

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

Complaint no. : 4559 of 2020  
First date of hearing: 19.01.2021  
Date of decision : 08.04.2021

1. Parveen Kumar Garg  
2. Sushila Devi  
Both RR/O: A1/3, Hastsal Road,  
Uttam Nagar, New Delhi-110059.

**Complainants**

Versus

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

**Respondent**

**CORAM:**

Dr. K.K. Khandelwal  
Shri Samir Kumar

**Chairman  
Member**

**APPEARANCE:**

Shri Nikhil Mittal  
Shri Venket Rao

Advocate for the complainants  
Advocate for the respondent

**ORDER**

1. The present complaint dated 10.12.2020 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations,

responsibilities and functions under the provision of the Act or the rules and regulations made 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Unit no.	1403, 14 <sup>th</sup> floor, Tower-T25 [Page 11 of complaint]
2.	Unit measuring	1998 sq. ft. [185.62 sq. mtrs.]
3.	Date of execution of flat buyer's agreement	24.12.2012 [Page 14 of complaint]
4.	Allotment letter	07.12.2012 [Page 43 of reply]
5.	Payment plan	Subvention payment plan. [Page 43 of reply]
6.	Total consideration	Rs. 1,33,11,226.00/- [as per statement of accounts page 58 of complaint]
7.	Total amount paid by the complainants	Rs. 1,26,52,689.30/- [as per statement of accounts page 58 of complaint]
8.	Due date of delivery of possession as per clause 5.1 read with clause 1.6 of the flat	24.06.2016



	buyer's agreement i.e. 42 months from the date of sanction of the building plan or execution of agreement, whichever is later.	
9.	Offer of possession	Not offered
10.	Occupation certificate	Occupation certificate for this particular tower has not been received.
11.	Delay in handing over possession till the date of decision i.e., 08.04.2021	4 years, 9 months, 15 days

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

Project related details			
1.	Name of the promoter	M/s BPTP Ltd.	
2.	Name of the project	Park Terra	
3.	Location of the project	Sector-37D, Gurugram	
4.	Nature of the project	Group Housing Project	
5.	Whether project is new or ongoing	Ongoing	
6.	Registered as whole/phase	Phase	
7.	If developed in phase, then phase no.	Not Provided	
8.	Total no. of phases in which it is proposed to be developed if any	Not Provided	
9.	HARERA registration no.	299 of 2017	
10.	Registration certificate	Date	Validity
		13.10.2017	12.10.2020

11.	Area registered	10.23 acres	
12.	Extension applied on	N/A	
13.	Extension certificate no.	Date	Validity
		N/A	N/A
Licence related details of the project			
1.	DTCP license no.	83 of 2008 dated 05.04.2008	
2.	License validity/ renewal period	04.04.2025 and 23.10.2019	
3.	Licensed area	23.814 Acres	
4.	Name of the license holder	83 of 2008: - Countrywide Promoters Pvt Ltd and 4 Others.	
5.	Name of the collaborator	N/A	
6.	Name of the developer/s in case of development agreement and/or marketing agreement entered into after obtaining license.	N/A	
7.	Whether BIP permission has been obtained from DTCP	N/A	
Date of commencement of the project			
1.	Date of commencement of the project	Not Provided	
Details of statutory approvals obtained			
S.N.	Particulars	Approval no and date	Validity
1.	Approved building plan	21.09.2012	20.09.2017

2.	Environment clearance	15.10.2013	14.10.2020
3.	Occupation certificate date	Occupation Certificate for this particular Tower has not been received.	

### B. Facts of the complaint

The complainants have submitted as under: -

4. That the respondent agreed to sell to the complainants the unit no. T-25-1403 in project terra located in sector 37-D Gurugram, Haryana vide flat buyer's agreement dated 24.12.2012 executed between the complainants and the respondent. As per the commitment made by the respondent in the flat buyer's agreement, the possession of the flat was to be rendered to the complainants within 42 months from the date of signing the flat buyer's agreement with a grace of 180 days i.e., latest by 24.12.2016. The respondent till the date of filing of the complaint has failed to handover the possession of the above-mentioned unit to the complainants.
5. That the complainants had duly met all the financial demands raised by the respondent on time but to the utter dismay of the complainants the possession was not delivered to them on time as per the flat buyer's agreement.
6. That by not delivering the possession even after the due date, the respondent therefore stands in breach of the flat buyer's agreement signed with the complainants. The complainants have sent several emails to the respondent regarding the handover of possession, but no constructive reply was given to

the complainants instead only false and vexatious assurances were given to the complainants in order to delay the delivery of possession of the said unit. By the act and conduct of the respondent it is unambiguously lucid that the respondent from the very beginning had a malafide intention to cheat and defraud the complainants.

**C. Relief sought by the complainants:**

7. The complainants have sought following relief(s):
  - (i) Direct the respondent to handover the actual possession of the apartment bearing no. T-25-1403 in project Terra located in sector 37-D Gurugram, Haryana-along with all the rights, titles and interests without any delay or default in terms with the flat buyer's agreement.
  - (ii) Direct the respondent to pay the delayed possession charges as per RERA Act in the name of the complainant no.1 for the property situated at "Terra", Sector-37-D, Gurugram, Haryana, till the delivery of the actual, physical and vacant possession.
8. 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.**

9. The respondent has contested the complaint on the following grounds: -

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

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

- The complainants had failed to disclose before the hon'ble authority that the complainants have approached the respondent through a broker namely ***"Ravi Satyam Builders and Properties Pvt. Ltd."*** after conducting due diligence and investigating the real estate market applied for booking of the unit in question.

- The complainants falsely stated that, timely payments was made by the complainants as and when demanded by the respondent, however, it is submitted that the complainants made defaults in making timely payments as a result thereof, the respondent had to issue reminder letters dated 19.12.2012 and 22.01.2013 and only after the reminder letters were sent, the complainants came forward to clear the outstanding dues against the demand letter dated 08.11.2012, accordingly receipt dated 01.02.2013 was issued by the respondent.
- The complainants had further misrepresented that the respondent never bothered to share the construction status with the complainants. It is submitted that via different demand letters, the complainants were duly informed from time to time about the stage of construction of the unit in question. Further, the respondent has also, from time to time, been updating the complainants with respect to the progress being made in the project by means of various emails wherein the respondent shared regular construction updates.
- The complainants concealed from the hon'ble authority that on 24.01.2013, a tri-partite agreement was executed between the complainants, respondent and HDFC Bank for loan amount of Rs. 95,00,000/-

and it was unequivocally agreed by the parties vide clause 8, that in case of cancellation of booking, the entire amount advanced by the HDFC had to be returned to HDFC by complainants only. Moreover, the respondent paid Rs.10,74,525.10 as Pre-EMI interest to the bank under the subvention scheme opted by the complainants.

- III. The sole intention of the complainants was to unjustly enrich himself at the expense of the respondent by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that considering the law laid down by the hon'ble apex court, the present complaint warrants dismissal without any further adjudication.
- IV. The relief(s) sought by the complainants are unjustified, baseless and beyond the scope/ambit of the flat buyer's 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 above submission implies that while entering into the flat buyer's agreement, the complainants had the knowledge that there may arise a situation whereby the possession could not be granted to the complainants as per the commitment period and in order to protect and/or safeguard the interest of the



complainants, the respondent have provided reasonable remedy under clause-6.1, and the complainants having accepted to the same in totality, cannot claim anything beyond what has been reduced to in writing between the parties. Reference may be made to Section-74 of the Indian Contracts Act, 1872, which clearly spells out the law regarding sanctity and binding nature of the ascertained amount of compensation provided in the agreement and further specifies that any party is not entitled to anything beyond the same. Therefore, the complainants, if at all, are only entitled to compensation under clause-6 of the flat buyer's agreement. The detailed relief claimed by the complainants goes beyond the jurisdiction of this hon'ble authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainants.

- V. Agreements that were executed prior to implementation of RERA Act and rules shall be binding on the parties and cannot be reopened. 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.

- VI. The parties had agreed under the flat buyer's agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainants had raised a dispute but did not take any steps to invoke arbitration. Hence, it is in breach of the flat buyer's agreement between the parties. The allegations made requires proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.
- VII. The construction activities are ongoing on site at full swing and the respondent endeavours to complete construction at the earliest. The possession was to be delivered within 42 months from the date of sanction of building plans or execution of flat buyer's agreement, whichever is later, along with 180 days of grace period, subject to force majeure circumstances and circumstances beyond control of the respondent. The parties had understood, agreed, and accepted under the indicative terms of the application for allotment that possession of the unit was subject to force majeure and timely compliance of the obligations.
- VIII. Vide clause G.2 of the application for allotment, which was later reiterated vide clause 6.1 of the flat buyer's agreement, 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 flat buyer's agreement, whichever is later along with 180 days of grace period, the respondent shall be liable to pay to the complainants compensation calculated @ Rs.5/- per sq. ft. for every month of delay. The parties had agreed the penalty, in case of delay in offering possession prior to entering the transaction. Prior to entering the transaction, the parties had further agreed vide clause 6.1 of the flat buyer's agreement that in case the complainants fails or defaults in making timely payment of any of the instalments, then the complainants would not be eligible for delay compensation. Thus, the understanding between the parties regarding compensation for delay in offering of possession had been agreed and accepted prior to entering the transaction.

- IX. The proposed timelines for possession have been diluted due to defaults in making timely payment of instalments by various allottees of the project Terra including the complainants herein. It is well known fact that the projected timelines for possession are based on the cash flow. It was not in the contemplation of the respondent that the allottees would hugely default in making payments and hence, cause cash flow crunch in

the project.

- X. The construction was affected on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority and on account of coronavirus (COVID 19), construction came to a halt, and it took some time to get the labour mobilized at the site. With respect to the construction of the tower in which the unit in question is located, work such as structural work, plaster works, MS railing work, IPS flooring work is completed. The remaining construction work is going at full pace at the site and the respondent is making every endeavour to handover possession of the unit at the earliest.

**E. Written arguments on behalf of complainants**

- i. If the purchaser has delayed in making payment of any of the instalment, then the purchaser waives his right to seek delay compensation. It is submitted that such clauses are totally unjust, arbitrary and amount to unfair trade practices as held by the hon'ble NCDRC in the case titled as "*Shri Satish Kumar Pandey & Anr. v/s M/s Unitech Limited (08.06.2015)*" and also in the judgement of Hon'ble Bombay High Court in "*Neelkamal Realtors Subarban Pvt. Ltd. v/s Union of India & Ors. (W.P. 2737 of 2017)*".

- ii. The grievance of the complainants relates to breach of contract, false promises, gross unfair trade practices and deficiencies in the services committed by the respondent regarding the flat allotted to the complainants, bought by them, spending their hard-earned money.
- iii. The respondent had failed to deliver the possession of the flat as per the flat buyer's agreement. Even after a delay of 4 years 2 months 8 days, the respondent has not issued the complainants, offer of possession.
- iv. The respondent has in an unfair manner misused the funds meant for the project Park Terra and utilized the same for respondent's own benefit for no cost. The respondent being builder and developer, whenever in need of funds from bankers or investors ordinarily has to pay heavy interest per annum. However, in the present scenario, the respondent utilized funds collected from the complainants for company's own good in other projects, being developed by the respondent.
- v. As late as 04.03.2020 it has been held by the Haryana Real Estate Regulatory Authority, Gurugram in a complaint no. 1070 of 2018 titled "**Amit Chaudhry Vs. Emaar MGF Land Ltd**". as under:

*"The respondent was directed to pay the interest at the prescribed rate for every month of delay on the amount paid by the complainant from the date of possession till the offer of possession. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order. The complainant is directed to pay*

*outstanding payments if any, after adjustment of interest for the delayed period. The respondent shall not charge any amount from the complainant which is not part of the buyer's agreement."*

- vi. The complainants cannot be expected to endlessly wait for the possession and this principle has been settled by the hon'ble Apex Court in the case of the "**Fortune Infrastructure & Ors. v/s Trevor D'Lima and Ors.**" and in the present case it is essential that the authority may be pleased to direct the respondent to immediately deliver the possession of the apartment to the complainants along with the necessary and just penalty for delay at prescribed rate of interest. The complainants are aggrieved by the actions of the respondent for withholding the money for several years and causing immense mental and financial distress.
10. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.
- F. Jurisdiction of the authority**
11. The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**F. I Territorial jurisdiction**

12. 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**

13. 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 complainants 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 untimely payments done by the complainants.**

14. The respondent has contended that the complainants have made defaults in making payments as a result thereof, the respondent had to issue reminder letters dated 19.12.2012

and 22.01.2013 and only after the reminders, the complainants came forward to clear the outstanding dues against the demand letter dated 08.11.2012, accordingly receipt dated 01.02.2013 was issued by the respondent. The counsel for the respondent stressed upon clause 7.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

**"7. TIMELY PAYMENT ESSENCE OF CONTRACT.  
TERMINATION, CANCELLATION AND FORFEITURE"**

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

15. At the outset it is relevant to comment on the said clause of the agreement i.e. **"7. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"** wherein the payments to be made by the complainants have been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the



promoter and against the allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainants being in default in making timely payments, the respondent has not exercised his discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 7.2 of the flat buyer's agreement whereby the complainants shall be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondent has charged delay payment interest as per clause 7.2 of the buyer's agreement and has not terminated the agreement in terms of clause 7.1 of the buyer's agreement. In other words, the respondent has already charged penalized interest from the complainants on account of delay in making payments as per the payment schedule. However, after the enactment of the RERA Act, the position has changed. Section 2(zd) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e.,

9.30% by the respondent which is the same as is being granted to the complainants in case of delay possession charges.

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

16. 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."

17. 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."

18. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the

allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

**G.III Objection regarding complainants are in breach of agreement for non-invocation of arbitration.**

19. The respondent had 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 in 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."*

20. 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.

21. 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."*

22. 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."*

23. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 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.

#### **H. Findings on the relief sought by the complainants.**

**Relief sought by the complainants:** The complainants had sought following relief(s):

- (i) Direct the respondent to handover the actual possession of the residential unit/apartment bearing no. T-25-1403 in project terra located in sector 37-D Gurugram, Haryana-along with all the rights, titles and interests without any delay or default in terms with the flat buyer's agreement.
- (ii) Direct the respondent to pay the delayed possession charges as per RERA Act in the name of the complainant no.1 for the property situated at "Terra", Sector-37-D, Gurugram, Haryana, till the delivery of the actual, physical and vacant possession.

24. 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."*

25. Clause 5.1 read with clause 1.6 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

*"Clause 5.1- The Seller/Confirming Party proposes to offer possession of the unit to the Purchaser(s) within the Commitment period. The Seller/Confirming Party shall be additionally entitled to a Grace period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said unit.*

*Clause 1.6 "FBA" "Commitment Period" shall mean, subject to Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, — as — prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC), stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyers Agreement, whichever is later."*

26. 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 allottee in fulfilling obligations, formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee 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 allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

27. **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 24.12.2012 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 24.06.2016. Further it was provided in the flat buyer's agreement that promoter shall be



entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the 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.

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

29. 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 home 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."*

30. 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%.
31. 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;"*
32. 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.



33. 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 flat buyer's agreement executed between the parties on 24.12.2012, the possession of the subject apartment was to be delivered within stipulated time i.e., by 24.06.2016. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 24.06.2016. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent to fulfil its obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 24.06.2016 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

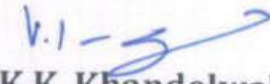
**I. Directions of the authority**

34. 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. 24.06.2016 till the handing over of possession.
- ii. The arrears of such interest accrued from 24.06.2016 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10<sup>th</sup> of the subsequent month as per rule 16(2) of the rules.
- iii. The complainants are also directed to pay the outstanding dues, if any. Interest on the due payments from the complainants 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 respondent shall not charge anything from the complainants which is not part of the builder buyer agreement.

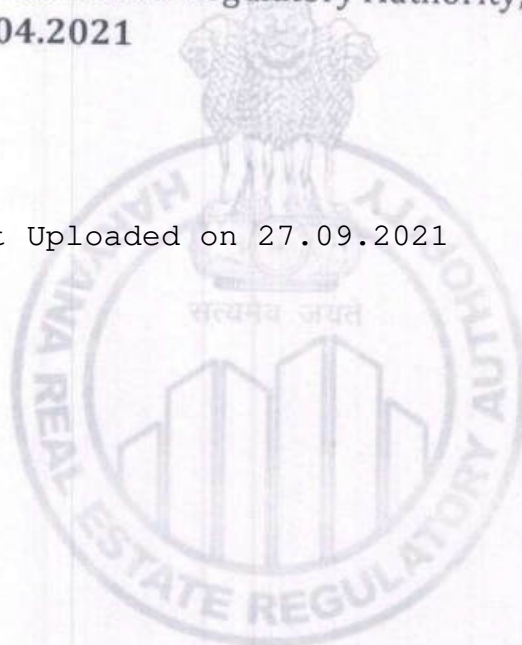
35. Complaint stands disposed of.  
36. File be consigned to registry.

  
**(Samir Kumar)**  
Member

  
**(Dr. K.K. Khandelwal)**  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram  
**Dated: 08.04.2021**

Judgement Uploaded on 27.09.2021



**HARERA**  
**GURUGRAM**