BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1485 of 2018**
Date of filing complaint:	**22.10.2018**
First date of hearing:	**28.03.2019**
Date of decision :	**25.07.2022**

1. 2.	Sh. Gopal Kacker S/o Sh. Narain Dass Kacker Smt. Lalina Kacker W/o Sh. Gopal Kacker **Both R/O**: D-843, New Friends Colony, New Delhi- 110065	**Complainants**
	Versus	
	M/s Athena Infrastructure Limited **Regd. office:** M-62 & 63, 1st floor, Connaught Place, New Delhi-110001	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Smt. Arzoo Raj proxy counsel	Complainants
Sh. Rahul Yadav (Advocate)	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 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under

the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Name and location of the project	"Indiabulls Enigma", Sector 110, Gurugram
2.	Nature of the project	Residential complex
3.	Project area	15.6 acres
4.	DTCP License	213 of 2007 dated 05.09.2007 valid till 04.09.2024 10 of 2011 dated 29.01.2011 valid till 28.01.2023
	Name of the licensee	M/s Athena Infrastructure Private Limited
		64 of 2012 dated 20.06.2012 valid till 19.06.2023
	Name of the licensee	Varali properties
5.	HRERA registered/ not registered	**Registered vide no.** **i. 351 of 2017 dated 20.11.2017 valid till 31.08.2018** **ii. 354 of 2017 dated 17.11.2017 valid till 30.09.2018** **iii. 353 of 2017 dated 20.11.2017 valid till 31.03.2018**

		iv. 346 of 2017 dated 08.11.2017 valid till 31.08.2018
6.	Allotment letter dated	07.05.2012 (As per page no. 10 of complaint)
7.	Date of execution of flat buyer's agreement	20.07.2011 (As per page no. 12 of complaint)
8.	Unit no.	A-022 on 2nd floor, tower A (As per page no. 16 of complaint)
9.	Super Area	3400 sq. ft. (As per page no. 16 of complaint)
10.	Payment plan	Construction linked payment plan (As per page no. 30 of complaint)
11.	Total consideration	BSP- Rs. 1,75,99,999/- (As per page no. 16 of complaint) TSC- Rs. 2,03,32,998/- (excluding tax) (As per demand letter dated 03.07.2018 on page no. 37 of the complaint)
12.	Total amount paid by the complainants	Rs. 2,04,92,683/- (As per demand letter dated 09.09.2019 on page no. 26 of the reply)
13.	Possession clause	**Clause 21** *(The Developer shall endeavour to complete the construction of the said building /Unit within* ***a period of three***

		years, with a six months grace period thereon from the date of execution of the Flat Buyers Agreement subject to timely payment*by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to him or as demanded by the Developer. The Developer on completion of the construction /development shall issue final call notice to the Buyer, who shall within 60 days thereof, remit all dues and take possession of the Unit.)*
14.	Due date of possession	20.01.2015 (Calculated from the date of the agreement i.e.; 20.07.2011 + grace period of 6 months) ***Grace period is allowed***
15.	Occupation Certificate	06.04.2018 (As per website of DTCP)
16.	Offer of possession	03.07.2018 (As per page no. 20 of reply)

B. Facts of the complaint:

3. That the respondent extensively advertised its project, "Indiabulls Enigma" situated at Sector-110, Village Pawala Khusrupur, Gurugram, Haryana (hereinafter 'the said project') across various media channels and had inter alia promised the timely completion of construction and handing over of possession. It was advertised that the residential complex shall consist of car parking at stilt & basement level along with residential flats, clubhouse,

convenient shopping, EWS staircases, lifts, open spaces, passages and services for water supply, sewerage disposal, irrigation, etc.

4. That based upon the representations of the respondent, the complainants applied for the allotment of a residential unit having an approximate covered area of 3400 sq. ft. along with proportionate undivided interest in the land beneath as well as rights of usage of common areas, facilities in the complex and 2 covered car parking spaces (hereinafter "the said unit") in the year 2011. The total sale price of the said unit was Rs.1,75,99,999/- at the rate of Rs. 5,176.40 per sq. ft. of super area.

5. That at the time of booking, the complainants paid a sum of Rs. 5,00,000/- as booking amount on 26.05.2011 and a further sum of Rs.12,85,000/- on 16.06.2011. Thus, a total amount of Rs. 17,85,000/- was paid by the complainants to the respondent at the time of making the booking in the months of May and June 2011.

6. That the complainants vide allotment letter dated 07.05.2012 were allotted a residential unit bearing no. A-022, on the 2nd floor in tower no. A, having approximately 3400 sq. ft. of super area (i.e. 315.87 sq. mts.) and covered area of 2605.54 sq. ft. (i.e. 242.06 sq. mts.) in terms of the Allotment Letter dated 07.05.2012. Subsequently, a flat buyer's agreement dated 20.07.2011 was duly executed between the parties (hereinafter "the said agreement").

7. That as per terms of the said agreement, the construction of the said unit was to be completed within a period of 3 years with a grace period of 6

months thereafter from the date of execution of the said agreement, and immediately upon the completion of construction of the said unit, the respondent would issue final call notice to the complainants, who shall take possession within 60 days thereafter. Since the said agreement was executed on 20.07.2011, in terms of the said agreement the construction of the said unit was to be completed by the respondent (including the 6-month grace period) latest by 20.01.2015.

8. That as per the payment plan, the payments in respect of the said unit were to be made in installments, which were linked with stage of construction of the project. The complainants have always been in full compliance of the terms of the said agreement, and the same is inter alia reflected by all the installments paid by them. They have paid a total sum of Rs. 2,04,92,683/- which is approximately 95% of the sale consideration of the said unit as and when required to be paid in terms of the said agreement.

9. That in order to make timely payments of all the instalments, they applied for a loan facility from ICICI Bank on which they have paid an interest of Rs. 27,59,899/- till date. The complainants availed the said loan facility in the legitimate expectation that the respondent would comply with the terms and conditions of the said agreement and would deliver the possession of the unit within the time undertaken by the it as per terms of the said agreement.

10. That due to the inordinate delay and defaults on part of the respondent, the construction of the said unit as specified under the said agreement dated 20.07.2011, they called upon the respondent and informed them that they would like to withdraw from the said project and requested the respondent to refund the entire amount paid by the complainants along with interest @ 18% per annum. However, the respondent has not refunded the money to the complainants so far.

11. That the default on the part of the respondent in the performance of its obligations under the flat buyers' agreement and it's the failure to hand over the possession of the said unit to the complainants within the time prescribed under the said agreement has caused grave and severe financial loss to the complainants. Apart from the fact that they have invested huge sums of their hard-earned money in the said unit, they have till date paid an amount of Rs. 27,59,899/- towards interest on the loan facility availed from ICICI Bank, which carries a very high rate of interest.

C. Relief sought by the complainants:

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

    i. Direct the respondent to refund the entire amount of Rs. 2,04,92,683/- paid by the complainant to the respondent till date along with interest at the prescribed rate under Act of 2016.

D. Reply by respondent:

The respondent by way of written reply made following submissions

13. That the present complaint is devoid of any merit and has been preferred with the sole motive to harass the respondent and is liable to be dismissed on the ground that the said claim of the complainants is unjustified, misconceived and without any basis as against the respondent.

14. That as per the terms of the agreement, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the subject transferred unit, the same was to be adjudicated through the arbitration mechanism as detailed therein under clause no. 49 of said buyer's agreement. Thus, it is humbly submitted that, the dispute, if any, between the parties is to be referred to arbitration.

15. That the relationship between the complainants and the respondent is governed by the flat buyers agreement dated 20.07.2011 executed between them. It is pertinent to mention herein that the instant complaint alleging delay in delivery of possession of booked a unit. However, the complainants are concealing the fact the possession of the same has been already offered to them vide letter dated 03.07.2018 i.e. prior of filing the instant complaint.

16. That in terms of clause 10 of the flat buyer agreement dated 20.07.2011, timely payment of installments was the very essence of the said agreement and that the handing over of the possession of the booked unit to the complainants was subject to timely payment of dues by them in terms of the payment schedule opted by them at the time of execution of the flat buyer agreement with the respondent.

17. That the complainants continuously delayed the due payment towards the price of the booked unit in spite of several reminders and service of various demand notices by the respondent for timely payment of installments by the complainants. That there has been a substantial delay on the part of the complainants for payment of dues towards the price of the unit and still a considerable outstanding amount is left to be cleared, which they are trying to escape paying, by filing the instant complaint.

18. That the complainants were also aware of the fact that there is a mechanism detailed in the FBA which covers the exigencies of inordinate delay caused in completion and handing over of the booked unit i.e. enumerated in the "clause 22" of duly executed FBA filed by the complainants along with their complaint. The answering respondent carves leave of this authority to refer & rely upon the clause 22 of flat buyer's agreement which is being reproduced hereunder:

> *"Clause 22 in the eventuality of developer failing to offer the possession of the unit to the buyers within the time as stipulated herein, except for the delay attributable to the buyer/force majeure / vis- majeure conditions, the developer shall pay to the buyer penalty of Rs. 5/- (rupees five only) per square feet (of super area) per month for the period of delay....."*

That the complainants being fully aware, having knowledge and are now evading from the truth of its existence and do not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainants are rescinding from the duly executed contract between the parties.

19. That the bare perusal of clause 22 of the agreement would make it evident that in the event of the respondent failing to offer possession within the proposed timelines, then in such a scenario, the respondent would pay a

penalty of Rs.5/- per sq. ft. per month as compensation for the period of such delay. The aforesaid prayer is completely contrary to the terms of the inter-se agreement between the parties. The said agreement fully envisages delay and provides for consequences thereof in the form of compensation to the complainants. Under clause 22 of the agreement, the respondent are liable to pay compensation at the rate of Rs.5/- per sq. ft. per month for delay beyond the proposed timeline. The respondent craves leave of this authority to refer & rely upon the clause 22 of flat buyer's agreement, which is being reproduced as:

> *"Clause 22: In the eventuality of Developer failing to offer the possession of the unit to the Buyers within the time as stipulated herein, except for the delay attributable to the Buyer/force majeure / vis-majeure conditions, the Developer shall pay to the Buyer penalty of Rs. 5/- (Rupees Five only) per square feet (of super area) per month for the period of delay ....."*

That the complainants being aware, having knowledge and having given consent of the above-mentioned clause/terms of flat buyer's agreement, are now evading themselves from contractual obligations inter-alia from the truth of its existence and do not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainants are also estopped from the duly executed contract between the parties.

20. That it has already credited an amount of Rs. 5,89,376/- on 02.07.2018 as credit penalty towards delay period in terms of buyer's agreement executed inter-se parties.

21. That it is a universally known fact that due to adverse market conditions viz. delay due to reinitiating of the existing work orders under GST regime,

by virtue of which all the bills of contractors were held between, delay due to the directions by the Hon'ble Supreme Court and National Green Tribunal whereby the construction activities were stopped, non-availability of the water required for the construction of the project work & non-availability of drinking water for labour due to process change from issuance of HUDA slips for the water to totally online process with the formation of GMDA, shortage of labour, raw materials etc., which continued for around 22 months, starting from February'2015.

22. That as per the license to develop the project, EDCs were paid to the state government and the state government in lieu of the EDCs was supposed to lay the whole infrastructure in the licensed area for providing the basic amenities such as drinking water, sewerage, drainage including storm water line, roads etc. The state government failed to provide the basic amenities due to which the construction progress of the project was badly hit.

23. That furthermore, the Ministry of Environment and Forest (hereinafter referred to as the "MoEF") and the Ministry of Mines (hereinafter referred to as the "MoM") had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of kiln which is the most basic ingredient in the construction activity. The MoEF restricted the excavation of topsoil for the manufacture of bricks and further directed that no manufacturing of clay bricks or tiles or blocks could be done within a radius of 50 kilometres from coal and lignite based thermal power plants without mixing at least 25% of ash with soil. The shortage of bricks in the region and the resultant non-availability of raw

materials required in the construction of the project also affected the timely schedule of construction of the project.

24. That in view of the ruling by the Hon'ble Apex Court directing for suspension of all the mining operations in the Aravalli hill range in state of Haryana within the area of approx. 448 sq. kms in the district of Faridabad and Gurgaon including Mewat which led to a situation of scarcity of the sand and other materials which derived from the stone crushing activities , which directly affected the construction schedules and activities of the project.

25. Apart from the above, the following circumstances also contributed to the delay in timely completion of the project:

a) That commonwealth games were organized in Delhi in October 2010. Due to this mega event, construction of several big projects including the construction of commonwealth games village took place in 2009 and onwards in Delhi and NCR region. This led to an extreme shortage of labour in the NCR region as most of the labour force got employed in said projects required for the commonwealth games. Moreover, during the commonwealth games the labour/workers were forced to leave the NCR region for security reasons. This also led to immense shortage of labour force in the NCR region. This drastically affected the availability of labour in the NCR region which had a ripple effect and hampered the development of this complex.

b) Moreover, due to active implementation of social schemes like National Rural Employment Guarantee Act and Jawaharlal Nehru National Urban Renewal Mission, there was a sudden shortage of labour/workforce in the real estate market as the available labour preferred to return to their

respective states due to guaranteed employment by the Central /State Government under NREGA and JNNURM schemes. This created a further shortage of labour force in the NCR region. Large numbers of real estate projects, including this project were struggling hard to timely cope up with their construction schedules. Also, even after successful completion of the commonwealth games, this shortage continued for a long period of time. The said fact can be substantiated by newspaper article elaborating on the above-mentioned issue of shortage of labour which was hampering the construction projects in the NCR region.

c) Further, due to slow pace of construction, a tremendous pressure was put on the contractors engaged to carry out various activities in the project due to which there was a dispute with the contractors resulting into foreclosure and termination of their contracts and we had to suffer huge losses which resulted in delayed timelines. That despite the best efforts, the ground realities hindered the progress of the project.

26. That it is pertinent to mention that the project of the respondent i.e., Indiabulls Enigma, which is being developed in an area of around 19.856 acres of land, in which the applicants invested money is an on-going project and is registered under The Real Estate (Regulation and Development) Act, 2016 and it is pertinent to note that the respondent has already offered the possession of the allotted unit on 03.07.2018. However, the complainants failed to take the possession of the allotted unit.

27. That based upon the past experiences, the respondent has specifically mentioned all the above contingencies in the flat buyer's agreement executed between the parties and incorporated them in "Clause 39" which is being reproduced hereunder:

Clause 39: "The Buyer agrees that in case the Developer delays in delivery of the unit to the Buyer due to:-

a. Earthquake. Floods, fire, tidal waves, and/or any act of God, or any other calamity beyond the control of developer.
b. War, riots, civil commotion, acts of terrorism.
c. Inability to procure or general shortage of energy, labour, equipment, facilities, materials or supplies, failure of transportation, strikes, lock outs, action of labour unions or other causes beyond the control of or unforeseen by the developer.
d. Any legislation, order or rule or regulation made or issued by the Govt or any other Authority or,
e. If any competent authority(ies) refuses, delays, withholds, denies the grant of necessary approvals for the Unit/Building or,
f. If any matters, issues relating to such approvals, permissions, notices, notifications by the competent authority(ies) become subject matter of any litigation before competent court or,
g. Due to any other force majeure or vis majeure conditions,

Then the Developer shall be entitled to proportionate extension of time for completion of the said complex....."

In addition to the reasons as detailed above, there was a delay in sanctioning of the permissions and sanctions from the departments.

28. That the flat buyer's agreement has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 20.07.2011 executed much prior to coming into force of the Act of 2016 and the rules of 2017. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under Act of 2016 has to be in reference to the flat buyer's agreement for sale executed in terms of said Act and said Rules and no other agreement, whereas, the flat buyer's agreement being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA and such agreement as referred herein above.

Hence, cannot be relied upon till such time the new agreement to sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainant.

29. That the respondent has made huge investments in obtaining requisite approvals and carrying on the construction and development of 'INDIABULLS ENIGMA' project not limiting to the expenses made on the advertising and marketing of the said project. Such development is being carried on by developer by investing all the monies that it has received from the buyers/ customers and through loans that it has raised from financial institutions. In spite of the fact that the real estate market has gone down badly the respondent has managed to carry on the work with certain delays caused due to various above mentioned reasons and the fact that on an average more than 50% of the buyers of the project have defaulted in making timely payments towards their outstanding dues, resulting into inordinate delay in the construction activities, still the construction of the project "INDIABULLS ENIGMA" has never been stopped or abandoned and has now reached its pinnacle in comparison to other real estate developers/promoters who have started the project around similar time period and have abandoned the project due to such reasons.

30. Copies of all the relevant documents have been filed and placed on 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:

31. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee 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;*
>
> **Section 34-Functions of the Authority:**
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

32. The respondent has raised an objection that the complainant has not invoked arbitration proceedings as per 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:

> *"Clause 49: All or any dispute arising out or touching upon or in relation to the terms of this Application and/or Flat Buyers agreement including the interpretation and validity of the terms thereof and the 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 Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereof for the time being in force. The venue of the arbitration shall be New Delhi and it shall be held by a sole arbitrator who shall be appointed by the Company and whose decision shall be final and binding upon the parties. The Applicant(s) hereby confirms that he/she shall have no objection to this appointment even if the person so appointed as the Arbitrator, is an employee or advocate of the company or is otherwise connected to the Company and the Applicant(s) confirms that notwithstanding such relationship / connection, the Applicant(s) shall have no doubts as to the independence or impartiality of the said Arbitrator. The courts in New Delhi alone shall have the jurisdiction over the disputes arising out of the Application/Apartment Buyers Agreement ....."*

33. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the

provisional booked unit by the complainant, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builders could not circumscribe the jurisdiction of a consumer.

34. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** **decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided

in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

> *"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

35. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within their right 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.

F.II Objections regarding the complainants being investors:

36. It is pleaded on behalf of respondent that complainants are investors and not consumers. So, they are not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate sector. The

Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are buyers and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

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

37. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainants are allottees as the subject unit allotted to them by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled *as* ***M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing***

(P) Ltd. and anr. has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being an investor are not entitled to protection of this Act also stands rejected.

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

38. 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 flat 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) decided on 06.12.2017*** 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."

39. 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."*

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

F.IV Objection regarding force majeure conditions:

41. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as commonwealth games held in Delhi, shortage of labour due to implementation of various social schemes by Government of India, slow pace of construction due to a dispute with the contractor, and non-payment of instalment by different allottee of the project but all the pleas advanced in this regard are devoid of merit. The subject unit was allotted to the complainants on 07.05.2012 and its possession was to be offered by 20.01.2015. So, the events taking place such as holding of common-wealth games, dispute with the contractor, implementation of various schemes by central govt. etc. do not have any impact on the project being developed by the respondent. Though some allottees' may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of some of the allottees. Moreover, in the present case, the allottees have already paid more than total consideration of allotted unit. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Entitlement of the complainants for refund:

G.I Direct the respondent to refund the entire amount of Rs. 2,04,92,683/- paid by the complainant to the respondent till date along with interest at the prescribed rate under Act of 2016.

42. The project detailed above was launched by the respondent as residential complex and the complainants were allotted the subject unit in tower A on 07.05.2012 against total sale consideration of Rs. 2,03,32,998/-. It led to execution of builder buyer agreement between the parties on 20.07.2011,

detailing the terms and conditions of allotment, total sale consideration of the allotted unit, its dimensions, due date of possession, etc. A period of three years along with grace period of six months was allowed to the respondent and that period has admittedly expired on 20.01.2015. It has come on record that against the total sale consideration of Rs. 2,03,32,998/- the complainants have paid a sum of Rs. 2,04,92,683/-.

43. The section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.

44. The due date of possession as per agreement for sale as mentioned in the table above is 20.01.2015 and there is delay of 3 years 9 months 02 days on the date of filing of the complaint. The allottee in this case has filed this application/complaint on 22.10.2018 i.e., after possession of the unit was offered to them on 03.007.2018 after obtaining occupation certificate by the promoter. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made to them and demand for due payment was raised then only filed a complaint before the authority. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of

the complainants is situated has been received. Section 18(1) gives two options to the allottee if the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

i. Allottee wishes to withdraw from the project; or

ii. Allottee does not intend to withdraw from the project

45. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the allottee has tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money he has paid to the promoter are protected accordingly.

46. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of***

U.P.and Ors. (supra) reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022***. it was observed

> *25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed*

47. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). This judgement of the Supreme Court of India recognized unqualified right of the allottee and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. But the allottee has failed to exercise this right although it is unqualified one. The allottee has to demand and make his intentions clear that the allottee wishes to withdraw from the project. Rather tacitly wished to continue with the project and thus made him entitle to receive interest for every month of delay till handing over of

possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottee in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.

In the case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.2021***, some of the allottees failed to take possession where the developer has been granted occupation certificate and offer of possession has been made. The Hon'ble Apex court took a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate. However, the developer was obligated to pay delay compensation for the period of delay occurred from the due date till the date of offer of possession was made to the allottees.

As per proviso to sec 18(1)

> *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 possession, at such as rate as may be prescribed.*

48. In case allottee wishes to withdraw from the project, the promoter is liable on demand to the allottee return of the amount received by the promoter with interest at the prescribed rate if promoter fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that allottee has to make his intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready then impliedly he has agreed to continue with the project i.e. he does not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and allottee shall be paid by the promoter interest at the prescribed rate for every month of delay. This view is supported by the judgement of Hon'ble Supreme Court of India in case of of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Supra)*** and also in consonance with the judgement of Hon'ble Supreme Court of India in case of ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors.,***

49. The authority hereby directs that the allottee shall be paid by the promoter an interest for every month of delay till handing over of possession at prescribed rate i.e. the rate of 9.80% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 within the timelines provided in rule 16(2) of the Haryana Rules 2017 ibid. The allottee is obligated to take the possession of the apartment since the construction is completed and possession has been offered after obtaining of occupation certificate from the competent authority. However, the developer is obligated to pay delay compensation for the period of delay occurred from the due date i.e. 20.01.2015 till the date of offer of possession plus two months i.e. 03.09.2018.

50. Further, it was submitted by the respondent-builder that it has already credited an amount of Rs. 5,89,376/- on 02.07.2018 as credit penalty towards delay period in terms of buyer's agreement executed inter-se parties. The authority further directs the respondent that from the amount so payable on account of delay possession charges, the respondent shall adjust amount already paid by it towards delay possession charges after providing proper statement of accounts.

H. Directions of the Authority:

51. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i. The respondent shall pay interest at the prescribed rate i.e. 9.80% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 20.01.2015 till the expiry of 2 months

from the date of offer of possession i.e. 03.09.2018, as per section 19(10) of the Act.

ii. The respondent is further directed that from the amount so payable on account of delay possession charges, the respondent shall adjust amount already paid by it towards delay possession charges after providing proper statement of accounts.

iii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order

52. Complaint stands disposed of.

53. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.07.2022