

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

**Complaint no. :** 6822 of 2022  
**Order reserved on :** 25.04.2024  
**Order pronounced on:** 25.07.2024

Jitender K Shokeen

**R/o:** House no. 321, Ferns City Layout, Doddanekundi, Outer Ring Road, Bangalore, Karnataka 560037.

**Complainant**

**Versus**

Athena Infrastructure Limited

**Regd. office:** 448-451, India bulls House, Udyog Vihar, Phase-V, Gurugram.

**Respondent**

**CORAM:**

Shri Vijay Kumar Goyal

**Member**

**APPEARANCE:**

Ms. Krishna Saroff (Advocate)

Shri Rahul Yadav (Advocate)

**Complainant  
Respondent**

**ORDER**

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities, and functions under the provisions of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter-se them.

**A. Unit and Project-related details:**

2. The particulars of the project, the details of sale consideration, the amount

paid by the complainant, the date of proposed handing over of the possession, and the delay period, if any, have been detailed in the following tabular form:

S.no.	Particulars	Details
1.	Project name and location	"Indiabulls Engima", Sector 110, Gurugram
2.	Project area	15.6 acres
3.	Nature of the project	Residential Complex
4.	DTCP license no.	213 of 2007 dated 05.09.2007 valid upto 04.09.2024 64 of 2012 dated 20.06.2012 valid upto 19.06.2023 10 of 2011 dated 29.01.2011 valid upto 28.01.2023
5.	RERA Registered/ not registered	351 of 2017, 353 of 2017, 354 of 2017 Valid till 18.09.2018
6.	Allotment letter	02.01.2012 [Page 23 of complaint]
7.	Builder buyer agreement	09.07.2011 [Page 25 of complaint]
8.	Flat no.	C012, 1 <sup>st</sup> Floor, Tower-C [Page 28 of complaint]
9.	Unit admeasuring	3400 sq. ft. [Page 28 of the complaint]
10.	Possession clause	<b>21.</b> <i>The Developer shall endeavor to complete the construction of the said unit/ building within a period of three years, with a six months of grace period thereon from the date of execution of the Flat Buyers Agreement subject to timely payment by the Buyer(s) of Total Sale price payable according to the payment plan applicable.....</i>

*A*

11.	Due date of possession	09.01.2015 [calculated from the date of execution of buyer agreement i.e., 09.07.2011 including a grace period of 6 months]
12.	Total sale price of the flat	Rs. 1,82,93,000 /- [Page 36 of reply]
13.	Amount paid by the complainant	Rs. 1,87,89,418/- [As per page 37 of reply]
14.	Occupation certificate	12.10.2021 [As per page 18 of complaint] Copy of OC is not annexed by either of parties and not uploaded by the DTCP Haryana
15.	Offer of possession	11.03.2022 [As per page 35 of reply]
16.	Possession taken under protest	12.10.2023 [both the counsels stated during proceedings dated 25.04.2024]

**B. Facts of the complaint:**

- The said project which is the subject matter of the present complaint, is situated at Sector-110, Gurgaon and therefore the Authority has jurisdiction to try and decide the present complaint.
- The respondent advertised itself as an ethical business group that lives onto its commitments in delivering its projects as per promised quality standards and agreed timelines. That the respondent while advertising the said project through flyers, catalogues, magazines, brokers, newspapers etc., promised to the targeted consumer their dream home that would be completed and delivered within the agreed time limit while selling the unit.

12

5. In or about 2010, the respondent through its marketing executives and advertisements, approached the complainant with an offer to sell residential flats of different sizes along with numerous facilities in the said project and being induced by the said offer and believing the representations made by the executive of the respondent to be true and correct, the complainant agreed to purchase a unit in the said project.
6. The complainant paid a sum of Rs. 5,00,000/- towards the booking amount. After a period of more than nine months, flat buyer agreement was executed between the parties on 09/07/2011 which broadly provided sale consideration of the said unit Rs. 1,78,85,000/- inclusive of basic price (Rs.1,65,80,000), EDC & IDC (Rs. 7,65,000), club charges (Rs. 2,00,000) and maintenance security (Rs.3,40,000/-). The respondent offered to give possession of the said unit within 36 months from the date of execution of the agreement that is on 08.07.2014, also proposed to provide facilities namely sprinkler system for fire safety, CPVC piping for water supply, waterproof board false ceiling with acrylic emulsion paint, premium modular switches and copper wiring etc.
7. That after 15 months from the date of booking, the respondent vide its letter dated 02/01/2012 allotted an apartment bearing a unit C-012 on 1<sup>st</sup> Floor in Tower/ Block no. C having an approx. 3400 sq. ft super area (that is 315.87 sq. mtrs, covered area 2605.54 sq ft.) comprising of 4BHK plus servant quarter and two covered parking in the said project (hereinafter referred to as the "said unit") to the complainant.
8. That the complainant was residing in Gurugram at the time of booking of the flat and eventually shifted to Bangalore in the year 2014 due to personal reasons.
9. That the respondent raised several demands from time to time as per payment

A

- schedule plan clearly denoting in other words that the progress of the construction was moving smoothly. Out of the said sale consideration of Rs.1,78,85,000/- the respondent has already received an amount of Rs. 1,74,89,485/- from the complainant. This will be evident from the ledger provided by the respondent to the complainant in Feb 2018.
10. The respondent sent a mail dated 17/10/2018 to the complainant informing him that a part occupancy certificate has been received in respect of several towers and that they would hand over possession of the units to the respective buyers shortly. However, the complainant received no communication from the respondent thereafter.
  11. The respondent not only failed to handover possession of the said unit on the deemed day of possession but also failed to complete construction of the said unit. Since no information was received from the respondent, the complainant's wife, Shweta Shokeen caused inspection sometime in November, 2021 when it appeared that the said unit was being used as a store room as the same was full of building materials. The complainant vide his mail dated 03/02/2022 communicated the same to the respondent and also requested it to inform the date on which he could take possession of the said unit.
  12. In response to the said mail, the respondent informed the complainant vide its mail dated 07.02.2022 that he could take inspection of the said flat by 29.03.2022. The respondent did not talk about completion of the said unit and/or date of handing over possession in its said communication.
  13. The complainant again took inspection of the said project and its unit on 03.03.2022 and it transpired that the said unit was still used as a dumping ground and was far from ready for handing over possession. The photographs of the said project/unit are annexed hereto.

A

14. In its email dated 11.03.2022, the respondent notified the complainant that it had obtained the occupation certificate for the tower wherein the aforementioned unit is situated. The respondent offered possession of the unit and requested payment of Rs. 3,76,192/- as the outstanding amount according to their calculations.
15. In response to the said mail the complainant vide his mail dated 11/03/2022 expressed his surprise as because the said unit was in a totally messy condition and asked for sending photographs of the said unit.
16. It is evident from an email dated 22.03.2022, that the application for the occupation certificate for Tower C was submitted on 19.04.2021. The respondent received the OC from the concerned authorities on 12.10.2021. However, surprisingly, possession of the unit was not offered by the respondent for a period of 5 months following receipt of the OC. This delay occurred purportedly due to incomplete construction of the flats/units, raising concerns that the respondent may have obtained the OC from the authorities through unfair means.
17. Further, to make things worse the respondent informed the complainant vide its mail dated 17/03/2022 that the said unit would be ready for inspection by 30<sup>th</sup> April, 2022 which is another proof of the fact that although OC was obtained in October 2021 but the respondent was unable to even offer inspection of the units until April, 2022.
18. The complainant wrote several mails vide dated 10/05/2022, 19/05/2022 & 14/07/2022 to the respondent repeatedly requesting them to give inspection of the unit. In reply thereto the respondent vide it's mail dated 15/07/2022 informed the complainant that the said unit would be ready for inspection only by end of August 2022. The respondent again vide it's mail dated 02/09/2022 changed the date of inspection from August to September, 2022.

19. It is more than obvious that the unit is not ready till date and the respondent has not been able to offer inspection of the unit despite giving repeated assurances. Apart from the aforesaid, the complainant is not liable to pay any amount on account of VAT as because the respondent was liable to handover possession of the said unit in 08/07/2014 and any liability arising after the said date is purely due to latches on the part of the respondent.
20. The respondent vide it's mail dated 11/03/2022 also demanded a sum of Rs. 6,95,100/- on account of Maintenance Security and Electric charges. The respondent has already charged Rs. 3,40,000/- towards maintenance security which is the part of the sale consideration and has again raised bill of Rs.2,66,700/- towards maintenance security on the same date of offering possession. Further, the complainant fails to understand as to how he can be made liable to pay a sum of Rs 4,28,400/- on account of electricity charges without even taking possession of the unit. Moreover, the said letter does not specify as to the said bill pertains to which period. The complainant has neither been allowed inspection of the unit, nor has taken possession thereof so how can he be compelled to pay any amount on the whims and fancies of the respondent.
21. The respondent has committed delay of 8 years 2 months which is extremely unreasonable and cannot be compensated by mere words. The letters of demand raised by the respondent on stating that the said unit had reached its completion was actually a farce. The respondent has been adopting all methods to defraud the homebuyers and have made them victim of their malice filled plans.
22. The respondent has failed to even give inspection of the said unit till date which is a clear indication of the fact that the said unit is still far from completion. It is more than obvious from the aforesaid facts that the

*Handwritten signature*

respondent is trying to take advantage and enjoying the hard-earned money of the complainant without any interest. They have resorted to fraud, concealment of facts and illegal demands throughout the period which tantamount to unfair trade practice.

23. Upon searches conducted online on behalf of the complainant it appears that some flat buyers have also filed cases against the respondent either claiming possession along with delay possession charges or refund and other reliefs either before the Hon'ble NCDRC or before this Hon'ble Forum. In all the cases the respondent has failed to provide any satisfactory reply and have thus been directed to give the possession of the said unit along with delay possession charges, interest and compensation.
24. The cause of action accrued in favor of the complainant and against the Respondent on 08.07.2014 when the respondent failed to complete the construction and also failed to offer inspection of the said unit as promised vide their mails dated 15/07/2022 and 02/09/2022 and has failed to give possession till date and the cause of action is still continuing and subsisting on day-to-day basis.

**C. Relief sought by the complainant:**

25. The complainant have sought the following relief(s):
- i. Direct the respondent to complete the said unit being C-012 in all respect, give inspection and handover the said unit to the complainant within a stipulated period.
  - ii. Direct the respondent to pay interest for every month of delay in offering of possession of the said unit to the complainant from 08/07/2014 @ 14% per annum on the amount taken till the date of handing over physical possession of the said unit.
  - iii. Declare the amount of Rs. 2,68,275/- charged by respondent on account of

A



- contingency deposit for VAT as null and void.
- iv. Declare the bill of Rs. 6,95,100/- raised by the respondent on account of maintenance security and electric charges as null and void.
  - v. Direct the respondent to pay cost of litigation of Rs. 1,00,000/- to the complainant.
26. On the date of hearing, the authority explained to the respondent /promoter about the contraventions as alleged to have been committed in relation to section 11(4) of the Act to plead guilty or not to plead guilty

**D. Reply by the respondent:**

27. The present complaint is not maintainable in the law or on the facts, and is as such liable to be dismissed/ rejected at the thresh hold, for not being filed as per the provisions of the Law.
28. The complainant provisionally reserved the subject unit with a speculative intent with sole purpose of investment and monetary gains out of the said investment. It is further submitted that the Complainant did its own market research and booked the subject unit on the basis of maximum commercial gains. That it was only based on the request of the complainant that the respondent allotted to the complainant a residential unit bearing no. C012 in tower "C" of the project of the respondent. Since there is a recession in the real estate market, the complainant is levying bald and baseless allegations against the respondent by way of the present complaint.
29. Pursuant to the provisional allotment, the complainant executed Flat Buyers Agreement (BBA) dated 09.07.2011 with the respondent post understanding the terms & conditions of the said agreement. That as per the agreed terms of the builder buyer's agreement the complainant were aware of the fact that the respondent shall endeavour to complete the construction of the said

A

building/unit" within the stipulated time as mentioned in the said agreement.

30. As per the terms of the agreement, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the subject unit, the same shall be adjudicated through the Arbitration mechanism as detailed therein. The respondent craves leave of this Hon'ble Authority to refer and rely upon the clause no. 49 of the duly executed FBA in which, dispute, if any, between the parties are to be referred to Arbitration. The complainant is contractually and statutorily barred from invoking the jurisdiction of the Hon'ble Authority. Moreover, no cause of action ever arose in favor of the complainant and against the respondent.
31. It is pertinent to mention here that from the very beginning it was in the knowledge of the complainant, that there is a mechanism detailed in the FBA which covers the exigencies of inordinate delay caused in completion and handing over of the booked unit i.e. enumerated in the "clause 22" of duly executed FBA. The respondent craves leave of this Hon'ble Authority to refer & rely upon the clause 22 of FBA:

*"In the eventuality of Developer failing to offer the possession of the unit to the Buyers within the time as stipulated herein, except for the delay attributable to the Buyer/force majeure / vis-majeure conditions, the Developer shall pay to the Buyer penalty of Rs. 5/- (Rupees Five only) per square feet (of super area) per month for the period of delay ....."*

It is thus prayed, that the complainant being aware, having knowledge and having given consent to the incorporation of the above-mentioned clause, are now evading from the truth of its existence and does not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainant is rescinding from the duly executed contract between the parties.



32. The present complaint is not maintainable as Flat Buyer's Agreement is not sacrosanct as in the said clause it is clearly stated that "the Developer shall endeavour to complete the construction of the said building/unit" within the stipulated time. Clause 21 of the said agreement has been given a selective reading by the complainant even though he conveniently relies on same and the period of delivery as defined in clause 21 of. The clause clearly says that the delivery of the unit / apartment in question was subject to timely payment of the instalments towards the basic sale price.
33. A bare perusal of clause 22 of the agreement would make it evident that in the event of the respondent failing to offer possession within the proposed timelines, then in such a scenario, the respondent would pay a penalty of Rs.5/- per sq. ft. per month as compensation for the period of such delay. The aforesaid prayer is completely contrary to the terms of the inter-se agreement between the parties. The said agreement fully envisages delay and provides for consequences thereof in the form of compensation to the complainant. Under clause 22 of the agreement, the respondent is liable to pay compensation at the rate of Rs.5/- per sq.ft. per month for delay beyond the proposed timeline. The Respondent craves leave of this Hon'ble Tribunal to refer & rely upon the clause 22 of flat buyer's agreement.
34. Some of the Force Majeure events/conditions which were beyond the control of respondent and affected the implementation of the project and are as under:
- Adverse market conditions viz. delay due to reinitiating of the existing work orders under GST regime, by virtue of which all the bills of contractors were held between, delay due to the directions by the Hon'ble Supreme Court and National Green Tribunal whereby the construction activities were stopped.

A

- Non-availability of the water required for the construction of the project work & non-availability of drinking water for labour due to process change from issuance of HUDA slips for the water to totally online process with the formation of GMDA.
- As per the license to develop the project, External Development Charges were paid to the State Government and the State Government in lieu of the EDCs was supposed to lay the whole infrastructure in the licensed area for providing the basic amenities such as drinking water, sewerage, drainage including storm water line, roads etc. That the State Government terribly failed to provide the basic amenities due to which the construction progress of the project was badly hit.
- The Ministry of Environment and Forest (hereinafter referred to as the "MoEF") and the Ministry of Mines (hereinafter referred to as the "MoM") had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of Kiln which is the most basic ingredient in the construction activity. The MoEF restricted the excavation of top soil for the manufacture of bricks and further directed that no manufacturing of clay bricks or tiles or blocks can be done within a radius of 50 (fifty) Kilometres from coal and lignite based thermal power plants without mixing at least 25% of ash with soil.
- Hon'ble Apex Court directing for suspension of all the mining operations in the Aravalli Hill range in State of Haryana within the area of approx. 448 sq. kms in the district of Faridabad and Gurgaon including Mewat which led to a situation of scarcity of the sand and other materials which affected the construction schedules and activities of the project.
- Commonwealth Games were organized in Delhi in October 2010. Due to this mega event, construction of several big projects including the

construction of Commonwealth Games village took place in 2009 and onwards in Delhi and NCR region. This led to an extreme shortage of labour in the NCR region as most of the labour force got employed in said projects required for the Commonwealth Games. Moreover, during the Commonwealth Games the labour/workers were forced to leave the NCR region for security reasons. This also led to immense shortage of labour force in the NCR region. This drastically affected the availability of labour in the NCR region which had a ripple effect and hampered the development of this Complex.

- Due to active implementation of social schemes like National Rural Employment Guarantee Act ("NREGA") and Jawaharlal Nehru National Urban Renewal Mission ("JNNURM"), there was a sudden shortage of labour/workforce in the real estate market as the available labour preferred to return to their respective states due to guaranteed employment by the Central /State Government under NREGA and JNNURM schemes.
- Due to slow pace of construction, a tremendous pressure was put on the contractors engaged to carry out various activities in the project due to which there was a dispute with the contractors resulting into foreclosure and termination of their contracts and we had to suffer huge losses which resulted in delayed timelines.
- The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f from 9-10 November 2016 the day when the Central Government issued notification with regard to demonetization. During this period, the contractor could not make payment in cash to the labour. During demonetization, the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to

A

labour on the site of magnitude of the project in question is Rs. 3-4 lakhs approx. per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour.

- Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. Also, the Hon'ble NGT has passed orders with regard to phasing out the 10-year-old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The contractor of respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal.
- Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.
- Due to heavy rainfall in Gurugram in the year 2016 and unfavourable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks.
- in view of the outbreak of COVID-19, the Government of India took various precautionary and preventive steps and issued various advisories, time to time, to curtail the spread of COVID 19 and declared a complete lockdown in India, commencing from 24th March, 2020 midnight thereby imposing several restrictions mainly non-supply of non-essential services during the lockdown period, due to which all the



construction work got badly effected across the country in compliance to the lockdown notification.

35. The FBA that has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the Flat Buyer Agreement dated 09.07.2011 executed much prior to coming into force of the RERA Act, 2016 and the HARERA Rules, 2017. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under RERA ACT, 2016 has to be in reference to the Flat Buyer's Agreement for Sale executed in terms of said Act and said rules and no other agreement, whereas the FBA being referred to or looked into in these proceedings is an agreement executed much before the commencement of RERA and such agreement as referred herein above. Hence, cannot be relied upon till such time the new agreement to Sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainant on the basis of the new agreement to sell as per RERA, Act 2016.
36. The complainant has preferred the instant complaint before the Hon'ble Authority, based upon false and baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in FBA entered into between the parties and to harass the respondent. In view of the same, it is submitted that there is no cause of action in favour of the complainant to institute the present complaint.
37. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and submissions made by the parties.

**E. Jurisdiction of the Authority:**

38. The authority observes that it has territorial as well as subject matter

*Ad*

jurisdiction to adjudicate the present complaint for the reasons given below.

**E. I Territorial jurisdiction**

39. 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 the entire Gurugram District for all purposes 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**

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

**Section 11(4)(a)**

*Be responsible for all obligations, responsibilities, and functions under the provisions of this Act or the rules and regulations made thereunder or to the 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 with the obligations cast upon the promoters, the allottees, and the real estate agents under this Act and the rules and regulations made thereunder.*

41. Hence, given 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 on account of complainant is in breach of agreement for non-invocation of arbitration.**





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

*"Clause 49 : All or any dispute arising out or touching upon or in relation to the terms of this Application and/or Flat Buyers agreement including the interpretation and validity of the terms thereof and the rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through Arbitration The arbitration shall be governed by Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereof for the time being in force. The venue of the arbitration shall be New Delhi and it shall be held by a sole arbitrator who shall be appointed by the Company and whose decision shall be final and binding upon the parties. The Applicant(s) hereby confirms that he/she shall have no objection to this appointment even if the person so appointed as the Arbitrator, is an employee or advocate of the company or is otherwise connected to the Company and the Applicant(s) confirms that notwithstanding such relationship / connection, the Applicant(s) shall have no doubts as to the independence or impartiality of the said Arbitrator. The courts in New Delhi alone shall have the jurisdiction over the disputes arising out of the Application/Apartment Buyers Agreement ....."*

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

the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. 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 complainant and builders could not circumscribe the jurisdiction of a consumer.

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

#### **F.II Objections regarding Force Majeure.**

45. The respondent/promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by Environmental Pollution Prevention & Control Authority, NGT, and orders of other courts/authorities to curb the pollution in NCR, demonetization, etc. It further requested that the said period be excluded

while calculating due date for handing over of possession. Further, in the instant complaint, as per clause 21 of FBA dated 09.07.2011, the due date of handing over of possession was provided as 09.01.2015. Grace period of 6 months is allowed being unconditional.

46. However, all the pleas advanced in this regard are devoid of merits. First of all, the possession of the unit in question was to be offered by 09.01.2015. Further, the time taken in governmental bans/guidelines cannot be attributed as reason for delay in project. Moreover, some of the events mentioned above are of routine in nature happening annually and are for very shorter period of time. The promoter is required to take the same into consideration while launching the project. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong and the objection of the respondent that the project was delayed due to circumstances being force majeure stands rejected.

**F.III Objection regarding the delay in payment.**

47. Another objection raised by the respondent regarding delay in payment by many allottees is totally invalid because the allottees have already paid the amount of Rs. 1,87,89,418/- against the total sale consideration of Rs. 1,82,93,000/- to the respondent. The fact cannot be ignored that there might be certain group of allottees that defaulted in making payments but upon perusal of documents on record it is observed that no default has been made by the complainant in the instant case. As per the payment plan more than 100% of the sale consideration has already been paid by the complainant till date. The fact cannot be ignored that there might be certain group of allottees that defaulted in making payments but upon perusal of documents on record it is observed that no default has been made by the complainant in the instant

case. Section 19(6) of Act lays down an obligation on the allottee(s) to make timely payments towards consideration of allotted unit. As per documents available on record, the complainant has paid all the instalments as per payment plan duly agreed upon by the complainant while signing the agreement. Moreover, the stake of all the allottees cannot put on stake on account of non-payment of due instalments by a group of allottees. Hence, the plea advanced by the respondent is rejected.

**G. Findings on relief sought by the complainant:**

**G.I Direct the respondent to pay interest for every month of delay in offering of possession of the said unit to the complainant from 08.07.2014 @14% p.a. on the amount taken till the date of handing over physical possession of the said unit.**

48. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

**Section 18: - Return of amount and compensation**

*"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."*

49. As per documents available on record, it is observed that the respondent failed to offer the possession of the allotted and did not receive occupation certificate from competent authority within stipulated period of time. The complainant took a plea that offer of possession was to be made in made in 2015, but the respondent has failed to handover the physical possession of the allotted unit.

**50. Admissibility of delay possession charges at prescribed rate of interest:**

The complainant is continuing with the project and seeking delay possession charges. However, proviso to section 18 provides that where an allottee does

not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

**Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]**

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

*Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

51. 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.
52. 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., 25.07.2024 is 9%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11%.
53. However, during the course of the proceedings, both counsels submitted before the Authority that the possession was offered on 11.03.2022 subsequent to obtaining the occupation certificate from the competent authority, and the complainant took possession under protest. The counsel representing the respondent further informed that an amount of Rs. 12,99,933/- has been credited as per the statement of account dated 31.08.2023.



54. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority observed 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 21 of the buyer agreement dated 09.07.2011, and the due date comes out as 09.01.2015. Occupation certificate was obtained on 12.10.2021. The offer of possession of the unit was offered dated 11.03.2022 and the possession was taken under protest by the complainant dated 12.10.2023. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject unit and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the agreement dated 09.07.2011 to hand over the physical possession within the stipulated period.
55. Therefore, the complainant/allottee is entitled for delay possession interest against the paid-up amount at prescribed rate of interest of 11% p.a. from due date of possession till the offer of possession plus two months.

**G.II Direct the respondent to pay amount of Rs. 2,68,275/- charged by the respondent on account of contingency deposit for VAT as null and void.**

56. The promoter is entitled to charge VAT from the allottees for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT) under the amnesty scheme. However, if the respondent opted for composition levy, then also, the incidence of such taxes shall be borne by the respondent only. But if composition scheme is not availed, VAT may be charged on proportionate basis subject to furnishing of proof of having its actual payment to the concerned taxation Authority.

**G.III Declare the bill of Rs. 6,95,100/- raised by the respondent on account of maintenance security and electric charges as null and void.**



57. The complainant raised an objection towards the amount raised towards maintenance charges. The promoter would be entitled to recover the actual charges paid to the concerned departments from the complainant/allottee on pro-rata basis on account of electricity connection, sewerage connection and water connection, etc., i.e., depending upon the area of the flat allotted to the complainant vis-à-vis the area of all the flats in this particular project. The complainant would also be entitled to proof of such payments to the concerned departments along with a computation proportionate to the allotted unit, before making payments under the aforesaid heads.

**G.IV Direct the respondent to pay sum of Rs. 1,00,000/- to complainant towards the cost of the litigation.**

58. The complainant is seeking relief w.r.t. litigation. The Hon'ble Supreme Court of India in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (2021-2022(1) RCR(C) 357)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

**H. Directions issued by the Authority:**

59. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance with obligations

*A*

cast upon the promoter as per the functions entrusted to the Authority under section 34(f) of the Act of 2016:

- I. The respondent is directed to pay delay possession charges to the complainant against the paid-up amount at the prescribed rate of interest i.e. 11% p.a. for every month of a delay from the due date of possession i.e., 09.01.2015 till the date of offer of possession i.e., 11.03.2022 plus two months after adjustment of credited amount of Rs. 12,99,933/- as per section 18(1) of the Act of 2016 read with rule 15 of the rules.
  - II. The respondent is directed to issue a revised account statement after adjustment of VAT, maintenance security and electric charges with delayed possession charges as per above within next 30 days from date of this order.
  - III. A period of 90 days is given to the respondent to comply with the directions given in this order failing which legal consequences would follow.
60. Complaint stands disposed of.
61. File be consigned to the Registry.

Dated: 25.07.2024

**HARERA**  
**GURUGRAM**

V.I - 3  
(Vijay Kumar Goyal)

Member  
Haryana Real Estate  
Regulatory Authority,  
Gurugram