HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint No:	**1700 of 2022**
Date of filing:	**02.08.2022**
Date of first hearing:	**22.09.2022**
Date of decision:	**06.07.2023**

Ravi Dhaka and Kompal Singh,
Both RR/o 901, Tower Discovery Park 80, Badoli(116), Baroli, Faridabad, Haryana-121004

....COMPLAINANT(S)

VERSUS

Haryana ShahariVikasPradhikaran, Faridabad
Estate Officer, Faridabad HUDA Complex, Sector-12, Faridabad, Haryana-121007

....RESPONDENTS(S)

CORAM: **Dr.Geeta Rathee Singh** **Member**
Nadim Akhtar **Member**

Present: Adv. Dhruv Lamba for the complainants through VC.
Mr.Arvind Seth for the respondent throughVC.

ORDER (NADIM AKHTAR- MEMBER)

1. Present complaint has been filed on 02.08.2022by complainants under Section 31 of The Real Estate (Regulation & Development) Act, 2016 (for short Act of 2016) read with Rule 28 of The Haryana Real Estate

(Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

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, delay period, if any, have been detailed in the following table:

S.No.	Particulars	Details
1.	Name of the project	Urban Estate, Faridabad.
2.	Name of the promoter	Haryana Shahari Vikas Pradhikaran, Faridabad.
3.	RERA registered/Unregistered	Unregistered
4.	Unit no.	Plot no. 707 GP
5.	Unit area	171 sq. mtr. (8 Marla)
6.	Date of allotment	01.09.2016-Allotment to original allottee'Smt. Bimla Devi'. 08.11.2016- Re-allotment to second allottee'Sh. Anurag'. 15.11.2019- Re-allotment to present complainants (Ravi Dhaka &Kompal Singh.

7.	Date of builder buyer agreement	No builder buyer agreement executed between the parties.
8.	Due date of offer of possession	01.09.2019 as per Clause 7 of allotment letter dated 01.09.2016 read as follows:- *'The possession of the plot will be offered within a period of 3 years from the date of allotment after completion of development work in the area. In case possession of the plot is not offered within the prescribed period of 3 years from the date of allotment, HUDA will pay interest @9% (or as may be fixed by Authority from time to time) on the amount deposited by you after the expiry of 3 years till the date of offer of possession and you will not be required to pay the further instalments. The payment of the balance installments will only start after the possession of the plot is offered to you'*
9.	Basic sale price	Rs.42,55,335/- (as per allotment letter dated 01.09.2016)
10.	Amount paid by complainant	Rs.45,69,892/- (as per receipts annexed)
11.	Offer of possession	No offer of possession

B. FACTS OF THE COMPLAINT

3. Facts recorded in the complaint are that a residential plot bearing no. 707GP measuring 171 sq. mtrs. (8 Marla) was allotted to Smt. Bimla Devi (hereinafter referred to as the 'original allottee') by the respondent

Haryana Shahari Vikas Pradhikaran in Sector-78 at Urban Estate Faridabad vide allotment letter dated 01.09.2016 by paying an amount of Rs. 4,05,000/- as earnest money. Copy of said allotment letter has been annexed as Annexure P/1 in complaint file.

4. That the said allotment was made for a total sale consideration of Rs. 42,55,335/- as mentioned in the allotment letter dated 01.09.2016

5. That further the amounts of Rs. 6,58,534/- and Rs.14,750/- were paid by the original allottee on 19.09.2016 and 22.09.2016 respectively against the total sale consideration. Copy of payment receipts dated 19.09.2016 and 22.09.2016 have been annexed as Annexure P/2 and Annexure P/3 in complaint file.

6. That the said plot was re-allotted to Sh. Anurag s/o Sh. Sube Singh H.No.62, Patel Nagar, Bhiwani vide re-allotment letter dated 08.11.2016 on request of the original allotee vide application dated 21.10.2016 to transfer the said plot in favour of Sh. Anurag (herein after referred to as the 'second allottee'). Copy of said re-allotment letter has been annexed as Annexure P/4 in complaint file.

7. That the respondent had sent a letter dated 09.06.2017 to second allottee for payment of enhanced compensation @Rs. 4,841/- per sq.mtrs., i.e., Rs. 8,27,811/- in accordance with condition no 9 of the allotment/re-allotment letter respectivelywherein it was mentioned that the price of

the said plot was subject to variation with reference to the enhancement of compensation in acquisition cost of land by the court and the court had enhanced the acquisition of land in this sector i.e., to the extent of Rs.4,841/- per sq.mtrs andthe said amount of Rs. 8,27,811/- was recoverable from Sh. Anurag. Copy of the said letter dated 09.06.2017 has been annexed as Annexure P/5.

8. That the second allottee Sh. Anurag had made payments of Rs. 3,86,000/, Rs. 4,51,477/-, Rs. 4,87,614/- and Rs. 5,31,917/- on 04.07.2017, 10.07.2017, 09.01.2017 and 28.08,2018 respectively against the total sale consideration of the said plot. The same were acknowledged by the respondent by issuing the receipts in this regard. Copy of said payment receipts have been annexed as Annexure P/6, P/7, P/8 and P/9.

9. Thereafter, the present complainants (Ravi Dhaka & Kompal Singh) had stepped into the shoes of the original allottee vide a full & final agreement dated 07.11.2019 executed between the second allottee and the present complainants. As per clause 3 of the said agreement the present complainants had paid an amount of Rs. 29,55,479/- to the second allottee. An indemnity bond was also executed on this date itself. Furthermore an affidavit was also given by the present complainants wherein they had solemnly affirmed and declared that they have accepted the allotment of the said allotted plot bearing no. 707GP

admeasuring 171 sq.mtrs in sector 78, Faridabad. Copy of Full & Final Agreement dated 07.11.2019 has been annexed as Annexure P/10. Copy of Indemnity Bond and Affidavit dated 07.11.2019 have been annexed as Annexure-P/11 and P/12 respectively.

10. That the said plot was then re-allotted to the present complainants vide re-allotment letter dated 15.11.2019issued by the respondent. In said re-allotment letter, the timeline of handing over possession of plot to complainants has not been mentioned. Copy of said re-allotment letter has been annexed as Annexure P/13. However, as per the clause 7 of the allotment letter dated 01.09.2016, executed inter se the original allottee and the respondent, the respondent had to handover the possession of the allotted plot within a period of 3 years from the date of allotment after completion of the development works, which came out to be 01.09.2019. But the respondent had failed to handover the possession on due date of possession.

11. Furthermore, the present complainants were forced to give an affidavit wherein they were forced to give away their statutory right of the delay compensation. The said affidavit was given by the present complainants under force, coercion and undue influence as without signing the same, the respondent was not issuing the re-allotment letter for which the full

and final agreement was already executed and a payment of Rs. 29,55,479/- was made to the second allottee (Sh. Anurag).

12. That the present complainants had made all the payments well on time as and when demanded by the respondent. Thus, complainants had paid Rs.45,69,892/- towards the total sale consideration which is more than 90% of the total sale consideration of the said plot.

13. Hence, the present complaint has been filed seeking possession along with delay possession interest from the due date of possession, i.e., 01.09.2019 till actual handing over of possession.

C. RELIEF SOUGHT

14. The complainants in their complaint have sought following reliefs:

a. To direct the respondent to give delay possession charges at prescribed rate from the due date of possession, i.e., 01.09.2019 till actual handing over of possession of the subject plot.

b. To direct the respondent that the rate of interest chargeable from the present complainants by the promoter shall be equitable as per section 2(za) of the Act of 2016.

c. To immediately handover the possession of the subject plot after completing the development works and taking appropriate approvals from the competent authorities.

d. Any other relief/direction which the Hon'ble Authority/Adjudicating Officer deems fit and proper in the facts & circumstances of the present complaint.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

Learned counsel for the respondent filed a short reply on 13.04.2023pleading therein:

15. That the present complaint deserves to be rejected solely on the ground that the present complainants are subsequent purchaser of the plot in question who had purchased the plot from the open market with open eyes despite knowing the fact that the possession of the plot was not delivered by the answering respondents.

16. That the complainants at the time of issuing allotment letter had duly furnished an affidavit dated 07.11.2019, by which they specifically undertaken not to claim any sort of delay possession interest from the answering respondent. Copy of the said affidavit has been annexed as Annexure R-1with reply file. The relevant clause of said affidavit has been reproduced hereunder:

> 7. *"That I shall not raise any dispute in respect of interest paid by the transferor in respect of delayed payment of instalments/ enhanced/ possession interest in respect of Plot as per policy of the authority decided from time to time."*

17. That the complainant had duly conceded to the terms and conditions of the re-allotment letter and submitted duly sworn affidavit with due diligence and full knowledge.

18. That the complainants have never applied for possession to respondent and directly approached this Authority without any justified reason, therefore, no question of not handing over of the plot arisesand the complaint filed by the complainants is liable to be dismissed on this ground alone.

19. That the ***Civil Appeal No. 2903, 2021 titled as Banwarilal &Ors. Versus State of Haryana &Ors.(Bunch of 1354 Cases)*** pertaining to the enhanced compensation in lieu of the acquisition relating to Sectors 76,77 and 78 Faridabad and Master Roads from Sector 75 to 89 was pending adjudication before the Hon'ble Supreme Court of India and the same was finally decided by the Hon'ble Apex Court vide order dated 14.07.2021.Due to the pendency of the said litigation the actual physical possession of certain chunks of lands in Sector76,77 & 78 Faridabad could not be taken by the answering respondents, which caused delay in offering possession to the affected allottees.

20. That clause 19(ii) of the re-allotment letter issued to the complainants specifically stated as follows:-

"You shall not raise any dispute in respect of the interest paid by the transferor on the delayed payment of instalment/enhanced compensation/possession interest in respect of plot/building as per policy of the Authority decided from time to time."

Hence, in view of the agreed terms and conditions of the re-allotment letter, the complainants at this stage cannot back out from the same.

21. That the development works in front of the plot in question are complete in all respects and the plot in question is ready for offering possession to the allottee. As per report of Executive Engineer, Electrical Division, HSVP Faridabad dated 10.04.2023,the PCC poles have been erected in front of the plot. The copy of the report has been annexed as Annexure R-2 in reply.

22. As per the HSVP policy the subsequent purchaser is not entitled for delay possession interest. In view of the above stated facts, it is prayed that the present complaint may kindly be dismissed in the interest of justice.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT AND RESPONDENT

23. During oral arguments learned counsel for the complainants insisted upon possession of their booked unit along with delay interest. Learned counsel for the respondent reiterated arguments as were submitted in its written statement.

In addition to its written statement, respondent argued that the jurisdiction of this Authority is barred because the project was completed before coming into force the RERA Act, 2016. He has also referred to judgment of Hon'ble Supreme Court of India in the case titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. Vs State of UP and others etc. in Appeal Case Nos. 6745-6749 of 2021***. The relevant portion of said judgement has been reproduced as under:-

> *37. Looking to the scheme of Act 2016 and Section 3 in particular of which a detailed discussion has been made, all "ongoing projects" that commence prior to the Act and in respect to which completion certificate has not been issued are covered under the Act. It manifests that the legislative intent is to make the Act applicable not only to the projects which were yet to commence after the Act became operational but also to bring under its fold the ongoing projects and to protect from its inception inter se rights of the stake holders allottees/home buyers, promoters and real estate agents while imposing certain duties and responsibilities on each of them and to regulate, administer and supervise the unregulated real estate sector within the fold real estate authority*
>
> *54. From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the ongoing projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016.*

24. He argued that the allotment to complainants has been made under the Haryana Development (Disposal of land and buildings) Regulations,

1978 which were made by exercising the powers of Section 54 of the Haryana Urban Development Authority Act, 1977(hereinafter referred to as HUDA Act, 1977). Thus, the provisions of RERA Act, 2016 are not applicable in the cases where the land has been developed by way of acquisition under the Land Acquisition Act and thereafter it has been developed under the provisions of HUDA Act, 1977. He stated that HUDA Act has been enacted by the state legislature with the aim and object to constitute a statutory authority in place of department of urban estate for ensuring the speedy and economic development of urban areas in the State of Haryana. Thus, the areas which have been developed under the provisions of HUDA Act, 1977 do not come under the purview of the RERA Act, 2016.

25. Thereafter, he referred Part-11, Chapter-11 of Constitution of India which prescribes the distribution of legislative relations between union and the states and distribution of legislative powers. He stated that Article 246 of the said constitution provides subject matter of laws made by parliament and by the legislatures of the states. Said Article 246 of the Constitution of India has been reproduced as under:-

> ***246. Subject-matter of laws made by Parliament and by the Legislatures of States.***
>
> *(1)Notwithstanding anything in clauses (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in List 1 in the Seventh*

Schedule (in this Constitution referred to as the "Union List").

*(2) Notwithstanding anything in clause (3). Parliament, and, subject to clause (1), the Legislature of any State 1*** also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in) this Constitution referred to as the "Concurrent List").*

*(3) Subject to clauses (1) and (2), the Legislature of any State 1*** has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").*

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included 2 [in a State] notwithstanding that such matter is a matter enumerated in the State List."

26. Thus, the State has power to enact the law related to transfer of property. Said power is traced from the provisions contained in the Schedule-7 of the concurrent list of Entry No. 6 which provides that there is no inconsistency in the RERA and HUDA Acts as both the Acts are enacted of their different roles, i.e., RERA Act is for regulation and promotion of real estate sector keeping in view the difficulty faced by the consumers of flats and plots buyers at the ends of the private developers and the HUDA act is enacted for urban development, which received the assent of President of India on 30.04.1977 and was published in the Haryana Gazette on 02.05.1977, where the land is acquired by the Urban Estate Department. Thus, the RERA Act and the HUDA Act operate in different fields as the HUDA cannot be equated with the private

developers as the acquisition of land is done by the state government for HUDA under the Land Acquisition Act(s).

27. Further, ld. counsel for respondent referred Article 254(2) of the Constitution of India which provides that if the law made by the State legislature with respect to any of the matter enumerated in the concurrent list contains any provisions repugnant to the provisions of earlier law made by the parliament or an existing law with respect to that matter then the law so made by the State Legislature of the state shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that state. However, it is subject to proviso that in case Parliament enact any law in respect of the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State, then in that case law made by the Parliament shall prevail.

28. He argued that since the HUDA Act, 1977 has not been repealed by the Parliament in the present case in accordance with proviso to Article 254(2) of Constitution, as Maharashtra Housing (Regulations and Development) Act, 2012 which was enacted after receiving the assents of the President was repealed by the Parliament while enacting the Maharashtra RERA Act, therefore, the provisions of RERA Act, 2016

are not applicable in this case, where the land has been developed under the provisions of HUDA Act. 1977.

29. Further, it was asserted by the respondent that an affidavit dated 07.11.2019 was submitted by the complainants expressing their satisfaction and acceptance with regard to allotment of the residential plot bearing no. 707GP admeasuring 171 sq.mtrs. in sector 78, Faridabad, which also stated that no claim or dispute of any delay possession interest would be raised against the developer and the said affidavit was duly submitted by the complainants with due diligence and full knowledge.

30. Disputing the above recorded statement of respondent counsel, the learned counsel for the complainants contended that complainants were forced to give an affidavit dated 07.11.2019 wherein they gave away their statutory right of the delay compensation. The affidavit was given under force, coercion and undue influence as without signing the same, the respondent was not issuing the re-allotment letter for which the full and final agreement was already executed and a payment of Rs. 29,55,479/- was made to the second allottee (Sh. Anurag).Thus, the learned counsel for the complainants argued that the undertaking/affidavit obtained from them dated 07.11.2019 cannot be relied upon by the developer to defeat their statutory rights.

F. ISSUES FOR ADJUDICATION

31. Whether the complainants are entitled to relief of possession of plot booked by them along with interest for delay in handing over of the possession in terms of Section 18 of Act of 2016?

G. FINDINGS AND OBSERVATIONS OF THE AUTHORITY

Findings on the objections raised by the respondent.

G-I. Objection regarding jurisdiction of this Authority to entertain the present complaint.

32. One of the averments of respondent is that provisions of the RERA Act of 2016 will not apply on the projects completed prior to coming into force of RERA Act, 2016.Respondent has argued that relationship of builder and buyer in this case cannot be examined under the provisions of RERA Act. In this regard, on perusal of letter dated 10.04.2023 of the Executive Engineer Electrical Division, HSVP, Faridabad annexed as Annexure R-2 of reply, Authority observes that the letter clearly states that "the PCC poles have been erected in front of the plot in question & ACSR conductor will be erected soon. The tender for balance work of Sector-78 has already been called & tender under allotment. As and when tender allotted to firm/agency the balance work i.e., conductor will be erected". This shows that the

development works are still not complete at site and thus the argument of the respondent that project of the respondent was completed prior to coming into force of RERA Act, 2016 is not accepted and thus the project of the respondent-promoter falls within the definition of on-going projects.

Further Authority observed that after coming into force the RERA Act, 2016, jurisdiction of the civil court is barred by Section 79 of the Act. Authority, however, is deciding disputes between builders and buyers strictly in accordance with terms of the provisions of agreements between the parties. In the present case, allotment of residential plot was made to the original allottee vide allotment letter dated 01.09.2016 and to the complainants vide re-allotment letter dated 15.11.2019 i.e., after coming into force of RERA Act, 2016. Thus, Authority has jurisdiction to decide disputes between builders and buyers strictly in accordance with terms of allotment agreed between the parties in the re-allotment letter issued to the complainants.

Further, since the said re-allotment letter had not mentioned the timeline of handing over possession of plot to complainants, thus, the due date of handover the possession of the plot has to be considered as per clause 7 of the Allotment letter dated 01.09.2016, executed inter se the original allottee and the respondent which comes out to be

01.09.2019 i.e., after RERA Act came into force. Therefore, this Authority has complete jurisdiction to entertain the captioned complaint.

33. Allotment to complainants is admitted by the respondent. Thus, terms agreed between the parties in said allotment letter is binding upon both the parties. As such, the respondent was under an obligation to hand over possession on the deemed date of possession as per allotment letter dated 01.09.2019and in case, the respondent failed to offer possession on the deemed date of possession, the complainants are entitled to delay interest at prescribed rate u/s 18(1) of RERA Act.

G-II. Objection regarding applicability of provisions of RERA Act, 2016 where land has been developed under the provisions of HUDA, Act, 1977.

34. Respondent contended that the provisions of RERA Act, 2016 are not applicable in the present case, where the land has been developed by the government developer (HUDA) under the provisions of HUDA Act. 1977and RERA Act is applicable only in cases where the flats and plots buyers have grievances against the private developers.

35. Before adjudicating upon said issue, Authority considers it important to refer to the Preamble of RERA Act, 2016 and has reproduced below for reference:

"Preamble: An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected connected therewith or incidental thereto."

It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute. The preamble provides that it shall be the function of the Authority to ensure sale of plot, apartment or building in an efficient and transparent manner and to protect the interest of consumers in the real estate sector by establishing a mechanism for speedy dispute redressal.

36. The Real Estate (Regulation and Development) Act, 2016 basically regulates relationship between buyer (i.e. allottee) and seller (i.e. promoter) of real estate i.e. plot, apartment or building, as the case may be and matters incidental thereto. Hon'ble Bombay High Court in the case ***Neelkamal Realtors Suburban Pvt. Ltd. and Ors. v. Union of India and Ors. 06.12.2017*** – BOMHC observed:

"In my opinion RERA does not fall under Entry 42 in List III- Concurrent List of the Seventh Schedule, namely, Acquisition and requisitioning of property. RERA fall under Entry 6, namely, Transfer of property other than

agricultural land; registration of deeds and documents, Entry 7-contracts, including partnership, agency, contracts of carriage and other special forms of contracts, but not including contracts relating to agricultural land and Entry 46, namely, jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in List III-Concurrent list of the Seventh Schedule".

The scope of this Act is limited to contracts between buyers and promoters and transfer to property. Both these items fall within the concurrent list III: entry-6 and entry-7 ready with entry-46.

This Act regulates the transactions relating to the sale of above mentioned real estate products, for an orderly growth of real estate market, by protecting the interests of different stake holders in a balanced manner and facilitating the consumer/buyer to make informed choice. Sec-88 of the RERA, Act, 2016 clearly provides 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. Furthermore, Section 89 provides that the provisions of this Act shall have the effect, notwithstanding anything inconsistent therewith, contained in any other law for the time being in force. Thus, there remains no ambiguity with respect to the fact that the Authority while adjudicating the complaints filed u/s 31 of the Act are only deciding the rights and obligations of the parties i.e. the builder/Promoter/developer and the allottee inter-se as per the

agreement for sale entered into between them for sale of a real estate project.

G.III Findings on the objection that subsequent-allottee who had executed anindemnity cum undertaking/affidavit with waiver clause is not entitledto claim delay possession charges.

37. The respondent submitted that complainants in question are subsequent allottees and they have executed an indemnity cum undertaking and an affidavit dated 07.11.2019 whereby the complainants had solemnly affirmed and declared that they have accepted the allotment of the plot bearing no. 707GP admeasuring 171 sq.mtrs. in sector 78, Faridabad and had consciously and voluntarily given up their right to raise any dispute or claim regarding delay possession interest against the residential unit in one of the condition of executing this affidavit accepting allotment of plot in question. Therefore, the complainants are not entitled to anydelay possession interest. With regard to the above contentions raised by the promoter/developer, it is worthwhile to examine following three sub-issues:

(i) Whether subsequent allottee is also allottee as per provisions of the Act?

(ii) Whether indemnity-cum-undertaking/affaidavit with waiver clause at thetime of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?

(iii) Whether the subsequent allottee is entitled to delayed possession charges with effect from due date of handing over possession or w.e.f. the date of transfer/endorsement/re-allotment (i.e., date on which he became allottee.

(i). Whether subsequent allottee is also an allottee as per provisions of the Act?

38. The term "allottee" as defined in the Act also includes and means thesubsequent allottee, hence is entitled to the same relief as that of the original allottee. The definition of the allottee as provided in the Act is reproduced as under:

> 2. *In this Act, unless the context otherwise requires-*
> *(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."*

39. Accordingly, following are allottees as per this definition:

(a) Original allottee: A 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.

(b) Allottees after subsequent transfer from the original allottee: A person who acquires the said allotment through sale, transfer or

otherwise. However, allottee would not be a person to whom any plot, apartment or building is given on rent.

40. From a bare perusal of the definition, it is clear that the transferee of an apartment, plot or building who acquires it by any mode is an allottee. This may include (1) allotment; (ii) sale; (iii) transfer; (iv) as consideration of services; (v) by exchange of development rights; or (vi) by any other similar means. It can be safely reached to the only logical conclusion that no difference has been made between the original allottee and the subsequent allottee and once the unit, plot, apartment or building, as the case may be, has been re-allotted in the name of the subsequent purchaser by the promoter, the subsequent allottee enters into the shoes of the original allottee for all intents and purposes and he shall be bound by all the terms and conditions contained in the allotment letter including the rights and liabilities of the original allottee. Thus, as soon as the unit is re-allotted in his name, he will become the allottee and nomenclature "subsequent allottee shall only remain for identification for use by the promoter. Therefore, the authority does not draw any difference between the allottee and subsequent allottee per se.

41. Reliance is placed on the judgment dated 26.11.2019 passed in consumer complaint no. 3775 of 2017 titled as ***Rajnish Bhardwaj Vs. M/s CHD Developers Ltd. by NCDRC*** wherein it was held as under:

> *"15. So far as the issue raised by the Opposite Party that the Complainants are not the original allottees of the flot and resale of flat does not come within the purview of this Act, is concerned, in our view, having issued the Re-allotment letters on transfer of the allotted Unit and endorsing the Apartment Buyers Agreement in favour of the Complainants, this plea does not hold any water."*

42. The authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 in ***Rajnish Bhardwaj vs. M/s CHD Developers Ltd. (supra)*** that it is irrespective of the status of the allottees whether it is original or subsequent, an amount has been paid towards the consideration for a unit and the endorsement by the developer on the transfer documents/ re-allotment letter clearly implies his acceptance of the complainants as allottees.

43. Therefore, taking the above facts into account, the authority is of the view that the term subsequent allottee has been used synonymously with the term allottee in the Act. The complainants/subsequent allottees at the time of buying a unit/plot takes on the rights as well as obligations of the original allottee vis-a-viz the same terms and conditions of the allotment letter issued by promoter-respondent to an original allottee. Moreover, the amount if any paid by the subsequent or original allottee is adjusted against the unit in question and not against any individual. Furthermore, the name of the complainants/subsequent allottees have been endorsed on the re-allotment letter dated 15.11.2019 issued by the promoter-respondent.

Therefore, the rights and obligation of the complainants/subsequent allottees and the promoter will also be governed by the said re-allotment letter. However, the said re-allotment letter had not mentioned the timeline of handing over possession of plot to complainants, thus, the due date of handover the possession of the plot has to be considered as per clause 7 of the Allotment letter dated 01.09.2016, executed inter se the original allottee and the respondent which comes out to be 01.09.2019.

ii). **Whether indemnity-cum-undertaking/affidavit with waiver clause at the time of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?**

44. The relevant clause of said indemnity bond and affidavit has been reproduced hereunder:

> *NOW THIS INDEMNITY BOND WITHNESSES AS FOLLOWS:-*
> *That the said Transfer which is sought in the name of against full & final payment of Plot from above transferee and in case the Estate Officer or any servant of HUDA would suffer any loss due to this transfer in his/her name, the executants and his Property and person shall be liable to make good the said loss which will be sustained by the Estate officer, Faridabad on account of this Transfer.*
> *1. That the legal heirs or successors shall also be liable to make good the said loss, if any accrued to the Estate Officer, Faridabad.*
> *2. That in case of any legal heirs or other person shall make any claim, regarding this Plot/Property, the Litigation of the same will be defended by the executant and the loss suffered by the Estate Officer, Faridabad will*

also be made good by the executant and Property and person.

The relevant clause i.e., clause 7 of said affidavit has been reproduced hereunder:

> *7. "That I shall not raise any dispute in respect of interest paid by the transferor in respect of delayed payment of instalments/ enhanced/ possession interest in respect of Plot as per policy of the authority decided from time to time."*

45. The Authority further is unable to gather any reason or has not been exposed to any reasonable justification as to why a need arose for the complainants to sign any such affidavit or indemnity-cum-undertaking and as to why the complainants have agreed to surrender their legal rights which were available to them as a statutory right under the provisions of RERA Act, 2016 and had also accrued in favour of the original allottee vide original allotment letter dated 01.09.2016. Thus, no sane person would ever execute such an affidavit or indemnity-cum-undertaking unless and until some arduous and/or compelling conditions are put before him with a condition that unless and until, these arduous and/or compelling conditions are performed by him, he will not be given any relief and he is thus left with no other option but to obey these conditions. Exactly same situation has been demonstratively happened here when the complainants/ subsequent-allottees have been asked to give the

affidavit or indemnity-cum-undertaking in question before transferring the unit in their name otherwise such transfer may not be allowed by the promoter. Such an undertaking/ indemnity bond given by the complainants thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. No reliance can be placed on any such affidavit/ indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on the said affidavit/indemnity cum undertaking. To fortify this view, we place reliance on the order dated 03.01.2020 passed by hon'ble NCDRC in case titled as ***Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd. Consumer case no. 351 of 2015***, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of section 23 and 28 of the Indian Contract Act, 1872 and therefore, would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below:

"Indemnity-cum-undertaking

30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee.
***Clause 13** of the said indemnity-cum-undertaking required the allotter to confirm and acknowledge that by accepting the offer af possession, he would have no*

further demands/claims against the company of any noture whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre- requisite condition for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-com undertaking. The obvious purpose behind such an undertaking was to deter the allotter from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. ***The execution of such an undertaking would defeat the provisions of Section 23 and 20 of the Indian Contract Act, 1872 and therefore would be against public policy besides being an unfair trade practice.*** *Any delay solely on account of the allottee not executing such undertaking would be attributable to the developer and would entire the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity"*

46. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgment dated 14.12.2020 passed in civil appeal no's 3864-3889 of 2020 against the order of NCDRC.

47. Hon'ble Supreme Court and various High Courts in a plethora of judgments have held that the terms of a contract shall not be binding if it is shown that the same were one sided and unfair and the person signing did not have any other option but to sign the same. Reference can also be placed on the directions rendered by the Hon'ble Apex Court ***in civil appeal no. 12238 of 2018 titled as Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan (decided on***

02.04.2019) as well as by the ***Hon'ble Bombay High Court in the Neelkamal Realtors Suburban Pvt. Ltd. (supra).*** A similar view has also been taken by the Apex court in ***IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna &Ors. (supra)*** as under:

> *".....that the incorporation of such one-sided and unreasonable clauses in the Apartment Boyer's Agreement constitutes on unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fore were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An unfair contract" has been defined under the 2019 Act and powers have been conferred on the State Consumer Forum and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.*
>
> *In view of the above, we hold that the Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer Agreement."*

48. The same analogy can easily be applied in the case of execution of an affidavit or indemnity-cum-undertaking which got executed from the complainants/subsequent allottees before getting the unit transferred in their name in the record of the promoter as allottees in place of the original allottee.

49. The Authority may deal with this point from yet another aspect. By executing an affidavit/undertaking the complainants/subsequent-allotters cuts their hands from claiming delay possession charges in

case there occurs any delay in giving possession of the unit beyond the stipulated time or the due date of possession. But the question which arises before the authority is that what does allottee got in return from the promoter by giving such a mischievous and unprecedented undertaking. However, the answer would be "nothing". If it is so, then why did the complainants executed such an affidavit/undertaking is beyond the comprehension and understanding of this authority.

50. The Authority holds that irrespective of the execution of the affidavit/undertaking by the complainants/subsequent allottees at the time of transfer of their name as allottees in place of the original allottee in the record of the promoter does not disentitle them from claiming the delay possession charges in case there occurs any delay in delivering the passession of the unit beyond the due date of delivery of possession as promised even after executing an indemnity-cum-undertaking.

iii. Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession?

51. The respondent/promoter contended that complainants/subsequent allottees shall not be entitled to any delayed possession charges since at the time of the execution of transfer documents/re-allotment, they were well aware that the due date of possession had already passed and have knowingly waived off their right to claim any

charges/interest for delay in handing over possession or any rebate under a scheme or otherwise or any other discount and accepted the allotment of plot in question in their favour vide re-allotment letter dated 15.11.2019 and stepped into the shoes of the original allottee.

52. Initially the plot was allotted to an original allottee vide original allotment letter dated 01.09.2016 i.e., after the RERA Act of 2016 came into force. By virtue of proviso to section 18(1), the Act has created statutory right of delay possession charges in favour of the allottees in case promoter fails to deliver possession within stipulated time in the terms of the agreement. In the present case, promoter has failed to deliver possession within the time stipulated in original allotment letter i.e., by 01.09.2019, thus, the statutory right of delay possession interest has accrued in favour of original allottee as per RERA Act of 2016 and promoter was well aware of this accrued statutory right of delay possession interest in favour of original allottee. Thereafter, the said plot was re-allotted to subsequent allotee vide re-allotment letter dated 15.11.2019. Now, the question arises is that whether the transfer of plot in favour of subsequent allottee creates a bar for the later to claim delay possession charges. The answer is in the negative. Taking the above facts into account, Authority is of the view that the term subsequent allottee has been used synonymously with the term allottee in the Act. The subsequent

allottee at the time of buying a plot takes on the rights as well as obligations of the original allotteevis-a-viz the same terms and conditions of the allotment entered into by the original allottee. Thus, the statutory right of delay possession interest which has already been accrued in favour of original allottee after the passing of deemed date of possession has been taken over by subsequent allottee by purchasing the plot in question from an original allottee, Thus, subsequent allotee has taken over the plot along with the right of delay possession interest and has came before this Authority with the statutory right of delay possession.

53. Further, the submission of the respondent that the subsequent allottee is not entitled for delay possession interest as per the HSVP policy is not accepted as no such alleged policy was placed on record by respondent in support of its contention. Moreover, if it is presumed that the said alleged policy provides that subsequent purchaser is not entitled for delay possession interest then also provisions of RERA Act will prevail over terms of such alleged policy. RERA Act is a Central Act which was enacted to regulate the contractual relationship between builder-buyers. Since, section 89 of the Act provides that if there is any provision inconsistent with the provisions of RERA Act, then RERA Act shall have the overriding effect, thus, even if any such

policy provides for non-entitlement of subsequent allottee to delay possession interest, the same cannot be accepted.

54. Respondent in its written submissions also averred that the pendency of Civil Appeal No. 2903, 2021 titled as ***Banwarilal &Ors. Versus State of Haryana &Ors.(Bunch of 1354 Cases)*** before the Hon'ble Supreme Court of India regarding enhanced compensation in lieu of the acquisition relating to Sectors 76,77 and 78 Faridabad and Master Roads from Sector 75 to 89 which was finally decided by the Hon'ble Apex Court vide order dated 14.07.2021 was the reason behind delay in offering possession to the affected allottees as during the pendency of the said litigation the actual physical possession of certain chunks of lands in Sector76,77 & 78 Faridabad could not be taken by the respondents. Authority observes that there is a delay on the part of the respondent and the reason given by the respondent is not plausible as the due date of offering possession was in the year 2019 and the Civil Appeal No. 2903 referred by the respondent pertains to the year 2021 therefore the respondent cannot be allowed to take advantage of the delay on his part by claiming the pendency of litigation as reason for not offering possession within stipulated time.

Observations of the Authority

55. In view of above and after going through the record, Authority observes that complainants are seeking possession of the plot allotted

to them along with delay possession interest. It is pertinent to mention that time for delivery of possession has not been stipulated in re-allotment letter issued to the complainants/ subsequent allottees. It is a general interpretation that in case re-allotment letter is silent with respect to any specific term, then reference can be made to terms of original allotment letter issued to the original allottee to fill the gap of terms of re-allotment letter issued to the subsequent allottee. In the present case, promoter has issued the re-allotment letter dated 15.11.2019 to complainants/subsequent allottees. But the time for delivery of possession has not been stipulated/ changed in re-allotment letter issued to the complainants. This shows that the intention of the promoter was never to amend/extend the original date of possession i.e., 01.09.2019 as stipulated in original allotment letter dated 01.09.2016. In such situation, time stipulated in original allotment letter can be relied upon with respect to the deemed date of possession. Therefore, in the present complaint, **01.09.2019** shall be deemed to be considered as due date of delivery of possession of plot in accordance with original allotment letter dated 01.09.2016.

56. Since, the respondent has failed to handover the possession on the deemed date of possession, i.e., by 01.09.2016, thus, the complainants are now entitled to two remedies u/s 18 of RERA Act. i.e.,

i. In the event, the allottee wishes to withdraw from the project, he/she shall be entitled without prejudice to any other remedy refund of the amount paid along with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act;

ii. In the event, the allottee does not intend to withdraw from the project, he/she 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.

However, in the present case, complainants wish to continue with project and insisted upon the relief of delay interest along with possession of the plot allotted to them. The provision of delayed possession charges has been provided under the proviso to Section 18 (1) of the Act, Section 18 (1) proviso reads as under:

> *"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.*

Thus, 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 theRules. Rule 15 has been reproduced as under;

> *"Rule 15. Prescribed rate of interest- (Proviso to section 12, section 18and sub-section (4) and subsection (7) of section-19]*
> *(1)For the purpose of proviso to section 12; section 18, and sub.sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of india highest marginal cost of lending rate +2%:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public".*

57. The legislature in its wisdom in the subordinate legislation under the provision of Rule 15 of the HRERA Rules, 2017 has determined the prescribed rate ofinterest. 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.

58. Consequently, as per website of the State Bank of India ie. https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e. 06.07.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

59. The definition of term 'interest' is defined under Section 2(za) of the Act which is as under:

(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;

60. Respondent plea that the complainants have never applied for possession to respondent and directly approached this Authority without any justified reason is of no relevance. Authority observes that as per RERA Act, 2016, obligation is casted upon the promoter-builder to complete the development works and take appropriate approvals from the competent authorities and then make an offer of possession to allottees as per agreement for sale. Thereafter, burden shifts upon the allottees to take the possession after paying all the dues towards the total sales consideration of the unit allotted. However, the factual condition of the present case reveals that the promoter-respondent itself has failed to complete or unable to give possession of the unit in accordance with the terms of allotment letter dated

01.09.2016, or tooffer of possession of the plot. Thus, complainants have rightly approached the Authority to enforce their statutory rights under the provisions of the Act of 2016 and plea of respondent to dismiss the case on ground that complainants have never applied for possession to respondent is outrightly discarded.

61. Considering above facts, delay in handing over of the possession of the unit has been established. Therefore, the respondent is liable to pay interest to the complainant on account of delay in delivery of possession from the deemed date of possession i.e., 01.09.2019 till today along with future interest for every month of delay occurring thereafter till the handing over of possession at the rate prescribed in Rule 15 of the HRERA Rules, 2017.

62. Authority has got delay interest calculated from its account branch. The details of amounts paid by the complainants and delay interest calculated on said amounts are shown in the following table: -

Amount paid by complainants	Upfront delay interest calculated by Authority till date of order i.e., 06.07.2023 @ 10.70% p.a rate of interest.	Further monthly interest till the date of actual handover of possession.
Rs.45,69,892/-	**Rs. 17,89,505/-**	**Rs.41,530/-**

63. Further, complainant is seeking relief of issuance of directions to the promoter to charge equitable interest as persection 2(za) of the Act of 2016 in case of any default in payment by the complainant. For this, Authority has referred to a judgment of Appellate Tribunal in ***Appeal No.21 of 2019 titled as M/s Pivotal Infrastructure Pvt. Ltd. VsPrakash Chand Arohi*** *along with* ***Section 2(za) of the Act*** *reads as under:*

> ***(za) (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;*
> *91. As per the aforesaid provision the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which promoter shall be liable to pay to the allottee in case of default. So, in this case the complainant/allottee has been awarded the interest at the rate SBI MCLR+2% on account of delay in delivery of possession. So, the respondent/promoter shall also be entitled to recover the the equal rate of interest from complainant/allottee. Thus we do not find any illegality in the aforesaid direction of learned Authority.*

In view of aforesaid judgment, Authority observes that it is a settled law that rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which promoter shall be liable to pay to the allottee in case of default. In the present case, complainants are awarded the delay possession interest at the rate SBI MCLR+2% i.e., 10.70% (8.70%+2%) on account of delay in delivery of possession by respondent. Similarly, in case complainants

have defaulted in making any timely payment to respondent-promoter, then respondent-promoter is also entitled to charge same rate of interest as awarded to the complainants in the present case i.e., SBI MCLR+2% i.e., 10.70% (8.70%+2%) on account of delay payment by the complainants. Thus, Authority directs the respondent that the interest chargeable by the respondent- promoter on account of delay payment by the complainantsif any, shall be equitable as per section 2(za) of the Act of 2016 as awarded to the complainant in the present case.

H. DIRECTIONS OF THE AUTHORITY

64. Hence, the Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:-

(i) Respondent is directed to pay the complainants upfront amount of **Rs.17,89,505/-**.Respondent's liability for paying monthly interest of **Rs.41,530/-** as shown in above table will commence w.e.f. 07.07.2023 and it shall be paid on monthly basis till actual possession is given to complainantsafter completing the development works and taking appropriate approvals from the competent authorities.

(ii) A period of 90 days is given to the respondent to comply with the directions given in this order as provided in Rule 16 of Haryana Real Estate (Regulation & Development) Rules, 2017 failing which legal consequences would follow.

65. **Disposed of**. File be consigned to record room after uploading on the website of the Authority.

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Dr. GEETA RATHEE SINGH
[MEMBER]

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NADIM AKHTAR
[MEMBER]

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