1BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**2595 of 2021**
Date of filing complaint:	**26.07.2021**
First date of hearing:	**11.08.2021**
Date of decision :	**27.07.2023**

	Sh. Gulshan Kumar S/o Late Sh. M.S. Ranga **R/O**: 102 Basera Apartment, GH-78, Sector-56, Gurugram- 122001	**Complainant**
	Versus	
1.	M/s Advance India Projects Limited **Regd. office:** 232B, 4th floor, Okhla Industrial Estate, Phase-III, New Delhi-110020	
2.	M/s Landmark Apartments Private Limited **Regd. office:** A 11, Chittaranjan Park, new Delhi-110019	**Respondents**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
APPEARANCE WHEN ARGUED:	
Complainant in person with Ms. Swastika Singh (Advocate)	Complainant
Sh. Harshit Batra (Advocate)	Respondent no. 1
None	Respondent no. 2

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 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.

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.	Particulars	Details
1.	Name of the project	"AIPL Joystreet"
2.	Project location	Sector 66, Village Medawas & Badshahpur, Gurugram, Haryana
3.	Project type	Commercial Complex
4.	Allotment letter	05.05.2016 [As per page no. 32 of complaint]
5.	Unit No.	088, Ground Floor [As per page no. 32 of complaint]
6.	Unit Area	252.52 sq. ft. (super area) [As per page no. 32 of complaint]
7.	Revised unit area	315.39 sq. ft. [As per page 114 of reply]
8.	Increased unit area	62.87 (+ 24.90)
9.	Date of unit buyer agreement	19.08.2016 (As per page 42 of complaint)
10.	Possession clause	**45.** *The company endeavours to hand over the possession of the unit to the allottee within a period* ***of 42 months with a further grace period of 6 months, from 1***

		January 2016 [page 60 of the complaint]
11.	Due date of possession	01.01.2020 ***Grace period of 6 months is allowed***
12.	Total sale consideration	Rs. 81,20,107/- [As per SOA dated 12.08.2021 annexed at page no. 132 of reply by R1]
13.	Amount paid by the complainant	Rs. 75,07,147/- [As per SOA dated 20.03.2021 annexed at page no. 99 of complaint] Rs. 61,47,005/- [As per SOA dated 12.08.2021 at page no. 132 of reply by R1]
14.	Occupation certificate	28.09.2020 [As per page no. 111 of reply]
15.	Intimation of constructive possession	05.10.2020 [As per page no. 114 of the reply]
16.	Reminder letters dated	05.06.2021, 23.07.2021 and 30.07.2021 [As per page no. 124-128 of reply R1]
17.	Pre-termination letter dated	06.07.2021 [as per page no. 129 of reply R1]

B. Facts of the complaint:

3. That the respondent no. 2 is the owner of land admeasuring 3.9562 acres and respondent no. 1 obtained license no.7 of 2008 dated 21.01.2008 for 2.8875 acres and license no. 152 of 2008 dated 30.07.2008 for 1.0687 acres from the Director General, Town and Country Planning, Haryana in respect

of the project land. Thereafter, they entered into a development agreement for setting up of an integrated commercial colony by the name and style of "AIPL JOYSTREET" ("said project") on the said land.

4. That respondents advertised the said project as mixed-use development spreaded over 4 acres, located in Sector 66, Gurugram and would be a joyful mix of high street retail, serviced apartments, office spaces, multiplex, restaurants, food courts, lively boulevards with over 220 shops set across the ground and first floor. It was further represented that the building plans of "AIPL JOYSTREET" has already been approved by the DGTCP vide memo no. ZP-483/AD (RA)/2013/1165 dated 15.01.2014.

5. That in December 2015, Golden Bricks, channel partner of the respondents approached the complainant and it was represented to him that the possession of unit shall be delivered within 42 months from 01.01.2016 with a grace period of 06 months and till the handing over of possession, the respondents at the option of the allottee/complainant could even lease out the unit on his behalf. At the time of booking, the complainant opted for the plan whereby the respondent would lease out the unit on his behalf.

6. That thereafter upon the reassurances and representations by the officials and executives of the respondents, the complainant on 27.01.2016 booked unit bearing no. 88 on the ground floor, admeasuring 23.46 sq. mts. (252.52 sq. ft.) (super area) along with one car parking in the said project ("said unit").

7. That the basic sale price of the unit was Rs. 47,17,074/- [@ Rs. 18,680 per sq. ft.], preferential location charges were Rs. 4,53,273/- [@ Rs. 1,795 per sq. ft.], development charges were Rs. 1,51,512/- [@Rs. 600 per sq. ft.]. The total sale consideration excluding taxes of the said unit was Rs. 53,47,111/-.

8. That after payment of booking amount, 35% of balance consideration was payable within 120 days of booking, another 35% on completion of super structure and balance 30% on offer of possession.

9. That at the time of booking, the complainant paid Rs. 5,00,000/- to the respondent no. 1 on dated 27.01.2016 and thereafter, on 5.05.2016, the respondent no. 1 provisionally allotted said unit and demanded Rs. 14,57,471/- from the complainant under possession link payment plan.

10. That the complainant made further payments of Rs. 7,00,000/- and Rs. 7,57,471/- on 15.05.2016 and 13.06.2016 respectively to respondent no. 1.

11. That on 19.08.2016 when the unit buyer's agreement was executed among respondents and complainant and as per the agreement possession of the unit was to be delivered within 42 months from 01.01.2016, i.e. the possession was to be delivered on 30.06.2019. However, 6 months grace period was also to be provided to the respondent, so the possession of the unit inclusive of the grace period was to be delivered on 01.01.2020. It is pertinent to note that the complainant has no say in the terms of the unit buyer's agreement. The unit buyer's agreement is one-sided and against public policy.

12. That on 29.11.2018, the complainant received an e-mail from the respondent no. 1 stating that the super structure of "AIPL Joy Street" has been completed and demanded Rs. 20,86,169/- which was paid by the complainant on 13.12.2018 vide cheque under receipt of Rs. 12,86,169/- and Rs 8,00,000/-.

13. That the complainant on 29.09.2019, sent an e-mail to the respondent no. 1 informing them that the unit shall be used by him for optical brand and contact lens clinic. The said 42 months (plus 06 months grace period) to grant possession of the unit elapsed on 01.01.2020 and the vacant physical possession has still not been delivered to him. Thereafter, on 06.10.2020, the complainant received an e-mail from the respondent no. 1 stating that occupation certificate for the said project has been received and the same is ready for possession and that he was required to remit the complete payments and formalities by 19.10.2020.

That vide said e-mail dated 06.10.2020, the complainant got to know that the respondents have unilaterally increased the super area of the said unit from 252 sq.ft. to 315.39 sq.ft., i.e., by 25.15%. Further, he was offered only the 'constructive possession'. It is pertinent to note that the unit buyer's agreement has no such clause. Furthermore, icing on the cake was that the respondents demanded further monies amounting to Rs.33,03,668/- which is more than half of the total sales consideration as against what was agreed upon in the buyer's agreement. It also demand other charges amounting to Rs. 4,22,831 and Rs. 93,786/- towards maintenance charges for 1 year and sinking fund.

14. That after unilaterally increasing the total super area (without any increase in the carpet area), the total basic price of the unit was Rs. 58,91,485/- and the total sales consideration stood at Rs. 66,78,383/-. As per the statement of accounts, the total amount that was charged by the respondents for said unit was now Rs. 78,69,948/-.

15. That on 7.10.2020, the complainant wrote e-mail to respondents enquiring about the increase in area and miscalculation of the same. He informed the respondents of his intention to have a Civil Engineer, in the presence of authorised Engineer of the respondents and measure the area of the unit.

16. That further on 9.10.2020, the complainant again wrote an e-mail expressing his grievances regarding increase in super area, charging of maintenance for one year without giving actual physical possession and high possession charges to the tune of Rs. 1,250 per sq. ft. He also sought certified copy of occupation certificate as issued to the respondents specifically highlighting increase of area of unit, and overall increase of area of the project. He also sought details received from Town and Country Planning Department, Haryana.

17. That the complainant protested against the unreasonable and exorbitant possession charges and demand for maintenance charges in advance especially since contrary to the unit buyer's agreement, actual physical possession not being offered and sought waiver of additional charges and time to arrange additional funds. He further raised objected that the earlier e-mails received from respondents did not mention of escalation of area up to such an extent and escalation beyond 10% was contrary to unit buyer's

agreement. Such increase in super area of the said unit by the respondents is unilateral and arbitrary.

18. That clause 9 & 10 of unit buyer's agreement stipulates that the variation can be to the extent of 10 percent, to which if the allottee is not agreeable, he can opt for an alternative unit or the amount with interest shall be refunded to him.

19. That as per the statement of accounts received by the complainant, the following amounts totalling Rs. 39,63,810.12/- has become due on 19.10.2020: (i) Common Area Maintenance Charges Rs 37,961.00; (ii) Sinking Fund: Rs. 55,825.00, (iii) Labour Cess : Rs. 6,545.00, (iv) Infrastructure Augmentation Charges Rs. 5,758.00; (v) Electric Switch-in Station & Deposit Charges Rs 39,845.00; (vi) Sewage/ Storm Water /Water connection Charges : Rs. 4,466.00; (vii) Electric Meter Charges: 9,440.00; (viii) Instalment : On Offer of Possession Rs 33,03,667.12 (ix) Stamp Duty Charges: Rs. 4,65,300.00 (x) Registration Charges : Rs. 35,003.00.

20. That on 20.10.2020, the complainant sent an e-mail seeking grant of extension of time for final payment, which had been arbitrarily escalated. He also stated that he had visited the respondent's office and met with CRM Executive and paid Rs.18,00,000/- vide cheque no. 281434 drawn on Bank of India and received an assurance that he would get more months to pay the balance without charging any interest. .

21. That on 06.11.2020, the complainant paid Rs. 40,159/-, Rs. 8,00,000/- and Rs. 5,19,983/- by different cheques and further paid for the other

additional charges that had been imposed by the respondents by cheques bearing no. 485981 and 485980 (i) Rs 9,440 towards Electric Meter Charges; (ii) Rs4,466 towards Sewage / Storm Water / Water connection Charges; (iii) Rs. 39,845 towards Electric Switch-in Station & Deposit Charges; (iv) Rs.5,758 towards Bank Infrastructure Augmentation Charges; (v) Rs.6,545 towards Labour Cess; (vi) Rs 55,825 towards Sinking Fund; (vii) Rs. 37961 towards common area maintenance charges.

22. That unjustly, and unfairly, the respondents charged maintenance for common area for the whole year in advance, without execution of the tripartite maintenance agreement or even the handing over of the vacant 'actual' possession. Besides the delay, the respondents in their e-mail dated 6.10.2020 stated that the project was ready for possession, however, it has been 7½ months and still possession of the same has not been given.

23. That the respondents have failed to deliver possession timely i.e. within 42 months (+06 months grace period) calculated from 01.01.2016. The possession, if grace period is to be included, should have been delivered on 01.01.2020. However, there has been a delay of more than 1.5 years. The possession has still not been given.

24. That on 20.03.2021, the complainant received statement of account from respondents where total amount due came to be Rs. 80,07,450/- out of which an amount of Rs. 75,07,147/- has been paid. The total sales consideration at the time of booking stood at Rs 53,47,111/- (excluding taxes) and now there has been an increase of approximately 66%. Vide this statement of accounts, the respondent no. 1 also waived the frivolous

interest that was charged from the complainant on account of delay in payment. Thereafter, on 5.04.2021, he received three e-mails from respondent no. 1 stating that some cheques has bounced, because they were 'Stale Cheques'.

C. Relief sought by the complainant:

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

i. Direct the respondents to deliver the actual vacant physical possession of the subject unit in a time-bound manner to the complainant.

ii. Direct the respondents to be restrained from unilaterally increasing the super area of subject unit from 252.52 sq. ft to 315.39 sq. ft. (i.e., beyond the area fixed under the unit buyer's agreement).

iii. Direct the respondents to be restrained from demanding sale considerations towards escalated super area [62.87 sq. ft] which is beyond the area fixed under the unit buyer's agreement.

iv. Direct the respondents to refund all monies charged towards escalated super area of subject unit along with interest calculated at 12% p.a. with half-yearly rests from the date of payment till refund of money.

v. The maintenance charges for the year demanded by respondents in advance be struck down.

vi. Direct the respondents to refund all maintenance charges collected by them from complainant without delivering vacant physical possession or leasing out the subject unit along with interest @ 12% p.a. with half-yearly rests from the date of payment till refund of money.

vii. Direct the respondent to pay Rs. 5 per sq. ft. per month as delay compensation to the complainant as, as per unit buyer's agreement physical possession was to be delivered on or before 31.12.2019,

respondents neither delivered vacant physical possession nor leased out the unit, thereby constituting breach of unit buyer's agreement for the delay in handing over physical possession.

viii. Direct the respondents to pay the complainant pendente lite and future damages (i.e., for the period from filing of this complaint and onwards) @ Rs. 5 per sq. ft. /- per month or at such higher rate to which the complainant may be found entitled.

ix. Direct the respondents to pay interest @12% per annum to the complainant on pendent lite and future damages from date of accrual till date of payment.

x. Direct the respondents to pay a sum of Rs. 1 lakh towards punitive compensation for mental agony, inconvenience and harassment caused to the complainant;

xi. Direct the respondents to pay cost of the complaint in favour of the complainant and against respondent.

26. On the date of hearing, the Authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by respondent no. 1:

27. The respondent no. 1 by way of written reply made the following submissions: -

a. The complainant has not approached the court with clean hands as has nowhere divulged the Authority with the fact that he has been in constant defaults in making good on his part of the obligations. He has approached the Authority with half cooked and manipulated stories is a

grave violation of the doctrine of clean hands Hence, this complaint is liable to be dismissed on this ground alone.

b. The present complaint has been filed in complete and absolute disregard to the procedures prescribed. That the Rule 28 of the Rules 2017 provides for filing of a compliant before the Authority in Form CRA, however, the complainant has filed the present complaint in blatant disregard to the same. Moreover, he does not mention of the details of the claim, jurisdiction and/or cause of action, which are pertinent for the maintainability of a complaint in view of Order VI Rule 11(a) of the Civil Procedure Code and hence, is liable to be dismissed on this ground alone.

c. That the complainant is an investor who had booked the said unit as a speculative investment in order to earn rent from its lease. That even otherwise, he has no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the contractual arrangement between the Parties, as shall be evident from the submissions made in the following paragraphs of the present reply.

d. That the complainant being interested in the real estate development of the respondent no. 1, known under the name and style of "AIPL Joystreet" located at Sector 66, Gurugram, Haryana ("Project") booked a unit vide an application form dated 20.01.2016. He was subsequently, allotted unit no. GF-88, having tentative super area 252.52 sq. ft. Thereafter, an agreement for sale ("Agreement") dated 19.08.2016 was executed between the parties.

e. That at the outset, it needs to be noted that the development of the project has been developed under the licenses no. 7 of 2008 and 152 of

2008, both extended up to 20.01.2025. The project is also registered with the Authority vide registration no. 157 of 2017. The respondents has entered into a development agreement for the development of the project, as was communicated to the complainant at the time of booking and agreement.

f. That the relationship between the parties is contractual in nature and is governed by the agreements between the parties. The rights and obligations of the parties flow directly from the application form and the agreement and is bound by the terms and conditions in the application form and the agreement.

g. That the unit was booked for commercial purposes, as has been agreed by the complainant as well and hence, not for residency. At the time of execution of the agreement, the respondent no. 1 categorically established its right of making any alterations, revisions, modifications or changes in the layout/building plan/drawings as per clause 9 of the agreement. In accordance with the same, the respondent no. 1 proposed changes to the made in the project and consequently, invited objections/suggestions from the complainant vide letter dated 16.11.2019.

h. That at this instance, it is also pertinent to note that the super area at the time of booking of the unit was tentative and could also be finalised upon the completion of construction of the unit. That the same was mutually and categorically agreed between the parties.

i. That upon the revision in the building plan, the objections were invited by the respondent no. 1, however, none were submitted by the complainant. That upon no objections being submitted, the absolute consent of the complainant can be observed. That after such revision, the super area of the unit increased from 252.52 sq. ft. to 315.39 sq. ft.

Accordingly, as per the clause 1.15 of the agreement, the increase in area was to be payable by the complainant.

j. That as per clause 38 of the application form note that the due date for delivery of possession of the Unit was subject to the force majeure conditions, allottee's default and timely payment on his part.

k. That the project was severely affected due to force majeure circumstances beyond the control of the respondent no. 1, inter alia, due to the complete ban imposed on the construction activities in National Capital Region as per the orders of Hon'ble Supreme Court, Environment Pollution (Prevention & Control) Authority for the National Capital Region and National Green Tribunal since 2016 which continued till 2019, from time to time. That these circumstances fall within the ambit of clause 38 of the application form. In this context it is pertinent to note that a construction ban for 1 day results in delay in project between 3 to 10 days, due to various factors like demobilisation of labour, delay in delivery of goods, etc and further, post lifting of the ban, it takes time to get the momentum for construction geared up to its earlier levels. That despite being faced with multiple adversities, the respondent no. 1 completed the construction of the unit without offering any cost enhancements to the complainant and hence, in accordance, with the same, the due date for delivery of possession is liable to be extended accordingly.

l. Furthermore, as noted above, the due date was also subject to the compliance of the allottee's obligations, inter alia, timely payments. That it is a matter of record that the complainant allottee stands in default of its obligation of timely payment and was accordingly served with multiple reminders for making the payment, as on 05.05.2016 and 10.06.2016.

m. That despite the default being caused by the allottee, the respondent no. 1 ensured compliance of the terms and conditions of the application form and the agreement. That the proposed due date of possession as per the application form is 42 months + 6 months of grace period from 01.01.2016 i.e., 01.01.2020. That the grace period is applicable in determination of the due date, as the time was rightly utilised by the respondent no. 1 in applying for the occupancy certificate. That despite the innumerable hardships being faced by the respondent, it completed the construction of the project and applied for part occupancy certificate vide an application dated 16.07.2020 before the concerned authority.

n. That at this juncture, it needs to be categorically noted that the delay caused in the issuance of the occupancy certificate by the competent authority cannot be considered to be a fault on part of the respondent no. 1. In addition to the above, it is also important to note that during the time of application of occupancy certificate was made, the country was suffering from the adverse effects of the pandemic Covid 19, which had gravely affected the functioning of the respondent no. 1, yet, the respondent no. 1 has ensured the compliance of its obligations. It may also be noted that was observed in ***SPR and RG Construction Private Limited vs. Subashini Thulasiram (19.06.2019 - REAT Tamil Nadu): MANU/RT/0005/2019*** that the delay caused in the grant of completion certificate may not be only on fault of the promoter builder, who has already made an application for the grant of completion certificate. Hence, having rightly applied for offer of possession within the time period, there cannot be said to be any delay.

o. That thereafter, the respondent no. 1 rightly and legally obtained the occupancy certificate on 28.09.2020 and accordingly offered the

possession to the complainant allottee vide letter of offer of possession dated 05.10.2020. However, the complainant allottee has miserably failed in taking the same and thus, has been in default of the application form, the agreement and the Act.

p. That at this juncture, it is pertinent to note that the respondent no. 1 is offering physical possession of the unit and is a mere typographical humanistic error of writing "constructive" in the notice of offer of possession. That the same is also evident from the fact that upon the complainant notifying his desire of opening an optical store in the unit, the same was duly considered by respondent no. 1 and consequently, the request of the respondent no. 1 to open his optical store was accepted on 31.10.2019.

q. That as per clause 12 of the agreement, possession can only be given after the complainant has made all the payments and discharged his obligations as under the agreement. That upon default being caused by the complainant, the complainant has been served reminders for taking the offer of possession on 05.06.2021, 23.07.2021 and 30.07.2021, however, the complainant has stood in grave violation of the application form and the agreement and has not taken the possession of the unit.

r. That after the continuous default being caused by the complainant as per clause 55 of the agreement, the respondent no. 1 served the complainant with a pre termination letter on 06.07.2021.

s. That compliance of the same has not been done by the complainant till date and the complainant stands in default of making an outstanding payment of Rs. 19,73,101/- as is evident from the account statement dated 12.08.2021. That at this instance, it is important to note that the demands raised by the respondent no. 1 are as per the mutually agreed terms and conditions of the agreement and the payment plan. That it

needs to be categorically noted that upon non-payment of dues by the complainant, the complainant is bound to pay the interest on delayed payments.

E. Reply by respondent no. 2:

28. The respondent no. 2 by way of written reply made the following submissions: -

a) That the instant complaint filed against the respondent no. 2 is without any merit and is liable to be dismissed at preliminary stage only. A development agreement between the respondent no. 2 (hereinafter referred to as "Landmark Company") and respondent no. 1 (hereinafter referred as "AIPL") was executed on 31.12.2015 in terms of which the respondent AIPL was to construct the entire project in sector 66, village Medawas and Badshahpur, Gurugram at its cost within a span of 36 months from the date of mobilisation of civil contractor at the project and six months from the date of development agreement, whichever is earlier. The respondents only demarcated/allocated and earmarked an area of 4,14,978.25 sq. ft. as saleable area/units specifically for both the respondents from the entire super area of 4,31,470.90 sq. ft. The said earmarked areas/units were divided between the parties in the ratio of 36.50% in favour of respondent no. 2 and 63.50% in favour of respondent no. 1 i.e AIPL. The balance super area of 16,492.65 sq. ft. remained un-demarcated, unallotted and not earmarked. The demarcated area between the parties has been specifically defined in annexure 7 of such development agreement.

b) That subsequently, an addendum dated 29.02.2016 was executed between the respondent parties. Thereafter, on the basis of mutual discussion various "Agreements to sell" were executed between the

respondents whereby the Landmark Company sold and transferred its share in the specific areas/units to the AIPL against partial payment of a consideration amount. Further, from the aforesaid balance area being 44,361.57 sq. ft., AIPL had sold 18,168.41 sq. ft. to third parties/Allottees (Total 41 Allottees) through the respondent and had received part proceeds of such sales in the name of the Landmark.

c) That the respondent Landmark became aware of the illegal selling of the area in excess of the share of the respondent AIPL in the year 2020, i.e., when AIPL provided it with the MIS dated 04.09.2020. Only after the receipt of the MIS dated 04.09.2020, it was able to ascertain that the AIPL has gone beyond its right conferred to it under the development agreement and power of attorneys and as such was caught red handed while illegally selling the area in the project.

d) That further in terms of article 3.15 (d) of the development agreement, the AIPL was liable to handover the unsold demarcated/allotted and earmarked as saleable areas/units of the Landmark area within 30 days of obtaining the occupation certificate of the project in question. Admittedly, the AIPL received occupation certificate of the project on 28.09.2020. However, even after receipt of the same the respondent i.e. AIPL has not handed over the possession of balance super area of the respondent Landmark in the said project. Hence, it is apparent that areas/units belonging to the respondent Landmark-Company still remains unaccounted for and unsettled by the respondent AIPL.

e) That the respondent, Landmark has sold the units to its 41 customers amounting to an area of 18,168 sq. ft. The amount in these cases were made in favour of the Landmark Company. However, in the instant case, the complainant has made payment to AIPL and hence, the respondent

no. 2 cannot be held liable for any payments against the relief claimed by the complainant.

f) That further, it is relevant to mention that the project is already complete. However, on account of various deviations, improper sale and misappropriation by the developer, a dispute has arisen between the parties and thus the case has been referred to arbitration and filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 stating therein the aforementioned irregularities and illegalities conducted by the respondent AIPL. Thereafter, FAO's were filed against the said judgement in the Hon'ble Court at Punjab and Haryana High Court at Chandigarh. That Review petitions against the aforesaid order were filed by the Respondents and the same were disposed of while holding the calculation of the area made by the Trial Court intact and reversing the part relating to application/invocation of clause 4.3 of the development agreement.

g) In view of the aforementioned facts and also on account of the procedural order passed by the Arbitral Tribunal, the respondent Landmark company has no objection if the possession of the unit under dispute is handed over to the complainant in compliance of clause no. 4 of the last procedural order no. 8 dated 05.10.2021 passed by the Hon'ble Arbitral Tribunal. However, it is pertinent to highlight that the respondent no. 1 is deliberately withholding the handover of the unit.

h) That the answering respondent is not a necessary party in the present complaint as the complaint pertains to the unit under the area of the respondent no. 1 and as such the complete sale consideration qua the unit under dispute has gone to the respondent no. 1 i.e. AIPL and no amount has been received by the respondent no. 2. It is evident and

clear that the developer was to only sell its own share in its name and not the share of the respondent Landmark i.e the landowner.

i) That a total number of 9 separate agreements to sell have been executed between 2016-2018 wherein the respondent Landmark company has sold some of its area in the project and hence, the respondent Landmark company cannot be now held liable or accountable with respect to those units/areas as all rights and liabilities w.r.t the said area stand transferred in the name of the respondent AIPL.

j) That it is submitted that the respondent Landmark has sold the units to its 41 customers amounting to super area of 18168 sq. ft. The cheques in these cases were made in favour of the Landmark Company. However, in the instant case, the complainant has made payment to AIPL and hence, the respondent no. 2 cannot be held liable for any payments against the relief claimed by the complainant.

k) That the complainant in the instant case has failed to make the payment of full consideration to the respondent no. 1 and hence this complaint is liable to be dismissed as the complainant cannot be permitted to take advantage of his own wrong and plead a case of delay and compensation. In any case, the complainant cannot claim any delay compensation before the present Authority as the claim of delay compensation is beyond the jurisdiction of the present authority.

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

30. 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.

F. Jurisdiction of the authority:

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

F. 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.

F. 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.

G. Findings on objections raised by the respondent.

G.I Objection regarding the complainant being investor.

32. 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 consumer 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 he 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 agreement for sale, it is revealed that the complainant is buyer and paid considerable amount towards purchase of subject unit.

33. In view Section 2(z)(d) of Act of 2016, definition of allottee as well as the terms and conditions of the apartment buyer's agreement executed between the parties, it is crystal clear that the complainant is allottee as the

subject unit allotted to them 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'. Thus, the contention of promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

G.II Objection regarding delay due to force majeure circumstances

34. The respondent-promoter has raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the National Green Tribunal, Environment Pollution (Prevention & Control) Authority and delay in completion of project due to Covid-19 pandemic. Since, there were circumstances beyond the control of respondent, so taking into consideration the above-mentioned facts, the respondent be allowed the period during which his construction activities came to stand still, and the said period be excluded while calculating the due date. But the plea taken in this regard is not tenable. The due date for completion of project is calculated as per clause 45 of agreement which comes out to be 01.01.2020. Though there have been various orders issued by various competent authorities to curb the environment pollution, but these were for a short period of time and the fact that such type of orders are passed by the various competent Authorities from time to time were already known to the respondent-builder.

35. The respondent-promoter has raised the contention that the construction of the project was delayed due to reasons beyond the control of the

respondent such as COVID-19 outbreak, lockdown due to outbreak of such pandemic and shortage of labour on this account. The authority put reliance judgment of Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020*** dated 29.05.2020 which has observed that-

> *"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."*

36. In the present complaint also, the respondents were liable to complete the construction of the project in question and handover the possession of the said unit by 01.01.2020. The respondents are claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the Authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession. Further, grace period of six months being unconditional has been allowed to the respondent-builder and no further leniency/relaxation in this regard can be allowed to it.

G.III Objection regarding non-payment by the complainant.

37. The respondent-builder submitted that the complainant-allottee has failed to make timely payment towards consideration of allotted unit and the same is evident as a pre-termination letter dated 06.07.2021 was issued by it against the complainant. The Authority observes that the complainant has already paid an amount of Rs. 75,07,147/- towards basic sale consideration of Rs. 81,20,107/- constituting more than 92.45% of total sale consideration which is itself a considerable amount. Thus, the plea of the respondent that the complainant is not coming forward in making payment towards consideration of allotted unit is not tenable and devoid of merits. Further, as far as plea with regard to issuance of pre-termination letter dated 06.07.2021 is concerned, the same is also rejected as the said demand was raised along with offer of possession/intimation of constructive possession dated 05.10.2020 without adjusting delay possession charges and arbitrary increase in super area of the subject unit.

H. Findings on the relief sought by the complainant

Relief sought by the complainant:

H.I Direct the respondents to deliver the actual vacant physical possession of the subject unit in a time-bound manner to the complainant.

38. The respondent no. 1 has offered the constructive possession of the allotted unit on 05.10.2020 after obtaining OC on 28.09.2020. The respondent further submitted in its reply that it is offering physical possession of the unit and is a mere typographical humanistic error of writing "constructive" in the notice of offer of possession and the same is also evident from the fact that upon the complainant notifying his desire of opening an optical store in the unit, the same was duly considered by it and

consequently, the request of the respondent no. 1 to open his optical store was accepted on 31.10.2019.

39. The Authority observes that as per clause 12 of said agreement that deals with handing over of possession, does not specifies anything about constructive offer of possession. Moreover, the respondent no. 1 in para 18 of its reply clearly specifies that it is willing to handover the physical possession of the allotted unit. In view of aforesaid circumstances, where the occupation certificate of the unit has already been obtained, the complainant is directed to take the possession of the allotted unit within 2 months after making payment towards due consideration, if any.

H.II Direct the respondents to be restrained from unilaterally increasing the super area of subject unit from 252.52 sq. ft to 315.39 sq. ft. (i.e., beyond the area fixed under the unit buyer's agreement).

H.III Direct the respondents to be restrained from demanding sale considerations towards escalated super area [62.87 sq. ft] which is beyond the area fixed under the unit buyer's agreement;

H.IV Direct the respondents to refund all monies charged towards escalated super area of subject unit along with interest calculated at 12% p.a. with half-yearly rests from the date of payment till refund of money.

40. The complainant submitted that the respondent no. 1 vide e-mail dated 06.10.2020, unilaterally increased the super area of the said unit from 252 sq. ft. to 315.39 sq. ft., i.e., by 25.15%. Whereas the respondent on the other hand took plea that for the proposed changes it invited objections/suggestions from the complainant vide letter dated 16.11.2019. The counsel of respondent further took plea of various clauses of application and agreement such as clause J, 1.3, 1.7, 1.9, 1.15; wherein the

allottee has undertaken to make payment towards increase of any such area.

41. The Authority observes that the complainant was originally allotted unit no. 88 on ground floor admeasuring 252.52 sq. ft. whereas the area of allotted unit was increased to 315.87 sq. ft. i.e. 24.90%. As per clause 1.3 of agreement the allottee agrees to pay for increase in super area and further, as per clause 10 of agreement which deals with alteration in unit super area provides that where such increase/decrease is more than 10%, every attempt shall be made by the respondent company to offer alternative unit to the complainant. The relevant part of the agreement is reproduced hereunder: -

> *In the event that variation in the Unit Super Area is greater than ±10% (ten percent) at the time of final measurement and the same is not acceptable to the Allottee, every attempt shall be made by the Company/Developer to offer the Allottee an alternative unit of a similar type within the Project subject to availability. ...*
>
> *In the event that Allottee does not accept such alternate unit or if there is no other unit of a similar type, then the Allottee shall be refunded its paid up Total Price with simple interest at the rate of 18% (eighteen percent) per annum, after deducting any Non Refundable Amounts paid by the Allottee, within 3 (three) months of the Allottee's intimation of non-acceptance of alternate unit to the Company. No other charge, lien, claim, monetary or otherwise, shall lie against the Company/Developer nor shall be raised otherwise or in any manner whatsoever by the Allottee*

42. The Authority is of considered view that the agreement shall be read as whole. Clauses specified under agreement dealing with change in area of the unit shall be read together and a collective reading of same clearly provides that the allottee agrees to make payment of any such dues on pretext of increase in area but such change limits to bar of 10%. Further,

the complainant cannot be made bound to switch to any alternative unit due such unexplained and unexpected change in the super area of the unit. It is a general principle that any allottee after keeping in mind his requirements as well as his budget decides to purchase any property/unit. On the other hand, a bar of 10% is specified to cop up with the minor alteration, if required, to be made by the promoter. Such liberty should not be taken advantage of. Further, it was held ***in complaint no. 4031 of 2019 Varun Gupta Vs Emaar MGF Land Limited***, that the promoter is not entitled to payment of any excess super area over and above what has been initially mentioned in the builder buyer's agreement, least in the circumstances where such demand has been raised by the builder without giving supporting documents and justification. Therefore, the respondents are directed to refund the excess amount charged on pretext of increased super area over and above the limit specified under buyer's agreement. (i.e. 10%).

H.V The maintenance charges for the year demanded by respondents in advance be struck down.

H.VI Direct the respondents to refund all maintenance charges collected by them from complainant without delivering vacant physical possession or leasing out the subject unit along with interest @ 12% p.a. with half-yearly rests from the date of payment till refund of money.

43. The complainant submitted that the respondent charged maintenance for common area for the whole year in advance, without execution of the tripartite maintenance agreement or even the handing over of the vacant 'actual' possession. The Authority is of view that in view of Section 11(4)(d) it is obligation of the respondent(s)-promoter for providing and

maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottee. Further, it is a well settled principle of law that he 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. As per offer of possession dated 05.10.2020, it has charges advance maintenance charges of 12 months and hence, is entitled to charge the same.

H.VII Direct the respondent to pay Rs. 5 per sq. ft. per month as delay compensation to the complainant as, as per unit buyer's agreement physical possession was to be delivered on or before 31.12.2019, respondents neither delivered vacant physical possession nor leased out the unit, thereby constituting breach of unit buyer's agreement for the delay in handing over physical possession.

H.VIII Direct the respondents to pay the complainant pendente lite and future damages (i.e., for the period from filing of this complaint and onwards) @ Rs. 5 per sq. ft. /- per month or at such higher rate to which the complainant may be found entitled.

H.IX Direct the respondents to pay interest @12% per annum to the complainant on pendent lite and future damages from date of accrual till date of payment..

44. In the present complaint, the complainant intends to continue with the project and are 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."

45. Clause 45 of the buyer's agreement dated 19.08.2016 provides for handing over of possession and is reproduced below:

"Clause 45

The company endeavours to hand over the possession of the unit to the allottee within ***a period of 42 months with a further grace period of 6 months, from 1 January 2016...."***

46. The Authority has gone through the possession clause of the agreement and observes that the respondent-developer proposed to handover the possession of the allotted unit within a period of 42 months with a grace period of 6 months, from 01.01.2016. In the present case, the date of due date of handing over of possession is calculated from 01.01.2016, as such the due date of handing over of possession without considering grace period comes out to be 01.07.2019.

47. **Admissibility of grace period:** As per clause 45 of buyer's agreement dated 19.08.2016, the respondent-promoter proposed to handover the possession of the said unit within a period of 42 months with a further grace period of 6 months, from 01.01.2016. 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 45 of the buyer's agreement dated 19.08.2016, the due date of possession comes out to be 01.01.2020.

48. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as

may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.*

49. 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., 27.07.2023 is @ 8.75 %. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.

50. 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.

51. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.75 % by the respondent/promoter which is the same as is being granted to them in case of delayed possession charges.

52. 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 45 of buyer's agreement executed between the parties on 19.08.2016, the possession of the subject apartment was to be delivered within a period of 42 months from 01.01.2016 along with six months grace period and the same comes out to be 01.01.2020. The respondent has offered the constructive possession of the allotted unit on

05.10.2020 after obtaining occupation certificate from competent Authority on 28.09.2020. Further, issue w.r.t constructive possession and physical possession has been addressed in detail in the above finding (i.e. H.I) of the Authority.

53. 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 28.09.2020 and it has also offered the possession of the allotted unit on 05.10.2020. 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 one 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. 01.01.2020 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 05.10.2020. Thus, delay possession charges shall be payable till offer of possession plus two months i.e. 05.12.2020.

Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 19.08.2016 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., 01.01.2020 till offer of possession plus two months i.e. 05.12.2020; at the prescribed rate i.e., 10.75 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

It is further clarified that that as per perusal of documents on record agreement has been signed by both the respondents as well as some demands (such as demand dated 05.05.2016 on page no. 106-107 of reply by R1) are issued in the name of respondent no. 2. Therefore, directions are issued against both the respondents and both are made jointly and severally liable.

H.X and XI Direct the respondents to pay a sum of Rs. 1 lakh towards punitive compensation for mental agony, inconvenience and harassment caused to the complainant.

H.XI Direct the respondents to pay cost of the complaint in favour of the complainant and against respondent..

54. The complainant is seeking relief w.r.t. compensation in the above-mentioned reliefs. ***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.,*** 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, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

I. Directions of the Authority

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

a. The respondents shall pay interest at the prescribed rate i.e. 10.75 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e.; 01.01.2020 till the date of offer of possession plus two months i.e. 05.12.2020; as per proviso to section 18(1) of the Act read with rule 15 of the rules.

b. The respondents are directed to refund the excess amount charged on pretext of increased super area over and above the limit specified under buyer's agreement (i.e. 10%).

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

d. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75 % by the respondents which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

e. The respondents are further directed to issue fresh statement of account after adjusting delay possession charges and excess super area charges as detailed above within two weeks from date of this order.

f. The complainant is directed to pay outstanding dues, if any, in next one month and the respondents shall handover the possession of the allotted unit complete in all aspects as per specifications of buyer's agreement within next two weeks.

g. The respondents are 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.

56. Complaint stands disposed of.

57. File be consigned to registry.

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 27.07.2023