BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 706 of 2020
First date of hearing: 13.03.2020
Date of decision : 08.04.2021

Smt. Rajni Bajpai Alias Rajni Khanna
R/O: C4H/81, Ground Floor, Janakpuri, Delhi-110046 **Complainant**

Versus

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

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

APPEARANCE:
Shri Rohit Sharma Advocate for the complainant
Shri Venket Rao Advocate for the respondent

ORDER

1. The present complaint dated 13.02.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No	Heads	Description
1.	Project name and location	"Terra" at Sector-37-D, Gurugram.
2.	Project area	19.74 Acres
3.	Nature of the project	Group Housing Towers
4.	DTCP license no. and validity status	83 of 2008 Issued on 05.04.2008 valid up to 04.04.2025 94 of 2011 Issued on 24.10.2011 valid up to 23.10.2019
5.	Name of the license holder for license no. 83 of 2008	Super Belts Pvt. Ltd and 4 others.
6.	Name of the license holder for license no. 94 of 2011	Countrywide Promoters Pvt Ltd and 4 others.
7.	RERA Registration number	"Terra" registered vide no. 299 of 2017 (Registered for 10.23 acres)
8.	Registration certificate	Dated 13.10.2017 valid up to 12.10.2020
9.	Date of sanction of building plan	21.09.2012
10.	Unit no.	T-20-1401, 14th floor, Tower

		T-20 (Page no. 31 of the complaint)
11.	Measurement of unit	1998 sq. ft. of super area (Page no. 31 of the complaint)
12.	Date of Allotment letter	27.12.2012 (Page no. 22 of the complaint)
13.	Date of builder buyer's agreement	20.02.2013 (Page no. 24 of the complaint)
14.	Payment plan	Subvention scheme (Page no. 40 of the reply)
15.	Total sale consideration	Rs. 14,065,471.00/- (Vide account statement on page no.52 of the complaint)
16.	Total amount paid by the complainant	Rs. 13,503,997.05/- (Vide account statement on page no. 52 of the complaint)
17.	Due date of delivery of possession (As per clause 1.6 of the flat buyer's agreement i.e., 42 months from the date of sanction of the building plan or execution of agreement, whichever is later.) (As per clause 5.1 of the flat buyer's agreement i.e., grace period of 180 days after the expiry of the said commitment period for making offer of possession of the said unit.)	20.08.2016 (Due date is calculated from the date of execution of the agreement as it is later from the date of sanctioning of building plan i.e., 21.09.2012) **Note: Grace period of 180 days is not allowed in the present case.**
18.	Occupation certificate	Occupation certificate for this tower has not been received.
19.	Offer of possession	Not offered.
20.	Delay in handing over the possession till the date of decision i.e., 08.04.2021	4 years 7 months 19 days.

B. Facts of the complaint

3. The complainant has submitted as under: -

4. That the hon'ble authority has the territorial jurisdiction to try and adjudicate the complaint as the apartment which is the subject matter of this complaint is situated in sector-37-D, Village- Basai, Tehsil & Dist.- Gurgaon Haryana, (Hereinafter referred as the 'said project') which is within the jurisdiction of this hon'ble authority.

5. That the developer is not delivering the property for 95 months from the date of allotment i.e., 27.12.2012 till the date of filing the complaint.

6. That Rajni Bajpai alias Rajni Khanna currently residing at C-1/5, 1st floor, Vasant Vihar-1, Southwest Delhi- 110057, the aggrieved party herein who is preferring the instant complaint against M/s BPTP Ltd. company incorporated under Companies Act, 1956 having its registered office at M-11, middle circle, Connaught circus, New Delhi – 110001.

7. The respondent allotted the residential apartment/flat "T20-1401" on 14th floor of tower no.- 20, unit no.- 01" (Hereinafter referred as the 'said unit') to the complainant on dated 27.12.2012 with a customer code no.- BE 88 / 144307 under "subvention plan."

8. That the respondent to dupe the complainant in their nefarious net, on 20.02.2013 executed a one -sided builder buyer's agreement and to create a false belief that the project shall be completed in time bound manner, and in the garb of

this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainant.

9. That the total sale consideration of the above-mentioned property is Rs. 1,40,65,471/- according to allotment letter and account statement dated 07.09.2019.

10. That according to the account statement dated 07.09.2019 the respondent had extracted 95% of the total cost which is amounting to Rs. 1,35,03,997/- with applicable govt. taxes, which is illegal, arbitrary, and unilateral.

11. That the complainant had made timely payment of all the instalments, as per the account statement dated 07.09.2019. The complainant has paid the 100% of the demands generated by the respondent under payment plan mentioned in the flat buyer's agreement. (Hereinafter referred as the 'FBA')

12. That the complainant approached the respondent several time and raised objections towards the slow progress, which was not as per the payment plan, the respondent cunningly answered that they have a set procedure and accordingly they have raised demand note.

13. That the utter dismay of the complainant, the project site with superstructure got stranded because respondent diverted inadequate funds for construction. The project is moving in very slow pace of work from last 07-years starting from 20.02.2013 (FBA date) till today. The billing meter of

respondent however continued to recover instalments, service tax, HVAT, other applicable charges and the complainant paid it.

14. That as per section- 19 sub-section- (6) & (7) of the Act of 2016 complainant has fulfilled her responsibilities regarding making the necessary payments in the manner and within the time specified in the said FBA. Therefore, the complainant herein is not in breach of any of its terms of the agreement.
15. That to complete or fulfil the demands on time raised by the respondent, the complainant has taken loan at heavy rate of interest @10.40 % per annum from HDFC Bank.
16. That the respondent failed to give the apartment / flat in the said project. respondent was duty bound to handover the physical possession of the apartment/flat to complainant in 42 months + 06 months from the date of sanction of the building plan or the execution of the builder buyer agreement.
17. That the respondent has a history of such fraud projects in Gurgaon, Faridabad and Noida and they had indulged in similar corrupt and devious practices leading to registration of some civil cases against them, presently also there are legal cases pending against the respondent for malafide conduct and mass-scale frauds perpetrated upon many buyers whom they wilfully and fraudulently induced, lured, and inveigled into investing in their projects.

C. Relief sought by the complainant:

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

    (i) Direct the respondent to pay the delay penalty at the rate of 18% per annum on the amount paid from the committed date of possession till date of actual physical possession and handover the actual possession of the allotted unit.

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

D. Reply by the respondent.

20. That the respondent had applied for registration of the project in question i.e., 'Terra' located at sector 37-D, (Hereinafter referred as the 'said project') Gurugram including Towers T-20 to T-25 & EWS before this hon'ble authority and accordingly registration certificate dated 13.10.2017 was issued by this hon'ble authority.

21. That the complainant has 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 respondent but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

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

- That the complainant had approached the respondent through her broker namely "Khushal Sethi Housing Solutions (P) Ltd." after conducting her own due diligence of the relevant real estate geographical market and after satisfying herself about all the aspects of her investment, for booking of a unit in the project being developed by the respondent viz., Terra situated at sector 37-D, Gurugram.
- That the complainant further concealed from this authority that the respondent vide demand letters as well as numerous emails has kept updated and informed the complainant about the milestone achieved and progress in the developmental aspects of the project. The respondent vide emails have shared photographs of the project in question. However, it is evident that the respondent has always acted bonafidely towards its customers including the complainant, and thus, have always maintained a transparency in reference to the project. In addition to updating the complainant, the respondent on numerous

occasions, on each and every issue/s and/or query/s upraised in respect of the unit in question has always provided steady and efficient assistance. However, notwithstanding the several efforts made by the respondent to attend to the queries of the complainant to their complete satisfaction, the complainant erroneously proceeded to file the present vexatious complaint before this authority against the respondent.

23. That the agreements that were executed prior to implementation of Act of 2016 and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented flat buyer agreement dated 20.02.2013 executed by the complainant out of their own free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them. The rules published by the State of Haryana, an explanation is given at the end of the prescribed agreement for sale in annexure A of the rules in which 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.

24. That the parties had agreed under clause-17 of the flat buyer agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainant has raised dispute

but did not take any steps to invoke arbitration. Hence is in breach of the agreement between the parties.

25. **Issues and Reliefs QUA VAT are beyond the agreed clauses of the agreement**

- That at the time of booking, vide clause C (5) of the application form the complainant had agreed and accepted that any tax/charges including any fresh incident of tax even if applicable retrospectively, would be payable by them.
- That the Government of Haryana vide notification No.19/ST-1/H.A.6/2003/S.59A/2016 dated 12.09.2016 launched Amnesty Scheme for developers – Haryana Alternative Tax Compliance Scheme for Contractors, 2016. The scheme provides for a tax rate of one Percent (1%) and sub-charge of five percent (5%), effective of tax comes to 1.05% of the entire aggregate amount received/receivable (total sale consideration) during the year for the period prior to 31.03.2014. The VAT payable under the VAT amnesty scheme is in lieu of tax, interest, penalty, charged or chargeable, under the provisions of the Act. In accordance with the same, it is stated that for the said unit, the respondent has received an amount of Rs. 74,61,174.05/- till 31.03.2014, therefore the respondent vide letter dated 10.11.2016 raised

demand towards VAT for a sum of Rs. 78,342/- i.e., 1.05% of the received amount which is completely with the purview of the amnesty scheme.

- Without prejudice to the above, it is submitted that the demand qua VAT has been duly paid by the complainant without any protest and demur. It is further submitted that the said charges have been agreed by the complainant right from the beginning and despite being agreed charges, the complainant are now at such belated stage is raising contentions against the said charges with a view to gain at the expenses of the respondent. HVAT being indirect tax always payable by the end user / allotee as per applicable laws.

26. That the proposed timelines for possession being within 42 months from the date of sanction of building plans or execution of FBA, whichever is later, along with 180 days of grace period was subject to ***force majeure*** circumstances, timely payments, and other factors. Building plans were approved on 21.09.2012 & FBA was executed on 20.02.2013. However, the complainant has indulged in selective reading of the clauses of the FBA whereas the FBA ought to be read as whole. The construction is going on full swing and the respondent is making every endeavour to hand over the possession at the earliest.

27. That the remedy in case of delay in offering possession of the unit was also agreed to between the parties. It is pertinent to

point out that the said understanding had been achieved between the parties at the stage of entering the transaction.

- That the parties had, vide clause 5.1 of the FBA [clause G (1) of the application form], duly agreed that subject to force majeure and compliance by the complainant of all the terms and conditions of the FBA, the respondent proposes to hand over possession of the flat to the complainant within 42 months from the date of sanction of the building plans or execution of the FBA, whichever is later along with a further grace period of 180 days.
- That vide clause G.2 of the application form, which was later reiterated vide Clause 6.1 of the FBA, it was duly agreed between the parties that subject to the conditions mentioned therein, in case the respondent fails to hand over possession within 42 months from the date of sanctioning of the building plans or execution of FBA, whichever is later along with 180 days of grace period, the respondent shall be liable to pay to the complainant compensation calculated @ Rs.5/- per sq. ft. for every month of delay.
- That the project in question was launched by the respondent in august' 2012. It is submitted that while the total number of flats sold in the project "Terra" is 401, for non- payment of dues, 78 bookings/ allotments have since been cancelled. Further, the number of

customers of the project "Terra" who are in default of making payments for more than 365 days are 125.

28. That the construction of the unit was going on in full swing. However, it be noted that due to the sudden outbreak of the coronavirus (COVID-19), construction came to a halt, and it took some time to get the labour mobilized at the site. However, the respondent in hopeful to handover possession of the unit in question at the earliest possible.

E. Rejoinder on behalf of the complainant

29. That the complainant, after suffering for almost 7 years and 11 months, approached the authority in utter frustration, aggrieved by the callous and casual approach of the respondent. The complainant, who had aspirations and was desirous of having a home of her own, had approached the respondent and stated her need of a home, wherein the respondent enticed, cajoled and effectively misled the complainant of their vast expertise in construction, their customer driven corporate philosophy and ethical business behaviour which as evidenced by the failure to perform their set of responsibilities, was far from the truth.

30. That the authority's attention is drawn to the behaviour of the respondent who claims to be a customer centric organization wherein, it may be seen that when the total duration of the time taken for construction was exhausted as well as the 'grace period' of 180 days was also consumed by

the respondent, it was only then that their "customer-centric" ethos was awakened from deep hibernation overnight and they began the correspondence with the complainant after two months in April 2017, after exhausting all time of 48 months (42+180 days) on 28.02.2017 that should have been utilized for construction and completion of the GH project and thereby it was only then that they began to update the complainant of the progress of the project as abovementioned thereby again making an attempt to mislead and misrepresent the actual status on the ground. The authority may kindly peruse the e-mail correspondences and it would emerge that none of the said e-mails state the actual day, date, week, month or year when the project would be completed and the housing unit be handed over to the complainant.

31. That the respondent however, communicated to the complainant in the said e-mails the stages of progress of the construction via electronic links to the pictures purportedly of the construction work done and in-progress of the project on their website, displaying pictures of rubble, bricks, construction material, piles of mortar, half constructed, incomplete buildings which are grossly unfit for habitation, some having no doors or windows or glass fitted, semi-pucca, un-motorable internal roads.

32. That the respondent has consumed not only the 42 months in addition to the 180 days of the grace period but since then

taken another 3 years and 11 months cumulatively consuming a total of 7 years and 11 months (almost a period of 8 years) from the date of signing the FBA on 20.02.2013 and still yet the construction is not complete nor a time stated when the construction would be complete and ready.

33. That the respondent has shared and stated the extract from the duly documented FBA that the complainant "is bound by the terms and conditions so agreed between them", i.e. the complainant and the respondent. The de-facto position as it exists between the complainant and the respondent is very different. It may be interpolated from the facts evidenced from the case in its entirety that and as stated in the FBA, both the complainant and respondent were and are though bound by the terms & conditions of the FBA, it is only the complainant that has fulfilled the said terms and conditions by duly paying the respondent as and when so demanded by the respondent within the stipulated time so allowed without any corresponding concrete action by the respondent for carrying out their part of the responsibilities.

34. The respondent has been woefully evasive and deceptive in communicating the actual reality on the ground at the project site and indulged in constructive deceitful behaviour by not carrying out the work entrusted to them and for the amounts so charged from the complainant was paid. It may also be observed from the behaviour of the respondent that, they knew and were well aware that the execution of the project

was delayed and as per their own statements, the work was and is still in progress even at the stage of their submissions to the authority, at various stages of completion but in-spite of being fully aware of the actual position on the ground of the project site and that they would not be able to honour their commitment of handover of the housing unit so booked and brought by the complainant by the date latest of 28.02.2017, they still issued the demand notes for payment which were complied by, extracting almost 95% of the total cost of the housing unit, amounts so evidenced by the account statement dated 07.09.2019 under schedule of the allotment letter and thereby have wilfully, knowingly and fraudulently indulged in an attitude and behaviour concurrently with an intent to hoodwink and dupe the complainant, compelling the complainant by their misrepresentation under a false assumption leading the complainant to believe that her housing unit would be delivered and handed over to her in time.

35. That the complainant has never denied to pay any govt taxes/ charges/levies, provided that they are charged at the actual time they becomes due but not at such time that they are pre-emptively charged by the respondent, to be detriment of the complainant as it has been done with the scheduled payments as per the payment plan.

36. That the proposed timelines for possession of the housing unit were within 42 months from the date of sanction of the

building plans or the execution of the FBA, whichever was later, along with 180 days of grace period and was further subject to force majeure circumstances, timely payments and other factors. It is a matter of record that the building plans were approved on 21.09.2012 and the FBA was executed on 20.02.2013. So, it may be construed and logically concluded that the timeline of 42 months and 180 days of grace period began on 20-02-2013. It may be brought to the attention of the authority, that the date of hand-over/ possession of the allotted housing unit, T20-1401, after taking into consideration all possible duration of construction and additions of the 'grace period', was latest by 28-02-2017, (subject to any 'force majeure' circumstances.). The 'force majeure' circumstances are mentioned in Clause 1.17 of the FBA, are not replicated here for the purposes of brevity and duplication, it is reasonably and logically assumed, and without any evidence to the contrary, that none of the circumstances mentioned in clause 1.17 ever took place, so the 'force majeure' clause may be discounted from the computation of the period for which the completion of the project and handover / possession is to be considered.

37. That the complainant had opted for the "subvention scheme" payment plan wherein the instalments of the payment to be made by the complainant were linked to the milestones in the stage of construction or the time elapsed from the date of the execution of the FBA.

- That reference is made to the clause G.2 of the application form read along with clause 6.1 of the FBA, reiterating that if the respondent fails to hand over the possession of the housing unit within the schedule stated in the FBA including the 'grace period' and the circumstances of the 'force majeure', the respondent shall be liable to pay to the complainant compensation calculated @ Rs.5/- Per sq. ft for every month of delay.
  A careful perusal of the terms of the FBA, and an analysis of the same reveals that :

  - Under the payment plan under annexure –C, the subvention scheme, provides that the buyers/purchasers would be required to deposit 20% of the sale consideration within 45 days of booking of the apartment.
  - Clause 7.2 of the FBA provides that if there is a delay in payment of an installment, the purchaser would be required to pay Interest on every delayed payment of such installment @ 18% p.a., compounded quarterly;
  - In contrast, clause 6.1 of the FBA provides that if the seller fails to offer possession by the end of the grace period i.e. 42+6 months, it would be liable to pay Delay Compensation @ Rs.5/- per sq. ft. of the super area for every month of delay.
    The price per sq. ft of an apartment under the FBA

was Rs. 5,750/- per sq. ft.The compensation payable by the Developer for delay in offering possession works out to:

$$\frac{5 \times 100 \times 12}{5750} = 1.0\% - 1.04\%$$

- Therefore, the delay compensation at Rs.5 per sq. ft. works out to approximately 1.0% to 1.04 % Interest per annum.

38. That the aforesaid clauses reflect the wholly one-sided terms of the FBA, which are entirely loaded in favor of the seller-respondent, and against the purchaser-complainant at every step. The terms of the FBA have been drafted mischievously by the respondent and are completely one-sided as also held in Para-181 of the ***Neelkamal Realtors Suburban Pvt. Ltd Vs. UOI & ors {WP 2737 of 2017}*** where the Bombay HC observed:

> *"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."*

39. That the demand notes issued by the respondent and the payment receipts which are adduced as annexure's in the

original complaint and are evidence of the timely and prompt payments by the complainant at each and every step-point of the schedule as accepted by the parties in the FBA. In fact, the respondent presently, in their own reply-submission have reiterated that the payments demanded were made on and within the stipulated time by the complainant and therefore to accuse the complainant of being a defaulter demonstrates and exposes the respondent as careless, casual, unobservant and irresponsible entity having no regard to the evidential record readily available to them regarding the payments made to and accepted by them and in fact exposes their whole approach towards the project which they have launched.

40. That the respondent had further floated a plea that the project is and was delayed due to the onset of the COVID-19-coronavirus pandemic which only came about in India in March 2020. To state such excuses after delaying the project for almost 8 years (7 years and 11 months plus and counting) and yet they have brazenly and without any iota of responsibility stated that the project is still not complete, is unfinished, inhabitable, semi-constructed, with no information even at this stage wherein they are engaged in litigation and submissions are being made presently to the authority, what is the actual stage of construction, what is left out, when would the project be completed, no concrete dates are mentioned, leaving the honest, trusting purchasers

and allottees at their wits end and leaving them hanging midway after collecting 95% of the cost of the housing unit already paid.

41. That the respondent had presented unverified and non-certified information which is not attested by any statutory authority pertaining to cash-flows without any authentication and without admitting or acknowledging the veracity and correctness of the information tendered, which they state it as a reason for the delay in completion of the project. However, in clause 15.1 of the FBA, it is mentioned that :

> *"Authorisation to raise finance: The Purchasers hereby authorises and permits the Seller/Confirming Party to raise finance/Loan from any institution / company / bank by any mode or manner by way of charge / mortgage / securitization of the Unit or the land underneath or the receivables, subject to the condition that the Unit along with the land underneath shall be made free from all encumbrances at the time of execution of the Conveyance Deed in favour of the Purchasers."*

42. That the respondent, having drafted the said FBA, would have been fully aware of this clause even if it is assumed only for the purpose of discussion that the reason they were suffering was due to paucity of funds at the hands of the defaulting allottees and there was a cash-flow crunch with the respondent, they were at full liberty to raise finances by way of loan from any institution / company / bank having already received the consent of the Purchasers-Complainants at the time of the execution of the FBA for such action and completed the Project in the agreed timelines. Therefore to

take a plea that the project was delayed due to the aforementioned reason and to penalise the complainant who has paid all their dues as and when raised by the respondent within the stipulated time, being rewarded by delaying the completion of the project and handing over for possession of the said unit is not acceptable by the complainant.

F. Jurisdiction of the authority

F. I Territorial jurisdiction

48. 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

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

appeal nos. 52 & 64 of 2018 titled as ***Emaar MGF Land Ltd. V. Simmi Sikka and anr.***

G. Findings on the objections raised by the respondent.

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

50. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

51. 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."

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

G. II Objection regarding complainant are in breach of agreement for non-invocation of arbitration.

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

> *"17. Dispute Resolution by Arbitration*
> *All or any disputes arising from or out of or touching upon or in relation to the terms or formation of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same*

shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996, or any statutory amendments, modifications or re-enactment thereof for the time being in force. A Sole Arbitrator, who shall be nominated by the Seller/Confirming Party's Managing Director, shall hold the arbitration proceedings at Gurgaon. The Purchaser(s) hereby confirms that he shall have no objection to such appointment and the Purchaser(s) confirms that the Purchaser(s) shall have no doubts as to the independence or impartiality of the said Arbitrator and shall not challenge the same. The arbitration proceedings shall be held in English language and decision of the Arbitrator including but not limited to costs of the proceedings/award shall be final and binding on the parties."

54. 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.

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

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the*

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

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

56. 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."

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

G. Findings on the relief sought by the complainant.

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

(i) Direct the respondent to handover the actual possession of the residential unit/apartment bearing no. T-20-1401 in project 'Terra' located in sector 37-D, Gurugram, Haryana.

(ii) Direct the respondent to pay the delay penalty at the rate of 18% per annum on the amount paid from the

committed date of possession till date of actual physical possession.

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

> *"**Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

59. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 42 months from the date of sanction of the building plan or execution of flat buyer's agreement, whichever is later. The flat buyer's agreement was executed on 20.02.2013 and the building plan was approved on 21.09.2012. The flat buyer's agreement being executed later, the due date is calculated from the date of execution of flat buyer's agreement. The said period of 42 months expires on 20.08.2016. Further it was provided in the flat buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondent is claiming this

grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondent/promoter had completed the said project within this span of 42 months and had started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoter has not offered the possession within the time limit prescribed by the promoter in the flat buyer's agreement nor has the promoter offered the possession till date. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

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

61. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases. The Haryana Real Estate Appellate Tribunal in ***Emaar MGF Land Ltd. vs. Simmi Sikka*** observed as under: -

"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the homer buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and

conditions of the Buyer's Agreement will not be final and binding."

62. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 08.04.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

63. 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;"*

64. 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.

65. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5.1 read with clause 1.6 of the agreement executed between the parties on 20.02.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by 20.08.2016. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 20.08.2016. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 20.08.2016 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

66. 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 complainant is entitled for delayed possession charges under section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 at the prescribed rate of interest i.e., 9.30% per annum for every month of delay on the amount paid by the complainant with the respondent form the due date of possession i.e., 20.08.2016 till the handing over of possession after obtaining occupation certificate.

ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till handing over of possession shall be paid on or before 10th of each subsequent month.

iii. The complainant is also directed to pay the outstanding dues, if any. Interest on the due payments from the complainant and interest on account of delayed possession charges to be paid by the respondent shall be equitable i.e., at the prescribed rate of interest i.e., 9.30% per annum.

iv. The respondents shall not charge anything from the 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.

57 Complaint stands disposed of.

58. File be consigned to registry.

(Samir Kumar)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.04.2021

Judgement uploaded on 16.12.2021.