its order dated 14.11.2019 passed in the matter of *"MC Mehta Vs Union of India & Others"* bearing *Writ Petition (c) No. 13029/1985* imposed complete ban on construction and excavation work across the National Capital Region from 04.11.2019, which was ultimately lifted on 14.02.2020 ban on construction caused irreparable damage to the delivery timelines and the real estate developers' finances as the respondent was not able to undertake any construction work during the aforesaid period and the same was beyond the control of the respondent. Furthermore, the impact of the COVID 19 pandemic has been felt throughout the globe and more particularly by the real estate industry. The pandemic completely disrupted the supply chain of the respondent therefore the delay if any, if not attributable to the respondent herein.
- (x) That it is pertinent to mention herein that the complainant has defaulted several times in making payment of installments, thus, complainant is not



entitled to seek timely possession of the flat. It is further pertinent to mention herein that even after delay in making payment by the complainant and order of the EPCA, HSPCB and Apex Court, respondent has finished major portion of construction work and that till date the respondent waived a sum Rs.2,01,245/- towards the interest.

- (xi) That the money received from the complainant/ allottee has been utilized towards the project/flat. Further, it is pertinent to mention here that during the three years, real estate sector has seen several events that severely impacted real estate sector. Further, it is also pertinent to mention here that the construction of the project is going on at full swing despite financial obstacles due economic slowdown. That 72% the construction cost is already being incurred as on date and major portion of the construction work has already been completed.
- (xii) That since the money paid by the allottee have only been utilized for construction of the project thus, it is not feasible for the respondent to pay interest as sought for, since the project is nearing completion, thus, awarding any relief as sought for by the complainant will cause severe loss to the project and other allottees who are eagerly waiting for the possession of their respective flat.
- (xiii) That the dispute between the parties involves complicated questions of facts and law, which necessarily entails leading of copious evidence and cross examination. The issues raised by the complainant cannot be addressed vide

the captioned complaint under reply, under a summary procedure. In view of the same, the subject matter cannot be adjudicated without going into the facts of each case which requires elaborate evidence to be led and which cannot be adjudicated upon under the summary jurisdiction of this authority.

- (xiv) That the respondent is investing its full dedication and efforts to complete the project with the agreed specifications. It is relevant to mention here that due to the current pandemic COVID-19 situation the construction at the site is slowed down. It is submitted that the respondent has already completed majority of the construction work in the project. It is relevant to mention here that on 30.09.2020 a team was appointed by this authority duly inspected the project site and was satisfied with the construction activities. It is further submitted that since the money paid by the allottees have only been utilized for construction of the project thus, it is not feasible for the respondent to comply with the prayer as sought for by the complainant, since the project is nearing completion and the same will cause severe loss to the project and other allottees who are eagerly waiting for the possession of their respective flat.

That the authority lacks jurisdiction on the ground that the complainant has prayed for reliefs which otherwise have to be claimed in a suit for possession and damages, after paying appropriate court fee. That in order to avoid the payment of court fee, the complainant has raised a dispute of a civil nature,



which requires elaborate evidence to be led and which cannot be adjudicated upon under the summary jurisdiction of this authority. In this view of the matter, the complaint is liable to be dismissed with costs.

- (xv) That it is apposite to mention here that the Hon'ble High Court of Punjab and Haryana in the matter of "*Experion Developers Private Limited Vs State of Haryana*" bearing CWP No. 38144 of 2018 vide Order dated 16.10.2020 was pleased to dispose of the writ petitions filed by various developers challenging the amended rules wherein the authority was granted power to adjudicate the cases with respect to the refund and penalty/interest. Being aggrieved by the order dated 16.10.2020, vide SLP(c) No. 13005/2020 titled as *Sana Realtors Pvt. Ltd. Vs Union of India & Ors.*, the said order was challenged before the Hon'ble Supreme Court of India. Vide order dated 05.12.2020, Hon'ble Supreme Court of India was pleased to stay the operation of the order dated 16.10.2020 passed by Hon'ble High Court of Punjab and Haryana. It is submitted that as the order passed by the Hon'ble High Court of Punjab and Haryana is stayed by the Hon'ble Supreme Court of India thus, in view of the same the complaint filed is not maintainable before this authority.
- (xvi) That the dispute between the parties involves complicated questions of facts and law, which necessarily entail the leading of copious evidence. The issues raised by the complainant cannot be addressed in a complaint before this authority which follows a summary procedure. In this view of the matter, the

complaint is liable to be dismissed. In view of aforementioned facts, it is submitted that the captioned complaint is frivolous, vague and vexatious in nature. The captioned complaint has been made to injure the interest and reputation of the respondent and therefore, the instant complaint is liable to be dismissed in limine.

- (xvii) That the complaint in present form is not maintainable and is liable to be dismissed at the threshold. It is submitted that the authority has got no jurisdiction to entertain the present complaint in view of the submissions made hereinabove. It is submitted that the prayers as mentioned in the complaint can only be adjudicated upon by the civil court in the suit for possession and damages.
- (xviii) That the complainant had applied for the allotment of the apartment as an investment and not for personal use of the complainant which is abundantly clear and evident from the conduct of the complainant. It is submitted that the complainant had invested in the apartment with intent to have monetary gains by way of reselling the apartment to a higher bidder at an appreciated value. Thus, in view of the constant precedents upheld by various Real Estate Regulatory Authorities across the country, the present complaint is not maintainable wherein, it is held unanimously that the investors of real estate projects are not entitled to relief from Real Estate Regulatory Authority.
- (xix) That the instant complaint is not maintainable keeping in view the facts, circumstances and law relating thereto. It is further submitted that the



complainant had failed to produce any evidence or specific averments worth its salt to prove its claims. Moreover, there is no quantification of claims as sought for by the complainant under prayer clause. Therefore, the instant complaint is liable to be dismissed at the threshold. The complainant had filed the captioned frivolous complaint with false averments, only with a malafide intention to make illegal enrichment at the cost of the respondent. Since the captioned complaint is filed without any cause of action, the same is liable to be dismissed at the outset.

- (xx) That since there is an arbitration clause in the agreement, complainant without invoking arbitration proceedings is liable to be dismissed. It is further submitted that the relationship of the complainant and the respondent is defined and decided by the apartment buyer's agreement executed between the parties. It is submitted that a specific clause for referring disputes to arbitration, is included in the said 13 agreement vide clause 29.2 of the agreement which is extracted hereunder

*"29.2 All or any disputes, differences, arising out of, in connection with or in relation to this transaction/agreement, shall be amicably discussed and settled between the parties by mutual discussion, failing which the same shall be resolved the provisions of the Arbitration and Conciliation Act, 1996 or any modification/amendment made thereto."*

Hence, both the parties are contractually bound by the above condition. In view of clause 29.2 of the agreement, the captioned complaint is barred. The complainant ought to have resorted to arbitration instead of having approached this authority with the captioned complaint. It is respectfully submitted that in light of the arbitration clause in the agreement, this

authority does not have the jurisdiction to adjudicate upon the instant complaint and ought to dismiss the same.

- (xxi) That as per the apartment buyer agreement entered into between the respondent and the complainant, both the parties have agreed upon their respective liabilities/ obligations in case of breach of any of the conditions specified therein and as such even assuming without admitting that the present complaint of the complainant is maintainable even then the complainant cannot claim reliefs which are beyond the compensation agreed upon by the complainant as enumerated under clause 11.4 of the agreement. in this view of not the matter, the captioned complaint is maintainable in law and is liable to be dismissed in limine.
- (xxii) That the line between valid concerns of allottees and frivolous demands can sometimes be a thin one. There cannot be any doubt that the frivolous demands of some allottees has resulted in the rampant increase in filing of vexatious complaints against real estate players. This practice needs to be curbed and dealt with iron hands given the potential drain of the frivolous legal proceedings on the limited financial and time resources available to the real estate players. In the present case the respondent has always kept the complainant aware with the status of the project, thus, the allegations of the complainant are vague and frivolous. Hence, the complaint is liable to be dismissed in limine.



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

#### **F. Jurisdiction of the authority**

The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

##### **F. I Territorial jurisdiction**

36. 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**

37. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

##### **Section 11(4)(a)**

*Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

*The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*

**Section 34-Functions of the Authority:**

*34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

So, in view of the provisions of the Act quoted above, 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 complainant at a later stage.

**G. Findings on the objections raised by the respondent.**

**G.1 Objection regarding complainant is in breach of agreement for non-invocation of arbitration.**

38. The respondent has raised an objection that the complainant has not invoked 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:

*"29.2 All or any disputes, differences, arising out of, in connection with or in relation to this transaction/agreement, shall be amicably discussed and settled between the parties by mutual discussion, failing which the same shall be resolved the provisions of the Arbitration and Conciliation Act, 1996 or any modification/amendment made thereto."*

39. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically



agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism. 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. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

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

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

*It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*

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

40. 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 para 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."*

41. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants is well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act, 2019 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.II Objection regarding entitlement of DPC on ground of complainant being investor.**

42. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a

statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of Rs.97,93,723.14/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

*"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

43. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainant is allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no.



0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

**G.III Objection regarding force majeure conditions such as EPCA, HSPCB, NGT orders, default in payments and COVID-19.**

44. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as EPCA, HSPCB, NGT orders, non-payment of instalment by different allottee of the project and COVID-19 but all the pleas advanced in this regard are devoid of merit. Though some allottee may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project cannot be put on hold due to fault of some of the allottee. Various orders passed by different authorities were for short durations. There has been no order continuously barring the construction of the project. As well as lockdown due to COVID-19 outbreak falls much later than the promised due date of possession.. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong

**H. Findings on relief sought by the complainant.**

**Delay possession charges:**

- i. Direct the respondent to handover the possession of the unit and pay the interest at the prescribed rate of interest on the whole amount deposited by the complainant till the actual physical possession of the apartment is

handed over after completing the project in all respects and till its further realization to the complainant

45. In the present complaint, the complainant intends to continue with the project and are seeking delay possession charges at prescribed rate of interest on amount already paid by them as provided under the proviso to section 18(1) of the Act which 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."*

46. Clause 11.2 of the apartment buyer's agreement (in short, the agreement) dated 16.09.2014, provides for handing over of possession and is reproduced below:

***"11.2.***

*"The company, based on its present plans and estimate and subject to Force Majeure and all just exceptions beyond control of the Company and the Allottee making timely payments, shall endeavor to complete the construction work of the said Apartment/ Building thereof within a period of 42 months( Forty-two) and a grace period of 6 (six) months from the date of this Agreement ("**Completion date**") and shall thereafter apply for grant of Occupation Certificate and on receipt of the same will offer possession of the said Apartment to the allottee."*

47. The builder buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee is protected candidly. The builder buyer's agreement lays down the terms that govern the sale of different kinds of properties like



residential, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted builder buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoter/developer to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoter/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoter/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

48. The respondent promoter has proposed to complete the construction of the subject apartment within a period of 42 months with a grace period of 6 months from the date of execution of the agreement and proposed that after expiry of such period it will apply for the occupation certificate. Further, the authority in the present case observes that, the respondent has misused its powers and stated an ambiguous clause where, offer of possession is subject to various condition and no specific period is given as to completion of construction within what period such application to concerned authority will be made and after what specific period offer of possession shall be made to the allottee. The allottees including complainant cannot be made to wait till infinite. This practice is not admissible. Therefore, the proposed period shall be treated as a period to handover the possession of the unit. In the

present case, buyer's agreement was executed on 16.09.2014. Due date of possession shall be i.e.; 16.03.2018 calculated from date of execution of buyer's agreement, as per clause 11.2 of agreement.

49. **Admissibility of grace period:** The respondent promoter has proposed to complete the construction of the said building/ unit within a period of 42 months, with six months grace period for obtaining occupation certificate and to offer the possession of the unit, thereon from the date of execution of the flat buyer's agreement. In the present case, the promoter is seeking 6 months' time as grace period. As a matter of fact, the respondent has yet not obtained the occupation certificate and offered the possession of the unit. The said period of 6 months cannot be allowed to the promoter. Therefore, the due date of possession comes out to be 16.03.2018.

50. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charge and proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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



51. 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.
52. 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., 20.07.2021 is @7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., @9.30%.
53. 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;"*

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

54. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 11.2 of the builder buyer's agreement executed between the parties on 16.09.2014, the possession of the allotted was to be delivered within stipulated time i.e., by 16.03.2018. Therefore, the due date of handing over possession was 16.03.2018 which is calculated from the date execution of buyer's agreement i.e. 16.09.2014. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee is entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession i.e., 16.03.2018 till handing over of possession after the date of receipt of valid occupation certificate as per section 18(1) of the Act of 2016 read with rule 15 of the rules.


**I. Directions of the authority**

55. Hence, the authority hereby passes this order and issue 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 sec 34(f) of the Act:



- i. The respondent is directed to pay the interest at the prescribed rate i.e., 9.30 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 16.03.2018 till handing over of possession after receipt of occupation certificate as per section 18(1) of Act read with rule 15 of the rules
  - ii. The respondent is directed to pay arrears of interest within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10<sup>th</sup> of the subsequent month as per rule 16(2) of the rules.
  - iii. The complainant is also directed to make payments/arrears if any due to the respondent at the equitable rate of interest i.e., 9.30% per annum.
  - iv. The respondent shall not charge anything from the complainant which is not part of the buyer's agreement.
56. Complaint stands disposed of.
57. File be consigned to the registry

  
(Samir Kumar)  
Member

  
(Vijay Kumar Goyal)  
Member

**Dated:20.07.2021**

JUDGEMENT UPLOADED ON 14.12.2021