BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**5654 of 2019**
Date of filing complaint:	**20.11.2019**
Date of decision :	**29.11.2022**

1. 2.	Sh. Bhupinder Singh S/o Sh. Jaspal Singh Chadha Smt. Harneet Chadha W/o Sh. Bhupinder Singh **R/O**: House no. H-901, Pilot Court, Essel Towers, MG Road, Gurugram-122002	**Complainants**
	Versus	
	M/s Athena Infrastructure Limited **Regd. office:** F-60, Malhotra Building, 2nd floor, Connaught Place, New Delhi-110001, Second and 448-451, Indiabulls House, Udyog Vihar, Phase-V, Gurugram-122001	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Sh. Rajan Gupta (Advocate)	**Complainants**
Sh. Rahul Yadav (Advocate)	**Respondent**

ORDER

1. The present complaint has been filed by the complainant/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 allottees 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 64 of 2012 dated 20.06.2012 valid till 19.06.2023
	Name of the licensee	M/s Athena Infrastructure Private Limited M/s 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	27.02.2013 (As per page no. 33 of complaint)	
7.	Date of execution of flat buyer's agreement as per the version of the complainant	27.08.2013 (As per page no. 40 of complaint) ***Note-*** The complainants filed a copy of buyer's agreement but the same is not signed by the respondent and on the other hand, complainants on page no 5 of complaint submits that the buyers' agreement was executed between the parties on 27.08.2013.	
8.	Date of execution of flat buyer's agreement as per the version of the respondent.	26.05.2017 (As per page no. 24 of reply)	
9.	Unit no.	A-184 on 18th floor, tower A (As per page no. 28 of reply)	
10.	Super Area	3350 sq. ft. (As per page no. 28 of reply)	
11.	Payment plan	Subvention scheme payment plan (As per page no. 07 of reply)	
12.	Total consideration	BSP- Rs. 2,50,55,000/- (As per page no. 28 of reply)	
13.	Total amount paid by the complainants	Rs. 2,61,72,012/-	
		Amount paid by complainants Rs. 41,36,272/- (As alleged by the complainants on page 05 of complaint)	***Amount paid by IHFL*** Rs. 2,20,35,740/- (As alleged by the complainants on page 05 of complaint)

14.	Pre-EMI paid by respondent	Rs. 1,33,81,505/- (Liable to pay till offer of possession of the unit)
15.	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.)*
16.	Due date of possession	27.02.2017 (Calculated from the date of the agreement i.e.; 27.08.2013 + grace period of 6 months) ***Grace period is allowed***
17.	Occupation Certificate	06.04.2018 (As per website of DTCP)
18.	Offer of possession	07.06.2018 (As per page no. 59 of complaint)
19.	Request for withdrawal prior to filing complaint but after offer of possession	30.08.2018 (As per page no. 63 of complaint)

B. Facts of the complaint:

3. That the respondent-company, an associate company of Indiabulls launched residential project under the name & style of "Enigma" at Sector-110, Gurugram, comprising of premium luxury apartments in the year 2012.

4. That it spent huge amount of money on the launch of the project to fleece the buyers and assured the interested buyers that it was a dream project of the company as well as buyers and would be completed within a period of 3 years. The complainants, being simple persons, believed the promises & assurances of the respondent company and invested all their savings with the hope to get a dream house within a period of 3 years.

5. That they booked an apartment in above mentioned project by submitting an application dated 08.12.2012 along with a sum of Rs. 5,00,000/- vide cheque no. 345358 dated 08.12.2012 drawn in favour of the respondent-company. The said application form was supplied to them by it and in said form too, it was specifically written that the construction of the building/apartment would be completed within a period of 3 years. However, clandestinely, it was mentioned that said period of 3 years would be reckoned from the date of execution of the apartment buyer's agreement.

6. That formal letter of allotment dated 27.02.2013 was issued by it allotting apartment no. 184 with super area admeasuring 2570.67 sq. ft. in block no. A on 18th floor with 2 covered basement parking space for a

total cost of Rs. 2,50,55,000/- calculated at the rate of Rs. 7479.10/- per sq. ft.

7. That after payment of booking amount of Rs. 5,00,000/-, the complainants made payment of Rs. 15,00,000/- each vide cheque no.s 345359 & 424840 dated 14.01.2013 drawn on HDFC Bank Ltd. and further made payment of Rs. 3,18,136/- each vide cheque no.s 424843 and 529526, dated 19.02.2013 drawn on HDFC Bank Ltd. As such, they made payment of Rs.41,36,272/- to the respondent-builder within two months of the booking.

8. That apart from receiving the aforesaid amount from the complainants, the respondent also received Rs. 2,20,35,740/- through FT-IFSL dated 04.04.2013 drawn on Axis Bank from its another associate company Indiabulls Housing Finance Ltd. on the basis of some loan agreement got executed by the respondent company with the complainants by fraud & inducement. As such, within a period of three months of the date of booking, a total sum of Rs. 2,61,72,012/- was received by the respondent against the consideration of allotted unit and whereas, as mentioned above, the total cost of allotted unit as per apartment buyer's agreement was Rs. 2,50,55,000/-.

9. That the apartment buyer's agreement was executed between the parties on 27.08.2013 i.e. after a period of more than 8 months of the date of booking and by that time as explained above, almost the entire amount of sale consideration was paid. The reason of delay was only to prolong the

period of completion of the project. The respondent-company in the application form mentioned clandestinely that the project would be completed within a period of 3 years from the date of execution of apartment buyer's agreement and intentionally delayed the execution of agreement. That clearly shows that the intention of the respondent from the very beginning was to cheat the complainants. As such, at the most, the respondent was under a legal obligation to complete the project within a period of three years from the date of execution of the apartment buyer's agreement i.e. up to 26.08.2016 and handover the physical possession of the allotted unit to them.

10. That despite having received the almost the entire of amount sale consideration, it failed to complete the project within contractual period of three years and to fulfil its promise of timely delivering the project.

11. That vide letter dated 07.06.2018, it informed them that the occupation certificate of the allotted unit has been received and raised demand of Rs. 27,45,087/- and further demand of Rs. 25,46,268/- towards club charges, electricity charges, maintenance charges etc.

12. That since it failed to deliver the possession of the allotted unit within the contractual period as per the application form and apartment buyers agreement, the complainants contacted the officials of respondent and informed that they were no more interested in the allotted unit and prayed for the refund of the amount paid along with interest and compensation. They also sent an email dated 30.08.2018 to the

respondent reiterating that since it has failed to fulfil its promise to handover the possession of the allotted unit as per the terms and conditions of the agreement between the parties and thus, asked it to refund the amount invested by them along with interest and compensation. However, till today it has failed to return the hard-earned money of the complainants and is continuously harassing them.

13. That the complainants are entitled for refund of amount paid by them along with interest @ 24 % from the date of payment till realization and compensation to be determined by the authority. The respondent be further directed to settle the loan account/amount with its sister concern i.e. Indiabulls Housing Finance Limited and otherwise, it be directed to refund the loan amount paid for the allotted unit by Indiabulls Housing Finance Limited i.e. Rs. 2,20,35,740/- along with interest @ 24 % from the date of payment till realization and compensation.

C. Relief sought by the complainants:

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

i. Direct the respondent to refund the amount of Rs. 41,36,272/- paid by the complainants to the respondent-builder till date along with interest at the rate of 24% p.a.

ii. Direct the respondent to settle the loan amount paid by its sister concern i.e., Indiabulls Housing Finance Limited of Rs. 2,20,35,740/- along with interest @ 24% from date of payment till realization.

D. Reply by respondent:

The respondent by way of written reply made the following submissions

15. 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 it.

16. That the complainants looking into the financial viability of the project and its future monetary benefits voluntarily approached the respondent and showed interest to provisionally reserve a unit in the project to be developed by it. Thereafter, the complainants after fully satisfying themselves with the facts and conditions of the licenses, zoning plans and approved building plans signed the application form(s) and subsequently executed a flat buyer's agreement.

17. 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 shall be adjudicated through the arbitration mechanism as detailed therein. In view of above section 49 of flat buyer's agreement, it is humbly submitted that, the dispute, if any, between the parties is to be referred to arbitration.

18. That the complaint pertains to a unit bearing no. A184 booked by the complainants in the project of the respondent i.e., "Indiabulls Enigma" for which an agreement dated 26.05.2017 was signed by both the parties. It is pertinent to mention herein that the instant claim of the complainants is further falsified from the very fact that they have in their complaint alleged delay in delivery of possession of the provisionally booked unit. However, factually, there is no delay in handing over the possession to the complainants. The respondent in terms of the buyer's agreement

offered possession to the complainants are as such, the very basis of the present complaint with respect to delivery of the unit is false & misleading and hence is liable to be dismissed.

19. That the complainants from the very beginning were aware that the period of delivery as defined in the application form was subject to the time as defined in the application form to commence from execution of the buyer's agreement. It is submitted that as per clause 21 of the application form, it was agreed that the possession of the unit would be delivered within the stipulated time computed from the execution of the apartment buyer's agreement. Clause 21 of the application form reads as:

> *"The Company shall endeavour to complete the construction of the said building/apartment within a period of 3 (three) years from the date of execution of the Apartment Buyer's Agreement....."*

The reading of the aforesaid clause clearly shows that the time period for delivery of the unit was subject to execution of the apartment buyers' agreement and not before. The apartment buyer's agreement was executed on 26.05.2017 and as such the possession was to be offered on or before 25.05.2020. However, the respondent offered the possession to the complainants on 07.06.2018 which is well within the stipulated time agreed between the parties.

20. That the subject unit was booked by the complainants under subvention scheme payment plan till possession and wherein they availed a loan facility of Rs. 2,20,35,740/- from financer and entered into a tripartite

agreement. In arriving to an arrangement, it was agreed that the builder would assume the liability on account of interest payable by the borrower to the financer during the period be referred to as the "Liability Period" i.e., till the date of issuance of offer for possession by the builder. Accordingly, it paid to the financer an amount of Rs. 1,33,81,505/- towards pre-Emi interest in terms of the tripartite agreement, details of which are mentioned below:

Co. code	3234
Co. Name	Athena Infrastructure Ltd.
Project Name	Enigma
AGREEMENT NO	HHLGRG00143889
Customer Name	BHUPINDER SINGH CHADHA
Subvention Current Status	Refund
Subvention End	6-Jun-18
Refund Date (IHFL) Ch No. 005927	11-Sep-18
Flat No./Unit. No	A184
Disburse amount	22,035,740
Refund Amount	22,035,740
Total for FY-2013-14	2,778,641
Total for FY-2014-15	2,919,736
Total for FY-2015-16	2,919,736
Total for FY-2016-17	2,313,753
Total for FY-2017-18	2,093,395
Apr-18	178,122
May-18	178,122

Total for FY-2018-19	356,244
Total interest paid till date	13,381,505

21. That the respondent in terms of the buyer's agreement, on 07.06.2018 offered the possession to the complainants and called upon them to take possession of the unit after making payment of the remaining outstanding amount due against it. However, the complainants instead of taking possession of the unit informed the respondent that owing to their difficulty and non-availability of funds, they were not in a position to take the physical possession of the unit as such, requested for cancellation of the allotment vide letter dated 30.08.2018.

22. That they have filed the present complaint alleging delay in handing over possession of the unit and have prayed for refund with interest. However, they have failed to place on record any such document to substantiate their said claim/allegation. They breached the terms of the tripartite agreement entered for the unit and made a request for cancellation of the booking, and deduction/ forfeiture was done by the respondent in terms of the buyer's agreement.

23. That the complainants were well aware of the fact that as per the agreed terms of the tripartite agreement and in the event of cancellation of the booking by them, the entire amount advanced by the financer was to be refunded by the builder i.e. the respondent. The relevant portion of clause 8 of the tripartite agreement is reproduced as below:

"That if the Borrower fails to pay the balance amount representing the difference between the loan sanctioned by IHFL and the actual purchase price of the flat/residential apartment, or in the event of death of the Borrower or in the event of cancellation of the residential apartment for any reason whatsoever the entire amount advanced by IHFL will be refunded by the Builder to IHFL forthwith. The Borrower hereby subrogates all his rights for refund with respect to the said residential apartment in favour of IHFL....."

24. That in a recent order dated 20.07.2021 passed by the Authority in ***complaint bearing number 87 of 2019 titled as "Sh. Dhiraj Chawla & Sadhna Chawla Vs. M/s. Godrej Premium Builders Pvt. Limited"***, it observed that its view as *"if the complainants by their sweet will opted to withdraw from the project, then the respondent are entitled to deduct/forfeit the amount as per Agreement"*. Similarly, in the present complaint after being offered possession of the booked unit, the complainants acting on the own will and volition and requested the respondent to cancel their allotment of the subject unit. The said cancellation was due to complainants' own financial condition and not due to any fault on part of the respondent and as such, the deductions/ forfeiture are to be as per the buyer's agreement terms which were agreed upon by them.

25. That the complainants breached the terms of the tripartite agreement and failed to make their EMI due to financer and informed it about their intent of cancelling the unit. The financer in terms of clause 10 of the tripartite agreement and vide letter dated 31.08.2018 wrote to the respondent giving its NOC for cancellation of allotment and asked the respondent to make refund of the loan amount availed by the

complainants which included principal outstanding amount, interest, and other charges etc. As such, it had to refund an amount of Rs. 22,035,740/- to the financer due to cancellation of the unit.

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

27. 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 those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

28. 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 allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> **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.

29. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors." SCC Online SC 1044 decided on 11.11.2021 and followed in M/s Sana Realtors Private Limited & others V/s Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** and wherein it has been laid down as under:

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the*

distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

30. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matters detailed above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the amount paid by the complainants.

F. Findings on the objections raised by the respondent:

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

31. The respondent has raised an objection that the complainants have not invoked arbitration as per the provisions of flat buyer's agreement which contains a provision regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the application form:

"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 ....."

32. The respondent contended that as per the terms & conditions of the buyer's agreement 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 the 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.

33. 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. 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 complainants 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."*

34. 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 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

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

G. Entitlement of the complainants for refund:

G.I Direct the respondent to refund the amount of Rs. 41,36,272/- paid by the complainants to the respondent till date along with interest at the rate of 24% p.a.

35. Admittedly, the project detailed above was launched by the respondent as a residential complex and the complainants were allotted the subject unit in tower A on 27.02.2013 against a total sale consideration of Rs. 2,50,55,000/-. It has come on record that they paid a total sum of Rs. 2,61,72,012/- to the developer. Out of amount so paid, an amount of Rs. 2,20,35,740/- was paid by the IHFL i.e., the financer on behalf of the complainants and the rest of the amount was paid by them from their own sources.

36. There is a dispute with regard to date of execution of agreement inter-se parties. The complainants on the one hand placed a buyer's agreement dated 27.08.2013 on record and submitted that the said document was intentionally not signed by the respondent-builder to delay the benchmark of due date of handing over of possession. As the that document, the possession clause is to be read from date of signing of agreement whereas on the other hand, the respondent placed reliance on agreement dated 26.05.2017 to show the due date of possession. The authority is of considered view that though the buyer's agreement is alleged to be executed between the parties on 26.05.2017 but that document came into existence after a delay of 4 years from date of more than 100% payment made by the allottees to the builder. That seems to be an unsavoury situation when they have already paid more than 100%

of sale consideration within less than two months of the allotment i.e., by 04.04.2013. So, in this way, the respondent builder received a sum of Rs. 2,61,72,012/- against sale price of Rs. 2,50,55,000/- of the allotted unit from the complainants. Thus, in such a situation, they have no option but to sign the buyer's agreement at a later stage in order to save their money paid against the allotted unit. Moreover, it is the version of the allottees from the very beginning that the buyer's agreement was executed by them at the time of allotment and the same was not signed by the promoter. It kept them waiting for a number of years and continued to receive payments against the allotted unit. So, all these facts point out to the only conclusion that the buyer's agreement was signed between the parties at the time of allotment or thereafter after a gap of 8 months. If the same would not be executed at that time as alleged by the respondent-builder, then there was no occasion for it to raise periodical demands including the loan raised by the allottees to pay the remaining sale consideration against the allotted unit.

37. Therefore, there the due date of handing over of possession in the instant case is to be calculated from date of agreement i.e., 27.08.2013 detailing the terms and conditions of allotment, total sale consideration of the allotted unit and its dimensions, etc. A period of three years along with grace period of six months is allowed to the respondent and that period has admittedly expired on 27.02.2017.

38. The complainants requested the respondent before filing the complaint for withdrawal from the project vide email dated 30.08.2018. The due date of possession as per agreement for sale as mentioned in the table above comes to 26.05.2017 and the allottees filed this complaint on 20.11.2019 seeking refund of the paid-up amount after the offer of possession of the allotted unit being made on 07.06.2018, on the basis of

occupation certificate dated 06.04.2018. Thus, in such a situation, it has been argued on behalf of the respondent that the complainants withdrew from the project only after they were offered possession of the allotted unit and as such are not entitled to seek refund of the paid-up amount.

39. It is observed by the Authority that the complainants requested the respondent even before filing of the complaint for withdrawal from the project. Vide letter dated 30.08.2018, they requested the respondent to refund the amount as due to delay in handing over of the possession. However, it is observed that the said request was made only after offer of possession dated 07.06.2018 was made to them of the allotted unit.

40. 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 but the allottees have been requesting the promoter for refund of their amount after offer of possession was made to them. The request of the allottees met with deaf ears and promoter failed to refund the amount.

41. The due date of possession as per agreement for sale as mentioned in the table above is 27.02.2017. The allottees in this case filed this application/complaint on 20.11.2019 after possession of the unit was offered to them on 07.06.2018 after obtaining occupation certificate by the promoter.

42. The right under section 18(1)/19(4) accrues to the allottees 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 allottees have 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 them, it impliedly means that they 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 allottees' interest for the money they have paid to the promoter is protected accordingly and the same was upheld by 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 (Supra)*** and wherein it was observed as under:

> *25. The unqualified right of the allottees 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 allottees, 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 allottees/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 allottees 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

43. 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 allottees as per agreement for sale under section 11(4)(a). This judgement of the Supreme Court of India recognized unqualified right of the allottees 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 allottees have failed to exercise that right although it is unqualified one. They have to demand and make their intentions clear that they wishe to withdraw from the project. Rather tacitly wished to continue with the project and thus made them entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottees 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 allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

44. In case allottees wish to withdraw from the project, the promoter is liable on demand to them 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 allottees have to make their intentions clear to withdraw from the project and a positive action on their part to demand return of the amount with prescribed rate of interest. If they have not made any such demand prior to receiving occupation certificate and unit is ready, then impliedly they have agreed to continue with the project i.e. do not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and allottees 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 ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.(Civil appeal no. 5785 of 2019)*** wherein 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 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 (Supra).***

45. Some of the admitted facts of the case are that the complainants vide letter dated 27.02.2013 were allotted a unit bearing no. A-184 on 18th

floor in tower "A" having super area of 3350 Sq. ft. by the respondent-builder in its project known as "Indiabulls Enigma", Sector-110, Gurugram for basic sale consideration of Rs. 2,50,55,000/-. Though the complainants paid part of the sale consideration against the allotted unit to the tune of Rs. 41,36,272/- but the remaining amount of Rs. 2,20,35,742/- was paid by the financer to the respondent-builder and that too, within less than two months form the date of allotment i.e., by 04.04.2013. So, in this way, they paid a total sum of Rs. 2,61,72,012/-. Keeping in view the aforesaid circumstances, that the respondent builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority. But in the case in hand, the allottees instead of taking possession of the allotted unit have moved for withdrawal from the project and seeking refund of the paid-up amount with interest. It is well settled that an allottee cannot be forced to take possession of allotted unit. This is the situation in the case in hand, wherein after receipt of request of cancellation of the allotted unit from the allottees on 30.08.2018, the forfeiture was done in terms of buyer's agreement. The respondent has also paid to the financer against the loan amount received on behalf of the complainants pre-EMI to the tune of Rs. 1,33,81,505/-. But there is nothing on record to show that after acceptance of that request, the complainants were sent any amount by way of refund either in full or after deduction of 10% of the basic sale consideration of the allotted unit. However, keeping in view the matrix of the facts detailed above, the allottees opted to withdraw from the project

after receipt of its occupation certificate and offer of possession vide letter dated 07.06.2018. So, they would be entitled to refund of the paid-up amount after deduction of 10% of the basic sale price of the unit as per the settled law. Even the Authority also framed a regulation in this regard known as Haryana Real Estate Regulatory Authority (Forfeiture of earnest money by the builder) Regulations, 2018, providing as under-

> *"5. AMOUNT OF EARNEST MONEY*
>
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"*

46. So keeping in view the above-mentioned facts and legal situation, the respondent-builder is directed to refund the amount received by it from the complainants after deducting 10% of the basic sale consideration of the unit being earnest money within 90 days from the date of this order along with an interest @ 10.35 % p.a. on the refundable amount, from the date of surrender i.e. 30.08.2018 till the date of realization of payment.

G.II Direct the respondent-builder to settle the loan amount paid by its sister concern i.e., Indiabulls Housing Finance Limited of Rs. 2,20,35,740/- along with interest @ 24% from date of payment till realization.

47. The aforesaid unit was booked under subvention scheme and as per terms agreed between the parties, the respondent-builder was under an obligation to make payment of pre-EMI till offer of possession. It is submitted by the respondent-builder that it has already paid an amount of Rs. 1,33,81,505/- towards pre-EMI. However, there is nothing on record to show that the amount of Rs. 2,20,35,740/- received by the respondent builder from the financer as loan against the allotted unit has been returned or not. It was agreed upon between the parties and the financer that till the offer of possession of the allotted unit, the respondent-builder would pay pre-EMIs to the financer and the amount of Rs. 1,33,81,505/- has admittedly been paid up to date. When on the basis of request received from the allottees on 30.08.2018, the allotted unit is stated to have been cancelled, then the respondent-builder is also obligated to return the amount of Rs. 2,20,35,740/- to the financer and the remaining amount to the allottees though after deduction of 10% of the basic sale price.

H. Directions of the Authority:

48. 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-builder is directed to pay an amount of Rs. 2,20,35,740/- to the financer of the complainants i.e., Indiabulls Housing Finance Limited.

ii. The respondent-promoter is also directed to refund the amount paid by the complainants to the tune of Rs. 41,36,272/-, to them after

deducting 10% of the basic sale consideration of the unit being earnest money along with an interest @ 10.35 % p.a. on the refundable amount, from the date of surrender i.e., 30.08.2018 till the date of realization of payment.

iii. A period of 90 days is given to the respondent-respondent to comply with the directions given in this order and failing which legal consequences would follow.

49. Complaint stands disposed of.

50. File be consigned to the registry.

Sanjeev Kumar Arora
(Member)

Ashok Sangwan
(Member)

Vijay Kumar Goyal
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

29.11.2022