BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint bearing no.		3534/2021, 3552/2021, 3528/2021, 3532/2021, 3526/2021,3544/2021, 3545/2021, 3541/2021, 3542/2021, 3555/2021, 3535/2021,3543/2021, 3554/2021, 3553/2021, 3530/2021, 3537/2021, 3523/2021, 3527/2021, 3533/2021, 3540/2021
Date of decision	:	29.09.2022

	MRG Infrabuild LLP Previously known as MRG Infrabuild Private Limited R/o: Unit no. 110, First floor, Best Sky Tower, Netaji Subhash Place, Pitampura, New Delhi-110034	**Complainant**
	Versus	
1.	M/s Maxworth Infrastructure Private Limited R/o: Flat No. 203, S/F Block –G2C, Pocket -2 Sector -18-B Dwarka, New Delhi-110078	**Respondents**
2.	Murliwala Realcon Private Limited R/o: Flat no. 104, Urban Greens, Plot no. 6A, Sector 39, Gurgaon, Haryana-122001	

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri. Ashok Sangwan	**Member**
Shri. Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Sh. Harshit Goyal (Advocate)	Complainant
Sh. Shankar Wig (Advocate)	Respondent no.1

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

A. Unit and project related details

2. The complaint case bearing no. 3534/2021 detailed above is being taken as a lead case in order to determine the controversy between the parties. 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 tabular form. Since common questions of fact and law are involved, so all the 20 cases are being taken up together by the authority and are being disposed of by this common order. The following 20 cases are being taken up together as all these belongs to project "City Residencies" and the issues are similar in nature.

Project Name: - "City Residencies", Sector 10 A, Gurgaon
Possession clause:- Developer will based on its present plans and estimates and subject to all just exceptions, contemplates to give/ offer possession of the unit to Buyer(s) **within 36 months/ 3 years from the date of commencement of construction of that particular tower where buyer(s) unit is located (with a grace period of 6 months),** subject to Force majeure events or governmental action/inaction or due to failure of Buyer(s) to pay in time the price of the said unit along with other charges and dues in accordance with the schedule of payments or any other activity of buyer(s) deterrent to the progress of the Project

Common details: -
RERA Registration no.- 252 of 2017 dated 09.10.2017
(Registered at Panchkula)
Project area: 2 acres
Nature of project: Residential complex
Commencement of construction- Not placed on record
Total sale consideration- Rs. 10,36,00,000/- [for all 20 units]
Amount paid- Rs. 3,19,94,753/- [for all 20 units]
Occupation certificate- Not obtained
Offer of possession- Not offered

Complaint no.	Unit no	Date of agreement	Due date of handing over of possession	Total sale consideration	Amount paid
3534/2021	A- 301 Area- 1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3552/2021	D-903 Area- 1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.17,21,423/-
3528/2021	A-101 Area- 1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3532/2021	D- 202 Area- 1600 sq. ft	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3526/2021	D-104 Area- 1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3544/2021	B-701 Area- 1200 sq. ft.	14.09.2018	14.03.2022	Rs.42,00,000/-	Rs.14,15,000/-
3545/2021	B-801 Area- 1200 sq.	14.09.2018	14.03.2022	Rs.42,00,000/-	Rs.14,15,000/-

	ft.				
3541/2021	A-401 Area-1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3542/2021	A-501 Area-1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3555/2021	D-103 Area-1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3535/2021	D-301 Area-1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3543/2021	D-602 Area-1600 sq. ft.	20.09.2018	20.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3554/2021	C-904 Area-1200 sq. ft.	20.09.2018	20.03.2022	Rs.42,00,000/-	Rs.14,23,330/-
3553/2021	C-901 Area-1200 sq. ft.	14.09.2018	14.03.2022	Rs.42,00,000/-	Rs.14,15,000/-
3530/2021	D-201 Area-1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3537/2021	A-302 Area-1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-
3523/2021	D-101 Area-	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-

	1600 sq. ft.				
3527/2021	B-802 Area-1200 sq. ft.	14.09.2018	14.03.2022	Rs.42,00,000/-	Rs.14,15,000/-
3533/2021	C-204 Area-1200 sq. ft.	14.09.2018	14.03.2022	Rs.42,00,000/-	Rs.14,15,000/-
3540/2021	D-304 Area-1600 sq. ft.	14.09.2018	14.03.2022	Rs.56,00,000/-	Rs.16,75,000/-

B. Facts of the complaint:

3. That the complainant is an allottee of the project namely "City Residences" situated at sector 10A, Gurugram being developed by the respondents being developer and landowner of the project respectively.

4. That on 14.12.2013, the respondents entered into development agreement and in pursuant to that respondent no 1 who is a developer had acquired development rights over 2 acres of the City Residences project land.

5. That the real estate project 'City Residences' is a residential group housing colony situated at Village Kadipur, Sector 10A, Gurugram comprised of 2 BHK and 3BHK Apartments divided into 4 Blocks i.e., Block A, Block B, Block C and Block D along with amenities of parking space, shopping area, community facilities, green area, play area for children, parks and many more features duly prescribed in the brochure.

6. In the year 2018, the representatives of the respondents approached the complainant and after personal meetings with Sh. Amarjeet Dhillon and Sushil Kaudinya, its directors, the complainant made part payment for

purchase of 20 apartments, including unit no. 101, Block-A in the project in question leading to execution of buyer's agreement on 14.09.2018 with an assurance of timely delivery of the possession of the project in question by 30.06.2019.

7. That in response to the personal meetings and part payment of the sale consideration, the respondents allotted an apartment bearing no 0301, on 3rd floor located in Block A measuring 1600 sq. ft at City Residences, Gurugram in the name of the complainant.

8. That according to clause 14 of the buyer's agreement, the respondents were liable to deliver the possession of the booked unit within a period of 36 months from the date of start of construction of the particular Tower in which the flat was located (Block A) with a grace period of 6 months. The construction of Block A commenced long before the date of registration of buyers agreement. Accordingly, the due date of delivery of possession is taken as 30.06.2019 which is mentioned as Date of receiving occupation certificate in the terms and conditions stated in schedule 1 of buyer's agreement. However, the respondents have failed to fulfil their obligation under clause 14 of the buyer's agreement and section 11 (4) (a) of the Real Estate (Regulation and Development) Act, 2016 till date.

9. The complainant had opted for construction linked plan duly mentioned in schedule i of the buyer's agreement, According, to the prescribed payment plan, the complainant was liable to pay in following manner:

a) On Application for Booking: Rs 5,00,000/-

b) Within 30 days of Booking: Rs 11,75,000/-

c) At the time of offer of possession or receiving of occupation certificate: Rs 39,25,000/-

10. That the complainant had already paid Rs 16,75,000/- out of the total agreed sale consideration Rs 56,00,000/- as and when demanded by the respondents. It is pertinent to note that the complainant had booked 20 units together in the project and made a consolidated payment of Rs 3,20,00,000/- in respect of all booked units.

11. That the complainant does not want to withdraw from the project in question and is ready and willing to accept possession of the booked unit and to make payment of the balance sale consideration on the date of offer of possession by the respondents as agreed in Schedule I of the buyers agreement.

C. Relief sought by the complainant:

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

    i. Direct the respondents to deliver the lawful and valid possession of the booked unit along with occupation certificate and register the sale deed in the concerned sub registrar office in favour of the complainant.

    ii. Direct the respondents to pay delay possession charges at the prescribed rate of interest to the complainant for the period of delay in delivery of possession of the booked unit.

13. No reply on behalf of respondent no. 2 was received despite due service and as such is being proceeded against ex parte.

D. Reply by respondent no. 1:

14. The answering respondent by way of written reply made the following submissions:

15. That apartment buyer agreement was executed between the parties prior to the act of 2016. So, neither the complainant has any cause of action against the respondent, nor the complaint filed is maintainable. Even otherwise, the complainant is estopped from filling the complaint by its act and conduct.

16. That in view of clause 37 of buyer's agreement, the complainant has no locus standi to file and maintain this complaint before the authority.

17. That as per clause 51 of the buyer's agreement in the event of any dispute between the parties, the matter was required o be referred to arbitration. Hence, in view of that stipulation the complaint filed before the authority is not maintainable.

18. That the complainant has not approached the authority with clean hands and suppressed the true facts. Hence, the complaint filed is liable to be dismissed.

19. That on the basis of the license bearing no. 23 of 2016 dated 21.11.2016 issued by DG, Town and Country Planning, Haryana, an affordable group housing project over land measuring 5.519 acres situated in Sec 89, Gurugram was being developed by the respondent builder along with land owners of the project, launched in year 2017 leading to collection of Rs.4.5 crores as application and allotment money from about 170 customers.

20. That in the same year the complainant approached the respondent builder and sought to take over the project by taking its development rights.

21. That after performing due diligence with regard to all the aspects, a term sheet was prepared between them on 13.08.2018 detailing the terms and conditions on which the project was to be transferred to the complainant. It was agreed that Rs.1100 per sq. ft. of the built-up area would be the

consideration for the transfer of the development rights'. It was further agreed between the parties that the sanctioned FSI of the project was approximately 5,08,750 sq. ft. and a token amount of Rs. 11,00,000 as advance was given by the complainant to respondent-builder for the said transfer. It was also agreed that the entire consideration of approximately Rs. 55,96,25,000/- along with GST would be given to the respondent M/s Maxworth on the date of registration of the land in the name of the complainant and transfer of development rights in its favour.

22. That it was further agreed by another condition of term sheet dated 13.08.2021 that M/s Maxworth would take consent and a no objection certificate from all the allotees within 15 days as the complainant did not want the existing allotees or any structure on the land for that matter. It is pertinent to note that the complainant agreed to pay an amount of Rs. 10,00,00,000 till the date of registry inclusive of all the advances, PDCs and other payments as aforementioned, as it was clearly mentioned in clause no 11 of Terms sheet that all the refunds would be made at common place in the present of the complainant. It is also important to mention that complainant made the refund to the allottees from its own current account.

23. That in pursuant to the conditions of the term sheet, an application dated 14.11.2018. was submitted to the office of Director, Town and Country Planning (DTCP) by Maxworth for the Grant of permission for the transfer of license and Change of Developer' in favour of MRG Infrabuild Pvt. Ltd and in principal, approval was accorded by the office of the DTCP on 26.02.2019 subject to certain conditions of deposit of administrative charges, 15% bank guarantee against total realization revenue documents original license etc.

24. That as mentioned earlier and in compliance of the conditions of the term sheet, an amount of Rs. 3,60,00,000/- was to be refunded to the allotees i.e. the answering respondent.

25. That although the complainant has agreed to give an advance of Rs 10,00,00,000 crore in order to facilitate the transition and fructify the deal, but a mutual understanding was developed between the parties due to the limitation of complainant in not being able to directly invest in the project nor being able to purse the application of change of developer in its name. As the both the parties were working towards the finalizing the project and were investing for the settlement of the transaction/deal, they wanted security for performance of their respective obligations. So, resultantly, 20 flats (in a housing society project in Sector 10-A Gurugram of 100% subsidiary of Maxworth, i.e. respondent known as 'Murliwala Realcon') were secured to MRG and in lieu of that Maxworth received a sum of Rs.3,20,000,00/- which on the request of the complainant, was shown as sale consideration. That amount was to be primarily used by Maxworth to refund the monies of erstwhile customers. The 20 flats/units were allotted to the complainant on 28.02.2019. The total consideration of the units was 10.36 crores and out of which Rs.3,20,000,00/- was paid as a stop-gap arrangement and Rs.7.16 crores remained outstanding.

26. That in addition to that, and to comply with the conditions of the in-principal approval of the transfer of license and the 'change in Developer', a loan agreement dated 06.02.2019 for a sum of Rs.1,00,00,000/- was also entered into between the parties. As per mutual understanding, those arrangements were to bind the parties for the timely execution of the deal/transaction.

27. That all obligations of the respondent-builder qua registration of land, 'change of developer', refund of the erstwhile customers, and also the facilitation of the money to be paid to the Land-owners have been duly completed, fulfilled and complied with on time. The land owners had been paid in full to the tune of Rs. 43,18,00,000/- as is buttressed by the CA certificate dated 03.08.2021.

28. That to the utter shock and dismay of respondent, the complainant still lodged a complaint against it and its directors.

29. That till date, the complainant has paid Rs.43,18,34,374 and 11 lacs as advance money towards the agreed total consideration of Rs 55,96,25,000/- as stated above. A legal notice was issued by the respondent to the complainant company for the remaining sum of Rs. 12,66,90,626/- which it had been holding back illegally and un-authorized since the registration of conveyance of the land had already been done in its name.

30. That with respect to the non-payment of balance consideration of Rs.7,16, 00,000/- of 20 flats in Sector 10-A, Gurugram, another legal notice was sent to the complainant by M/s Murliwala Realcon (100% subsidiary of Maxworth), asking for strict adherence of the payment schedule.

31. That in fact, Mr. Amarjeet Dhillon, director of respondent filed a police complaint dated 20.07.2021 against MRG Infrabuild Pvt. Ltd. and its directors stating the correct position of facts and the undue harassment at the hands of the complainant but as a counterblast, the complainant got an FIR no.497 dated 26.07.2021 registered against M/s Maxworth, M/s Murliwala Realcon and their directors under Sections 406 and of IPC.

32. That the complainant has not approached the Hon'ble Authority with clean hands and has concealed the material facts with regard to its own default of

non-payment of Rs. 12.66 crore as per the term sheet and the non- payment of Rs 7.19 crores only with regard to the balance consideration of the 20 units in Sector 10-A project.

33. That the present complaint is a counterblast to the legal notices dated 19.07.2021 and 13.07.2021, for recovery of the afore-stated pending amount due to the answering respondent by the complainant.

34. Because the nature of the understanding between the project and also to obtain the no-objection certificate, and (ii) to bind the parties the timely execution of the deal/transaction. It is submitted that the complainant company, in order to escape from its liability of Rs. 12,66,00,000/- under the 2018 Term sheet agreement, is now raising false claims relying on the buyer agreement for the 20 units by reading the agreement in isolation.

35. That neither there is any cause of action against the respondent, nor any fraud was committed by it. All the monies received from the complainant were utilized with prior knowledge to fructify the takeover of the Sector 89 project, and for the benefit of the complainant itself. There was no dishonest intention on part of the developer.

36. That it is further submitted that the Hon'ble High Court of Punjab and Haryana having Judicature at Chandigarh whilst disposing of CRM M 3500/2021 dated 08.11.2021 had categorically observed that two agreements were executed between the Complainant and in one of the agreement, there was a total sale consideration of Rs 55,96,00,000/- against sale of complete affordable group housing society license out of which the complainant had paid approximately an amount of Rs. 43,00,00,000/- and the balance consideration of Rs. 12,76,00,000/- is pending till date and the respondents are entitled to it but however the complainant with nefarious

instructions is reluctant to pay the same. The complainant had also purchased 20 builder flats from the respondent for a total sale consideration of Rs. 10,16,00,000/- only, out of which a sum of Rs 3,25,00,000/- is paid to the respondent and an amount of Rs. 7,16,00,000/- is outstanding. It is further submitted that the amount of Rs 3,25,00,000/- received in lieu of perpetrated 20 builder flats has already been returned. It is further submitted that as per the observations of the Hon'ble High Court in its order are till date the complainant incurs a liability of 22,76,00,000/- towards the respondent. It is further submitted that the Respondent is entitled to an additional difference in the sale consideration due to price escalation amounting to Rs 6,00,00,000/- and thus the total amount to which the complainant is entitled comes to Rs 28,76,00,000/- and it is be noted that after the receipt of this entire legitimate sale consideration that the respondent would be under an obligation to deliver the flats of same dimensions and structure in the adjacent project.

37. All other averments made in the complaint were denied in toto.

38. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Even the written submissions made by parties have been considered and perused. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

39. 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 promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

F. Findings on the objections raised by the respondent:

F. I. Objection regarding maintainability of the complaint in the face of agreements/ term sheets dated 13.08.2018/13.08.2021:

The respondent has alleged that the complainant having breached the terms and conditions of the agreement and contract by defaulting in making timely payments. Further the above-mentioned contention is supported by the builder buyer agreement executed between both the parties. Clause 3 provides that the buyer shall make all payments in time without any reminders from the developer and further agrees that the payments on due dates as set out in annexure shall be made in a time and manner specified therein. Secondly it is pleaded on behalf of the respondent that it being a developer entered into collaboration agreement with the landowners of the project namely Affordable Group Housing project spread over 5.519 acres situated in Sec 89, Gurugram and Obtained license bearing no. 23 of 2016 dated 21.11.2016. That project was launched in the year 2017 and a sum of Rs.4.5crores was collected from 170 customers as application and allotment money. The complainant approached in the year 2017 and sought to take over the development rights of that project leading to preparing a term sheet dated 13.08.2018 between them and agreeing to certain terms and conditions mentioned in it vide annexure R3. Even an application dated 14.12.2018 was submitted in the office of DTCP Haryana for grant of permission for transfer of license and change of developer in favour of the complainant and which was accorded in principle vide annexure R4. Though both the parties were working towards that direction but wanted security for due performance of their respective obligation. So, that lead to securing 20 flats in the project and the answering respondent on a request

of the complainant received a sum of Rs.3.2 crores from it. That amount was not received towards allotment of the units and rather the same was to be used by the answering respondent to refund the monies of its erstwhile customers. That was only a stop gap arrangement and Rs.7.16 crores remained outstanding against the complainant as detailed in annexure R5.

Thus, the complainant has paid only Rs.43,18,34,374/- and Rs.11 lacs as advance money towards the agreed sale consideration of Rs.55,96,25,000/- and still involving the respondents in civil as well as criminal litigation leading to filing of a case bearing FIR no. 497 dated 26.07.2021 against them u/s 406 of Indian Penal Code. But the observations of the Hon'ble High Court while dealing with their bail application on 08.11.2021 (R-12) vindicate their stand with regard to validity of agreements between the parties and the amount due against the complainant.

The authority has perused the pleadings as well as documents placed on the file on the above-mentioned issues by both the parties. It is evident from a perusal of the documents placed on the file by the respondent that a project by the name of affordable group housing project situated in Sec 89 on the basis of license bearing no. 23 of 2016 was being developed by the respondents and the complainant sought to take over the same leading to preparing/agreeing to two term sheets dated 13.08.2018 [Annexure R/3] and 13.08.2021 setting out certain terms and conditions with regard to their fulfilment and obligations of both the parties. It has also come on record that on the basis of the application dated 14.11.2018 submitted to DTCP by the respondent builder for grant of permission, for transfer of license and change of developer in favour of the complainant was approved in principle vide annexure R4 dated 26.02.2019. Though certain obligations were to be performed by the parties, but it has come on the record that the

complainant is an allottee of 20 flats for Rs.10.36 crores and out of which Rs.3.2 crores were paid to the answering respondent. The details in this regard are available in annexure R5 placed on the file by the answering respondent. It is pleaded by it that thought it received Rs.43,18,34,374/- and Rs.11 lacs against total sale consideration of Rs.55,96,25,000/- but the complainant illegally held back the remaining amount leading to civil as well as criminal litigation. But when it is evident that the complainant is an allottee of 20 units of the respondent builder and paid about one third of the total sale consideration, then it is far the promoter to prove otherwise. There may be some other deal between the parties but the authority is to consider the apartment buyers agreement entered int between the parties on 14.09.2018 wherein terms and conditions of allotment of the unit its sale price, dimensions of the unit, the amount received and due date of its possession have been mentioned. The defence of the respondent builder as set up in the written reply would have been more probable and creditworthy if the pleas taken in it would have been mentioned in the buyer's agreement itself. But no such plea as taken in the written reply finds mention in the buyer's agreement. Thus, the version of respondent taken in the written reply to averments of the complainant is afterthought and is not tenable. Thus, the complaint filed by the complainant seeking possession of the allotted unit alongwith delay possession charges is very much maintainable. Consequently, it has every locus standi to file and maintain the complaint before this authority.

F.II Objection regarding complainants is in breach of agreement for non-invocation of arbitration.

The respondent has raised an objection that the complainant has not invoked 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:

> *"Clause 51: "That all disputes arising out of this Agreement between the parties shall be adjudicated by arbitration in accordance with the Arbitration & Conciliation Act, 1996. The Buyer(s) has agreed that...Business Head of .....or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted with similar duties. There will be no objection by Buyer(s) to nay such Appointment on the ground that the arbitrator is Developer's employee or that he has dealt with matter to which the agreement relates or that in the course of his duties as a company employee, he has expressed his views on all or any of the matters in dispute. The venue of Arbitration shall be Delhi."*

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 complainants, 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 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 Complainant and the Builder cannot circumscribe the*

jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

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."

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 their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act,1986 and Act of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has

the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily

G. Findings regarding relief sought by the complainant:

G.1 Direct the respondent to pay delay possession charges at the prescribed rate of interest to the complainant for the period of delay in delivery of possession of the booked unit.

Admissibility of delay possession charges:

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

> ***Section 18: - Return of amount and compensation***
>
> *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*

41. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. 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 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.

42. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

43. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter.

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 fulfilling 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 apartment 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.

Admissibility of grace period: The respondent promoter has proposed to handover the possession of the unit within 36/3 months /years from the date of commencement of construction of that particular tower where buyer(s) unit is located (with a grace period of 6 months) subject to force majeure events. The grace period of 6 months is allowed due to force majeure events. Therefore, the due date of possession comes out to be 14.03.2022.

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

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

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:

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

44. 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.

45. 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., 29.09.2022 is @ 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.

46. 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;"*

Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 8% + 2% i.e., 10% per annum by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

47. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14 of the buyer's agreement executed between the parties on 14.09.2018, the developer proposes to hand over the possession of the apartment within 36/3 months /years from the date of commencement of construction (with a grace period of 6 months) subject to force majeure events. The date of commencement of construction of the project has not been placed on record therefore in absence of date of construction due date is calculated from the date of execution of builder buyer's agreement with grace period of 6 months is allowed so the possession of the booked unit was to be delivered on or before 14.03.2022. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 14.09.2018 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and

responsibilities as per the buyer's agreement dated 14.09.2018 to hand over the possession within the stipulated period.

48. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the respondent has not been applied for the occupation certificate and same has not been received yet from the competent authority Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession till the date of actual handing over of the possession or offer of possession plus two months after obtaining occupation certificate whichever is earlier.

49. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession charges at prescribed rate of interest i.e. 10% p.a. w.e.f. due date of possession till the date of actual handing over of the possession or offer of possession plus two months after obtaining occupation certificate whichever is earlier as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act of 2016.

G.2 Direct the respondents to deliver the lawful and valid possession of the booked unit along with occupation certificate and register the sale

deed in the concerned sub registrar office in favour of the complainant.

There is nothing on the record to show that the respondent has applied for OC of the above-mentioned project. So, in such a situation no direction can be given to the respondent to handover the possession of the subject unit, as the possession cannot be offered till the occupation certificate for the subject unit has been obtained.

H. Directions of the authority:

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

i. The respondent is directed to pay the interest at the prescribed rate i.e. 10% per annum for every month of delay on the amount paid by the complainant in all the twenty cases from due date of possession till the date of actual handing over of the possession or offer of possession plus two months after obtaining occupation certificate whichever is earlier.

ii. The arrears of such interest accrued from due date of possession till the date of order by the authority shall be paid by the promoter to the allottees 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 allottees before 10th of the subsequent month as per rule 16(2) of the rules.

iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iv. The rate of interest chargeable from the complainant/allottee by the promoter in each of the case, in case of default shall be charged at the prescribed rate i.e., 10% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

v. The respondent shall not charge anything from the complainant which is not the part of buyer's agreement.

51. This decision shall mutatis mutandis apply to twenty cases mentioned in para 2 of this order.

52. Complaint's stand disposed of.

53. True certified copies of this order be placed in the case file of each matter.

54. Files be consigned to registry.

(Sanjeev Kumar Arora) Member

(Ashok Sangwan) Member

(Vijay Kumar Goyal) Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.09.2022