HARERA
GURUGRAM

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	1753 of 2022
Date of filing complaint:	10.05.2022
First date of hearing:	02.08.2022
Date of decision :	02.03.2023

Sh. Pramod Arora S/o Sh. Sohan Lal Arora **R/O**: 307 JMD Galleria, 3rd floor, JMD Galleria, Sohna Road, Sector 48, Gurugram- 122018	**Complainant**
Versus	
M/s Athena Infrastructure Limited **Regd. office:** 448-451 Indiabulls House, Udyog Vihar Phase V, Gurugram-122001	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Ganesh Kamath (Advocate)	Complainant
Sh. Rahul Yadav (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the 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 complainant , date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.no.	Heads	Information
1.	Name and location of the project	"Indiabulls Enigma", Sector 110, Gurugram
2.	Nature of the project	Residential complex
3.	Project area	15.6 acres
4.	DTCP License	• 213 of 2007 dated 05.09.2007 valid till 04.09.2024 • 10 of 2011 dated 29.01.2011 valid till 28.01.2023 • 64 of 2012 dated 20.06.2012 valid till 19.06.2023
5.	Name of the licensee	M/s Varali Properties M/s Athena Infrastructure Private Limited
6.	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**
7.	Allotment letter dated	Not placed on record
8.	Date of execution of flat buyer's agreement	11.10.2011 (As per page no. 42 of complaint)

9.	Unit no.	H071 on 17th floor, tower H (As per page no. 45 of complaint)
10.	Super Area	3880 sq. ft. (As per page no. 45 of complaint)
11.	Payment plan	Construction linked payment plan
12.	Total consideration	Rs. 2,19,26,600/- (As per applicant ledger dated 07.05.2019 on page no. 40 of reply)
13.	Total amount paid by the complainant	Rs. 1,92,03,736/- (As per applicant ledger dated 07.05.2019 on page no. 40-41 of reply)
14.	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.)*
15.	Due date of possession	11.04.2015 (Calculated from the date of the agreement i.e.; 11.10.2011 + grace period of 6 months) ***Grace period is allowed***

16.	Occupation Certificate	17.09.2018 (As per page no. 35 of reply)
17.	Offer of possession	07.05.2019 (As per page no. 37 of reply)
18.	Notice for termination	31.05.2014 & 17.06.2020 (As per page no. 30 & 31 of reply)
19.	DPC already adjusted	Rs. 7,22,475/- (As per applicant ledger dated 07.05.2019 on page no. 41 of reply)

B. Facts of the complaint:

3. That the respondent-company i.e. Athena Infrastructure Limited is nothing else except a sham company created by Indiabulls Limited to acquire land parcels. Hence, the respondent-Athena Infrastructure Limited is nothing but a shadow company operating under the direct control, direction and supervision of Indiabulls Limited with vested interests.

4. That on the basis of representations made by developer-company which were widely circulated in newspapers and in other media, the complainant, acting under respondent's misrepresentations and being swayed by the published material as well as all the offers given offered by it, was lured to purchase an apartment/unit admeasuring 3880 sq. ft. for a total consideration of Rs. 2,16,10,200/-, situated at Sector 110, Gurgaon in the scheme known as "Indiabulls Enigma" floated by respondent under their banner.

5. That the respondent committed that the apartment would be ready in a span of three years with a grace period of six months (in case of a very unforeseen situation). It was further represented that being a developer of repute and ethics, it would adequately compensate him in case the project was delayed for any reason and assured that the developer would proceed to obtain occupation certificate/completion certificate for the project from the concerned statutory authority on/before April 2015 and in case of delay, he would be getting a fixed assured amount per month (from May 2015) which would be continued till the time his premises is handed over to him (after project is complete in all sense) without any delay in any circumstances. Accordingly, the complainant purchased the unit vide application dated 22.02.2011.

6. That the complainant was offered a unit on the seventh floor bearing no H-071 having super area of 3880 sq. ft. The complainant asked the respondent's officers about the calculation arrived at in calculating the super area and what would be the exact carpet area of his apartment to which it was assured that his genuine query would be addressed within a period of one month.

7. That after series of follow ups, the complainant was issued a confirmation letter of receipt which specifically mentioned his unit number and area details and was asked to make further payments through demand letters which were satisfied by him and till date he has paid an amount of Rs 1,92,03,736/- towards consideration of allotted unit.

8. That after long follows ups and months of taking place of the transactions, an extremely one-sided builder buyer's agreement (hereinafter, "BBA") was handed over to him for execution after having paid considerable sums. There was precious little he could do to confront the respondent about the one-sided BBA on which, he raised his concerns as regards several unconscionable and unreasonable provisions and clauses of the BBA that placed him in a considerably unfair and disadvantageous position vis-à-vis the dominant position of the respondent. However, instead of addressing his genuine concerns regarding the one-sided BBA, he was laconically and brusquely brushed aside. It was further strange to note that the respondent has changed many terms and conditions which were earlier agreed upon by it and it is pertinent to mention here that the amounts were taken on 22.02.2011 whereas he was made to run from pillar to post for months for the BBA.

9. That the respondent at that relevant point of time represented to the complainant that in case if he refrains from executing the BBA with its existing provisions that were patently unconscionable and went against the interests of all buyers of the project and if they insisted that separate agreement be executed in respect of their unit, then in that event, an unnecessary controversy would be generated amongst the other buyers of the project and therefore, expressed its inability to accommodate his concerns about untenable provisions of the BBA and conveyed to him that he has to execute the already prepared BBA without any modifications and amendments. The respondent even intimidated, coerced and arm-twisted

the complainant and threatened him that it would forfeit the entire amount deposited by him if he failed to sign such BBA.

10. That finally, without any bargaining power at their disposal and under threat of losing the hard-earned money he has already paid, the complainant executed the one-sided BBA on 11.10.2011. While the BBA contained coercive and penal consequences for various events all designed to cause a substantial wrongful loss to the complainant, at the same time, it had been repeatedly assured by the it that the stringent penal covenants contained in the BBA would not be brought into effect/force against him. As far as the complainant is concerned, he had to no option to but to trust the respondent based on the picture portrayed by them.

11. That after deposit of Rs. 1,92,03,736/- in regard to said unit, the complainant kept on following the developer as well as its directors about the fate of the unit and about exact time when its possession would be handed over and other details as to when further documents would be executed by developer, but it always avoided the issue and kept on delaying the matter on false and bogus pleas and excuses.

12. That the respondent admitted the liability of delay penalty and promised to pay the same vide many verbal communications, but till date have not fulfilled the same. Faced with such a situation, the complainant a number of times visited its office for update on the project, but he was never given a true picture of the exact status of the project. He kept on requesting about the pending delay returns also both verbally as well as through many visits,

but it kept on buying time on one pretext or the other. That after due diligence, he visited the office of respondent in May-December 2015 and demanded the possession of his unit, where he was informed that the actual time of possession had passed long by (as was promised possession in April 2015 while he paid the booking amount on 22.02.2011).

13. That to a glaring disregard, the respondent did not honour the commitments made to him and failed to give them the unit in the said project. The respondent was duty bound to handover the possession of the unit in April 2015 as mentioned in the buyer agreement. It was thereafter revealed that the building plans were not approved by Department of Town & Country Planning-Chandigarh when it took amounts from complainant. The same is in gross violation of the license conditions imposed upon developer/respondent. Thus, in 2011 when the complainant paid the booking about for allotment of the unit, no sale of any unit in the project could have been lawfully made by it as they did not possess the necessary approvals that alone could legally empower respondent to sell units in the project.

14. That the Authority may take cognizance of the same and punish the developer and its directors for such illegal acts. The booking of the unit made by respondent in favour of the complainant in 2011, was utter violation of statutory provisions as well as the terms of license for the project. In fact, a specific prohibition was imposed in the license itself in terms of which prohibits the respondent from even advertising for the sale

of any unit/floor area in the said project prior to sanction and approval of the layout plans/building plans for the project which were pending with DTCP.

15. That since the abovementioned times, the complaint has suffered inexplicable ignominy, scorn and disdainful ridicule at the hands of the respondent and his various requests, reminders and entreaties at relevant times have failed to evoke any positive response from it. He visited the office of the respondent several times only to face dejection, contempt and unmitigated disparaging and offensive abuse and snide remarks made by the respondent who questioned why they "were in a hurry etc." Since then, he has only demanded what is due to him and when they were told that the possession cannot be given per the representations made earlier by it. He also demanded the pending returns, the delayed penalty calculated @ 24% of the amounts taken by the respondent till date as well as damages for the loss, suffering, harassment, mental agony and frustration caused to them by the various acts of commission and omission on the part of the respondent.

16. That the respondent has a history of such fraud projects in Gurgaon and has indulged in similar corrupt and devious practices leading to registration of some criminal cases against them. Presently also, there are legal cases pending against it for malafide conduct and mass-scale frauds perpetrated upon many unsuspecting buyers whom they wilfully and fraudulently induced, lured and inveigled into investing in their projects.

17. That further, the developer unscrupulously issued the offer of possession letter on 10.05.2019 where the super area is unilaterally mentioned as 3880 sq. ft. which has no nexus to actual area at site. There is no nexus to super area Vs actual area at site and approx. an amount of Rs. 57,56,457/- was demanded.

18. That the respondent has arbitrarily mentioned the super area vs carpet area of the unit without any rhyme or reason and manipulated the area of the unit at its own whims and fancies. Further, the areas of the individual units have been arbitrarily and whimsically computed but the same absolutely had no nexus with the actual areas including but not limited to confined and open areas of the project and other common areas. The respondent has further sold the car parking illegally to the complainant as well as many other similarly placed innocent customers of the project. It sold/offered car parking separately during relevant times at varying prices.

19. That the aforesaid demands were absolutely illegal, baseless and unreasonable and the same were not liable to be satisfied by complainant. The aforesaid demands of payments were raised by respondent so as to coerce and browbeat the complainant and to mount undue pressure on him so as to make him succumb to the respondent' illegal and unethical acts and to refrain from challenging them.

20. That, thereafter, seeing the delays from respondent's office, when the complainant started following up rigorously for pending delay penalty along with interest and harassment cost, officials of the respondent openly

proclaimed and boasted that they were extremely well-connected bureaucratically and amongst police officials and politicians. They openly stated that concerned officials of Directorate of Town & Country Planning Haryana, Chandigarh including the senior-most officials were on their payroll and it is precisely for this reason that no one would dare to initiate any action against them for their misdeeds including indulging in unauthorized selling of apartments in the project without necessary approvals, changes in super areas, one-sided BBA, delay in completion and handing over of possession etc.

21. That the complainant also explained that had the possession would been given timely, no GST would have been payable. Hence, the liability of GST ought to be borne by the respondent.

22. That the complainant visited the office of the respondent and tried their level best to meet the senior officials but the same was never allowed by CRM (Customer Relation Managers). The complainant demanded their pending money with interest for not fulfilling the promises as made in the BBA dated 11.10.2011. However, it didn't bother to pay any heed to the genuine demands of the complainant. He served the legal notice dated 28.09.2020 and tried for amicable resolution, but the respondent, in high headedness, did not pay any heed and have not replied to the aforesaid notice.

C. Relief sought by the complainant :

23. The complainant have sought following relief(s):

i. Direct the respondent to pay interest for every month of delay at prevailing rate of interest Rs. 18,24,355/- per month.

ii. Direct the respondent not to levy any GST.

iii. Direct the respondent not to include any charges not limited to holding charges, maintenance etc. till the date of actual handover after completing the apartment in all sense.

iv. Direct the respondent not to levy any interest.

v. The charges shall be taken as per carpet area and not super area as the area mentioned in documents has no nexus to the actual area at spot.

D. Reply by respondent:

The respondent by way of written reply made following submissions

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

25. That the present complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The alleged flat buyer's agreement(s) were executed between the complainant and the respondent prior to the enactment of the Act of 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

26. That the complainant looking into the financial viability of the project being developed by the respondent and its future monetary benefits approached the respondent and showed its interest in booking unit in the project being developed by it. The complainant provisionally reserved the subject unit

with a speculative intent with sole purpose of investment and monetary gains out of the said investment. He did his own market research and booked the subject unit on the basis of maximum commercial gains. Since there is a recession in the real estate market, he is levying bald and baseless allegations against the respondent by way of the present complaint.

27. That owing to repeated defaults by the complainant in making clear his dues in timely manner, the respondent issued intimation of termination proceedings dated 31.05.2014 & 17.06.2020, whereby intimating him that in the event he does not make payment of the outstanding balance amount, his provisional reservation in the subject unit would be terminated.

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

29. That the relationship between the complainant and the respondent is governed by the flat buyer's agreement dated 11.10.2011 executed between them. It is pertinent to mention herein that the complainant with malafide intention has not disclosed, in fact concealed the material fact from this Authority that he has been a wilful defaulter since the beginning, not paying its due instalments on time as per the payment plan opted at the time of execution of builder buyer 's agreement.

A

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

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

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

31. That the bare perusal of clause 22 of the agreement would make it evident that in the event of the respondent failing to offer possession within the proposed timelines, then in such a scenario, the respondent would pay a penalty of Rs.5/- per sq. ft. per month as compensation for the period of such delay. The aforesaid prayer is completely contrary to the terms of the inter-se agreement between the parties. The said agreement fully envisages delay and provides for consequences thereof in the form of compensation to the complainant . Under clause 22 of the agreement, the respondent are liable to pay compensation at the rate of Rs.5/- per sq. ft. per month for delay beyond the proposed timeline. The respondent craves leave of this

authority to refer & rely upon the clause 22 of flat buyer's agreement, which is being reproduced as:

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

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

32. That the respondent after completing the construction of the unit/ tower applied for grant of occupation certificate for the tower in question on 17.09.2018 the occupational certificate was received from the competent Authority. The respondent completed the construction of the unit/ tower in question by and before 30.04.2018 as such any delay beyond the said if any cannot be attributed upon the respondent. Subsequent to receiving occupational certificate, the respondent vide its letter dated 07.05.2019 offered possession of the subject unit to the complainant, whereby calling him to take physical possession of his unit after remitting balance outstanding amount due and payable towards the sale consideration of the subject unit.

33. That in terms of the buyer's agreement, under the payment plan opted by the complainant for the subject unit, an amount of Rs. 80,05,851/- is still outstanding, due and payable by the complainant to it.

34. That it is a universally known fact that due to adverse market conditions viz. delay due to reinitiating of the existing work orders under GST regime, by virtue of which all the bills of contractors were held between, delay due to the directions by the Hon'ble Supreme Court and National Green Tribunal whereby the construction activities were stopped, non-availability of the water required for the construction of the project work & non-availability of drinking water for labour due to process change from issuance of HUDA slips for the water to totally online process with the formation of GMDA, shortage of labour, raw materials etc., which continued for around 22 months, starting from February'2015.

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

36. That furthermore, the Ministry of Environment and Forest (hereinafter referred to as the "MoEF") and the Ministry of Mines (hereinafter referred to as the "MoM") had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of kiln which is the most basic ingredient in the construction activity. The MoEF restricted the excavation of topsoil for the manufacture of bricks and further directed that no manufacturing of clay bricks or tiles or blocks could be done within

a radius of 50 kilometres from coal and lignite based thermal power plants without mixing at least 25% of ash with soil. The shortage of bricks in the region and the resultant non-availability of raw materials required in the construction of the project also affected the timely schedule of construction of the project.

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

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

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

b) Moreover, due to active implementation of social schemes like National Rural Employment Guarantee Act and Jawaharlal Nehru National Urban Renewal Mission, there was a sudden shortage of labour/workforce

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

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

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

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

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

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

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

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

41. That the flat buyer's agreement has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 11.10.2011 executed much prior to coming into force of the Act of 2016 and the rules of 2017. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under Act of 2016 has to be in reference to the flat buyer's agreement for sale executed in terms of said Act and said Rules and no other agreement, whereas, the flat buyer's agreement being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA and such agreement as referred herein above. Hence, cannot be relied upon till such time the new agreement to sell is

executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainant .

42. That the complainant being aware, having knowledge and having given consent of the above-mentioned clause/terms of flat buyer's agreement, is now evading from their contractual obligations inter-alia from the truth of its existence and does not seem to be satisfied with the amount of Rs. 7,22,475/- credited in the ledger of the complainant in lieu of delay penalty as per the terms of the BBA.

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

developers/promoters who have started the project around similar time period and have abandoned the project due to such reasons.

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

E. Jurisdiction of the authority:

45. The Authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the

case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.

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

F. Findings on the objections raised by the respondent:

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

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

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

courts in New Delhi alone shall have the jurisdiction over the disputes arising out of the Application/Apartment Buyers Agreement ...."

47. The respondent contended that as per the terms & conditions of the 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, 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 ***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. Further, the arbitration clause in agreements between the complainant and builders could not circumscribe the jurisdiction of a consumer.

48. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the 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** upheld the aforesaid judgement of NCDRC.

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

F.II Objections regarding the complainant being investors:

50. It is pleaded on behalf of respondent that complainant is investor and not consumer. So, they are not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter, if it contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainant is buyer and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress

upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

> *"2(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold(whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."*

51. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainant is allottee as the subject unit allotted to him by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled *as* ***M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

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

52. Another contention of the respondent is that Authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The Authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read

and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017*** which provides as under:

> *119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

53. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and <u>will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion</u>. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

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

F.IV Objection regarding force majeure conditions:

55. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as commonwealth games held in Delhi, shortage of labour due to implementation of various social schemes by Government of India, slow pace of construction due to a dispute with the contractor, and non-payment of instalment by different allottee of the project but all the pleas advanced in this regard are devoid of merit. The subject unit was allotted to the complainant and as per provisions of agreement, its possession was to be offered by 11.04.2015. So, the events taking place such as holding of common-wealth games, implementation of various schemes by central govt. etc. do not have any impact on the project being developed by the respondent. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainant:

G.I Direct the respondent to pay interest for every month of delay at prevailing rate of interest Rs. 18,24,355/- per month.

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

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

57. Clause 21 of the buyer's agreement 11.10.2011 provides for handing over of possession and is reproduced below:

> ***"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..."*

58. Further, it has been clarified that the respondent issued notice for termination dated 31.05.2014 and 17.06.2020 for delay in payment towards consideration of allotted unit by the complainant. However, no cancellation was acceded thereafter.

59. The Authority has gone through the possession clause of the agreement and observes that the respondent-developer proposes to handover the possession of the allotted unit within a period of three years from the date

of execution of agreement. In the present case, the flat buyer's agreement inter-se parties was executed on 11.10.2011; as such the due date of handing over of possession comes out to be 11.10.2014.

60. **Admissibility of grace period:** As per clause 21 of buyer's agreement dated 11.10.2011, the respondent-promoter proposed to handover the possession of the said unit within a period of three years and six months grace period. The said clause is unconditional. The authority is of view that the said grace period of six months shall be allowed to the respondent being unconditional. Therefore, as per clause 21 of the buyer's agreement dated 11.10.2011, the due date of possession comes out to be 11.04.2015.

61. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant 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.*

62. 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.

63. 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., 02.03.2023 is @ 8.70 %. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

64. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
>
> *Explanation. —For the purpose of this clause—*
>
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*
>
> (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

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

66. 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 are 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 21 of buyer's agreement executed between the parties on 11.10.2011, the possession of the subject apartment was to be delivered within a period of three years and six months grace period from date of execution of such agreement. The due date of possession is calculated from the date of execution of buyer's agreement i.e.; 11.10.2011, which comes out to be 11.04.2015. The respondent has offered the possession of the allotted unit on 07.05.2019 after obtaining occupation certificate from competent Authority.

67. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate has been obtained from the competent Authority on 17.09.2018 and it has also offered the possession of the allotted unit on 07.05.2019. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is to be given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 11.04.2015 till the expiry of two months from the date of offer of possession or till actual handing over of possession, whichever is earlier. The respondent-builder has already offered the possession of the allotted unit on 07.05.2019, thus delay possession charges shall be payable till offer of possession plus two months i.e. 07.07.2019.

Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 11.10.2011 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 11.04.2015 till offer of possession plus two months i.e. 07.07.2019; at the 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.

68. The respondent through its counsel stated at bar that a compensation/penalty on account of delay has already been credited to the account of complainant. The Authority observes that as per applicant ledger dated 07.05.2019 on page no. 41 of reply, an amount of Rs. 7,22,475/- has been credited to the account of complainant as delay possession charges. Therefore, out of amount so assessed on account of delay possession charges, the respondent is entitled to deduct the amount already paid towards DPC.

G.II Direct the respondent not to levy any GST.

69. The Authority laid reliance on judgement dated 04.09.2018 in ***complaint no. 49/2018, titled as Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.*** passed by the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that where the

possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. The aforesaid order was upheld by Hon'ble Haryana Real Estate Appellate Tribunal, Chandigarh in ***appeal no. 21 of 2019***. The relevant para is reproduced below:

> *"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements."*

70. In the instant complainant, the due date of possession comes out to be 11.04.2015 which is prior to the date of coming into force of GST i.e. 01.07.2017. In view of the above, the Authority is of the view that the respondent/promoter is not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreement.

71. The Authority is of further view that in case of late delivery by the promoter only the difference between post GST and pre-GST should be borne by the promoter. The promoter is entitled to charge from the allottees the applicable combined rate of VAT and/or service tax. However, it further directs that the difference between post GST and pre-GST shall be borne by the promoter.

G.III Direct the respondent not to include any charges not limited to holding charges, maintenance etc. till the date of actual handover after completing the apartment in all sense.

72. The complainant has not specified anything in this regard in his complaint. However, it is a well settled principle of law that the respondent shall not charge anything which is not part of buyer's agreement. Further as far as holding charges are concerned that shall not be charged by the promoter at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

73. Further, the respondent shall not demand the advance maintenance charges for more than one (1) year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than one (1) year.

G.IV Direct the respondent not to levy any interest.

74. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the

promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. Therefore, in case of any default by the complainant, it shall be liable to pay interest at the equitable rate as charged by the respondent.

G.V The charges shall be taken as per carpet area and not super area as the area mentioned in documents has no nexus to the actual area at spot.

75. The complainant submitted in his complainant that the respondent has manipulated the area of the unit on its whims and fancies, and the individual units have been arbitrarily computed and the same has absolutely no nexus with the actual area including but not limited to confined and open area of the project and it has been selling car parking separately during relevant times at wearing prices. However, no arguments in this regard has been advanced by either of the parties during the course of proceedings. Hence, in such as a situation the aforesaid issue cannot be deliberated upon by the Authority.

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H. Directions of the Authority:

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

    i. The respondent shall pay interest at the prescribed rate i.e. 10.70 %

per annum for every month of delay on the amount paid by the complainant from due date of possession i.e.; 11.04.2015 till the date of offer of possession (07.05.2019) plus two months i.e. 07.07.2019; as per proviso to section 18(1) of the Act read with rule 15 of the rules.

ii. Out of amount so assessed, the respondent is entitled to deduct the amount already paid towards DPC (i.e. Rs. 7,22,475/-).

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

iv. 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 % 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.

v. The respondent is directed to issue a fresh statement of account after adjusting delay possession charges within 15 days from date of this order.

vi. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period and thereafter payment of such dues, if any, the respondent shall handover the possession of the allotted unit within next two months.

vii. The respondent is directed to pay arrears of interest accrued, if any, after adjustment in statement of account; within 90 days from the date of this order as per rule 16(2) of the rules.

77. Complaint stands disposed of.

78. File be consigned to the registry.

V.l —

(Vijay Kumar Goyal)
Member
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 02.03.2023

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