

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

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| Complaint no. : | 4604 of 2022 |
| Date of filing complaint: | 27.06.2022 |
| First date of hearing: | 02.08.2022 |
| Order reserved : | 02.03.2023 |
| Date of pronouncement | 06.07.2023 |

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| M/s Unique Engineers Private Limited Office: 23, Deep Plaza Complex, Opp. District Courts, Gurugram-122001 | Complainant |
| Versus | |
| M/s Athena Infrastructure Limited Regd. office: M-62 & 63, 1st floor, Connaught Place, New Delhi-110001 | Respondent |

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| CORAM: | |
| Shri Vijay Kumar Goyal | Member |
| APPEARANCE WHEN ARGUED: | |
| Dr. Sham Taneja (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 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. | 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 |
| | Name of the licensee | M/s Athena Infrastructure Private Limited |
| | | 64 of 2012 dated 20.06.2012 valid till 19.06.2023 |
| | Name of the licensee | Varali properties |
| 5. | HRERA registered/ not registered | Registered vide no. i. 351 of 2017 dated 20.11.2017 valid till 31.08.2018 ii. 354 of 2017 dated 17.11.2017 valid till 30.09.2018 iii. 353 of 2017 dated 20.11.2017 valid till 31.03.2018 iv. 346 of 2017 dated 08.11.2017 valid till 31.08.2018 (<i>Note: Notice under Section 4(2)(I)(c) has been issued</i>) |
| 6. | Allotment letter dated | Not placed on record |

| 7. | Date of execution of flat buyer's agreement | 02.05.2014 (As per page no. 53 of complaint) | | |
|-----------------------------------|--|---|-----------------------------------|----------------------------|
| 8. | Unit no. | 12C3 on 12C floor, tower C (As per page no. 56 of complaint) | | |
| 9. | Super Area | 3550 sq. ft. (As per page no. 56 of complaint) | | |
| 10. | Payment plan | Subvention scheme | | |
| 11. | Basic sale consideration | BSP- Rs. 2,47,20,000/- (As per page no. 57 of complaint) | | |
| 12. | Total amount paid | Rs. 2,46,97,372/- (As alleged by the complainant on page no. 03 & 13 of complaint) | | |
| | | <table border="1"> <thead> <tr> <th><i>Amount paid by complainant</i></th> <th><i>Amount paid by IHFL</i></th> </tr> </thead> <tbody> <tr> <td>Rs. 40,23,609/-</td> <td>Rs. 2,06,73,963/- (As per page no. 85 of complaint)</td> </tr> </tbody> </table> | <i>Amount paid by complainant</i> | <i>Amount paid by IHFL</i> |
| <i>Amount paid by complainant</i> | <i>Amount paid by IHFL</i> | | | |
| Rs. 40,23,609/- | Rs. 2,06,73,963/- (As per page no. 85 of complaint) | | | |
| 13. | Possession clause | <p>Clause 21</p> <p><i>(The Developer shall endeavour to complete the construction of the said building /Unit within <u>a period of ten months, with a six months grace period thereon from the date of execution of the Flat Buyers Agreement subject to timely payment</u> 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</i></p> | | |

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| | | <i>dues and take possession of the Unit.)</i> |
| 14. | Due date of possession | 02.09.2015 (Calculated from the date of the agreement i.e.; 02.05.2014 + grace period of 6 months) <i>Grace period is allowed</i> |
| 15. | Occupation Certificate | 12.10.2021 (As per page no. 33 of reply) |
| 16. | Offer of possession | 20.10.2022 (As clarified during proceedings dated 02.03.2023) |
| 17. | Tri-partite agreement dated | 28.05.2013 (As per page no. 78 of complaint) |
| 18. | Pre-EMI clause | Clause 3 <i>It is agreed that till the commencement of EMI the borrower shall pay Pre-EMI, which is the simple interest on the loan amount disbursed calculated at the rate of interest as mentioned in the respective loan agreement of the Borrower, however, the Borrower has informed IHFL of the scheme of arrangement between the Borrower and the Builder in terms whereof the Builder hereby assumes the liability on account of interest payable by the Borrower to IHFL during the period be referred to as the "Liability Period" i.e. till the date of issuance of Offer for Possession by the Builder (and the Liability be referred to as "Assumed Liability). The assumption of liability by the Builder in no manner whatsoever releases,</i> |

| | | |
|-----|--|---|
| | | <i>relinquishes and / or reduces the liability of the Borrower and that same shall not be affected in any manner on</i> |
| 19. | Amount already adjusted on pretext of delay possession charges | Rs. 7,06,850/- (As per applicant ledger dated 01.03.2023 filed with written submissions dated 28.03.2023) |

B. Facts of the complaint:

3. That being persuaded by various advertisements in print and as well as in electronic media, the complainant through its authorized signatory, Mr Rajiv Gupta applied for allotment of a unit in residential group housing colony known as 'Indiabulls Enigma' consisting of car parks at stilt, basement level and residential flats, staircases, lifts and passages with rights in the common areas, situated at village Pawala Khusrupur, Sector 110, Gurugram, Haryana, on the land measuring 16.6 acres.
4. That the representatives of respondent assured the complainant that the construction at the project site has already been started and it has obtained all the necessary license for construction of the subject project. It was also assured that possession of the said unit would be handed over within 10 months from the date of execution of buyer's agreement with a grace period of 6 months. Believing upon the representations and assurances of the respondent, the complainant booked a unit in its project on 27.02.2013 and paid booking amount of Rs 5,00,000/- vide cheque bearing no. 722767 drawn on Syndicate Bank.

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5. That in pursuance to the aforesaid booking made by the complainant for allotment of unit, the respondent allotted a unit bearing no. 12C-3 in tower C on 12th floor, admeasuring super area of 3350 sq. ft. with two covered car parking for a total basic sale consideration of Rs 2,47,20,000/-.
6. That at the time of booking asked the respondent to execute the 'buyer's agreement' but it gave false excuses and delayed execution of buyer's agreement stating one or other reasons. Thereafter, it created an undue pressure to give money as per their demands without executing buyer's agreement. It is further submitted that within that said time period the complainant has already made 95% of the sale price amounting to Rs. 2,46,97,372/- by 30.05.2013 before execution of buyer's agreement. Thus, after an intense persuasion the execution, the flat buyer's agreement was executed on 02.05.2014, after 15 months of the booking of the subject unit.
7. That in order to make timely payments for the subject unit, the complainant obtained a loan of Rs. 2,06,73,963/- from its sister concern, namely Indiabulls Housing Finance Limited (IBHFL). As per the loan scheme, the complainant also entered into a 'Tripartite Agreement' dated 28.05.2013. In accordance with the said tripartite agreement executed between the complainant as the borrower, the respondent as the developer and IBHFL as the grantor of loan (Creditor), wherein IBHFL agreed to disburse the said loan amount directly to the developer on behalf of the borrower as per the installment agreed between them in the buyers agreement dated 02.05.2014.

8. That the subject unit was booked under the 'Subvention Scheme till Possession', wherein 15% of the sale consideration was to be paid within 30 days of booking; 80% of the sale consideration on loan approval from the its sister concern, Indaibulls Financial Services Limited (IBFSL), and the balance 5% was payable on offer of possession. It is pertinent to mention that besides complainant's contribution of Rs 40,23,409/- till 14.05.2013, the IBHFL released an amount of Rs 2,06,73,963/- on account of complainant through cheque dated 30.05.2013 drawn on Axis bank.
9. That the complainant has paid his hard-earned money and fulfilled each and every demand of the respondent that have arisen from time to time, thus till date 95% sale consideration amount of Rs. 2,46,97,372/- has been paid to the respondent. The same were duly accepted and receipts were provided against all the payments. The table below shows the payment made by the complainant through his bank account:

| DATE | RECEIPT No. | AMOUNT |
|--------------|--|-----------------------|
| 06.03.2013 | 4294 vide Cheque No. 722767 dated 27.02.2013 | 5,00,000.00 |
| 16.04.2013 | 4415 vide Cheque No. 379670 dated 02.04.2013 | 34,70,306.00 |
| 14.05.2013 | Cheque No. 379487 dated 14.05.2013 | 53,103.00 |
| 30.05.2013 | 4555 vide IBFSL Transfer | 2,06,73,963.00 |
| TOTAL | | 2,46,97,372.00 |

10. That the complainant was shocked to receive an intimation of installment dated 30.05.2022 for a sum of Rs. 24,34,357/- being the last instalment, which is totally in contravention of payment terms agreed upon between

the parties as enumerated in payment schedule (page 72) of the buyer's agreement dated 02.05.2014. It is pertinent to mention that the complainant came to know for the first time through this communication that the 'Occupation Certificate' for the tower C has been received from the DTCP Haryana, however, the complainant had not received any 'offer of possession' till date.

11. That as per buyer's agreement dated 02.05.2014, the possession time for handing over of the subject unit after obtaining the required 'OC' from the competent authority was within ten months from the date of execution of buyer's agreement with a six months grace period thereon, which works out to be 01.09.2015. The project is running much behind the schedule and there seems no possibility of handing over possession of the subject unit for at least another one year. Thus, the respondent is liable to pay the interest for every month of delay till handing over of the possession at the prescribed rate as envisaged under Section 18(1) of the Act. The delay period from the due possession till date of filing of this complaint i.e. 01.06.2022 works out to be 6 years 10 months on the deposited amount i.e. Rs 2,46,97,372/-, the simple interest amounts to Rs 1,56,95,000/-. In addition, the pendent-lite and future interest till handing over possession of the subject unit works out to be Rs. 1,91,405/- per month.
12. That during the construction of the project, the respondent has unilaterally revised the building plan bringing in a subsidiary of Indiabulls, namely Varali Properties Limited, wherein additional 4 floors were added in towers A to D, making it to ground+21 floors as against original ground+17 floors.

This increase in floors/FAR resulted in change of entire theme of the project, which ultimately disturbed the population density of the group housing colony and its basic design attraction and will create an extra burden on the common amenities & facilities.

13. That the increased saleable area beyond the original plan will lead to strain on the common facilities like open areas, car parking space, club facilities, swimming pool usage etc. as with an increase in population density the ease of use of common facilities has been seriously compromised against the complainant's interests. Moreover, the strength of the structure of towers A to D has been compromised, wherein the foundation designed and built for ground+17 floors would not withstand the additional load of 'four' floors.
14. That to the unlawful act of increasing FAR, the respondent referred to an obscure notice released by it in non-descript newspaper(s) advertising the said change in Building Plan. This unconscionable act is clear violation of legal mandate, wherein the developer is required to invite objections from allottees of the project before seeking any revision in the original building plan. The respondent has the complete contact details of all the allottees including phone nos. and email ID, where it has been doing regular communication, yet it never communicated any intention or action to revise the sanctioned building plans. It has been sending various communications and demands through emails, but it has conveniently avoided to take approval of the complainants for the major changes in sanctioned plans which has changed the fundamental nature of the project.

15. That the representative of the complainant has made several visits at the project site and noticed serious quality issues with respect to the construction carried out by the respondent till now. The flats were sold representing that the same shall be luxurious apartment, however, all such representations seem to have been made just to lure the complainant to purchase the unit at extremely high prices. The respondent marketed these luxury high-end apartment, but have compromised even with basic features, designs and quality to save costs. The constructed structure is of extremely poor quality and is totally unplanned with sub-standard, low-grade and defective materials.
16. That it has breached the fundamental term of the contract by inordinate delaying the delivery of possession resulting in creating irreparable mental agony and harassment to the complainant's directors besides monetary loss in investment with additional litigation cost.

C. Relief sought by the complainant:

17. The complainant has sought following relief(s):
- i. Direct the respondent to pay interest on the total amount of Rs. 2,46,97,372/- paid by the complainant for the delayed period of 6 years 10 months, from the due date of possession i.e. 1st September 2015 till filling of this complaint i.e. 1st July at the prescribed rate of interest.
 - ii. Direct the respondent to pay monthly interest on the total amount of Rs. 2,46,97,372/- paid by the complainant for the pendent-lite and

future period till handing over of possession at the prescribed rate of interest.

iii. Direct the respondent to pay Rs. 1,00,000/- as the litigation cost.

D. Reply by respondent:

The respondent by way of written reply made following submissions

18. That the present complaint is devoid of any merits 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 are unjustified, misconceived and without any basis as against the respondent.
19. That the instant complaint filed by the complainant are outside the purview of the Authority as the complainant after looking into the financial viability of the project and its future monetary benefits willingly approached the respondent with a sole purpose of investment and monetary gains out of the said investment. They did their own market research and applied for provisional booking of a unit in its project for maximum commercial gains.
20. That the instant complaint has been filed by Mr. Pradeep Sharma, being the authorized representative of the complainant-company. However, Mr. Pradeep Sharma has not placed on record any such document i.e. authority/resolution in his favour to institute the present complaint and as such the complaint filed by the complainant is liable to be dismissed on the sole ground.
21. That the complainant has submitted that it has paid a total amount of Rs. 2,46,97,372/- towards the sale consideration of the subject unit against

which he is claiming delay interest penalty, which is factually incorrect and wrong. The complainant booked the subject unit under subvention scheme payment plan till possession and availed a home loan of Rs. 2,06,73,963/- from Indiabulls Housing Finance Limited (IHFL). Further, the complainant has only paid an amount of Rs. 39,70,306/- from his own sources towards sale consideration of the subject unit provisionally booked by it. As such the complainant has till date merely paid to the Respondent Rs. 39,70,306/- towards the subject unit.

22. That under the subvention scheme, a tripartite agreement was executed between the complainant, respondent and the financier, wherein as per clause 3 of the TPA, the Builder assumed the liability of the interest component payable to the financier during the subvention period. Further, in terms of the arrangement between the complainant and the respondent, it has paid to the financier an amount of Rs.2,23,91,954/-, towards Pre-EMI as the liability period is still continuing and details of which are as per below table:

| | | |
|----------------------------------|----------------------------|---------|
| Co. Name | Athena Infrastructure Ltd. | |
| Project Name | Enigma | |
| AGREEMENTNO | HHLRAO00153965 | |
| Customer Name | UNIQUE ENGINEERING P LTD. | |
| Subvention Current Status | Active | |
| New end date | Till Possession | |
| Flat No./Unit. No | 12C3 | |
| | May-13 | 13,594 |
| | Jun-13 | 206,740 |

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| Jul-13 | 206,740 |
| Aug-13 | 215,354 |
| Sep-13 | 223,968 |
| Oct-13 | 223,968 |
| Nov-13 | 223,968 |
| Dec-13 | 228,275 |
| Jan-14 | 228,275 |
| Feb-14 | 228,275 |
| Mar-14 | 228,275 |
| Total for FY-2013-14 | 2,227,431 |
| Apr-14 | 228,275 |
| May-14 | 228,275 |
| Jun-14 | 228,275 |
| Jul-14 | 228,275 |
| Aug-14 | 228,275 |
| Sep-14 | 228,275 |
| Oct-14 | 228,275 |
| Nov-14 | 228,275 |
| Dec-14 | 228,275 |
| Jan-15 | 228,275 |
| Feb-15 | 228,275 |
| Mar-15 | 228,275 |
| Total for FY-2014-15 | 2,739,300 |
| Apr-15 | 228,275 |
| May-15 | 228,275 |
| Jun-15 | 228,275 |
| Jul-15 | 228,275 |
| Aug-15 | 228,275 |
| Sep-15 | 228,275 |
| Oct-15 | 228,275 |
| Nov-15 | 228,275 |



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| Dec-15 | 228,275 |
| Jan-16 | 228,275 |
| Feb-16 | 228,275 |
| Mar-16 | 228,275 |
| Total for FY-2015-16 | 2,739,300 |
| Apr-16 | 228,275 |
| May-16 | 228,275 |
| Jun-16 | 86,142 |
| Jul-16 | 180,897 |
| Aug-16 | 180,897 |
| Sep-16 | 180,897 |
| Oct-16 | 180,897 |
| Nov-16 | 180,897 |
| Dec-16 | 180,897 |
| Jan-17 | 180,897 |
| Feb-17 | 180,897 |
| Mar-17 | 180,897 |
| Total for FY-2016-17 | 2,170,766 |
| Apr-17 | 163,669 |
| May-17 | 163,669 |
| Jun-17 | 163,669 |
| Jul-17 | 163,669 |
| Aug-17 | 163,669 |
| Sep-17 | 163,669 |
| Oct-17 | 163,669 |
| Nov-17 | 163,669 |
| Dec-17 | 163,669 |
| Jan-18 | 163,669 |
| Feb-18 | 163,669 |
| Mar-18 | 163,669 |
| Total for FY-2017-18 | 1,964,026 |



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| Apr-18 | 167,115 |
| May-18 | 167,115 |
| Jun-18 | 170,560 |
| Jul-18 | 170,560 |
| Aug-18 | 179,174 |
| Sep-18 | 179,174 |
| Oct-18 | 196,403 |
| Nov-18 | 205,017 |
| Dec-18 | 205,017 |
| Jan-19 | 205,017 |
| Feb-19 | 205,017 |
| Mar-19 | 205,017 |
| Total for FY-2018-19 | 2,255,185 |
| Apr-19 | 205,017 |
| May-19 | 205,017 |
| Jun-19 | 205,017 |
| Jul-19 | 205,017 |
| Aug-19 | 205,017 |
| Sep-19 | 205,017 |
| Oct-19 | 205,017 |
| Nov-19 | 205,017 |
| Dec-19 | 205,017 |
| Jan-20 | 205,017 |
| Feb-20 | 205,017 |
| Mar-20 | 205,017 |
| Total for FY-2019-20 | 2,460,202 |
| Apr-20 | 205,017 |
| May-20 | 205,017 |
| Jun-20 | 205,017 |
| Jul-20 | 205,017 |
| Aug-20 | 205,017 |



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|--------------------------------------|-------------------|
| Sep-20 | 205,017 |
| Oct-20 | 205,017 |
| Nov-20 | 205,017 |
| Dec-20 | 205,017 |
| Jan-21 | 205,017 |
| Feb-21 | 205,017 |
| Mar-21 | 205,017 |
| Total for FY-2020-21 | 2,533,079 |
| Apr-21 | 205,017 |
| May-21 | 205,017 |
| Jun-21 | 205,017 |
| Jul-21 | 205,017 |
| Aug-21 | 205,017 |
| Sep-21 | 205,017 |
| Oct-21 | 205,017 |
| Nov-21 | 205,017 |
| Dec-21 | 205,017 |
| Jan-22 | 205,017 |
| Feb-22 | 205,017 |
| Mar-22 | 205,017 |
| Total for FY-2021-22 | 2,460,202 |
| Apr-22 | 205,017 |
| May-22 | 205,017 |
| Jun-22 | 211,908 |
| Jul-22 | 220,522 |
| Total for FY-2022-23 | 842,464 |
| Total Interest Paid Till Date | 22,391,954 |

23. That in terms of the buyer's agreement, under the payment plan opted by the complainant for the subject unit, an amount of Rs.30,32,557/- is the outstanding balance amount payable by it to the respondent.

24. That the instant complainant is outside the purview of the Authority as the complainant after looking into the financial viability of the project and its future monetary benefits willingly approached the respondent and got the said unit booked after making requisite due diligence on its own. It was post understanding the terms & conditions of the agreement(s), it has voluntarily executed flat buyer agreement with the respondent on 02.05.2014. As per agreement duly executed between them, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional unit booked, the same shall be adjudicated through arbitration mechanism as detailed in the agreement and made reference to clause 49 of the duly executed agreement.
25. That the relationship between the parties is governed by the document executed between them i.e. buyer's agreement dated 02.05.2014. The complainant has not come before the Authority with clean hands and wishes to take advantage of his own misdoings with the help of the provisions of the Act of 2016, which have been propagated for the benefit of innocent customers who are end-users and not defaulters, like the complainant in the present complaint.
26. That the complainant were 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..

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27. That the complaint is not maintainable as the period of delivery as defined in clause 21 of flat buyer's agreement is not sacrosanct as in the said clause it was clearly stated that *"the Developer shall endeavour to complete the construction of the said building/unit"* within the stipulated time. Clause 21 of the said agreement has been given a selective reading by the complainant even though he conveniently relies on same. The clause reads:

"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 these Flat Buyer' Agreement subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to his or as demanded by the Developer..."

The reading of the said clause clearly shows that the delivery of the unit/apartment in question was subject to timely payment of the installments towards the basic sale price.

28. 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, it 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 is 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.

29. 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.
30. That as per the license to develop the project, EDCs was 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.

31. 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, 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.
32. 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 districts of Faridabad and Gurgaon including Mewat which led to a situation of scarcity of the sand and other materials derived from the stone crushing activities, which directly affected the construction schedules and activities of the project.
33. 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. A 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, that 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 had to suffer huge losses which resulted in delayed timelines. Despite the best efforts, the ground realities hindered the progress of the project.

34. That the project of the respondent which is being developed in an area of around 19.856 acres of land, in which the applicant has invested its money is an on-going project and is registered under Act. The respondent has already obtained the occupational certificate of the subject tower from the

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concerned Authority and has already offered possession of the unit booked by the complainant long before filing of the instant complaint.

35. 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.

36. 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 02.05.2014 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.

37. 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 offered in lieu of delay. It is thus obvious that the complainant are also estopped from the duly executed contract between the parties.
38. That the respondent has made huge investments in obtaining requisite approvals and carrying on the construction and development of the 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. Despite 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 has never been stopped or abandoned and has now reached its pinnacle in comparison to other real estate developers who have started the project around similar time period and have abandoned the project due to such reasons.

39. That in the event the Authority grants relief to the complainant whereby allowing delay possession charges. In such scenario, the said interest be calculated only upon the amount paid by the complainant out of his own source i.e. Rs.39,70,306/- and not on the whole amount which also includes the loan amount of Rs. 2,06,73,963/- availed by the complainant from the financier. In the event the Authority grants delay interest to the complainant, in such scenario the amount of Rs.2,06,73,963/- paid by it to the financier under subvention scheme payment plan be adjusted, since the respondent has paid a huge amount to the financier under the subvention scheme on behalf of the complainant, causing huge financial burden on the respondent.
40. That the respondent has already paying/ bearing the interest component till date on behalf of the complainant-company as such any further interest if allowed in favour of the complainant would cause heavy financial loss upon the respondent. The Authority in **Complaint no. 915 of 2018 titled Amit Tyagi Vs. Athena Infrastructure Limited** has given its observation that:

"...the interest paid by the respondent/promoter by way of subvention scheme shall be considered to have been adjusted in the delay possession charges and no further interest is required to be paid by the respondent to the complainant till offer of possession of allotted unit..."

41. That the facts and circumstances of the present complaint is identical to the facts & circumstances in **Complaint no. 915 of 2018 titled Amit Tyagi Vs. Athena Infrastructure Limited** as such in view of the aforesaid observation of the Authority the complainant-company is not entitled for interest/compensation/litigation cost/any monetary claim as sought by the it.
42. That the respondent, has been acting in consonance with the FBA dated 02.05.2014 executed and no contravention in terms of the same can be projected on the respondent. The complainant has preferred the instant complaint before the Authority, based upon false and baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in FBA entered into between the parties and to harass the respondent.
43. All other averments made in the complaint were denied in total.
44. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents.
45. Both the parties also filed written submissions to substantiate their averments made in the pleadings as well as in the documents and the same were taken on record and have been perused.

E. Jurisdiction of the authority:

46. 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.1 Objection regarding complainant are in breach of agreement for non-
invocation of arbitration.**

47. The respondent has raised an objection that the complainant have 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"

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

Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in **National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506**, 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. Similarly, in **Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017**, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builders could not circumscribe the jurisdiction of a consumer forum.

49. While considering the issue of maintainability of a complaint before a consumer forum/commission in the face of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as **M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC. The relevant para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant have also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under



the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

50. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant are well within the rights 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:

51. It is pleaded on behalf of respondent that complainant are investors and not consumers. 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 the promoter 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 are buyers 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:



"Z(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."

52. 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 are 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'. 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 are 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

53. 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."

54. 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 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. 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."

55. 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:

56. 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 its possession was to be offered by 02.09.2015. So, the events taking place such as holding of common-wealth games, dispute with the contractor, implementation of various schemes by central govt. etc. do not have any impact on the project being developed by the respondent. Though some allottee may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of some of the allottee. Moreover, in the present case, the allottee have already paid approximately 95 % of total

consideration of allotted unit. 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 on the total amount of Rs. 2,46,97,372/- paid by the complainant for the delayed period of 6 years 10 months, from the due date of possession i.e. 1st September 2015 till filling of this complaint i.e. 1st July at the prescribed rate of interest.

G.II Direct the respondent to pay monthly interest on the total amount of Rs. 2,46,97,372/- paid by the complainant for the pendent-lite and future period till handing over of possession at the prescribed rate of interest.

57. 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."

58. Clause 21 of the buyer's agreement 02.05.2014 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 ten months, 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..."



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 ten months from the date of execution of agreement. In the present case, the flat buyer's agreement inter-se parties was executed on 02.05.2014; as such the due date of handing over of possession comes out to be 02.03.2015.
60. **Admissibility of grace period:** As per clause 21 of buyer's agreement dated 02.05.2014, the respondent-promoter proposed to handover the possession of the said unit within a period of ten months 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 02.05.2014, the due date of possession along with grace period comes out to be 02.09.2015.
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

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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 02.05.2014, the possession of the subject apartment was to be delivered within a period of ten months 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.; 02.05.2014, which comes out to be 02.09.2015.
67. The respondent has raised a plea that delay possession charges shall be made payable on the amount paid by the complainant only i.e. Rs. 40,23,609/- and not on the amount paid by the financier i.e. Rs. 2,06,73,963/- as it has been paying pre-EMI on the said amount disbursed by the financier under tri-partite agreement. The Authority clarifies that the subject unit was booked under subvention scheme and as per arrangement agreed between the parties, 80% of the sale consideration was payable to the respondent at the time of sanction of loan. The Authority observes that the issues w.r.t pre-EMI can be dealt in either ways and if such delay possession charges are to be calculated on the amount paid by the complainant from his own sources only, then the amount disbursed by the financier shall be treated separately and then, no such adjustment will be required w.r.t payment of pre-EMI. As far as payment of pre-EMI is concerned, the same is dealt in later part of the agreement whereas w.r.t delay possession charges, the same shall be payable on the amount paid by the complainant from its own sources. Thus, it is hereby clarified that

"amount-paid" for consideration of payment of delay possession charges shall be "the amount component paid by the complainants from their own sources only" for the reason detailed above.

68. Further, second issue that arise before the Authority is that there was dispute w.r.t offer of possession of the allotted unit as it has been submitted by complainant that no offer of possession has been made by the respondent till date. Whereas the respondent on the other hand, it has offered the possession of the subjection unit vide letter dated 20.10.2022. To which concerned has been raised by the complainant that such letter provided for payment of outstanding dues instead of offer of possession. The Authority observes that the letter has been titled as "Intimation of installment" but reads as *"that occupation certificate for the tower in which your unit is located, has been received from the Director General Town & Country Planning Department and according we hereby offering you the possession of your apartment."* The Authority is of view that the said letter clearly conveys the offer of possession of the subject unit to the complainant and thus, can be regarded as a valid offer of possession. Thus, it can be concluded that the respondent has offered the possession of the allotted unit on 20.10.2022 after obtaining occupation certificate from competent Authority.
- 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 12.10.2021 and it has also offered the possession of the allotted unit on 20.10.2022. 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. 02.09.2015 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 20.10.2022, thus delay possession charges shall be payable till offer of possession plus two months i.e. 20.12.2022.

Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 02.05.2014 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., 02.09.2015 till offer of possession plus two months i.e. 20.12.2022; 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.

69. 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 01.03.2023, an amount of Rs. 7,06,850/- 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.



70. The Authority observes that a tri-partite agreement dated 28.05.2013 was executed between the parties and financier. As per clause 3 of said tri-partite agreement, the respondent was under obligation to make payments towards pre-EMI till offer of possession. Thus, after offer of possession i.e. 20.10.2022, it were complainant who were supposed to make payments towards EMI thereafter. The respondent has made payment of Rs. 2,23,91,954/- towards pre-EMI from date of disbursement of such amount. As per clause 3 of tri-partite agreement, such pre-EMI was payable till offer of possession. The Authority hereby directs the respondent to adhere to the obligation of payment of pre-EMI as per tri-partite agreement dated 28.05.2013 executed between the parties.

G.III Direct the respondent the respondent to pay Rs. 1,00,000/- as the litigation cost.

71. 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.

H. Directions of the Authority:

72. 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 its own sources; from due date of possession i.e.; 02.09.2015 till the date of offer of possession (20.10.2022) plus two months i.e. 20.12.2022; as per proviso to section 18(1) of the Act read with rule 15 of the rules.
 - ii. The Authority hereby directs the respondent to adhere to the obligation of payment of pre-EMI as per tri-partite agreement dated 28.05.2013 executed between the parties.
 - iii. Out of amount so assessed, the respondent is entitled to deduct the amount already paid towards DPC (i.e. Rs. 7,06,850/-).
 - iv. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.
 - v. 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.

- vi. The respondent is directed to issue a fresh statement of account after adjusting delay possession charges within 15 days from date of this order.
- vii. The complainant is directed to pay outstanding dues, if any, after aforesaid adjustments in next two months and the respondent shall handover the possession of the allotted unit complete in all aspects as per specifications of buyer's agreement within next 15 days and if no dues remains outstanding, the possession shall be handed over within four weeks from date of this order.
- viii. 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.

73. Complaint stands disposed of.

74. File be consigned to the registry.

V. I. S.
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Pronounced on: 06.07.2023