BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**4134/2021**
Date of filing complaint:	**14.10.2021**
Date of decision	**09.04.2024**

	Gopal Krishan Arora R/O: H No C 1/17 First Floor Rana Pratap Bagh Malka Ganj Delhi	**Complainant**
	Versus	
	Experion Developers Private Limited R/O: F-9, First Floor, Manish Plaza-I, Plot No. 7 Mlu, Sector 10, Dwarka, New Delhi-110075	**Respondent**

CORAM:	
Shri Arun Kumar	**Chairman**
Shri Vijay Kumar Goyal	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Sh. K.K Kohli (Advocate)	Complainant
Sh. Saurabh Gauba (Advocate)	Respondent

ORDER

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

S.No.	Heads	Information
1.	Name of the project	Wind chants Sector 112, Chauma, Gurugram
2.	Nature	Group housing
3.	DTCP License	21 of 2008 dated 08.02.2008 valid up to 07.02.2020 28 of 2012 dated 07.04.2012 valid up to 06.04.2025
4.	Licensee name	Experion Developers
5.	Registered /not registered	Registered in 3 phases I. 112 of 2017 dated 28.07.2017 Valid up to 27.08.2019 II. 64 of 2017 dated 18.08.2017 III. 73 of 2017 dated 21.08.2017 Valid up to 20.08.2019
6.	Date of environment clearance	27.12.2012 (As per project details taken from the planning branch)
7.	Provisional allotment letter in favour of original allottee i.e., Kuldeep Yadav	04.08.2012 (Page no. 97 of complaint)
8.	Date of execution of buyer's agreement between the original allottee and the respondent	26.12.2012 (Page no. 101 of complaint)
9.	The subject unit was endorse in favour of the complainant on	30.12.2014 (Page no. 138 of complaint) OR

		31.03.2014 as per annexure 5 of the reply
10.	Unit no.	1103, 11th floor, tower no. WT-07 (Page no. 133 of complaint)
11.	Unit area admeasuring as per BBA	2650 sq. ft. (Page no. 133 of complaint)
12.	Increase in area of the unit as per offer of possession dated 08.12.2017	2802 sq. ft. (Page no. 124 of reply)
13.	Possession clause	**10 Project completion period** 10.1 Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company intends to hand over possession of the Apartment within a period of ***42 (forty two months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and forests, Government of India for the Project or execution of this Agreement, whichever is later*** ("Commitment Period"). The Buyer further agrees that the Company shall additionally be entitled to a time of 180 (one hundred and eighty days ("Grace Period") after expiry of the Commitment Period for unforeseen and unplanned Project realities. However, in case of any default under this Agreement that is not rectified or remedied by the buyer within the period as may be stipulated, the Company shall not be bound by such Commitment Period. (Page no. 118 of complaint)
14.	Due date of possession	27.12.2016

		(Calculated from the date of environment clearance being later and grace period of 180 days being allowed)
15.	Total sale consideration	Rs.2,06,46,921/- (As per SOA dated 08.11.2021 at page no. 250 of reply)
16.	Amount paid by the complainant	Rs.1,97,19,159/- (As per SOA dated 08.11.2021 at page no. 250 of reply)
17.	Occupation certificate	06.12.2017, 23.07.2018 and 24.12.2018 (Page no. 177 to 183 of reply)
18.	Notice of possession	08.12.2017 (Page no. 123 of reply)

B. Facts of the complaint:

3. That the complainant was induced to buy the apartment on the basis of representations made by respondent that he is a 100% FDI company and the project is a low density, high green area project with high quality construction and world class amenities which will be delivered within stipulated time of 42 months. The respondent misused his position as a dominant party to a contract and drafted a one-sided buyer agreement which the complainant was made to sign on the dotted line.The respondent unilaterally changed the definition of term 'sale area' in the agreement from the one used in the booking application form. As per the definition of the application form the term sale area is defined as "... the area of the apartment and the proportionate undivided share of relevant areas for common use, enjoyment and access of the occupants of all the apartments at the project level which is necessary for the functional operation of all the apartments and its occupants and as may also be provided for in the declaration".

4. That whereas as per the buyer agreement the sale area has been defined as " 'sale area' shall include the covered area, inclusive of areas enclosed by the periphery walls, balconies/ decks, area under the columns and walls, half of the area of walls common with other premises, cupboards, projections/ ledges, area utilized for the common services and facilities provided viz. areas under staircases, circulation areas, walls, atriums, stilts, lift shafts and lobbies, lift machine rooms, service shafts, passages/ corridors, refuge areas, common washrooms/ toilets, mail rooms, all electrical. plumbing and fire shafts, community facilities, common service rooms, security rooms, sewage treatment plants, underground and overhead water storage tanks, DG/panel room, terrace gardens, air handling units, pantries and any other areas which have been paid for or are constructed by the company for common use but shall exclude the areas under the following:-

   a) Sites for retail shops and other commercial areas in the project.

   b) Amenities such as schools; medical centre / dispensary, crèche, other health centres and the like.

   c) Dwelling units for the Economically Weaker Sections as prescribed under Applicable Laws.

   d) Car parking spaces.

5. That the respondent added many items in the scope of Sale consideration which were arbitrary, unfair and illegal. These include, but not limited to, car parking charges, ad hoc payments, community furnishing charges, among others.

6. That the complainant duly made all payments on time as and when demanded without prejudice to his rights. The respondent after having recovered more than 1.80 crores, which is more than 90% of the stipulated amount, started claiming, for the first time in 2017, Rs

10,38,464/- towards additional sale area differential which he failed to justify despite repeated requests.

7. That the complainant obtained information under RTI which revealed that respondent has violated the sanctioned plans and encroached on organised green area. He has illegally built HSD tank and gas bank which is in close proximity to the tower in which complainant's apartment is situated. Other violations include, but not limited to, unilateral alteration of circulation road plans, reduction in surface car parkings, reduction in ground coverage of towers, building 20 additional ews units beyond the sanctioned total 100 units. The respondent further refused to share details of sanctioned plans including as built drawings.

8. That the respondent has refused to hand over the lawful possession of the apartment, complete in all respects as per specifications in buyer agreement and as assured at the time of luring the complainant into buying the apartment. The offer of possession dated 08.12.2017 was invalid and bad in law as the project was not habitable by any standard and list of incomplete works along with photographic evidence was repeatedly shared with respondent who did not pay any heed to complainant's concerns. As per clause 10.1 of buyers agreement, which was signed on 26.12.2012 details of which are attached, the possession of the said unit was supposed to be delivered within 42 months from the date of approval of the building plans or the date of receipt of the approval of the ministry of environment and forests for the project or from execution of the builder buyer agreement, whichever is later plus a grace period of 180 days, making the due date of delivery i.e., 27.12.2016. However, the possession is offered after a delay of almost 18 months from the agreed date as per the notice of possession dated 08.12.2017 which itself is invalid and bad in law.

9. That it is pertinent to note that under clause 4.8 of the builder buyer's agreement, upon delay of payment by the allottees, the respondent can charge 18% simple interest per annum.

10. That the demand towards the increased sale area is against the RERA Act, 2016 and hence illegal and unjustified and hence the respondent should reverse the charges so levied of in addition to EDC, IDC, GST, corresponding stamp duty for registration and corresponding maintenance charges as well as interest free maintenance security. The respondent issued a public notice dated 14.03.2021 calling for objection for revision in the sanctioned plans. Despite having received regular requests from the complainant for the "As built plans" the respondent has never complied with the same.

11. That the respondent provided an architect certificate, issued in 2018, which itself is vague and does not have any calculation/ explanation/ specification regarding the ilegally revised sale area. It is further pertinent to note the definition of the sale area as provided in the said one sided agreement is wholly unreasonable and the complainant cannot be compelled to pay anything accordingly. There is no justification at all provided by the respondent as to in what manner the said alleged revised sale area has been apportioned to the apartments.

12. That the deposit of HVAT of Rs. 87,592 before the execution of conveyance deed as per notice of possession which is illegal and unjustified. It is therefore illegal on the part of the respondent to claim Rs 87,592/- towards HVAT from the complainant. Payment of Rs. 98,070/- IFMSD at the time of notice of possession as per the buyer's agreement, the IFMS was payable on the offer of possession. The respondent has stated at annexure 2 of notice of possession that, 24 months of advance maintenance charges @ Rs. 3.5 per sq. ft plus GST @ 18% for 12 months

amounting to rs. 2, 30,123.00 has to be paid by the complainant. The bonafides of the complainant are clear as he has made full payment, towards this illegal demand, without prejudice and under protest. Therefore, the respondent is liable to return the amount charged on account of car parking usage charges of Rs. 8, 24,720.00 with appropriate rate of interest.

13. That the notice of possession is not a valid offer of possession. It has been held by the Hon'ble NCDRC, New Delhi in many cases that offering of possession, conditional on the payment of charges which the flat buyer is not contractually bound to pay, cannot be a valid offer of possession. Present case the following charges of Rs. 14, 27,029/- levied are not a part of the buyer agreement, and hence are not payable:

    a) Dual Meter Charges- Rs. 17,700
    b) PHE Charges- Rs. 15,874
    c) FTTH Charges- Rs. 22,284
    d) Solar Power Charges- Rs. 7,528
    e) BCC Charges- 1,71,524
    f) Community Building Furnishing Charges- 2,24,000
    g) Interest free Maintenance Security Deposit-98,070

14. That the amount which the allottee is not contractually bound to pay is illegal and unjustified and asking for unspecified deposit towards annual common area maintenance is illegal. The allottee is not contractually bound to pay this and hence the offer of possession is not a valid offer of possession.

15. There is no second thought to the fact that the complainant has paid more than Rs. 1,97,19,159.00/-which exceeds the total consideration that was agreed upon in the buyer agreement.

16. That the alleged sale area which was increased by the respondent is illegal and the impugned LC report cannot be relied upon. At the outset, the complainant states that the respondent did not allow even inspection of unit unless the complainant pays all the illegitimate/ arbitrary demands raised by it. The respondent was neither entitled to increase sale area nor did it follow the due process of law before allegedly increasing the area, the respondent has also miserably failed to substantiate its claim of having increased the sale area by 152 sq. ft. The final bill of the total area constructed by project contractor M/S L&T has never been shared by respondent till date despite repeated requests. It is a matter of record that the architect certificates were issued after more than 3 years of the raising of the illegal demand for the increased area. There are discrepancies and factual errors in figures submitted by the respondent who did not provide complete set of plans, documents and information despite specific directions by Hon'ble HREAT (order dated 04.11.2022 in appeal no.379 of 2022 in the matter of Experion Developers vs Gopal Krishan Arora). This Hon'ble Authority has also directed the respondent to provide complete information vide orders dated 28.01.2022 and 06.04.2022. The objections are not being repeated here for the sake of brevity but the following short points are being submitted:

i. The local commissioner did not physically verify the measurements submitted by respondent nor did he give any firm opinion on determination of sale area. The local commissioner merely forwarded selective and limited information provided by respondent to the Authority.

ii. The respondent arbitrarily changed the definition of term sale area in the buyer's agreement from the one used in booking application form. The components like stp, pump room, blower room, lift room, electric room, terrace gardens were subsequently

added in the definition. Most of these items are in the nature of development works and allottees have already paid EDC/ IDC for same.

iii. The factual errors-stilt area in relevant tower is claimed to have increased from 120 sq mtr to 177 sq mtr. This is factually incorrect as stilt area has actually reduced from 240 sq mtr to 177 mtr.

iv. The basement area used for car parking has actually reduced by over 24000 sq ft. responded has mischievously concealed this fact. The reduction in basement area can be computed by comparing sanctioned basement area and area actually built as per OC 1,2 and 3 annexed with the local commissioner report. Ground coverage of relevant tower has actually reduced from sanctioned 919 sq mtr to 899 sq mtr. Total constructed area is logically bound to decrease and not increase due to reduction in ground coverage. Area under lift wells and shaft wells has been wrongly computed on each floor. As per law and standard architectural jurisprudence, lift wells and shafts are computed only once at ground floor level as the lift wells and shaft wells are hollow from ground level to top floor.

v. The local commissioner violated the principles of natural justice by not agreeing to involve complainant and his architect in the whole exercise of determining area.

vi. As Built drawings allegedly supplied by Respondent to LC are neither duly certified by DTCP nor these are the complete set of drawings.

17. That the respondent is duty bound to handover the actual physical possession and to pay the delayed possession charges for every of delay till the date of actual handing over of physical possession of the unit to the complainant in view of section 18 of the act of 2016.

18. That w.r.t adhoc charges, gst, legal fees, cbfc, ifmsd and other charges which were never part of the buyer's agreement nor agreed inter se parties. The respondent has charged Rs. 2,34,910 towards ADHOC charges under various heads. These are illegal being outside the terms of

the agreement. Further, the respondent has charged Rs. 3,62,078 (towards GST which was introduced in July 2017. However, the due date of possession was 26.06.2016. And the respondent may be directed to furnish complete details of edc/idc collected and deposited. Any excess amount retained by respondent is liable to be refunded.

19. Written submissions have been filed by the complainant and the same is taken on record and perused.

C. Relief sought by the complainant:

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

i. Direct the respondent – builder to handover the physical possession complete in all respects and to pay delay possession charges to the complainant.

ii. Direct the respondent to declare that the alleged sale area increased by the respondent is illegal.

iii. Direct the respondent by restraining them from charging holding charges, maintenance charges, GST, community building furnishing charges and interest free maintenance security deposit.

iv. Direct the respondent to restrain them from charging adhoc charges, car parking usage charges and HVAT.

v. Direct the respondent to refund excess amount collected on account of EDC and IDC.

D. Reply by respondent:

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

21. That the present complaint is barred on account of the arbitration clause 26 mentioned in the apartment buyer agreement dated 26.12.2012.

22. That the original allottee, namely, Mr. Kuldeep Yadav booked an apartment with the respondent in the project named "Windchants"

situated at Sector 112, Village Choma, Gurugram, Haryana by signing and submitting the booking application dated 19.06.2012. Pursuant to the said booking application, the original allottee was provisionally allotted apartment unit no. 1103 in tower WT-07 of the said project vide an allotment letter dated 04.08.2012. On 26.12.2012, an apartment buyer agreement was executed between the original allottee and the respondent herein. Thereafter the original allottee transferred his rights and interest in the apartment to the complainants on 31.03.2014. The respondent obtained the approved building plan on 07.06.2012 and received environmental clearance on 27.12.2012 and as per clause 10.1 of the agreement, the possession of the apartment was to be offered within 42 months plus 180 days grace period from the date of the approval of the building plan or the date of receipt of the approval of the ministry of environment and forests, government of India or the date of the present agreement whichever is later. It is submitted that clearance from the Ministry of Environment and Forests, Government of India was received on 27.12.2012 therefore the tentative completion date of the apartment was 27.12.2016 i.e., including 180 days grace period.

23. That further clause 4.2 of the agreement clearly stipulated that the basic sale price of the apartment is exclusive of EDC and IDC and other statutory deposits and / or charges, including charges for connection and use of electricity, water, sewerage, sanitation and other amenities, utilities and facilities or any other charges required to be paid by the company to the relevant authorities and would be payable by the buyer at such rates as may then be applicable and in such proportion as the sale area of the apartment bears to the sale area of all the apartments in the project. The respondent completed the construction of tower WT-07 and applied for an occupation certificate from the DTCP vide an application

dated 21.04.2017. The respondent received occupation certificate from the DTCP on 06.12.2017 and the respondent issued notice of possession dated 08.12.2017 to the complainant. The respondent requested the complainant to make payments of the amounts due and complete the documentation requirements as specified in the notice on or before 08.01.2018.

24. That the common facilities/amenities were all in place and fully functional even before offer of possession to the complainants was made. The respondent has already received occupation certificates for three phases of the project on 06.12.2017, 23.07.2018, and 24.12.2018 respectively. It is clarified that tower T-01 as per the approved building plan was marketed for marketing purposes and was named as WT-07.

25. That the respondent had also issued a reminder to the complainant to take possession of their apartment dated 28.02.2018 and a final notice of possession dated 26.09.2019 was also sent to the complainant further was called upon the complainant to clear the outstanding amount of Rs.10,02,088/- at the earliest towards the maintenance, stamp duty, registration charges, legal fees, delay payment interest, holding charges. The respondent had utilized the part sale consideration received from customers for execution of the project however, due to the slowdown in the economy, slowdown in sale of the apartments and lack of timely payments from several allottees including the complainant the possession of apartments could not be handed over in a timely manner

26. There were certain delays on account of force majeure events, which occurred during construction of the apartment i.e., more than one month on account of several bans imposed by national green tribunal on construction activities in delhi ncr and more than one month on account of demonetization policy announced by Govt. Of India due to which

labour and material were not available for carrying out construction activities. The delay in construction of the apartment is not on the part of the respondent, but due to delay caused by the contractor hired to complete the project. The respondent had awarded the works of civil engineering structure, finishing, mechanical, electrical, hvac and external development works, including provisional sum items on design and build basis for construction of the project in question to larsen and toubro limited ("L & T") vide a work agreement dated 07.02.2013 for a work contract . The commencement date of the contract was 09.01.2013 and the expected completion date was 09.01.2016. The respondent did its best and handed over construction to l&t thinking that it would complete the work in a timely fashion. However, L&T delayed the construction milestones and has been seeking extension in the timelines for completing the work on the project. In these circumstances, the respondent cannot be held liable for any delays as alleged or otherwise or at all. The delays are beyond the control of the respondent.

27. That the construction was completed within a reasonable time and total delay in completing the project is of less than one year. Time was never made of essence to the agreement by the complainant as he failed to make timely payments themselves. Hence the completion of the project by the respondent and offer of possession to the allottees within reasonable time amounts to sufficient compliance of the apartment buyer agreement. It is apposite to mention here that the complainant is also liable to pay holding charges on account of delay in execution of the conveyance deed as stated in clause 11.3 of the apartment buyer agreement.

28. That the op strictly adhered to the terms and conditions of the agreement and called upon the complainants to pay an amount of Rs. 23,32,267/-

towards the unit and Rs. 15,22,823/- towards the maintenance, stamp duty, registration charges and legal fees. Grand Total of Rs. 38,55,090 /- vide notice of possession dated 08.12.2017 . An amount of Rs. 10,02,088/- without interest towards cost of unit is still outstanding to be paid by him apart from other amounts payable towards stamp duty charges, registration charges, legal fee, delay payment interest and holding charges etc.

29. That the respondent is entitled to charge for increase in area as per clause 8.6 of the agreement. The complainant from the inception knew about the provisions of sale area incorporated under the buyer's agreement. Further, clause 8.6 categorically provide for variation in the sale area upto 10% and there is variation of only 152 sq ft i.e. from 2650 to 2802 sq ft which is less than 10%. The said fact was intimated to the complainant vide letter dated 27.04.2017 as per clause 8.6. The project is further measured by 3 independent architects on 30.01.2018 and 23.09.2020 who have confirmed the increase in area.

30. That the Hon'ble Authority vide order dated 17.11.2021 appointed Local Commissioner to ascertain the saleable area of the project. The local commissioner after going through all the requisite documents submitted by the promoter found no violation of any law with respect to saleable area and said saleable area was within the terms and conditions agreed between the parties at the time of execution of agreement. Therefore, in view of the above the charges demanded were valid and legal, in terms of clause 8 of the agreement.

31. That the complainant is bound to pay for dual meter charges, phe charges, ftth charges, solar power charges, ecc charges, IFMS and other charges to the respondent as per the agreed terms of the apartment buyer agreement . The car parking charges were included in schedule iv of the

aba and as such the complainant knew about the said charges from inception. The respondent was within its right to charge car parking charges as agreed under the agreement.

32. That the respondent, vide its letter dated 22.06.2017, informed the complainant that as per provisions of Haryana Value Added Tax Act, 2003 , the advances, received against the purchase of the said was liable for Value Added Tax however due to uncertainty around the levy of the VAT, the Respondent did not charge VAT from the complainant but as per the clarified tax position the transaction is subject to VAT. It was further informed to the complainant that Government of Haryana introduced amnesty scheme for contractors, whereby the liability of VAT was reduced to 1.05% and an amount of Rs. 88,477/- was already paid by the respondent on behalf of the complainant towards discharge of the VAT liability. Hence, the respondent demanded the said amount towards HVAT from the complainants and this amount was duly paid by the complainants on 31.07.2017 without any protest/reservation and hence the complainant IS now estopped from disputing the same.

33. Written submissions have been filed by the respondent and the same is taken on record and perused.

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

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

E. Jurisdiction of the authority:

36. 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) The promoter shall-*
>
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

37. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance

of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent:

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

38. The respondent has raised an objection that the complainant has not invoked arbitration proceedings as per the agreement which contains a provision regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration :

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

39. 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 complainants, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the

existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy &Anr. (2012) 2 SCC 506*** and followed in case of ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, Consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

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

G. Findings on the relief sought by the complainant:

G.I Direct the respondent – builder to handover the physical possession complete in all respects and to pay delay possession charges to the complainant.

41. In the present case in hand the complainant is a subsequent allottee. The said unit was transferred in the favour of the complainant on 30.12.2014 i.e., before the due date of handing over of the possession (27.12.2016) of the allotted unit. As decided in complainant no. 4037 of 2019 titled as *Varun Gupta Vs. Emaar MGF Land Limited*, the authority is of the considered view that in cases where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over of possession, the delayed possession charges shall be granted w.e,f. due date of handing over possession.

42. The complainants intend 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."*

43. Clause 10 of the buyer's agreement 26.12.2012 provides for handing over of possession and is reproduced below:

> ***10 Project completion period***
>
> *10.1 Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company intends to hand over possession of the Apartment within a period of 42 (forty two months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and forests, Government of India for the Project or execution of this Agreement, whichever is later ("Commitment Period"). The Buyer further agrees that the Company shall additionally be entitled to a time of 180 (one hundred*

and eighty days ("Grace Period") after expiry of the Commitment Period for unforeseen and unplanned Project realities.

44. 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 42 months from the date of approval of building plans or the date of receipt of approval of environment clearance or execution of this agreement whichever is later. In the present case, the flat buyer's agreement inter-se parties was executed on 26.12.2012 plus grace period of 180 days as such the due date of handing over of possession comes out to be 27.12.2016.

45. **Admissibility of grace period:** As per clause 10.1 of buyer's agreement dated 26.12.2012, the due date of possession comes out to be 27.12.2016 by allowing grace period being unqualified and being allowed in earlier case no. 530 of 2018 of the same project.

46. **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.

47. 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.

48. 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., 09.04.2024 is @ 8.85 %. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

49. 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.

50. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.85 % by the respondent/promoters which is the same as is being granted to them in case of delayed possession charges.

51. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the Authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 10.01 of buyer's agreement executed between the parties on 26.12.2012, the possession of the subject apartment was to be delivered within a period of period of 42 months from the date of approval of building plans or the date of receipt of approval of environment clearance or execution of this agreement whichever is later. The due date of possession is calculated from the date of environment clearance plus 180 days grace period which comes out to be 27.12.2016. The respondent has offered the possession of the allotted unit on 08.12.2017 after obtaining occupation certificate from competent Authority on 06.12.2017.

52. 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 06.12.2017 and it has also

offered the possession of the allotted unit on 08.12.2017. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 27.12.2016 till offer of possession i.e 08.12.2017. The respondent-builder has already offered the possession of the allotted unit on 08.12.2017, thus delay possession charges shall be payable till offer of possession plus two months i.e. 08.02.2018.

53. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 26.12.2012 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., 27.12.2016 till offer of possession plus two months i.e.upto 08.02.2018; at the prescribed rate i.e., 10.85 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

G.II Direct the respondent to declare that the alleged sale area increased by the respondent is illegal.

54. As per letter dated 08.12.2017 on page no. 124 of reply, the respondent has increased the super area of the flat from 2650 sq. ft. to 2802 sq. ft. without any prior intimation and justification. Whereas at page no. 146 of the complaint, the respondent sent an email dated 28.04.2017 regarding finalization of area w.r.t. allotted unit. The respondent has increased the super area by 152 sq. ft. In other word, the area of the said unit was increased by 5.7%. As per clause 8.6 of buyer's agreement, the

area of the said unit can be said to be increased by 10%. The relevant clause of the agreement is reproduced hereunder: -

> *While every attempt shall be made to adhere to the Sale Area, in case any Changes result in any revision in the Sale Area, the Company shall advise the Buyer in writing along with the commensurate increase/decrease in Total Sale Consideration based, however, upon the BSP as agreed herein. Subject otherwise to the terms and conditions of this Agreement, a maximum of 10% variation in the Sale Area and the commensurate variation in the Total Sale Consideration is agreed to be acceptable to the Buyer and the Buyer undertakes to be bound by such increase / decrease in the Sale Area and the commensurate increase /decrease in the Total Sale Consideration. For any increase/decrease in the Sale Area, the payment for the same shall be required to be adjusted at the time of Notice of Possession or immediately in case of any Transfer of the Apartment before the Notice of Possession or as otherwise advised by the Company.*

55. The respondent submitted that as per clause 8.6 of buyer's agreement he is entitled to charge for such increase which is less than 10%.

56. Vide proceeding dated 17.11.2021 , local commissioner was appointed .The report of local commissioner was received on 13.04.2023 and the relevant observation is reproduce hereunder:-

> *As per table submitted by the promoter, showing area change comparative , the promoter stated that the 51.62 sq. ft. area has been increased in built up area of unit , 56.49 sq. ft. area has been increased in tower level common area and 60.45 sq. ft. area has been increased in project level common area.*

57. The authority is of considered view that the said approval of increase in area up to 10% is subject to the conditions that the flats and other components of the super area on the project have been constructed in accordance with the plans approved by the competent authorities. Moreover, in the present case also, the respondent has increased the super area of the flat from 2650 sq. ft. to 2802 sq. ft. without any prior intimation and justification. Whereas on page no. 146 of the complaint,

the respondent sent an email dated 28.04.2017 regarding finalization of area w.r.t. allotted unit was annexed. On repeated requests of the complainant, the respondent shared an architect certificate on 03.02. 2018.But it is pertinent to mention herein that the said architect certificate is of 03.01.2018 i.e. after 28.04.2017, when such increase of area has been intimated to the complainant. In other word, the area of the said unit is increased by 5.7%. The respondent is entitled to charge for the same at the agreed rates being less than 10% as was agreed between both the parties as already held by the Authority in CR No. 4732 of 2022.

G.III Direct the respondent by restraining them from charging holding charges, maintenance charges, GST,community building furnishing charges and interest free maintenance security deposit.

58. **Holding charges** - The developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed. Also, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12. 2020.However the reasonable maintenance charges are required to be paid altogether.

59. **Maintenance Charges** - The Act mandates under section 11 (4) (d) that the developer will be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Clause 15.5, 15.6 & 15.7 of the buyer agreement provides the clause for maintenance charges.

60. In the present case, the respondent has demanded charges towards maintenance of Rs. 2,30,123/- through demand cum notice of possession letter dated 08.12.2017 on page no. 124 of the reply . However, the

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

61. **GST** - In the instant complainant, the respondent charged amount on pretext of GST from the complainants. However, it has been submitted by the complainant that the respondent it has already credited an amount of Rs. 54,743/- to the complainant for which they charged on account of GST and the same is annexed at page 260 of the complaint.

62. The Authority laid reliance on judgement dated 04.09.2018 in ***complaint no. 49/2018, titled as Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.*** passed by the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that where the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. The aforesaid order was upheld by Hon'ble Haryana Real Estate Appellate Tribunal, Chandigarh in ***appeal no. 21 of 2019***. The relevant para is reproduced below:

> *"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in*

delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements."

63. In the instant complainant, the due date of possession comes out to be 27.12.2016 which is prior to the date of coming into force of GST i.e. 01.07.2017. In view of the above, the Authority is of the view that the respondent/promoter is not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreement. The Authority is of further view that in case of late delivery by the promoter only the difference between post GST and pre-GST should be borne by the promoter. The promoter is entitled to charge from the allottees the applicable combined rate of VAT and/or service tax. However, it further directs that the difference between post GST and pre-GST shall be borne by the promoter.

64. Moreover, the fact cannot be ignored that it has already credited an amount equivalent to Rs. 54,743/- charged from the allottees on account of pre-GST, any further amount charged from the allottee part from the aforesaid quoted amount, the same shall also be refunded in view of the above finding of the Authority.

65. **Community Building Furnishing Charges and Interest Free Maintenance security deposit** - The respondent stated that such charges has been charged as per clause 4.2 of buyer's agreement dated 26.12.2012, the aforesaid charges are not part of BSP. The relevant clause of the buyer's agreement has been reproduced hereunder: -

The BSP of the Apartment is exclusive of EDC and IDC and other statutory deposits and/or charges, including charges for connections and use of electricity, water, sewerage, sanitation and other amenities, utilities and facilities or any other charges required to be paid by the Company to relevant authorities and shall be payable by the Buyer at such rates as may then be applicable and in such proportion as the Sale Area of the Apartment bears to the total sale area of all the apartments in the Project. If in case at any time in the future, such charges/rates are revised due to enhancement in government and statutory dues, or rates of taxes, cesses or charges under Applicable Laws are enhanced (including with retrospective effect, if applicable), or if fresh notifications and/or amendments / modifications thereto are announced by any Government and/or Competent Authority, including but not limited to revision in the EDC/IDC/other statutory charges, increase in rates/amounts of any deposits/fees for the provision of electricity, water and sewerage facilities, additional fire. protection/mitigation systems, pollution control and effluent treatment plants, rain water harvesting systems or other outgoings of whatever nature, whether prospectively or retrospectively, and by whatever name called, the same shall also be payable by the Buyer in such proportion as the Sale Area of the Apartment bears to the total sale area of all the apartments in the Project. All such charges shall be payable by the Buyer on first demand of the Company/Maintenance Agency, whether before or after registration of the Conveyance Deed and irrespective of the Payment Plan. Delays in making such payments shall attract interest at rates as applicable for payments under the Payment Plan.

66. It is submitted on behalf of the complainant that the charges raised above by the promoter are not covered under any provision of ABA. Though the complainant is liable to pay basic sale price of the unit besides EDC, IDC & other statutory deposits but never agreed to pay amount under any head as demanded. The respondent is justified in demanding EDC & IDC as it is included in the total sale consideration as per clause 4.1 of the agreement on page no. 111 of the complaint but since these charges are payable on actual payment basis the respondent cannot charge a higher rate against EDC/IDC as actually paid to the concerned authority.

Therefore, the respondent is directed to provided calculation of EDC & IDC.

G.IV Direct the respondent to restrain them from charging adhoc charges, car parking user charges and hvat .

67. In the notice for possession letter dated 08.12.2017 the respondent has charged Rs. 25,31,277/- wherein the adhoc charges such as HVAT ,solar power charges, Dual Meter connection charges, phe charges , FFTH charges etc. are also added . This issue has been specifically adjudicated by the authority in complaint bearing no. **CR/4031/2019 titled as Varun Gupta Vs. Emaar MGF Land Limited** wherein the authority has held that for any other charges like incidental / miscellaneous and of like nature, since the same are not defined and no quantum is specified in the builder buyer's agreement, therefore the same cannot be charged.

68. In the instant matter, as per clause 1 (xii) and 3.4 of the builder buyer's agreement26.12.2012, the allottee had agreed to pay the cost of covered car parking charges over and above the basic sale price. Accordingly, the promoter is justified in charging the same.

G.V Direct the respondent to refund excess amount collected on account of EDC and IDC.

69. As per clause 4.1 of the buyer's agreement, EDC and IDC were included in total sale consideration. But since these charges are payable on actual payment basis the respondent cannot charge a higher rate against EDC/IDC as actually paid to the concerned authority. Therefore, the respondent is directed to provide detailed calculation of EDC & IDC along with justification before its levy and to charge on proportionate basis the charges as actually paid to the government under the head of EDC/IDC only.

H. Directions of the Authority:

70. 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:

a. The respondent shall pay interest at the prescribed rate i.e., 10.85 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., upto 27.12.2016 till the date of offer of possession (08.12.2017) plus two months i.e., 08.02.2018 as per proviso to section 18(1) of the Act read with rule 15 of the rules.

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

c. The respondent is not entitled to claim holding charges from the complainant/ allottee at any point of time even after being part of the builder buyer's agreement.

d. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The respondent is further directed to handover the possession within next two weeks and the complainant is also directed to take the possession of the subject unit.

e. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85 % 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.

71. Complaint stands disposed of.

72. File be consigned to the registry.

(Sanjeev Kumar Arora)
Member

(Vijay Kumar Goyal)
Member

(Arun Kumar)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated:09.04.2024