BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	6254/3831 /2019
Date of filing complaint:	11.12.2019
First date of hearing:	20.02.2020
Date of decision	21.04.2023

	Sh. Naresh Arora R/O: 537, Sector-7, Gurgaon	Complainant
VERSUS		
	Experion Developers Pvt. Ltd. R/O: F-9, First Floor, Manish Plaza-1, Plot No. 7, Mlu Sector 10, Dwarka, Newdelhi 110075	Respondent

CORAM:	
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Naresh Arora	Complainant
Sh. Nishant Jain (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 provisions of

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

2. ADD CONVEYANCE DEED IN TABLE BEFORE GIVING ORDER FOR SIGNING

A. Unit and project related details

3. 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 of the project	"Heartsong", Sector-108, Gurugram
2.	Nature of the project	Residential Group Housing colony
3.	DTCP License no.	38 of 2010 dated 14.05.2010 Valid till 13.05.2022
4.	Name of Licensee	M/s S.K.N Developers Pvt. Ltd. M/s K.S.N Real Estate Developers
5.	Registered / not registered	113 of 2017dated 28.08.2017 valid upto 27.08.208
6.	Unit no.	B3/0304
7.	Super Area	1758 sq. ft.
8.	Date of builder buyer agreement	28.05.2013
9.	Possession clause	***10.1*** Subject to terms of this clause Subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in

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		default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 months from the date of signing of this agreement, subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of 180 days, for unforeseen and unplanned project realities
10.	Due date of possession	28.05.2016 (Disallowing grace period)
11.	Total sale consideration	Rs. 1,07,72,770/-. [As alleged by the complainant)
12.	Total amount paid	Rs. 11,14,38,471 /- [As alleged by the complainant)
13.	Occupation certificate	02.03.2017 (Page 23 of reply)
14.	Offer of possession	03.03.2017 [Page 50 of complaint]

B. Facts of the complaint:

4. That the project of the respondent " Heartsong " in Sector 108, Gurugram, was being advertised by the respondent – builder. The complainant being interested in the project the complainants decided to explore if an original allottee was willing to transfer the provisional allotment. Shri Vivek Kumar R/o C-11/95, Sector - 3,

Rohini, New Delhi- 110085 who was provisionally allotted apartment No. B3/0304 having approximate Sale Area of 1758 Sq. Ft. who was desirous of transferring his unit was contacted and a deal of finalised for transfer. The Respondent having charged an amount of Rs. 1,48,147 / - as administrative charges, transferred the provisional allotment in the name of the complainant on 18.02.2013.

5. That there after the complainants paid all the instalments as per demand from the respondent before entering into an Apartment Buyer Agreement . The buyer's agreement was executed between the parties on 28.05.2013 for a total sale consideration of Rs. 1,07,72,770/- which was inclusive of Car Parking Charges, EDC, IDC, Community Building Furnishing Charges, and security deposit for community building and Maintenance as per schedule - I of the Agreement. That as per clause 10.1 of the agreement, the possession of the apartment was to be given in 36 months from the date of this agreement and the due date comes out to be 28.05.2016.

6. The letter of offer of possession was given to the complainants on 03.03.2017. However, at the time of final payment the respondent adjusted an amount of Rs. 6,282/- as delayed interest which was not in line with the interest payment provision for delayed possession as per RERA since the registration of Apartment took place after RERA was implemented in the state of Haryana. That the complainants were asked to make the payment upfront before inspecting the apartment. The complainants in good faith and believing that all items and amenities promised in the agreement have been provided in the apartment/ common spaces etc. made

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the final payment and cleared all the dues with reservation to confirmation of Area, compensation for delayed period and accounting of payments made on lump sum basis.

7. That the possession of the apartment was given to the complainants on 11.06.2017 with acknowledgement of confirmation of fittings. and lightings in the apartment and car parking space with specific mention that the construction of work in the project is going on and all the common facilities /amenities will be in place shortly. The complainants took the possession on 11.06.2017, it is now more than two years but a number of common facilities/ amenities at this project has not been completed as per terms and conditions of the agreement and no account is provided for items/facilities paid on lump sum basis. The complainants continue to convey to the respondent about the deficiencies and are always assured that the work on facilities so deficient is going on and everything will be in place shortly, but it appears that the respondents will never provide the services/amenities incomplete so far.

8. That the prominent deficiencies in the unit / common facilities at the time of taking over possession of the unit and not yet provisioned are listed below:

   A. That on repeated requests of the complainants the respondent had not provided the certificate of project architect to confirm that the final sale area is exactly the same as tentative sale area for which the complainants have been made to make final payment. The 'sale area' in

the agreement was tentative and it was to be determined based upon final measurement of the apartment and calculation of areas under Common Areas after obtaining the Occupation Certificate and in this regard, subject otherwise to the terms in respect of any change in the Sale Area as contained in the agreement the Certificate of the Project Architect was to be final and binding as per Clause 3.1 of the Agreement. The respondent have also not mention i) built up area of the: Apartment, ii) limited common area for individual residential building block and iii) Common areas and facilities for the entire project in the Declaration' as per the requirement of The Haryana: Apartment Ownership Act, 1983 (herein after referred as Apartment Act):

B. As per the calculation done by the complainants, the respondent have artificially inflated the sale area and overcharged the complainants. As per the approved site plan Memo No. 71 753 /JD(BS) /2012 dated 18.09.2012, the "Sale Area" total Sale Area of all residential apartments in the said Project is 12,36,732 Sq. ft. however, basis the unit-wise chargeable Sale Area of all residential apartments against which the total Sale Price is being charged and recovered from the apartment buyers including the complainants is 14,85.218 Sq: ft. which is

20.09% of the actual physical Sale Area being delivered to the buyers including the complainants. Since the maintenance is charged on the sale area basis, the complainants are paying 20.9% extra amount every month from the date of taking over possession on 11.06.2017 and the complainants continue to pay the maintenance on regular basis.

9. That the following external facilities /amenities which are included in the 'Sale Area' of the apartment have not been provided till date and it can be concluded that the Respondent will not provide the same at a future date.

   I. Terrace Garden: -Terrace Garden is included in the 'sale area' and was to be provided on the roof top of the apartment building as per printed material. While taking possession of the apartment, the complainants were assured that it will come up shortly but it appears that the same had been cancelled as neither lift shaft' is extended to the roof top nor the roof construction is of the kind required for roof lop garden. The area of the roof top of the apartment. Building of the complainant is about 1275 Sq. Ft. and when divided by 14 (14 storey building) the share of the area of the complaint comes to 91.07 Sq Fl. Additionally, the expenditure which the respondents could have made to extend the lift to

terrace garden and the special roofing which is a requirement for creating terrace garden had further been curtailed resulting in disproportionate gain to the respondent and loss to the complainants. Thus, the respondent has unfairly gained and the complainants lost on this account' not providing the Terrace Garden and special roofing etc. in violation of the terms and conditions of the agreement.

II. Mail Room:- The apartment building block of the complainants was to have the provision of Mail Room as per agreement and included in the 'sale area' which had not been provided. Tentatively assuming that the area of the Mail Room shall have been about 100 Sq. Ft., the share of the area of the complaints comes 1.79 Sq Ft. (building block having 56 apartments). Thus, the respondent has unfairly gained and the complainants lost on this account by not providing the Mail Room in violation of the terms and conditions of the agreement.

III. Air Handling Unit:- Air Handling Unit , a provision in the modern housing complexes for enhancing the quality of life was required to be provisioned as part of sale area in the apartment. Building block of the complainants but the same had not been provided. Assuming that the dedicated space of a size of about 144 Sq. Ft. for the

equipment installation was to be provisioned, the share of the area of the complaints comes to 2.57 Sq Ft (building. block having 56 apartments). Thus, the respondent has unfairly gained and the complainants lost on this account by not providing the AHU area in violation of the terms and conditions of the agreement.

IV. Refuse Area: Refuse Area was to be provided in the building block of the complainant as per calculation in the sale area and not provided. Taking the area of the Refuse Area to about 36 Sq. Ft., the share of the area of the complaints comes to .64 Sq. Ft. (building block having 56 apartments. Thus, the respondent has unfairly gained and the complainants lost on this account.

V. Pantries : Pantry area was to be provided in the building block of the complainant as provided in the sale area but the same had not been provisioned. Tentatively, taking the Pantry area to about 120 Sq. Ft., the share of the area of the complaints comes to 2:14 Sq. Ft. (building block having 56 apartments). Thus, the respondent has unfairly gained and the complainants lost on this account.

C. The Solar Water Heating System: That as per the provisions of the Approval of revised Building Plans of the Group House Colony vide Memo No. ZP-753/JD(BS)/2012 dated 18.09.2012 Para 17(xii) the respondent is required to make provision of solar water heating system' as per norms specified by HREDA order No. 22/52/05-5P dated 29.07.2005 in force on the date of approval of the project and the same was required to be made operational in each building block before applying for an occupation certificate but the same had not been provided by the respondent and occupation certificate had been granted by the DTCP. The complainant was charged an amount of Rs. 8,087/- along with final instalment for the facility. Thus, the respondent had failed to fulfil the requirement of approval plan and DTCP had filer to carry out their statutory duty by granting OC ignoring the condition of approval. The respondent had unfairly charged Rs 8.087/ from the complaints.

D. The Fire Safety: That as per the provisions of the Approval of revised Building Plans of the Group House Colony vide MemoNo. ZP-753/JD(BS)/2012 dated 18.09.2012 Para 3, the provision of fire safety and firefighting measures is mandatory as per fire safety bye laws but the same had not been completed by the respondent in the housing complex. Only symbolic firefighting equipment's are placed at

designated hydrant points. The main fire water line is deficient of necessary provisions such as pressure gages, hawse pipes and other related fittings etc. Thus, endangering the life and property of the apartment occupiers including the complainants.

E. Community Centre - Operation and Utilisation: That as per the provisions of the Approval of revised Building Plans of the Group House Colony vide Memo No. ZP-753/JD(BS) /2012 dated 18.09.2012 Para 17 (ix), the community centre shall form part of the common areas and facilities of the group house colony as defined in the Apartment Act and given in the 'declaration' submitted by the respondent as per Apartment Act. Such community centre is for the exclusive use of the residents of the group housing colony only whereas the respondents is using most part of the community centre as sales office thus depriving the apartment buyers including the complainants its exclusive enjoyment and also interfering in the privacy of the apartment buyers. The infringement of the right of actual users inot be quantified in direct money terms but the Association of Apartment Buyers already in place should be compensated for deprivation of this facility which is the

property of the association and under forcible utilisation of the respondent for business purpose.

F. Over charging of EDC: As per statement for EDC issued byDTCP, the total amount of EDC payable by the respondent for License No. 38 of 2010. of the project aggregates to Rs.26,55,36,000/-. The said amount is recoverable from the apartment buyers including the complainant proportionately. as per sale area of the project aggregating to 14,85,218 Sq. Ft., resulting in a chargeable EDC charges of Rs. 179 per sq. ft. As against this the respondents charged EDC amount from complainants @ Rs:300/- per Sq. Ft., however, due to pressure from the buyers including the complainants the respondent was forced to reduce the EDC from Rs. 300 / - to Rs. 236 / - per Sq. Ft. in June 2015 and adjusted the excess of Rs. 64/- per Sq. Ft. against the July 2015 instalment demand without any interest payment. The respondent made the said reduction under the false pretext of downward revision in EDC rates, whereas in reality there was no such downward revision by DCP. The complainants have been charged Rs. 57 / - per sq.ft. on this account and the excess amount needs to be returned with. interest.

10. That at the time of registration of the unit /taking over of the possession, the complainant learnt from the 'declaration' bearing.

Vasika No. 14099 dated 19.08.2016 that the respondent had fraudulently overcharged the complainants on a number of items against the provisions of the relevant laws. The illegal gain to the respondent and loss to the complainants are as follows:

a) Car Parking Usage Charges: The respondent had illegally charged an amount of Rs. 3.50,000/- from the complainants for basement car parkin, Car parking spaces was excluded from the 'sale area' in the «Sale Area' definition (Clause No. 1-xiviiil in the agreement to mislead and defraud the apartment buyers including the complainants. Basement is to be used for parking as per Approval of revised Building Plans of the Group House Colony vide Memo No. ZP-753/JD(BS)/2012 dated 18.09.2012 Para 13. Basement parking is common area as per the provisions of Section 3(f) of The Haryana Apartment Ownership Act, 1983. Accordingly, it has been declared as common area in the 'declaration' bearing Vasika No. 14099 dated 19.08.2016. Thus, only option with the builder is to charge such parking spaces under common areas as decided by 'The Hon'ble Supreme Court in the Civil Appeal No. 2544 of 2010, between Nahalchand Laloochand Pvt Lid Vs Panchali Co-operative Housing. Society Ltd: Charging the apartment buyers under anv other name such as 'Car Parking Use Charge' for area

which is already declared as 'common area' is illegal and a fraud on the apartment. buyers including the complainants.

b) Community Building: The respondent has charged an amount of Rs. 1,50,000/-. from each apartment buyer including the complainants under the head 'Community Building Furnishing Charges' (CBFC). As per para 1(xiv) of definitions in the agreement, CBFC includes 'one-time fixed cost' and expenses for furnishing the Community Building. As per para 6(iv) of the declaration bearing Visaka No. 14099 dated 19.08.2016 the value of community building has been fixed at Rs. 8,28.00,000/- against the total amount of Rs. 12.16.50,000/-charged from apartment buyers of 811 units in the project.Thus, charging of Rs. 8,28,00,000/- towards 'one-time fixed cost' i.e. construction of the building of the community centre is illegal and against t provisions of para 17(xxii) of the Approval of revised Building Plans of the Group House Colony vide Memo No. ZP 753/ID(BS)/2012 dated 18.09.2012 and Section 3(3)(a)(jii) ul The Har ana Development and Regulation of Urban Areas Act, 1975 and Section 11 (1)(e) of The Haryana Development and Regulation of Urban Areas Rules, 1976.

11. That the following services have been charged on lum sum basis' from the complainants and no account have been provided for utilisation of amount charged from the complainants by the respondent for these services;

a) ADHOC Charges-FTTH, MDTH, WI-FI, Rs.29,685
Router Charges

b) ADHOC Charges-Solar Power Charges - Rs.9,134
c) ADHOC Charges-ECC/ PHE Connection Charges -Rs. 1,75,824
d) ADHOC Charges-Duel Meter Charges 1700 Rs
e) Community Building Furnishing charges- 47,904

12. Non- Encumbrance: That at para Vi (d) of the "declaration' bearing Visaka No. 14099 dated 19.08.2016 it is declared that the independent units and their percentage of undivided interests in the common areas and facilities and the restricted/limited common areas and facilities appertaining to each independent units are not encumbered in any manner whatsoever on the date of declaration but the respondent has failed to provide documentary evidence for the same. That on the date of registration of declaration the project has to be free of all encumbrances as per Apartment Act. By no providing a certificate to this effect, the complainant is deprived of his right of enjoyment of a property free of all encumbrances.

13. That the only person benefitting from the aforesaid illegal and fraudulent acts is the respondent, inasmuch as, it fraudulently and illegally charged the complainants. for services which cannot be charged legally, services which are deficient in terms of agreement and over charging etc.

14. That the law is that at the time of execution of a contract, meeting of minds of the parties is sine quo non. The Complainants entered into an agreement on 28.05.2013 and entitled for all the facilities/amenities as per agreement and return of amount charged illegally and fraudulently along with return of amount overcharged and compensation for services which cannot be directly valued in money terms. It is well settled law that a party to a contract who suffers the loss must be compensated to the stage as if the contract was completely implemented.

15. That the complainants have diligently discharged all their obligations as per the agreement where's the respondent had failed

to perform its application stipulated in the agreement and it is in breach of the same .The cause of action to file the complaint Is continuing as the respondent had illegally charged for facilities which cannot be charged and failed to develop certain facilities in project as per the terms of agreement.

C. Relief sought by the complainants:

16. The complainants have sought the following relief(s):

    i. Direct the respondent – builder to pay for delay in possession.

    ii. Direct the respondent to declare the exact sale area in place of tentative sale area and regulate the final payment as per the final as built area . and provide certificate of the project architect giving details of built up area and area under common services.

    iii. Direct the respondent to declare i) built up area of the apartment ii) limited common area for individual residential building block and iii) common areas and facilities. before the entire project in the declaration.

    iv.Direct the responded to return the amount paid for inflated sale area by 20.09% which amounts to rupees 20,18,346/- and over charged from the complaints.

    v. Declare other respondent is deficient by not providing terrace garden as per sale area and visual depiction in the brochure on the rooftop of the apartment building of the complainants an order to return of an amount of rupees 5, 20,465/-

    vi.Declare that the respondent is deficient by not providing male room as per sale area in the apartment building of the complainants and order to return of an amount of Rs10,230/-

vii. Declare that the Respondent is deficient why not providing space for air handling unit as per sale area in the apartment building of the complainants and order to return of an amount of rupees14,688/-

viii. Declare that the respondent is deficient by not providing the refuse area 'sale area' In the apartment building of the complainants and order to return of an amount of Rs 3658

ix.Declare that the respondent is deficient by not providing pantries as per sale area in the apartment building of the complainants and order to return of an amount of rupees one to,230

x. Declare that the respondent is deficient by not providing solar water heating system as per approval of revised building plans of the group house colony and direct to return of Rs8,087 charged from the complainants on this account with an interest amount of rupees 2,077 from the date of payment. also to compensate the complainants for not providing this amenity.

xi.Declare that the respondent is deficient by not providing complete fire safety devices/infrastructure and direct the responding to complete the same in specified time frame.

xii. Declare that the respondent is illegally using the community centre as sales office thus depriving the apartment buyers including the complainants of its exclusive enjoyment and direct the respondent to vacate the Community Centre immediately.

xiii. Direct the respondent to provide complete details of payment made to the authorities on account of EDC collected from

the apartment buyers including the complainants unpaid an interest on the excess amount.

xiv. Direct the respondent to return the illegally charged amount of ₹3,50,000/- from the complainants for car parking which is the common area with interest.

xv. Direct the respondent to return illegally charged amount off rupees1,02,096 from the complainants for construction of community building with interest.

xvi. Direct the respondent to provide details of actual spending of the following charges collected from the apartment buyers including the complainants on lump sum basis Adhoc charges FTTH,MDTH WIFI Rs. Voice29,685 ,

adhoc charges solar power charges rupees 9,134

adhoc charges ecc / phe connection Rs. 1,75,824

adhoc charges dual meter charges rupees 17, 100

community building furnishing charges rupees 47, 904

xvii. Direct the respondent to make lump sum payment to the complainants as compensation as shown against each of the services not provided in the project.

xviii.Direct the respondent to make lump sum payment to the registered association as compensation and shown against each of the services for not providing in the project with the terms and condition of the agreement.

xix. Direct the responding to pay compensation of ₹5,00,000 for harassment mental agony and litigation expense of ₹75,000.

xx. Direct the respondent to produce non encumbrance certificate by the concerned Revenue Authority for the land on which the project has come up and other assets of the community.

D. Reply by respondent no. 1:

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

17. That the complainants are allottee of the above-mentioned unit for a total sale consideration of Rs. 39,67,200/- and had applied for allotment of an apartment.

18. The That the present complaint is not maintainable in law or on facts. The provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'Act) and the Haryana Real Estate (Regulation & Development) Rules, 2017 (hereinafter referred to as the "said Rules/Rules") are not applicable to the Project in question. The relevant phase of the project, i.e. "The Heartsong" at Sector-108, Gurugram, Haryana, in which the apartment in question is situated (hereinafter referred to as the "said Project/Project") is neither covered under the Act nor is the said Project of the Respondent registered with this Hon'ble Regulatory Authority.

19. That the relevant phase of the Project in which the apartment in question is situated is not an ongoing project as per definition provided under the Rules as the Respondent has applied for Occupation Certificate for the relevant phase of the project in which the apartment in question is situated on 16.08.2016 and received occupation certificate on 02.03.2017 i.e. prior to applicability of said Act/Rules in the state of Haryana. This Hon'ble Authority does

not have the jurisdiction to entertain and decide the present complaint. The present complaint is liable to be dismissed on this ground alone.

20. That the respondent has offered possession of the apartment to the complainants vide Notice of Possession dated 03.03.2017 and as per agreed terms of Agreement respondent has paid an amount of Rs. 25,491/- on account of delay possession compensation to the complainants. The complainants have accepted the delay possession compensation paid by the respondent, executed the conveyance deed bearing registration no. 691 dated 08.06.2017 and have taken possession of the apartment.

21. That after more than two years of taking possession the complainants cannot seek any reliefs as detailed in the complaint. The present complaint is time barred and cannot be entertained on this ground alone. The present complaint is liable to be dismissed on limitation ground.

22. That the present complaint is not maintainable as the respondent has obtained occupation certificate and offered possession of the apartment in question to the complainants, vide Notice of Possession dated 03.03.2017, before applicability of said Act/Rules. The RERA Act/Rules are not applicable retrospectively. The agreed terms of the Agreement executed between the parties or allotment of the apartment in question cannot be modified by any law/rules which came into effect after completion of the transaction of allotment of the apartment.

23. That prior to purchase of the apartment from its original allottee the complainants had carried out elaborate and detailed enquiries

with regard to the nature of sanctions/permissions obtained by the respondent for the purpose of undertaking the development/implementation of the residential project referred to above. The complainants were very well aware about the terms of completion of Project, definition of Sale Area, the amenities/facilities to be provided in the Project and the delay possession compensation amount as the same were described in the Booking Application Form endorsed in favour of the complainants and signed and submitted by the original allottee of the apartment in question. The Complainants took an independent and informed decision, uninfluenced in any manner by the Respondent to purchase the apartment in question.

24. That the respondent has completed construction of the Project even after facing several difficulties. There were significant defaults in the payments by several allottees who investors were and stopped payments of due instalments due to sluggish real estate market. Several allottees who were investors defaulted in timely payments and demanded their money back without having any reason for the same.

25. The respondent awarded construction contract to M/s Kazstroyservice Infrastructure India Pvt Ltd. in April 2013 and in terms of agreement it was agreed to complete the construction of the project within 24 months i.e. till April 2015.The contractor delayed the construction due to its internal financial hardships, the respondent provided additional financial help to the contractor, only with an intention to deliver the Apartment/project within time However, during the construction phase of the project the contractor of the project i.e. Kazstroyservice Infrastructure India

Pvt Ltd. became bankrupt, due to which the respondent suffered huge losses, i.e. Rs. 16 Crore approx., and for a long-time construction of the project was stopped. It took lots of time to appoint new contractor and complete the construction of the project. In spite of losses in the contract the respondent has put additional equity from its own pocket to get the project completed on time for the benefit of allottees of the project. Further it is submitted that the respondent has not even charged any escalation in the price of the apartment.

26. That the DCP Chandigarh issued licences no. 38 of 2010 for the development of the Projects i.e., Annexure R-5, Memo approving the building plans dated 18.09.2012 is Annexure R-6. It is respectfully submitted that the bonafide of the Respondent are further evident from the fact that the Respondent has completed construction of all the residential towers of the project in question.

27. That it is evident from the entire sequence of events, that no illegality can be attributed to the Respondent. The allegations levelled by the complainant qua the respondent are totally baseless and do not merit any consideration by this Hon'ble Authority.

28. That the present complaint is barred on account of the arbitration clause (clause 26) in the Apartment Buyer's Agreement. Hence, this Hon'ble Authority does not have the jurisdiction to hear and decide the present complaint.

29. That a local commission was appointed vide order dated 22.02.2022 and as per the report of LC the LC does not go into detail regarding the break up of the sale area of the unit.

30. The respondent has not charged for the facilities as claimed by the complainants. After obtaining the occupation certificate sale deed of the unit got registered and possession was also delivered to the complainants and they were fully satisfied regarding area and facilities provided by the respondent .

31. That the respondent has provide al the amenities / facilities / services in the project as per the sanction plans .

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

33. Copies of all the relevant dcumentso have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be denied on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

34. 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

35. 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) The promoter shall-*
>
> *(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.*

36. 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.

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F. Findings on the objections raised by the respondent

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

37. The respondent raised an objection that the complainants have not invoked arbitration proceedings as per application form which contains a provision regarding initiation of arbitration proceedings

in case of breach of agreement. The following clause 64 has been incorporated w.r.t arbitration in the application form:

> *26 Dispute Resolution*
>
> In case of any dispute between the Parties relating. to this Agreement and / or matters arising therefrom including the interpretation and validity of the terms hereof and respective rights and obligations of the Farties hercto, the same shall be adjudicated by arbitration by a sole arbitrator to he mutually appointed by the Parties. The Party willing to initiale arbitration will give a request for arbitration ("Request') to the other Party for the appointment of the arbitrator within 30 (thirty) days of the Request. The arbitration shall be held at at Delhi and shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 and amendments / moditications thereto. The arbitration proceedings shall be in the English language and the Parties shall respectively and proportionately bear the costs and expenses of such arbitration unless the arbitrator specifically awards costs. The arbitral award shall be final and binding upon the Parties. The arbitrator shall give reasons in writing for the award.

38. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainant the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the

provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy &Anr. (2012) 2 SCC 506*** and followed in case of ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, Consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. A similar view was taken by the Hon'ble apex court of the land 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** and has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, that the law declared by the Hon'ble Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

39. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within the right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings on the relief sought by the complainants:

G.I Direct the respondent – builder to pay delay possession.

40. The complainant is admittedly the allottees of respondent – builder of a residential unit for a total sum of Rs. 1,07,72,770/-. A buyer's agreement was executed between the parties in this regard on 28.05.2013. The due date for completion of the project was fixed as 28.05.2016 So, in this way, the complainant paid a total sum of Rs. 11,14,38,471 /- against the allotted unit. The occupation certificate of the project was received on 02.03.2017 and the possession was offered to the complainants on 03.03.2017.

41. In the present complaint, the complainants 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*
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> ....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

Clause 10.1 of the buyer's agreement (in short, agreement) provides for handing over of possession and is reproduced below:

> Subject to terms of this clause Subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 months from the date of signing of this agreement, subject to timely compliance of the provisions of the Buyer's Agreement by the

Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of 180 days, for unforeseen and unplanned project realities.

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

43. 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.

44. 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., 21.04.2023 is @8.70%. Accordingly, the prescribed

rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

45. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, 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;"*

46. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

47. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 23 of the buyer's agreement the possession of the subject unit was to be

delivered within 36 months from the date of start of construction. The due date of possession is calculated from the signing of the agreement i.e., 28.05.2013 which comes out to be 28.05.2016.

48. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate is obtained on 02.03.2017 and the same was obtained after the due date of possession. The respondent offered the possession of the unit in question to the complainants on 03.03.2017. The complainant has taken the possession.

49. Accordingly, as such the allottees shall be paid, by the promoter, interest for every month of delay on the amount paid by the complainants from the due date i.e 28.05.2016 till the date of offer of possession plus two months i.e 03.05.2017 .The amount towards delay possession paid if any shall be adjusted in above amount , at prescribed rate i.e., 10.70 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

G.II Direct the respondent to declare the exact sale area in place of tentative sale area and regulate the final payment as per the final as built area and provide certificate of the project architect giving details of built-up area and area under common services.

G.III Direct the respondent to declare i) built up area of the apartment ii) limited common area for individual residential building block and iii) common areas and facilities. before the entire project in the declaration

50. The respondent is directed to provide the documents related to the exact sale area and to declare built up area of the apartment ,

limited common area for individual residential building block and common areas and facilities.

G.IV Direct the responded to return the amount paid for inflated sale area by 20.09% which amounts to rupees 20,18,346/- and over charged from the complaints.

G.V Declare other respondent is deficient by not providing terrace garden as per sale area and visual depiction in the brochure on the rooftop of the apartment building of the complainants an order to return of an amount of rupees 5, 20,465/-

G.VI Declare that the respondent is deficient by not providing male room as per sale area in the apartment building of the complainants and order to return of an amount of Rs10,230/-

G.VII Declare that the Respondent is deficient why not providing space for air handling unit as per sale area in the apartment building of the complainants and order to return of an amount of rupees14,688/-

G.VIII Declare that the respondent is deficient by not providing the refuse area 'sale area' In the apartment building of the complainants and order to return of an amount of Rs 3658

G.IX Declare that the respondent is deficient by not providing pantries as per sale area in the apartment building of the complainants and order to return of an amount of rupees one to,230

G.X Declare that the respondent is deficient by not providing solar water heating system as per approval of revised building plans of the group house colony and direct to return of Rs8,087 charged

from the complainants on this account with an interest amount of rupees 2,077 from the date of payment. also, to compensate the complainants for not providing this amenity.

G.XI Declare that the respondent is deficient by not providing complete fire safety devices/infrastructure and direct the responding to complete the same in specified time frame.

G.XII Declare that the respondent is illegally using the community centre as sales office thus depriving the apartment buyers including the complainants of its exclusive enjoyment and direct the respondent to vacate the Community Centre immediately.

G.XIII Direct the respondent to provide complete details of payment made to the authorities on account of EDC collected from the apartment buyers including the complainants unpaid an interest on the excess amount.

G .XIV Direct the respondent to return the illegally charged amount of ₹3,50,000/- from the complainants for car parking which is the common area with interest.

G. XV Direct the respondent to return illegally charged amount off rupees1,02,096 from the complainants for construction of community building with interest.

G. XVI Direct the respondent to provide details of actual spending of the following charges collected from the apartment buyers including the complainants on lump sum basis Adhoc charges FTTH, MDTH WIFI Rs. Voice29,685,

Adhoc charges solar power charges rupees 9,134

Adhoc charges ecc / phe connection Rs. 1,75,824

Adhoc charges dual meter charges rupees 17, 100

community building furnishing charges rupees 47, 904

G. XVII Direct the respondent to make lump sum payment to the complainant as compensation as shown against each of the services not provided in the project.

G. XVIII Direct the respondent to make lump sum payment to the registered association as compensation and shown against each of the services for not providing in the project with the terms and condition of the agreement.

G. XIX Direct the respondent to pay compensation of ₹5,00,000 for harassment mental agony and litigation expense of ₹75,000.

51. The above-mentioned reliefs from G IV to G XIX being interconnected are being taken up together. The complainant sought relief of refund of amount excess paid to the respondent which they charged for various amenities such as terrace garden, mail room , air handling unit , refuse area , water heating system fire safety , community centre car parking solar water heater , fire system , pantries . To clarify the Local Commission was appointed vide order dated 22.02.2022 and as per the details of a local commissioner report the issue raised by the complainant regarding the amenities it was concluded that that the respondent has not provided the terrace garden. Mail room has been provided in the stilt area of tower as per requirement and specification. Air handling unit , Refuge Area , Pantries have not been provided . Solar Photovoltaic power plant has been installed on the terrace of community building having capacity of 40 KW. . Solar water heater are not installed . Fire system has been installed on the project site

and NOC has been obtained from the department before obtaining occupation certificate . For clarification regarding installation process and layout plan the issue may be referred to the fire department. Hence, the complainant is seeking compensation in the aforesaid reliefs and as decided by Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. 2021-2022 (1) RCR (c) 357***, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses.

H. Directions issued the Authority:

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

i. The respondent is directed to pay the interest at the prescribed rate i.e., 10.70% per annum for every month of delay on the amount paid by the complainants from the due date i.e 28.05.2016 till the offer of possession i.e 03.03.2017

plus two months i.e 03.05.2017 and delayed possession charges paid earlier be adjusted

ii. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70% per annum by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2 (za) of the Act.

53. Complaint stands disposed of.

54. File be consigned to the Registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.04.2023

HARYANA REAL ESTATE REGULATORY AUTHORITY
HARERA
GURUGRAM