HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	1404 of 2022
Date of filing:	06.06.2022
Date of first hearing:	02.08.2022
Date of decision:	05.09.2023

1. Hukam Chand, S/o Late Shri. Khem Chand,
   402/A4, Palm Court, VIP road Zirakpur,
   Distt. SAS Nagar, Mohali, Punjab- 140603,
2. Meera Rani, W/o Hukam Chand,
   402/A4, Palm Court, VIP road Zirakpur,
   Distt. SAS Nagar, Mohali, Punjab- 140603

....COMPLAINANT(S)

VERSUS

1. M/s S N Realtors through its Managing Director,
   Regd. Office at Omaxe House, 7, Local Shopping Centre,
   Kalkaji, New Delhi-110019
2. M/s Omaxe, through its Directors,
   Regd. Office at: Omaxe House, 7, Local Shopping Centre
   Kalkaji, New Delhi- 110019

....RESPONDENT(S)

CORAM:	Dr. Geeta Rathee Singh	Member
	Nadim Akhtar	Member

Date of Hearing: 05.09.2023

Present: Mr. Hukam Chand, complainant representing both complainant(s).

Adv. Munish Gupta, counsel for respondents.

ORDER (NADIM AKHTAR - MEMBER)

1. Present complaint has been filed on 06.06.2022 by the complainant 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 unit booked by complainant, the details of sale consideration, the amount paid by the complainant and details of project are detailed in following table:

S.No.	Particulars	Details
1.	Name of the project	Omaxe City, Yamunanagar
2.	Independent Villa	No. 108
3.	Area	Independent Villa, 1275 sq ft. on plot size of 172 sq. yards
4.	RERA registered/ not registered	Un-Registered
5.	Date of booking	November 2012
6.	Date of Allotment/ Builder Buyer Agreement	31.10.2013
7.	Deemed date of possession (24+6)	30.04.2016 As per clause 40(a), company shall complete the construction within 24 months from the date of signing of the Agreement and/or further extendable by 6 months.
8.	Basic sale price	Rs.24,98,231/-
9.	Amount paid by complainant	Rs.24,24,987/-
10.	Offer of possession	05.02.2016 however possession never handed over.
11.	Occupation Certificate	18.01.2018
12.	Legal notice	09.01.2020
13.	Final Demand letter	11.05.2022
14.	Cancellation letter	21.05.2022

B. FACTS OF THE CASE AS STATED IN THE COMLAINT FILED BY THE COMPLAINANT:

3. In this case, allottees Sh. Hukam Chand and his wife Smt. Meera Rani, booked an independent villa no.108, having plot area of 172 sq. yard and super area of 1275 sq. ft. in the project of the respondent namely, "OMAXE CITY, Yamunanagar". Flat buyer agreement was executed on 31.10.2013 by the respondent with the complainant, who paid a sum of Rs.3,25,429/- at the time of filing an application for allotment. The total sale consideration of the flat was fixed as Rs. 24,98,231/- against which complainants have paid Rs.24,24,987/- till the year 2015. Copy of receipts have been attached at page no. 82-93 of the complaint book. As per clause 40(a) of the flat buyer agreement, respondent was obliged to complete the construction of the flat within 24 months from the date of signing of the agreement, further extendable by 6 months.

4. That the complainant submits that he was not permitted to make omission/alteration/addition in the draft agreement, the terms of which were completely unilateral and arbitrary. In the agreement, completion period was extended by 6 months (24+6) against the 24 months as stated in the price list and extra charges on account of water/sewage/ EEC/ Storm Water Cost/ Meter cost were added and having paid about 6 lakhs in demands to the respondents, thought that they lost any leverage to the

respondents, thus signed the BBA. Further the complainant brings to the notice of the Authority the clauses of the BBA, which they deem to be arbitrary and unfair, which are as follows:

a. Clause 35 and 40(g) as per which the respondents had the right to terminate the agreement and forfeit the earnest money in case of delay of installments and also had the right to accept delayed installment with an interest @18% p.a. for delay upto one month and 24% thereafter whereas as per clause 40(g), in case of delay in the completion of project the complainants were entitled to get compensation of Rs.5 per sq. ft. every month of delay beyond 30 (24+6) months which turns out to be meager 3% p.a interest on investments. Such compensation is subject to the condition that the allottees had made timely payments to the builder and complied with all the terms and conditions of the agreement and that in event Buyer has agreed not to claim any penalty for delay in construction.
b. Clause 40(k), as per which buyer was given no right to object against the respondents' developing or continuing with developments of other units adjoining to the unit sold to the buyer.
c. Clause 40(f), as per which upon taking possession of the unit, the buyer will be debarred of his right to claim over the respondent as to any item of work, materials, installations, any loss or damage to the

finishes, fittings and fixtures in the unit or any ground etc. All the complaints shall be deemed to be rectified before taking the possession by the buyer.

d. Clause 40, as per which the complainants were devoid of the right to object or make any claim due to inconvenience caused due to respondents' act of construction and development in the area falling outside the unit for many years.

e. Clause 10, as per which the respondents had the right to use the additional FAR in any manner they deem fit including but not limited to making additions to said building or making additional building around the said building.

f. Clause 35, as per which the respondents are given overwhelming power to suspend or cancel the allotment in event of buyer failing to perform his obligations and forfeit out of the amounts paid by him earnest money together with any interest on installment, delayed payments due or payable etc. while the buyer has the power to cancel the allotment within 6 months and in that case too, the earnest money will be forfeited and balance amount would be returned without any interest after allotment of the said unit.

Complainant submits that such execution of one sided and arbitrary agreement is illegal as has been in several judgments of HRERA

Appellate Tribunal and National Consumer Dispute Redressal Commission, as per which if any document confer unfair advantage to the builders/ developers, then such are considered to be unfair contracts and would be inapplicable and unsustainable under the eyes of law.

5. That the villa has a super area of 1275 sq. ft., which includes built up area/covered area plus common areas as per clause 6 of BBA. Since villa is an independent unit, thus there exists no common area and therefore, the built up area is the super area in the present case. That the complainants took Home Loan for making payments to the respondent, who paid a sum of Rs.24,24,987/- upto 16.09.2015 including payments towards club membership and maintenance security. As per BBA, the balance payment of Rs.1,22,661.5/- was to be made at the time of offer of possession.

6. That the complainants submit that the period of completion of project was extended beyond 24 months and made the completion of the project subject to force majeure conditions specified in clause 40(a). However, date of completion was never extended due to such condition because the date of completion of the said villa was committed by the respondent to be by 31.10.2015 in the price list on the basis of which villa was actually booked.

7. That vide letter dated 05.02.2016, respondent offered fit-out possession of the villa to the complainants stating that the allotted unit is in completion stage but the same being subject to completion of necessary formalities including payment of balance consideration of Rs.9,23,519/- as stated in the statement of account within a period of 15 days. Such demand was excessive, without any explanation and calculation details and to the utter dismay of the complainants, when he visited the actual site, he found that work was incomplete and when asked for production of completion certificate, the respondent could not produce it. Various communications were made with the respondent by the complainant seeking explanations to such conduct of the respondent demanding excessive payments, details of calculation, area of plot, component wise bifurcation of super area into built up area and common area and status of occupancy certificate, but respondent did not reply to any of those. Thereafter, the complainant served them with a legal notice on 09.01.2020 demanding possession of the said villa. Respondents responded by saying that the Villa is in completion stage and offered fitout possession for carrying out the interior works in the villa vide letter dated 22.07.2020, 07.08.2020, 05.11.2020 attaching the statement of account for payment without any adjustments, requesting details and clarification.

8. That the complainants got to know about the issuance date of completion certificate only after filing an RTI in Jan, 2022 as per the reply of which, the completion certificate was granted on 18.01.2018 and as per record, the respondent issued the first letter offering possession in February, 2016. Therefore, such offer was invalid and illegal as per BBA and per law.

9. That the complainants in theircomplaint challenges the demand letter issued by the respondent along-with the offer of possession. They dispute it by saying that such is illegal on the following grounds:

    a. The Built up area/ super area is short, i.e., built up/ covered area is only 926.54 sq. ft. and area of mumty is 132.3 sq. ft. whereas respondent was charging for 1275 sq. ft. Since Villa is an independent unit, therefore there exists no common area with other allottees which makes the addition of mumty area as unjustified and not subject to demand of any additional payment. It is pertinent to note that the complainants have paid for 1275 sq. ft. area whereas actual built up area is only 926.54 sq. ft. Thus respondents should adjust Rs.4,52,996/- in the statement of account and not overcharge the complainants by Rs.4,52,996/-.

    b. The complainant submits that EDC charges levied are unauthorized by the act and as per the terms of the agreement. The BBA executed

between the parties reveals that EDC is a government levy and are not included in the price and shall be payable by the buyer on demand by the company on offer of possession of the said unit or as and when demanded by the concerned competent authority. The charges are exorbitant and disproportionate to the super area of all the units in the project as per clause 9 and 18 of BBA. As per clause 15, super area given in the agreement is tentative and subject to change upon approval of final building plan but the respondent has never confirmed the final size and is demanding payments without any explanation/details.

c. That the amount of Rs.46,672/- charged/demanded towards water/ Sewage/EEC/ Storm water cost is unfair as such amount was never mentioned in the price list at the time of booking and mentioned them at the time of BBA, taking advantage of their dominant position.

d. That an amount of Rs.38,865/- has been demanded towards Meter cost which was also not mentioned at the time of booking in the price list and was introduced only in the agreement, making it excessive and unfair.

e. That amount of Rs.32,601/- demanded in lieu of Haryana VAT and another demand of Rs.28,068/- towards ST/GST lacks support of details and documents.

f. That interest @24% charged on account of delayed remittances is exorbitant and illegal. Besides that complainant asserts that respondent has kept compensation for delayed possession at the rate of only 5% per sq. ft. of super area which turns out to be only 3% p.a., which is arbitrary because as per RERA rules, interest can be charged only at highest MCLR rate of SBI as decided in the past by the Authority.

10. That the complainant disputes the cancellation of allotment as being illegal and against the rules and regulations prescribed by RERA Act, 2016 in the following ways:

a. That cancellation is illegal due to the fact that more than 95% amount prescribed in the BBA has been made to the respondent by 16.11.2015 and the balance of which was to be paid on offer of possession. The offer of possession made on 05.02.2016 was illegal as it was issued without issuance of any valid OC in their favour and also demanded disproportionate amounts without details and calculations.

b. That the allotment letter was also cancelled by the respondent citing reasons of non-payment of installments on more than two occasions and non-compliance with the payment commitments, though payments were made as per the payment plan only. As stated above balance was to be paid only on valid offer of possession, which was not made legally.

c. That fit out possession was offered when buyer had no Occupation Certificate (OC) in hand. Thus such act of the respondent builder had the sole objective to supplement their efforts to obtain the necessary approvals to occupy and use the Villa.

d. That the respondent sent an unsigned letter dated 11.05.2022 through email demanding payment of an amount of Rs.8,02,351.76 with interest amount of Rs.14,25,137.25/- within 10 days, failing which the complainant was threatened that it will lead to cancellation of the unit allotted to him. A reply was sent to the same objecting to such demand as 95% of the amount is already paid. Despite this, the respondent company cancelled the allotment issued in his favour and forfeited an amount of Rs.3,67,984.54/- towards earnest money and Rs.14,30,740.56 towards interest.

11. That such cancellation of allotted unit and demand of exorbitant and arbitrary amount towards interest and other charges was illegal and devoid of any reason or statement. Hence, the present complaint was filed by the complainant.

C. RELIEF SOUGHT:

12. In view of the facts mentioned above, the complainant prays for the following relief(s):-

    a) Quash the letter dated 21-05-2022 (Annexure C-8) of the Respondents vide which allotment of Villa to Complainants has been cancelled and restore the allotment to the Complainants.

    b) Quash the letter dated 05-02-2016 (Annexure C-4) along with attached Statement of Account offering fit-out possession being illegitimate.

    c) Modify demand letter of the Respondents.

    d) Direct the Respondents to deliver immediate Possession of the Villa to Complainants, i.e., Villa No.108, Omaxe City, Yamunanagar, Haryana having plot area of 172 sq. yds. as per buyer's agreement, after due completion along with all the promised amenities and facilities and to the satisfaction of the Complainants; and

    e) Direct Respondents to complete construction of the Club for which Complainants have paid membership fee and provide amenities specified in advertisement.

    f) Direct the respondents to pay interest at the rate 11.35% (9.3% being the highest MCLR of SBI during the delay period) on the

amount of Rs. 24,24,987/- already paid by the Complainants from the promised date of delivery, i.e., 31 Oct, 2015 till the actual physical and legal delivery of possession; and

g) Pass an order restraining the respondents from charging any amount from the Complainants which do not form part of the Builder Buyer's Agreement dated 31st October 2013 and/or is illegal and arbitrary including but not limited to enhanced charges, cost escalation charges, delay penalty charges, GST charges, VAT charges, etc. whatsoever; and/or to direct the respondents to refund/adjust any such charges which they have already received from the Complainants;

h) May pass any other order or orders as this Hon'ble Authority may deem fit under the facts and circumstances of the matter;

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT:

Ld. Counsel for the respondent filed detailed reply on 13.12.2022 pleading therein:

13. That no cause of action has arisen in favour of complainants to file the present complaint, as the complainants, inter-alia amongst others, have sought quashing of cancellation letter dated 21.05.2022. That the cancellation of the unit has taken place, as the complainants, despite issuance of numerous reminders, did not come forward to take over

possession after clearing the outstanding dues. Thus, the complaint deserves to be dismissed.

14. That the complainants are not entitled for any relief from this Hon'ble Authority, as the complainants themselves are defaulters. That complainants defaulted in making timely payments, after booking the unit as also after the offer of possession which is why the unit was cancelled after having sent several reminders. Even registered intimation letter was sent on 10.03.2018, which was also followed by numerous reminder letters dated 14.08.2013, 30.08.2013, 28.05.2014, 28.10.2015 but in vain. Reminders were also sent after offer of possession letter dated 05.02.2016, i.e., letters dated 09.07.2018, 22.07.2020, 07.08.2020, 05.11.2020, 12.10.2021 were sent. Further, intimation letter dated 10.03.2018 was sent and reminders dated 21.04.2018, 20.06.2018, 19.07.2021 were sent subsequently.

15. That the complaint deserves to be dismissed as the financial institution has not been impleaded as party. Admittedly, complainants availed financial help, thus, the financial Institution ought to have been impleaded by the complainants. Having not done so, the complaint deserves dismissal on the said score.

16. That the respondents states that the alleged dispute ought to be referred to Arbitration under Section 8 of the Arbitration & Conciliation Act, 1996 [as amended vide the Arbitration & Conciliation (Amendment) Act,

2015] in terms of Clause 61 of the Agreement dated 31.10.2013. The filing of present reply is without prejudice to the said fact and it should not be construed that the respondent has agreed to submit to jurisdiction of this Hon'ble Authority or that it has waived its plea for referral of alleged dispute to arbitration. The respondent prays that matter be referred to arbitration as not only does the amended Section 8 of the Arbitration & Conciliation Act, 1996 make it mandatory to refer disputes to arbitration notwithstanding any judgment of any court but also due to fact that present case raises complex questions of fact and would involve detailed evidence. Hence, the present complaint is not maintainable.

17. That this Hon'ble Authorities does not have territorial jurisdiction to entertain the present complaint, as clause 62 of agreement provides that only the Courts at Yamuna Nagar and Delhi shall have jurisdiction in connection with the agreement in question.

18. That the respondent submits that the complaint has been filed to escape from the liability of making payment of the outstanding dues which can't be permitted and thus, deserves to be dismissed. He submits that the complaint has been filed with malafide intention, which can be gauged from the fact that in the complaint, grievance qua the terms and conditions of the agreement has been raised, however, no such grievance was ever raised after the execution of agreement dated 31.10.2013 till the filing of complaint. It is also apt mentioning here that the agreement was

executed by the parties with their own free consent and had sufficient time to sign the agreement because as per complainant's version itself, agreement was received by them on 29.08.2013 while it was signed by them on 31.10.2013.

19. That the grievance qua clause no.40 and 10 are only for the purpose of filing the present complaint. Further, the grievance qua clause 35 is unsustainable as it deals with the procedure when the builder fails in performing his obligation. It is submitted by the respondent that the agreement cannot be said to be arbitrary and one sided once it has been executed by consent of both the parties. Thus, it is not proper to raise any grievance qua the same, as the same is hopelessly time barred, at this stage.

20. That the issue qua the demand raised by the respondent is valid and legal as it being raised after possession was offered and OC was issued. It is asserted by the respondent in his reply that the area as calculated by the complainant is incorrect. Such area can be measure only by a person having specialisation in such field. That the charges as demanded by them are only as per the area of the unit in question which was allotted to the complainants i.e. 1275 sq. ft. and charges have been calculated as per that only. Such area has been duly mentioned in the payment schedule attached with the demand letter sent to the complainants from time to time.

21. That EDC being a government tax goes to the government department and thus, complainants cannot be exempted from paying the same as in such process of payment the developer plays the role of a mediator. As per Annexure-B, part-II read with other part of the agreement, duly covers the charges as it is clearly mentioned therein that the costs does not cover the charges which shall be payable by the buyer and will be demanded by the company on offer of possession. In relation to Haryana Vat charged by the respondent, such is a government tax , therefore, the complainants are liable to pay it.

22. That agreement is dated 31.10.2013, which is prior to the coming on force of RERA Act, 2016 and its rules of 2017. Thus, the complainants cannot take shelter of the same. Moreover, such agreement was signed by the complainants with open eyes, therefore, averments made by them are of no avail to the complainants.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANTS AND RESPONDENTS:

23. During arguments, the learned counsels for complainants and respondents reiterated the facts of the case as stated in para no.3-11 and in para no. 12-22 of this order respectively. For the sake of brevity, such facts are not repeated herein.

F. JURISDICTION OF THE AUTHORITY

24. Authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

F.1: Territorial Jurisdiction

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

F.2: Subject Matter Jurisdiction

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

> *"Section 11(4)(a)*
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the 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 allotees 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".

In view of the provisions of the Act of 2016 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 learned Adjudicating Officer if pursued by the complainants at a later stage.

G. ISSUES FOR ADJUDICATION:

25. Whether complainants are entitled to relief of possession along-with delay interest for delay in handling over the possession in terms of Section 18 of Act of 2016?

H. OBSERVATIONS OF THE AUTHORITY:

Findings on the objections raised by the respondent.

I.I Objection regarding execution of BBA prior to the coming into force of RERA Act, 2016.

One of the averments of respondents is that provisions of the RERA Act of 2016 will not apply on the agreements executed prior to coming into force of RERA Act, 2016. Accordingly, respondents

have argued that relationship of builder and buyer in this case will be regulated by the agreement previously executed between them and the same cannot be examined under the provisions of RERA Act. In this regard, Authority observes that after coming into force the RERA Act, 2016, jurisdiction of the civil court is barred by Section 79 of the Act. Authority has to decide disputes between builders and buyers strictly in accordance with terms of the provisions of flat-buyer agreements. After RERA Act of 2016 coming into force the terms of agreement are not re-written, the Act of 2016 only ensures that whatever were the obligations of the promoter as per agreement for sale, same may be fulfilled by the promoter within the stipulated time agreed upon between the parties. Issue regarding opening of agreements executed prior to coming into force of the RERA Act, 2016 was already dealt in detail by this Authority in ***Complaint no. 113 of 2018 titled as Madhu Sareen v/s BPTP Ltd decided on 16.07.2018***. Relevant part of the order is being reproduced below:

> *"The RERA Act nowhere provides, nor can it be so construed, that all previous agreements will be re-written after coming into force of RERA. Therefore, the provisions of the Act, the Rules and the Agreements have to be interpreted harmoniously. However, if the Act or the Rules provides for dealing with certain specific situation in a particular manner, then that situation will be dealt with in accordance with the Act and the Rules after the date of coming into force of the Act and the Rules. However, before the date of coming into force of the Act and the Rules, the*

provisions of the agreement shall remain applicable. Numerous provisions of the Act saves the provisions of the agreements made between the buyers and seller."

Execution of builder buyer agreement is admitted by the respondent. Said builder buyer agreement is binding upon both the parties. Therefore, the respondent buyer cannot avert that such act and its rules are not applicable to them.

I.II Objection regarding complainants are in breach of Agreement (BBA) for non-invocation of arbitration.

The respondent submitted that the complaint is not maintainable for the reason that the alleged dispute ought to be referred to arbitration under section 8 of the Arbitration and Conciliation Act, 1996 in terms of clause 61 of the agreement dated 31.10.2013. It is also submitted by the counsel for the respondent that amended section 8 of the Arbitration and Conciliation Act, 1996 makes it obligatory to refer disputes to arbitration notwithstanding any judgment of any court but also due to the fact that present case raises complex questions of fact and would involve detailed evidence. As per section 8 of the Act of 1996:

Section-8: Power to refer parties to arbitration where there is an arbitration agreement.
(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of

submitting his first statement on the substance of the dispute, then, ***notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.***

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Clause 61 of the BBA may also be reproduced as under:-

> *"61. All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms othereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 and/or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in Delhi/ New Delhi."*

The Authority is of the opinion that jurisdiction of the Authority cannot be fettered by the existence of an arbitration clause in the agreement as it may be noted that section-79 of the RERA 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 RERA 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 Ltd. v. M. Madhusudhan Reddy and Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to Arbitration even if the agreement between the parties had an arbitration clause.

Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short the Real Estate Act"), Section 79 of the said Act reads as follows-*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating*

> *officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra) the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act*
>
> .....
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated land of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section B of the Arbitration Act."*

While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the application form, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629- 30/2018 in civil appeal no. 23512-23513 of 2017*** decided on 10.12.2018 has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts

within the territory of India and accordingly, the Authority is bound by the aforesaid view. The relevant para of the judgement passed by the Hon'ble Supreme Court is reproduced below:

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

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 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. In the light of the above-mentioned reasons,

the authority is of the view that the objection of the respondent stands rejected.

I.III Objection regarding dismissal of complaint as the financial institution has not been impleaded as party.

The issue with respect to dismissal of the complaint on the ground that financial institution is not impleaded as a party deserves to be rejected because financial institution is not a necessary party in the present complaint. The Hon'ble Supreme Court in the case of ***Mumbai International Airport Private Limited vs. Regency Convention Centre and Hotels Private Limited and others, (2010) 7 SCC 417*** had an occasion to consider who is a necessary party to the proceedings. It will be relevant to refer to paragraph 15 of the said judgment, which reads thus:

> *"15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance."*

It could thus be seen that a necessary party is a person in whose absence no effective decree could be passed by the Court. It has been held that if a "necessary party" is not impleaded, the suit itself is liable to be dismissed. But in the present complaint, the financial institution is not a necessary party, thus, the complaint is not liable to be dismissed on this ground.

I.IV Objection regarding restoration of cancellation letter dated 21.05.2022.

The complainant has pleaded before the authority for quashing of cancellation latter dated 21.05.2022 of the respondents to the complainants and also prayed for restoration of said allotment to the complainants. Perusal of the complaint case reveals that the respondents had issued latter dated 21.05.2022 vide registered post intimating the cancellation of the allotted unit no. "OCYV/108" in OMAXE City Yamunanagar, Pabni Bilaspur road. The reason was non-payment of balance of due-instalments in more than two occasions followed by the letter giving the last and final opportunity to pay the pending dues to avoid cancellation of the unit. It is pertinent to mention that vide such cancellation letter, a sum of Rs.3,67,984.54 and interest of Rs.14,30,740.56 and applicable GST for delayed payment calculated as per provisions of RERA Act were

declared to be forfeited. From the perusal of the record it is found that despite issue of said notice on 21.05.2022, until now, respondent has neither refunded the balance amount after deduction according to BBA nor has sought the specific performance of the agreement as per clause 35 of the agreement dated 31.10.2013, the relevant clause is reproduced as under:

> *"35. In the event of the failure of the Buyer(s) to perform his obligations or fulfill all the terms and conditions set out in the Agreement, the Buyer(s) hereby authorizes the Company to keep on abeyance/ suspension of booking or cancel the Allotment of the said Unit and forfeit out of the amounts paid by him, the earnest money as aforementioned together with any interest on installments, interest on delayed payment due or payable, brokerage, dealer commission etc. The amount, if any, paid over and above the earnest money, interest on delayed payment due or payable, brokerage, dealer commission etc. shall, however be refunded to the Buyer(s)/ financial institution as the case may be by the Company without any interest after re-allotment of the said Unit and after compliance of certain formalities by the Buyer(s). However, in exceptional circumstances the Company may, in its absolute discretion, condone the delay in payment by charging penal interest at the rate of 18% p.a. on the amount outstanding up to one month delay from the due date of outstanding and at the rate of 24% per annum thereafter on all outstanding dues from their respective due dates. Further, if any discount/ concession has been given by the Company in the Basis Sale Price/ payment term to the Buyer(s) in lieu of consensus of the Buyer(s) for timely payment of installments and other allied cost, then the Buyer(s) hereby authorizes the Company to withdraw such discount/concession and demand the payment of such discount/ concession amount as a part of sale consideration amount, which the Buyer(s) hereby agree to pay immediately. The Buyer(s) may opt for cancellation only within six months from the date of allotment of the said Unit and in case the allotment of the said Unit is cancelled at the behest of the Buyer(s), then the Buyer(s) hereby authorizes the Company to*

> *forfeit the earnest money and the amount, if any, paid over and above the earnest money shall be refunded by the Company to the Buyer(s) without any interest after re-allotment of the said Unit. Upon cancellation of the said Unit, this Agreement shall stand cancelled and the Buyer(s) shall be left with no right, title, interest, lien etc. on the said Unit."*

Hence, the respondent has violated the above mentioned clause which is in violation of section 11 of the Act ibid. Moreover, after having received more than 95% of the total sale consideration, it was illegal for the respondent builder to cancel the said allotment solely on non-payment of additional charges besides the total sale consideration as demanded by them.

I.V Objection regarding Builder buyer agreement which is alleged by the complainant to be unfair and arbitrary.

The complainant in the complaint filed by him disputes the BBA executed by him on 31.10.2013 to be unfair and arbitrary with it terms being alleged to be one-sided. The respondent disputes the said agreement to be fair and legal and asserts that when the agreement was signed, it was with consent of both the parties. Had the terms been arbitrary, the complainant was at liberty to not sign the said agreement. And it is an established fact that the said agreement was received by the complainant on 29.10.2013 and it was signed on 31.10.2013. Therefore, the complainant had ample time to decide whether or not he wishes to sign the said agreement and to also decide

if such terms are unfair to them. It is asserted by the complainant that he had unequal bargaining power.

Authority observes that since BBA constitutes the sole basis of subsisting relationship of the parties, both the parties are lawfully bound to obey the terms and conditions enunciated therein. Respondent had raised each specific demand strictly in consonance with the payment plan opted and agreed at the stage of booking as well as within the ambit of the clauses agreed and accepted by the complainant at the time of execution of BBA. Complainant after thorough reading and understanding of the terms and conditions as mentioned in the BBA signed the agreement that too without any protest and demur. It is pertinent to mention that here the agreement was executed prior to the coming in force of Real Estate (Regulation and Development) Act, 2016 (RERA Act in brief). Therefore, agreement executed prior to the coming into force of the Act or prior to registration of project with RERA cannot be reopened.

LVI Objection regarding demand of respondent as claimed by the complainant to be excessive and arbitrary.

The complainant asserted that the actual built up area/ covered area is only 926.54 sq. ft. while the respondents claim that the area to be of 1275 sq. ft., which can be inferred from Annexure-B (Part-II) of BBA. Thus, the charges levied are not unfair because as per section

101 of the Indian Evidence Act, burden of proof is on the person who asserts and who would fail if the fact asserted is not proved. Thus, burden was on the complainant to prove by way of evidence the fact that the actual area is not the same as referred to in the BBA. Thus, the said issue becomes superfluous.

(i) The demands raised by the respondent in terms of EDC charges is not arbitrary as the levy of such charges was clearly mentioned in the BBA, under clause 18, that buyer(s) undertake to pay additionally to the company the EDC charges and IDC charges on demand.

(ii) The demand in relation to water/sewage/EEC/Storm water cost amounting to Rs.46,672/- and meter cost amounting to Rs.38,865/- is not unfair and has support of clause 14 of BBA, as per which it has been clearly mentioned that basic selling price does not include the cost towards club, electric connection, Power back up, EEC, FFC, lease rent, etc. and other administrative expenses which shall be payable by the buyer in addition to the price of the said unit.

(iii) Clause 17 of the BBA clearly states that the cost of the unit does not include any tax paid or payable by the company or its contractors by way of VAT, State Sales Tax, Central Sales Tax, Water Contract Tax, Service Tax and other cess

or any other taxes, charges etc. and buyer also undertakes to pay to the company, in addition to the cost point out in the Annexure B of the said unit a price equal to the proportionate share of taxes. Thus, the demand in relation to Haryana VAT amounting to Rs. 32,601/- and ST/GST of Rs.28,068/- is valid as per terms of BBA signed by consent of both the parties.

The Authority observes that the respondent though is entitled to such costs but he is entitled to only demand the actual expenses incurred as the amount demanded by the respondent seems to be on higher side, keeping in view of the fact that the respondent has failed to provide justification of the said amounts claimed. Thus, the respondent is entitled to charge such amount as is actually incurred at the time of occurrence of such expenses and further any charges should be levied on pro-rata basis of actual expenses from the allottees/complainants.

LVII Objection regarding offer of possession which is disputed by the complainant to be illegal and illegitimate.

Authority observes that it is a matter of admittance by the complainant as well as the respondent that Occupation Certificate stands issued on 18.01.2018, while offer of possession was made on 05.02.2016, approximately 2 years prior to the issuance of letter of

possession. Therefore, the said offer of possession is held to be invalid as the possession should not have been handed over to the complainants without obtaining occupancy certificate and this is a clear unfair trade practice. It is held that the respondent did wrong. This constitutes a deficiency in service as held in the case of ***Treaty Construction v. Ruby Tower Coop. Housing Society Ltd., (2019) 8 SCC 157*** as well as a breach of law.

I.VIII Objection regarding default in payments made by the complainant.

It is observed that against the total sale price of Rs.24,53,231/- as asserted by the complainant, the complainant has paid an amount of Rs. 24,24,986/- which amount to 98% of the total sale consideration. Respondent thus, cannot be allowed to take the plea that complainant has defaulted in payments when it is the respondent who has admitted in the said offer of possession issued on 05.02.2016 that the project is in completion stage. It is clearly mentioned that only upon realization of the amount of Rs.9,23,519/- and on completion of codal formalities, the possession of said unit will be handed over to the complainant.

As such, the respondent is under an obligation to hand over possession on the deemed date of possession as per agreement and in case, the respondent failed to hand over the possession on the deemed

date of possession, the complainant is entitled to delay interest at prescribed rate u/s 18(1) of RERA Act.

26. After going through rival contentions of both the parties, Authority observes that complainant in this case had booked a unit in the project of the respondent in November, 2012. Vide allotment letter/Builder Buyer Agreement dated 31.10.2013, complainant was allotted an independent villa no. 108, measuring 1275 sq. ft. The complainant had voluntarily signed the builder buyer agreement for the allotted unit and paid amount of Rs. 24,24,986/- against the total sale price of Rs. 24,98,231/-.

27. As per clause 40(a) of the agreement, possession of the unit should have been delivered by 30.04.2016. It is an admitted fact that the delivery of possession of the unit has been delayed by the respondent by more than 7 years from the deemed date of possession as per the agreement entered between the parties. Learned counsel for respondent submitted vide his reply that they received occupation certificate in respect of the unit of the complainant on 18.01.2018. Complainant is willing to take possession of the unit and is further claiming delay interest for the delay caused in delivery of possession.

28. The facts set out in the preceding paragraph demonstrate that construction of the project had been delayed beyond the time period stipulated in the buyer's agreement. The Authority observes that the respondent has failed

to fulfil its obligation stipulated in BBA dated 31.10.2013. Possession of the unit should have been delivered by 30.04.2016. Now, even after a lapse of 7 years, respondent has not offered a valid offer of possession of the unit and has in fact cancelled the said unit allotted to the complainant on 21.05.2022. Complainant, however, does not wish to withdraw from the project and is rather interested in getting the possession of his unit. In these circumstances, the provisions of Section 18 of the Act clearly come into play by virtue of which while exercising the option of taking possession of the unit, the allottee can also demand, and the respondent is liable to pay, interest for the entire period of delay caused at the rates prescribed. The respondent in this case has not made any valid offer of possession to the complainant till date. So, the Authority hereby concludes that the complainant is entitled for the delay interest from the deemed date, i.e., 30.04.2016 up to the date on which a valid offer is sent to him. As per Section 18 of Act, interest shall be awarded at such rate as may be prescribed. 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;*

Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is as under:

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

29. Consequently, as per website of the State Bank of India i.e. https://sbi.co.in, the highest marginal cost of lending rate (in short

MCLR) as on date, i.e., 05.09.2023 is 8.75%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e. 10.75%.

30. Hence, Authority directs respondent to pay delay interest to the complainant for delay caused in delivery of possession at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development) Rules, 2017, i.e., at the rate of SBI highest marginal cost of lending rate (MCLR)+ 2 % which as on date works out to 10.75% (8.75% + 2.00%) from the due date of possession, i.e., 30.04.2016 till the date of a valid offer of possession.

31. Authority has got calculated the interest on total paid amount from due date of possession, i.e., 30.04.2016 till the date of this order, i.e., 19.10.2023 which works out to ₹19,17,649/- and further monthly interest of Rs. 21,426/- as per detail given in the table below. However it is made clear that complainant will be entitled for monthly interest till valid offer of possession, duly supported with payables and receivables as per RERA Act, 2016 and Rules of 2017, is made to the complainant by the respondent.

Sr. No.	Principal Amount (in ₹)	Deemed date of possession or date of payment whichever is later	Interest Accrued till 05.09.2023 (in ₹)
1.	3,25,429/-	30.04.2016	2,57,345/-
2.	42,556/-	30.04.2016	33,653/-

3.	2,52,904/-	30.04.2016	1,99,993/-
4.	11,370/-	30.04.2016	8,991/-
5.	2,75,790/-	30.04.2016	2,18,091/-
6.	1,00,000/-	30.04.2016	79,079/-
7.	1,52,910/-	30.04.2016	1,20,919/-
8.	2,76,942.25	30.04.2016	2,19,003/-
9.	1,158.75/-	30.04.2016	916/-
10.	3,79,355/-	30.04.2016	2,99,989/-
11.	2,25,708/-	30.04.2016	1,78,487/-
12.	3,80,864/-	30.04.2016	3,01,183/-
Total:	**24,24,987/-**	-	**19,17,649/-**
Monthly interest:	24,24,987/-	-	**21,426/-**

It is pertinent to mention that complainant has claimed to have paid an amount of ₹ 24,24,987/-, which has also been admitted by the respondent vide receipts annexed as Annexure C-3 from page no…82-93.

I. DIRECTIONS OF THE AUTHORITY

32. 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 upfront delay interest of ₹ 19,17,649/- (till date of order i.e 05.09.2023) to the complainant

towards delay already caused in handing over the possession within 90 days from the date of this order and further monthly interest @ ₹ 21,426/- till the offer of possession after receipt of occupation certificate.

(ii) Complainant will remain liable to pay balance consideration amount to the respondent at the time of valid possession offered to her.

(iii) The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e, 10.75% by the respondent/ Promoter which is the same rate of interest which the promoter shall be liable to pay to the allottees.

(iv) Letter dated 21.05.2022 (Annexure C-8) cancelling the allotment of the complainants to the said unit is hereby quashed and the said allotment is restored in the name of the complainants.

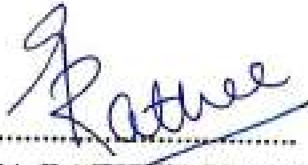
(v) Offer of possession given vide letter dated 05.02.2016 is hereby quashed as it being illegal and invalid.

(vi) Respondents are directed to modify the demand letters issued to the complainants.

(vii) Respondents are directed to complete the construction of the Club for which complainants have paid membership fee and provide amenities as specified in the advertisement.

(viii) Respondents are directed to not charge any such amount from the complainants which do not form part of Builder Buyers agreement dated 31.10.2013.

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



DR. GEETA RATHEE SINGH
[MEMBER]

NADIM AKHTAR
[MEMBER]