

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

Complaint no. : 351 of 2021
Date of filing complaint : 22.01.2021
First date of hearing : 24.02.2021
Date of decision : 23.12.2021

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| 1. Shri Rohit Madhok 2. Smt. Plara Madhok R/O: - 481, Block - H, Palam Vihar, Gurugram, Haryana-122017 | Complainants |
| Versus | |
| M/s BPTP Limited Regd. Office at: - M-11, Middle Circle, Connaught Circus, New Delhi -110001 | Respondent |

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| CORAM: | |
| Dr. K.K. Khandelwal | Chairman |
| Shri Vijay Kumar Goyal | Member |
| APPEARANCE: | |
| Sh. Jagdeep Kumar (Advocate) | Complainants |
| Sh. Venket Rao, Pankaj Chandola & Ms. Akshita Mathur (Advocates) | Respondent |

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and



Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

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

| S. No. | Heads | Information | |
|--------|----------------------------------|---|---|
| 1. | Name of the project | 'Park Spacio' Sector-37 D, Gurugram | |
| 2. | Nature of the project | Group Housing Complex | |
| 3. | Project Area | 23.814 acres. | |
| 4. | DTCP license no. | 83 of 2008 dated 05.04.2008 | 94 of 2011 dated 24.10.2011 |
| 5. | License validity/ renewal period | 04.04.2025 | 23.10.2019 |
| 6. | Name of the license holder | M/s Superbelts Pvt.Ltd., & 4 others | M/s Countrywide Promoters Pvt. Ltd., & 5 others |
| 7. | RERA registered/ unregistered | Registered | |
| 8. | Registration certificate | Registered vide registration no. 300 of 2017 dated 13.10.2017 | |



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| | | valid up to 12.10.2020 (Registered tower are from tower T-8 to T-13) |
| 9. | Unit no. | M-202, 2 nd floor, tower-M (annexure R-4 on page no. 76 of reply) |
| 10. | Unit admeasuring | 1800 sq. ft. (annexure R-4 on page no. 76 of reply) |
| 11. | Revised unit area (as per offer of possession) | 1865 sq. ft. (annexure R-21 on page no. 177 of reply) |
| 12. | Date of Booking | 10.12.2010 (vide payment receipt on page no. 55 of reply) |
| 13. | Date of execution of flat buyer's agreement | 25.03.2011 (annexure R-4 on page no. 71 of reply) |
| 15. | Total consideration | Rs 82,19,977.71/- (vide statement of accounts on page no. 180 of reply) |
| 16. | Total amount paid by the complainants | Rs 61,57,741.24/- (vide statement of accounts on page no. 180 of reply) |
| 17. | Possession clause | "3. Possession 3.1 Subject to Clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the seller/confirming party and any restraints/restrictions from any courts/authorities and subject to the Purchaser(s) having |



complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and having complied with all provisions, formalities, documentation, etc. As prescribed by the Seller/Confirming Party, whether under this Agreement or otherwise, from time to time, **the Seller/Confirming Party proposes to hand over the possession of the Flat to the Purchaser(s) within a period of 36 months from the date of booking/registration of the Flat.** The Purchaser(s) agrees and understands that the Seller/Confirming Party shall be entitled to a grace period of 180 (One Hundred and Eighty) days after the expiry of 36 months, for applying and obtaining the occupation certificate in respect of the Colony from the Authority. The Seller/Confirming Party shall give Notice of Possession in writing to the Purchaser with regard to the handing over of possession, whereafter, within 30 days, the Purchaser(s) shall clear all his outstanding dues



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| | | and complete documentary formalities and take physical possession of the Flat. In case, the Purchaser(s) raises any issue with respect to any demand, the same would not entitle to the Purchaser(s) for an extension of the time for taking over possession of the flat.” (Emphasis supplied). |
| 18. | Due date of delivery of possession | 10.12.2013 |
| 19. | Occupation certificate | 15.01.2021 (annexure R-20 on page no. 174 of reply) |
| 20. | Offer of possession | 01.02.2021 (annexure R-21 on page no. 177 of reply) |
| 21. | Delay in handing over possession till the offer of possession plus 2 months i.e., 01.04.2021 | 7 years 3 months 22 days. |
| 22. | Grace period utilization | Grace period is not allowed in the present complaint |
| Note: - The respondent has filed an affidavit which states that the sanctioned name for Tower M (marketing name) is T-10 (sanctioned name), for which the OC has been granted on 15.01.2021 | | |

B. Facts of the complaint

3. That the respondent is a real estate development company incorporated under the Companies Act,1956, working in field of construction and development of residential as well as commercial projects across country in the name of BPTP



Limited (A BPTP Group Company), the respondent is an established real estate entity in the NCR.

4. That the real estate project named "Spacio", which is the subject matter of present complaint, is situated at sector-37D, Gurugram, therefore, the authority does have the jurisdiction to try and decide the present complaint.
5. That the respondent while launching and advertising any new housing project promises to the targeted consumer that their dream home will be completed and delivered to them within the time agreed initially in the agreement while selling the dwelling unit to them. They also assured to the consumers like complainants that they have secured all the necessary sanctions and approvals from the appropriate authorities for the construction and completion of the real estate project sold by them to the consumers in general.
6. That the respondent was very aware of the fact that in today's scenario looking at the status of the construction of housing projects in India, especially in NCR, the key factor to sell any dwelling unit is the delivery of completed house within the agreed and promised timelines and that is the prime factor which a consumer would consider while purchasing his/her dream home. The respondent, therefore used this tool, which is directly connected to emotions of gullible consumers, in its marketing plan and always represented and warranted to the consumers that their dream home will be delivered within the agreed timelines and consumer will not go through the hardship of paying



rent along-with the instalments of home loan like in the case of other builders in market.

7. That somewhere in the end of 2010, the respondent through its business development associate approached the complainants with an offer to invest and buy a flat in the proposed project of respondent, which the respondent was going to launch the project namely "Spacio" in the sector-37D, Gurugram (hereinafter referred as the said 'project'). That the complainants on 18.12.2010 had a meeting with respondent where they explained the project details of the said project and highlighted the amenities like recreational area, swimming pool, 100% power backup, 24X7 security, and round-the-clock water supply to mention a few, on relaying on these details the complainants enquired the availability of a flat on 2nd floor in tower-M which was a unit consisting of area 1800 sq. ft. The respondent represented to the complainants that the respondent is a very ethical business house in the field of construction of residential and commercial project and in case the complainants would invest in the project of the respondent, they would deliver the possession of proposed flat on the assured delivery date as per the best quality assured by the respondent. The respondent assured that the allotment letter and flat buyer's agreement (hereinafter referred as the 'FBA') for the said project would be issued to the complainants within one week of booking to made by the complainants. The complainants while relying upon those assurances and believing them to



be true, the complainants booked a residential flat bearing no. M-202, on 2nd floor in tower - M (hereinafter referred as the said 'unit') in the proposed project of the respondent measuring approximately super area of 1800 sq. ft. in the township to be developed by respondent. Accordingly, the complainants have paid Rs. 4,89,283/- through cheque bearing No 615654 & 532111 dated 08.12.2010 as booking amount on 8.12.2010.

8. That in the said application form, the price of the said unit was agreed at the rate of Rs. 2650/- per sq. ft. At the time of execution of the said application form, it was agreed and promised by the respondent that there shall be no change, amendment or variation in the area or sale price of the said unit from the area or the price committed by the respondent in the said application form or agreed otherwise. That the respondent on 14.02.2011 issued an allotment to complainants.
9. That the respondent on 25.03.2011 issued the FBA, which consisting very stringent and biased contractual terms which are illegal, arbitrary, unilateral and discriminatory in nature, because every clause of agreement is drafting in a one-sided way and a single breach of unilateral terms of the FBA by the complainants, will cost him forfeiting of (Earnest Money) 15% of total consideration value of unit and about the delay payment charges of 18% they said this is standard rule of company and company will also compensate at the rate of Rs. 5 per sq. ft. per month in case of delay in possession of said



unit by company. The complainants opposed these illegal, arbitrary, unilateral and discriminatory terms of provisional allotment letter but as there is no other option left with the complainants because if he stops the further payment of instalments then in that case the respondent would forfeit 15% of total consideration value from the total amount paid by complainants.

10. That as per the clause – 3.1 of the FBA, the respondent had agreed and promise to complete the construction of the said flat and deliver its possession within a period of 36 months with a 180 days of grace period thereon from the date of start of booking/registration of the flat. However, the respondent has breached the terms of the FBA and failed to fulfil its obligations and has not delivered possession of said unit within the agreed time frame of the FBA. The proposed possession date as per the FBA was due on 10.06.2014.
11. That from the date of booking 08.12.2010 and till 26.06.2019, the respondent had raised various demands for the payment of instalments towards the sale consideration of said unit and the complainants have duly paid and satisfied all those demands as per the FBA without any default or delay on their part and has also fulfilled otherwise also their part of obligations as agreed in the FBA. The complainants were and has always been ready and willing to fulfil their part of agreement, if any pending.
12. That as per the payment plan of the FBA, the total sale consideration for said unit was Rs. 62,91,200/- (which



included the charges towards basic price - Rs 46,74,600/-, govt charges (EDC & IDC) - 6,51,600/-, club membership - Rs. 1,00,000/-, IFMS - Rs 90000, car parking charges - Rs 2,80,000/-, firefighting & power backup install charges Rs. 1,80,000/-, PLC for second floor of Rs. 1,35,000/- and PLC for Corner Rs 1,80,000/-) exclusive of service Tax and GST.

13. That the complainants have paid the substantial sale consideration along with applicable taxes to the respondent for the said unit. As per the statement dated 28.12.2020, issued by the respondent, upon the request of the complainants, he has already paid Rs. 61,57,741.23/- towards total sale consideration and applicable taxes as on today to the respondent as demanded from time to time and now nothing is pending to be paid on the part of complainants.
14. That on the date agreed for the delivery of possession of said unit as per date of booking and later on according to the FBA is 10.06.2014, the complainants have approached the respondent and its officers for inquiring the status of delivery of possession, but none had bothered to provide any satisfactory answer to the complainants about the completion and delivery said unit. The complainants thereafter kept running from pillar to post asking for the delivery of their flat but could not succeed in getting any reliable answer.
15. That the conduct on part of respondent regarding delay in delivery of possession of the said unit has clearly manifested



that the respondent never ever had any intention to deliver the said unit on time as agreed. It has also cleared the air on the fact that all the promises made by the respondent at the time of sale of involved flat were fake and false. The respondent had made all those false, fake, wrongful and fraudulent promises just to induce the complainants to buy the said unit on the basis of its false and frivolous promises, which the respondent never intended to fulfil.

16. That the complainants on 28.12.2020 wrote an email to respondent to know the expected date for the possession of the said unit, but the respondent again sent a false reply to complainants.
17. That the respondent has committed grave deficiency in services by delaying the delivery of possession and false promises made at the time of sale of the said unit which amounts to unfair trade practice which is immoral as well as illegal. The respondent has also criminally misappropriated the money paid by the complainants as sale consideration of said unit by not delivering the unit on agreed timelines. That as on 18.01.2021, it has been a total delay of 6 years and 7 months.
18. That the cause of action accrued in favour of the complainants and against the respondent on 08.12.2010 when the complainants had booked the said unit and it further arose when the respondent failed /neglected to deliver the said unit on proposed delivery date. The cause of action is continuing and is still subsisting on day-to-day.



C. Relief sought by the complainants.

19. The complainants have sought following relief: [The complainants have prayed for the relief of delayed possession charges and other relief included excess EDC/IDC. Now, vide application filed on 09.04.2021 during the proceedings of the court, the counsel for the complainants prayed for pursuing only the relief of delayed possession charges and possession]

(i) Direct the respondent to provide the possession of the allotted unit with immediate effect and pay interest at the applicable rate of 18% on account of delay in offering possession on Rs. 61,57,741/- paid by the complainants as sale consideration of the allotted unit from the date of payment till the date of delivery of possession.

D. Reply by the respondent.

20. That the complainants themselves are defaulter/offender under section 19 (6), 19 (7) and 19 (10) of the Real Estate (Regulation and Development) Act, 2016 and not in compliance of these sections. The complainants cannot seek any relief under the provision of the Act of 2016 or rules frame thereunder.

21. That upon completion of construction and upon getting/securing OC from the competent authority, the respondent has issued offer of possession letter cum final demand notice. Delay in completion of project, if any, does



not give any entitlement to the complainants to hold the due payments. This is an arm-twisting tactic adopted by the complainants to get possession of unit without making due payments.

22. That the complaint filed by the complainants is also liable to be dismissed as the complainants have concealed material facts from this authority. Reference may be made to the following:

- That the complainants have concealed from this authority that with the motive to encourage the complainants to make payment of the dues within the stipulated time, the respondent also gave additional incentive in the form of timely payment discount to the complainants and in fact, till date, the complainants have availed timely payment discount of Rs. 212,652.33/-. That at the stage of booking, the respondent offered a discount on the BSP amounting to Rs. 95,400/- to the complainants. Thus, the net BSP charged from the complainants is less than the original amount of unit.
- That the respondent kept updated and informed the complainants about the milestone achieved and progress in the developmental aspects of the project. The respondent vide emails has shared photographs of the project in question. However, it is evident to sat that the respondent has always acted bonafidely towards its customers including the complainants, and



thus, has always maintained a transparency in reference to the said project. In addition to updating the complainants, the respondent on numerous occasions, on each and every issue or query upraised in respect of the unit in question has always provided steady and efficient assistance.

23. That agreements that were executed prior to implementation of the 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 FBA dated 25.03.2011 executed by the complainants out of their own free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them.
24. That it is clarified in the rules published by the state of Haryana, the explanation given at the end of the prescribed agreement for sale in annexure A of the rules, it has been clarified that the developer shall disclose the existing agreement for sale in respect of ongoing project and further that such disclosure shall not affect the validity of such existing agreement executed with the customers. The explanation is extracted herein below for ready reference:

"Explanation (a) The promoter shall disclose the existing Agreement for sale entered between promoter and the Allottee in respect of ongoing project along with the application for registration of such ongoing project. However, such disclosure shall not affect the validity of such existing agreement (s) for sale between promoter and Allottee in respect of apartment, building or plot, as the case may be, executed prior to the stipulated date



25. That the relief(s) sought by the complainants are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainants entered into the said agreement with the respondent with open eyes and is bound by the same. The complainants while entering into the agreement has accepted and is bound by each and every clause of the said agreement.
26. That the detailed relief claimed by the complainants goes beyond the jurisdiction of this authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainants.
27. That having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the '*Doctrine of Aprobate & Reprobate*'. Therefore, in light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this authority.
28. That the parties had agreed under clause 33 of the FBA to attempt at amicably settling the matter and if the matter is not settled amicably, then to refer the matter for arbitration.



Admittedly, the complainants have raised dispute but did not take any steps to invoke arbitration.

29. That the remedy in case of delay in offering possession of the unit was also agreed between the parties as also extension of time for offering possession of the unit. That the said understanding had been achieved between the parties at the stage of entering into the transaction. Clause 3.1, 3.3, 3.5, 10 of the FBA are noteworthy.
30. That the project "Spacio" got delayed due to reasons beyond the control of respondent in as much as there was de-mobilization of the main contractor M/s Vascon, which is "A" grade contractor and listed on NSE/BSE. It is submitted that the work contract with M/s Vascon was foreclosed on 28.12.2012 due to slow pace of construction work being carried out by the said contractor despite advance amounts and mobilization advances being received by him. It is further submitted that due to this de-mobilization, it took some time to close the work order through proper documentation like closing of final executed quantities, final bills, escalation etc. The respondent thereafter awarded the balance work to a new Agency M/s YFC Projects Private Ltd. who deputed their staff and manpower at the site since April 2013. However, due to default of M/s YFC Projects Private Ltd, the work contract was foreclosed and thus the balance work was assigned to two new contractors, namely, M/s Sunshine Finishes and M/s Shri Sidhi Vinayak Infrastructure who deputed their staff and manpower at the site since from



March 2015. Thereafter, the two contractors started the construction of the balance work. That to make sure that the project is not delayed any further, the respondent has arranged funds and the work at site is going on in full swing and shortly the respondent shall be in a position to offer of units in a phased manner.

31. That the construction was also affected on account of NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. That vide its order NGT placed sudden ban on the entry of diesel trucks more than 10 years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondent.
32. That it was communicated to the complainants vide email dated 26.02.2020 that the construction of the allotted unit was going on in full swing and the respondent was confident to handover possession of the unit in question by April 2020. However, it be noted that due to the sudden outbreak of the coronavirus, the construction came to a halt, and it took some time to get the labour mobilized at the site.
33. That the construction of tower in which the unit is located has been completed and the OC for the same has also been received where after, the respondent has already offered possession to the complainants. However, the complainants



being investor do not wish to take possession as the real estate market is down and there are no sales in secondary market, thus has initiated the present frivolous litigation.

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

E. Jurisdiction of the authority

The respondent has raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

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 promoters, 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 complainants at a later stage.

F. Findings on the objections raised by the respondent.

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

35. The respondent has raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation of



arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

"33. Dispute Resolution by Arbitration

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

36. 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.

37. 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."

38. 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 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."

39. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act, 1986 and Act of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

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

40. 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."

41. 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."

42. 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 allottees 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. Findings on the relief sought by the complainants.

Relief sought by the complainants: The complainants have sought following relief: [The complainants have prayed for the relief of delayed possession charges and other relief included excess EDC/IDC. Now, vide application filed on 09.04.2021 during the proceedings of the court, the counsel for the complainants prayed for pursuing only the relief of delayed possession charges and possession]

- i. Direct the respondent to provide the possession of the allotted unit with immediate effect and pay interest at the applicable rate of 18% on account of delay in offering possession on Rs. 61,57,741/- paid by the complainants as sale consideration of the allotted unit from the date of payment till the date of delivery of possession.

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

Section 18: - Return of amount and compensation

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

—
.....

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

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

"3. Possession

3.1 Subject to Clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the Seller/confirming party and any restraints/restrictions from any courts/authorities and subject to the Purchaser(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and having complied with all provisions, formalities, documentation, etc. As prescribed by the Seller/Confirming Party, whether under this Agreement or otherwise, from time to time, the Seller/Confirming Party proposes to hand over the possession of the Flat to the Purchaser(s) within a period of 36 months from the date of booking/registration of the Flat. The Purchaser(s) agrees and understands that the Seller/Confirming Party shall be entitled to a grace period of 180 (One Hundred and Eighty) days after the expiry of 36 months, for applying and obtaining the occupation certificate in respect of the Colony from the Authority. The Seller/Confirming Party shall give Notice of Possession in writing to the Purchaser with regard to the handing over of possession, whereafter, within 30 days, the Purchaser(s) shall clear all his outstanding dues and complete documentary formalities and take physical possession of the Flat. In case, the Purchaser(s) raises any issue with respect to any demand, the same would not entitle to the Purchaser(s) for an extension of the time for taking over possession of the Flat."

45. At the inception it is relevant to comment on the pre-set possession clause of the flat buyer's agreement wherein the possession has been subjected to innumerable terms and



conditions, force majeure circumstances and innumerable terms and conditions. The drafting of this clause is not only vague but so heavily loaded in favour of the promoter that even a single default by the allottees in fulfilling obligations, formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

46. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 36 months from the date of booking. In the present complaint, the date of booking vide payment receipt of booking amount is 10.12.2010. Therefore, the due date of handing over possession comes out to be 10.12.2013. It is further provided in agreement that promoter shall be entitled to a grace period of 180 days for applying and obtaining the occupancy certificate etc. from DTCP. As a matter of fact, from the perusal of occupation certificate dated 15.01.2021 it is implied that the promoter applied for occupation certificate only on 21.01.2020 and 21.08.2020



which is later than 180 days from the due date of possession i.e., 10.12.2013. The clause clearly implies that the grace period is asked for applying and obtaining occupation certificate, therefore as the promoter applied for the occupation certificate much later than the statutory period of 180 days, he does not fulfil the criteria for grant of the grace period., As per the settled law one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoter. Relevant clause regarding grace period is reproduced below: -

"Clause 3.1The Purchaser(s) agrees and understands that the Seller/Confirming Party shall be entitled to a grace period of 180 days, after expiry of 36 months, for applying and obtaining the Occupation Certificate in respect of the Colony from the Authority....."

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

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

- (1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the*



State Bank of India highest marginal cost of lending rate +2%:

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

48. 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.
49. 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., 23.12.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
50. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

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

*Explanation. —For the purpose of this clause—
the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*

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

51. Therefore, interest on the delay payments from the complainants 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 complainants in case of delayed possession charges.
52. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of 3.1 of the flat buyer's agreement executed between the parties on 25.03.2011, the possession of the subject unit was to be delivered within 36 months from the date of booking i.e., 10.12.2010. Therefore, the due date of handing over possession is 10.12.2013. 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 10.12.2013. The occupation certificate has been received by the respondent on 15.01.2021 and the possession of the subject unit was offered to the complainants on 01.02.2021. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the

terms and conditions of the flat buyer's agreement dated 25.03.2011 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period.

53. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 15.01.2021. The respondent offered the possession of the unit in question to the complainants only on 01.02.2021, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainants keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 10.12.2013 till the expiry of 2 months from the date of offer of possession (01.02.2021) which comes out to be 01.04.2021.

54. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e., 9.30% p.a. w.e.f. 10.12.2013 till 01.04.2021 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

H. Directions of the authority


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


- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 10.12.2013 till the date of offer of possession i.e., 01.02.2021 + 2 months i.e., 01.04.2021 to the complainants as per section 19(10) of the Act.
- ii. The complainants are directed to take possession of the allotted unit after paying outstanding dues if any, as the respondent has already offered possession to the complainants on 01.02.2021.
- iii. The arrears of such interest accrued from 10.12.2013 till 01.04.2021 shall be paid by the promoter to the allottees within a period of 90 days from date of this order as per rule 16(2) of the rules.

- iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- v. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(z a) of the Act.
- vi. The respondent 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.

56. Complaint stands disposed of.

57. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 23.12.2021

Judgement uploaded on 07.01.2022.