

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

Complaint no. :	1356 of 2019
Date of filing complaint:	12.04.2019
First date of hearing:	19.09.2019
Date of decision :	25.07.2022

Pankaj Maniktala S/o Sh. SC Maniktala R/O: 8/20 Top Floor, West Patel Nagar, New Delhi	<b>Complainant</b>
Versus	
M/s Athena Infrastructure Limited Regd. office: M-62 & 63, 1st floor, Connaught Place, New Delhi-110001	<b>Respondent</b>

<b>CORAM:</b>	
Dr. KK Khandelwal	<b>Chairman</b>
Shri Vijay Kumar Goyal	<b>Member</b>
<b>APPEARANCE:</b>	
Ms. Medhya Ahluwalia (Advocate)	Complainant
Sh. Rahul Yadav (Advocate)	Respondent

**ORDER**

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 complainant, 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	<b>Registered vide no.</b> 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	02.06.2011 (As alleged by the complainant on page 14 of CRA)
7.	Date of execution of flat buyer's agreement	28.08.2011 (As per page no. 20 of complaint)
8.	Endorsement dated	06.03.2013 (As per page no. 43 of complaint)
9.	Unit no.	B-012 on 01 <sup>st</sup> floor, tower B (As per page no. 24 of complaint)
10.	Super Area	3400 sq. ft. (As per page no. 24 of complaint)
11.	Payment plan	Construction linked payment plan (As per page no. 44-45 of complaint)
12.	Total consideration	BSP- Rs. 1,82,79,998/- (As per page no. 44 of complaint)  TSC- Rs.2,06,04,998 /- (excluding tax) (As per applicant ledger dated 06.03.2019 on page no.44 of the complaint)
13.	Total amount paid	Rs. 1,91,96,118/-

		(As per applicant ledger dated 06.03.2019 on page no. 44-46 of the complaint)
14.	Possession clause	<p><b>Clause 21</b></p> <p><i>(The Developer shall endeavour to complete the construction of the said building /Unit within <u>a period of three years, with a six-month grace period thereon from the date of execution of the Flat Buyers Agreement subject to timely payment</u> 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.)</i></p>
15.	Due date of possession	<p>28.02.2015</p> <p>(Calculated from the date of the agreement i.e., 28.08.2011 + grace period of 6 months)</p> <p><b>Grace period is allowed</b></p>
16.	Occupation Certificate	<p>Not obtained for tower B</p> <p>(As per website of DTCP)</p>
17.	Offer of possession	Not offered

**B. Facts of the complaint:**

- That the complainant was induced by the assurances and promises made by the respondent-promoter and accordingly booked a flat in its project named above. The respondent transferred an already booked

flat in his name and accordingly on 06.03.2013 endorsed the flat buyer agreement dated 28.08.2011 in favour of the complainant.

4. That the respondent by way of aforesaid flat buyer agreement allotted apartment bearing no. B-012 on 1st floor in tower no. B, admeasuring super area of approx. 3400 sq. ft and paid a total sum of Rs. 1,91,96,118/- towards the aforesaid residential flat. It is pertinent to mention that the respondent endorsed the earlier issued payment receipts in favour of the complainant, thereby acknowledging that by virtue of aforesaid transfer, the complainant had stepped into the shoes of the earlier allottee and acquired all his rights of as per the flat buyer's agreement.
5. That the respondent in a totally malafide and illegal manner raised a demand for "commencement of finishing work" in September 2014. Pursuant to the receipt of demand, the complainant along-with few other homebuyers visited the site to see the progress of construction at the project. He was shocked to see that the stage at which demand was raised had not yet reached and further, the project site was in total shambles. After his visit, he immediately wrote an email dated 24.09.2014 to it asking to withdraw the demand in view of the fact that it was premature. The respondent vide its reply dated 24.09.2015 very clearly avoided the grievances of the complainant and stated that the possession of the unit would be offered by the end of 2015, which also later proved to be utterly false.

6. That the complainant vide email dated 06.03.2019 again agitated his grievances and asked the respondent to refund the entire amount paid so far along-with interest and compensation. It is worthwhile to note that even in the email dated 06.03.2019, he stated that the levy of delay payment interest was totally misplaced on account of the premature demand being raised by it. The respondent vide email dated 07.03.2019 responded to the aforesaid email by simply stating that soon occupation certificate would be applied for the tower in which the complainant has booked his unit.
7. That it was promised to complete the project within a period of 36 months from the date of execution of the agreement with a grace period of six months. The flat buyer's agreement was executed on 28.08.2011 and till date, the construction is not complete. As per the relevant clause 21 of the said agreement, the respondent was under an obligation to complete and handover the possession of the booked unit by 28.02.2015(including grace period). However, it has failed to fulfil its most fundamental obligation. The project Indiabulls Enigma comprises of towers A to J. The tower D is to be developed by another subsidiary of Indiabulls namely Varali Properties Ltd. The other towers i.e. A to C and E to J are being developed by respondent herein. It was presented to the complainant that towers A to D would have 17 floors. However, during construction, the respondent and Varali changed the original plan and revised the same to the detriment of the complainant and

unilaterally increased 4 floors in towers A to D. The increase in floors/FAR changed the entire theme of the project. It would ultimately disturb the density of the colony and its basic design attraction, creating an extra burden on the common amenities and facilities.

8. That it increased the saleable area much more than was originally represented, which would lead to a strain on the common facilities like open areas, car parking space, club facilities and swimming pool usage etc. Moreover, with an increase in population density, the ease of the use of common facilities is going to be seriously compromised against the interest of the allottees. Moreover, the strength of the structure of tower A to D has been compromised, the foundation designed and built for 17 floors would not withstand the additional load of 4 floors. The respondent did not seek the consent of the complainant for increasing the floors and did it in a secretive manner. It is stated that the enhancement of FAR is in total violation of representations made in the respondent' advertisement material displayed at site as well as on the internet.
9. That the unlawful act of increasing the FAR, the respondent referred to an obscure notice released by it, in non-descript newspaper(s) advertising the said change in plan. That unconscionable act is clear violation of the legal mandate whereby the developer is required to invite objections from allottees before seeking any revision in the original building plans. It possesses complete contact details including

phone numbers and email ID of the complainant where it has been doing regular communication. But the respondent never communicated any intention or action to revise the sanctioned building plans. It is worthwhile to mention that the respondent has been sending various communications and demands vide emails, but it conveniently avoided to take approval of the complainant for the major changes in sanction plans, the fundamental nature of the project.

10. That it has failed to complete the project in time, resulting in extreme kind of mental distress, pain, and agony to the complainant. He made visits at the site and observed that there are serious quality issues with respect to the construction carried out by the respondent till now. It has compromised with level of quality and guilty of mis-selling. There are various deviations from the initial representations. It marketed luxury high end apartments, but they have compromised even with the basic features, designs, and quality to save costs. The structure, which has been constructed, on face of it is of extremely poor quality. The construction is totally unplanned, sub-standard low grade defective and despicable construction quality whereas the same was sold, stating that it would be next landmark in luxury housing and will redefine the meaning of luxury. But the respondent has converted the project into a concrete jungle. There are no visible signs of alleged luxuries.

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

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



- i. Direct the respondent to refund the entire amount of Rs. 1,95,46,624/- along with interest @18% p.a. from date when payment was made till its actual realization.
- ii. Direct the respondent to waive off the delay payment interest levied so far.
- iii. Direct the respondent to pay a sum of Rs. 5,00,000/- as cost of litigation.

**D. Reply by respondent:**

The respondent by way of written reply made following submissions

12. 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 complainant is unjustified, misconceived and without any basis.
13. 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.
14. That the relationship between the complainant and the respondent is governed by the flat buyer's agreement dated 28.08.2011 executed between them. It is pertinent to mention herein that the instant complaint is alleging delay in delivery of possession of booked a unit. However, the complainant is concealing the fact has been a wilful

defaulter since the beginning, not paying due installments on time as per the payment plan opted at the time of execution of agreement.

15. That in terms of clause 21 of the flat buyer agreement, the delivery was subject to timely payment of the installments towards basic sale price.
16. 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 various sanctions from the departments.

17. 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 complainant. Under clause 22 of the agreement, the respondent is 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 complainant being aware, having knowledge and having given consent of the above-mentioned clause/terms of flat buyer's agreement, is now evading from contractual obligations inter-alia from the truth of its existence and do as not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainant is also estopped from the duly executed contract between the parties.

18. 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.

19. 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 and roads etc. However, the state government failed to provide the basic amenities due to which the construction progress of the project was badly hit.
20. 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") 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 activities. 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.

21. 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 led to a situation of scarcity of the sand and other materials derived from the stone crushing activities, directly affecting the construction schedules and activities of the project.
22. 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 project.
- 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. A large number 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 the respondent had to suffer huge loss which resulted in delayed timelines. Despite the best efforts, the ground realities hindered the progress of the project.

23. That the respondent has made huge investment 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, but 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.

24. 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:**

25. 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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 allottee and the real estate agents under this Act and the rules and regulations made thereunder.*

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

**F. Findings on the objections raised by the respondent:**

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

26. 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 .....*"

27. 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** and followed in **Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017**, 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.

28. While considering the issue of maintainability of a complaint before a consumer forum/commission in the face 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.
29. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within the 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 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act**

30. 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."*

31. 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."*

32. 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.III Objection regarding force majeure conditions:**

33. 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 allottees of the project. But all the pleas advanced in this regard are devoid of merit. The subject unit was allotted to the original allottee on 02.06.2011 and the same was endorsed in favour of complainant vide endorsement sheet dated 06.03.2013. So, the events taking place such as holding of commonwealth 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 allottee has already paid more than total basic sale price of allotted unit. Thus, the promoter-respondent cannot be given any leniency based on aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrong.

**G. Entitlement of the complainant for refund:**

**G.I Direct the respondent to refund the entire amount of Rs. 1,95,46,624/- along with interest @18% p.a. from date when payment was made till its actual realization.**

34. The project detailed above was launched by the respondent as residential complex and subject unit was allotted to the original allottee namely Smt. Akshi Mittal on 02.06.2011. A flay buyer's agreement was executed between the original allottee and the respondent with regard to the allotted unit on 28.08.2011. But it was endorsed in favour of complainant vide endorsement sheet dated 06.03.2013, providing details with regards to 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 to complete the project and offer possession of the unit. That period has admittedly expired on 28.02.2015. It has come on record that against the total sale consideration of Rs. 2,06,04,998/-, a sum of Rs. 1,91,96,118/- has already been paid against the allotted unit.

35. The complainant is a subsequent allottee and has entered into the shoes of original allottee vide endorsement dated 06.03.2013 i.e., before due date of handing over of possession 28.02.2015. Keeping in view the fact that the allottee-complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.
36. The due date of possession as per agreement for sale as mentioned in the table above is **28.02.2015** and there is delay of more than 4 years 01 months 15 days on the date of filing of the complaint i.e., 12.04.2019.
37. The occupation certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in *Ireo Grace Realtech Pvt. Ltd. Vs.*

**Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021**

*“” .... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project.....”*

38. 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*

39. 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). The promoter has failed 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. Accordingly, the promoter is liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

40. This is without prejudice to any other remedy available to the allottee including compensation for which he may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
41. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 1,91,96,118/-with interest at 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 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

**G.II Direct the respondent to waive off the delay payment interest levied so far.**

42. The allottee-complainant submitted that the respondent has raised premature demands. thereby asking amount payable for installments against construction milestone that were actually not achieved. On the other hand, the respondent alleged that it is the complainant who has been defaulting in making timely payments. The authority observes that



none of the parties have placed anything on record to support the rival contentions. Therefore, as per section 2(za) of Act of 2016, 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.

**G.III Direct the respondent to pay a sum of Rs. 5,00,000/- as cost of litigation.**


43. The complainant is seeking relief w.r.t compensation in the aforesaid relief, Hon'ble Supreme Court of India in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (supra)*, held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant may approach the adjudicating officer for seeking the relief of compensation.

**H. Directions of the Authority:**

44. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i. The respondent is directed to return the amount received by him i.e., Rs. 1,91,96,118/- to the complainant with interest at 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 from the date of each payment till the actual date of refund of the amount.
- ii. A period of 90 days is given to the respondent to comply with the directions of the authority and failing which legal consequences would follow.
45. The complaint stands disposed of.
46. File be consigned to the registry.

  
(Vijay Kumar Goyal)  
Member

  
(Dr. KK Khandelwal)  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 25.07.2022**