HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	**599 of 2023**
Date of filing:	**10.04.2023**
Date of first hearing:	**19.07.2023**
Date of decision:	**14.01.2025**

Dinesh Chand Aggarwal, S/o Sh. Raman Lal Aggarwal,
R/o House no.16, Street no.2,
Prince Colony, 33 ft. road, Mundian Kalan,
Ludhiana, Punjab- 141015

....COMPLAINANT

VERSUS

M/s Konark Rajhans Estates Pvt. Ltd.,
through its Director
Regd. Office: Village Kot, Sector-14, Panchkula
Extension-II, District Panchkula, Haryana.

....RESPONDENT

CORAM: **Dr. Geeta Rathee Singh** **Member**
Chander Shekhar **Member**

Present: Adv. Arjun Kundra, ld. counsel for complainant, through VC.

Adv. Viren Sibel, ld.counsel for respondent through VC.

ORDER:

1. Present complaint was filed on 10.04.2023 by 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 him and details of project are detailed in following table:

S.No.	Particulars	Details
1.	Name of the project	Asha Panchkula, Sector-14, Panchkula Extention II, village Kot.
2.	Apartment no.	B-0706, 7th floor

3.	Area	1110 sq. ft.
4.	RERA registered/ not registered	Registered Reg. no.- 173 of 2017 dated 29.08.2017
5.	Date of booking application	04.03.2016
6.	Date of allotment	27.05.2016
7.	Date of Apartment Buyer Agreement	08.08.2016
8.	Deemed date of possession as provided in apartment buyer's agreement (36+6)	23.12.2019 *As per clause 9, the company contemplates to offer possession of the said apartment to the allottee within a period of 36 months from the receipt of the first instalment against allotment of the said apartment plus a grace period of 6 months from the date of the agreement, unless there is a delay or failure due to force majeure conditions and due to failure of apartment allottee(s) to pay in time the total sale price and other charges and dues as mentioned in the agreement or any failure by allottee(s) to abide by all or any of the terms and conditions of the agreement.* Note:- The first instalment was made on 23.06.2016 as per receipt attached with the complaint.
9.	Basic sale price	Rs.16,88,310 /-

10.	Total sale consideration	Rs.23,58,800 /-
11.	Amount paid by complainant	Rs.22,60,886 /-
12.	Offer of possession	Not offered

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

3. That complainant made a booking application on 04.03.2016 and on 27.05.2016 was provisionally allotted a unit in the real estate project namely "Asha Panchkula", being developed by the respondent. Vide this allotment, respondent confirmed the allotment of a 2 BHK apartment with flat no. B-0706 on 7th floor. Thereafter, an apartment buyer agreement was executed on 08.08.2016 between the complainant and respondent for a basic sale price of Rs.1521 per sq. ft., amounting to Rs.16,88,310 /-. The total sale consideration of the said flat was fixed as Rs.23,58,800 /- including additional charges towards EDC, IDC and IFMS.

4. That the complainant disputed the terms of apartment buyer agreement, being arbitrary and consisting of unilateral terms. When complainant protested to such terms, he was threatened with cancellation of allotment and forfeiture of the amount already paid. Thus, seeing the loss of any leverage the complainant signed the apartment buyer agreement.

5. That not only did the respondent abused its dominant position and employed unfair trade practices, but also miserably failed in completing the construction and development of the residential apartment building within the promised time frame and offer the possession of the unit. As per clause 9 of apartment buyer agreement dated 08.08.2016, possession was to be delivered within a period of 36 months from the date of receipt of first instalment, with an additional grace period of 6 months The relevant clause 9 of the agreement is reproduced hereunder:

> *"9. Schedule for possession of the said apartment.*
> *The Company based on the present plans and estimates contemplates to offer possession of the said apartment to the apartment allottee within a period of 36 months from the receipt of first installment against allotment of said apartment plus a grace period of 6 months, unless there shall be a delay or failure due to Force Majeure conditions and due to failure of apartment allottee(s) to pay in time the total sale price and other charges..."*

First instalment was paid on 23.06.2016, therefore, possession has been due since 30.07.2019, however respondent has failed to deliver possession within the prescribed period. Not only have the respondent failed to complete the development of the project, it has collected almost the entire sale consideration from the complainant without even reaching the relevant milestones. Till date, complainant has already made the payment to the tune of Rs. 22,60,886/-which is almost the agreed total sale consideration. Perusal

of the payment receipts would reveal that the respondent had collected majority of the payment before 2018. The complainant on the other hand submits that he never defaulted in any instalment as there was a lingering threat of delay penalty of 12% and/or cancellation of the unit.

6. That, it is submitted that complainant had made the booking of the apartment for the personal residential needs and requires immediate possession of the same along with the agreed rate of interest on the paid amount as delayed penalty. That as per the terms of the apartment buyer agreement, in case of delay, either party had agreed to the payment of delay penalty @12% p.a. The relevant provision is reproduced below: -

> *"5. Timely payment is the essence of this Agreement*
> *...If Company fails to give possession of the said Apartment as mentioned herein this Agreement, then Company shall also be liable for compensation at the rate of 12% p.a. simple interest for the entire period of such delay in giving possession beyond the schedule for possession of the said apartment as per clause 9 of this agreement."*

The complainant had requested the respondent several times for possession of their unit along with applicable delay penalty. That it would be further relevant to mention here that the complainant had to even take a loan for the present unit. Thus, he is being miserably burdened with heavy pre EMI & EMI also. The copy of demand letters issued by the respondent, loan

documents & email dated 01.08.2022 sent by the complainant to the respondent have been annexed as Annexure C-5 (colly).

7. That it is submitted that from booking of the apartment till date, respondent has never informed the complainant about any force majeure or any other circumstances which were beyond the reasonable control of the respondent that led to the delay in the completion and development of the project within the time prescribed in the agreement. It is clear that the delay of more than 3 years in the construction of the project is intentional and solely due to deliberate negligence and deficiency on the part of the respondent. It is further submitted that complaint had tried his best to approach the respondent for the redressal of his grievances, but to no avail.

8. That it is submitted that respondent company was bound to abide by the provisions & terms and conditions of the agreement and deliver possession of the apartment within the time prescribed in the apartment buyer's agreement. However, the respondent has miserably failed to complete the project and offer legal possession of the booked unit complete in all aspects and free from all encumbrances along with promised amenities within prescribed time-period. It is clear that there is deficiency of service on the part of the respondent in delivering the possession of the unit. Further he submits that the Hon'ble Supreme Court in ***Lucknow Development***

Authority v. M.K. Gupta [1994 AIR 787, 1994 SCC (1) 243) has held that when a person hires the services of a builder, or a contractor, for the construction of a house or a flat, and the same is for a consideration, it is a "service". The inordinate delay in handing over possession of the flat clearly amounts to deficiency of service.

9. That further complainant submits that it is pertinent to mention that respondent has acted in illegal and fraudulent manner which is evident from the following:

i. That the complainant opted for a construction linked payment plan under which the respondent was supposed to demand instalments from the complainant upon start/ completion of particular milestone/landmark as provided in the plan but they illegally demanded instalments from the complainant without actually reaching the milestones at the actual construction site. Majority of the instalments have been collected by the respondent by 2018 itself thus vindicating the argument of the complainant.

i. ii. The respondent failed to keep the pace of the construction as per the promised schedule but demanded installments from the complainant.

ii. iii. The respondent coerced the complainant into entering into an "unfair contract" which contained arbitrary and unilateral terms.

Thus, all the above activities of the respondent are illegal and arbitrary in nature and fall under "unfair practices" as defined under the RERA Act.

10. That furthermore it is submitted that the Section 18 of the Real Estate (Regulation and Development) Act, 2016 states that if the developer fails to complete the project and is unable to give possession to the buyer within the prescribed time period and in case the allottee wishes to continue with his/her allotment, then developer is liable to pay compensation/interest for such delay in handing over the possession to the allottees. The complainant is thus seeking the payment of interest as per the agreement i.e., 12% p.a. from the promised date of possession i.e., 23rd June 2019 until the actual delivery of the unit after receipt of the occupation certificate & completion certificate etc.

11. That the complainant submits that he seeks to rely on the several judgments passed by this Hon'ble Authority, wherein, this Hon'ble Authority has been pleased to award interest from the promised date of possession until the actual delivery of the unit. Therefore, complainant prays for possession

along-with delay interest as per Rule 15 of HRERA Rules, 2017 framed under RERA Rules, 2016, on the ground that respondent has not completed the project even after lapse of 8 years from the date of booking and it is not likely to be completed in near future due to mismanagement.

C. RELIEF SOUGHT:

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

a) Direct the respondent to deliver immediate possession of the 3BHK apartment of the complainants i.e., B-0706, Floor-7th, "Asha Panchkula", Kot Village, Panchkula Extension-2, Sector-14, Panchkula, Haryana admeasuring 1,405.00 sq ft. after due completion and receipt of occupancy/completion certificate along with all the promised amenities and facilities and to the satisfaction of the complainants after removal of any deficiencies and defects; and

b) Direct the respondent to pay agreed rate of interest i.e., 12% p.a., on the amount already paid by the complainants from the promised date of delivery i.e., 23rd June 2019 till the actual physical and legal delivery of possession after receipt of the Occupancy Certificate etc.; and

c) Pass an order quashing/ restraining the respondent from charging any amount from the complainant which do not form part of the apartment buyer agreement dated 8th August 2016 and/or is illegal and arbitrary including but not limited to enhanced charges, cost escalation charges, delay penalty/interest charges, GST charges, VAT charges, Club membership charges, maintenance charges etc. whatsoever; and/or to direct the respondent to refund/ adjust any such charges which they have already received from the complainant and further to set aside and quash one sided, unilateral, illegal, unfair, arbitrary clauses/ contracts/ agreements, etc.;

d) May pass any other order or orders which this Hon'ble Authority deems fit as per the facts and circumstances of the matter.

D. REPLY:

13. Learned counsel for the respondent filed reply on 31.05.2023 pleading therein:

a. That the present complaint filed by the complainant is liable to be dismissed as the complainant wrongly seeks to proceed on the basis that time was the essence of the contract and consequently, ignores the provisions of clause 9 of the buyer's agreement, which have to be read in its totality to gauge the intention of the parties, which clearly is not to

treat delivery of possession clause as being the essence of the contract. The constitution bench of the Hon'ble Supreme Court in the case of ***Chand Rani Vs Kamal Rani' 1993-1-SCC-519 (Para 25) and other decision namely Gomathinayagam Pillai Vs Palaniswami Nadar' 1967-1-SCR-227 - 2 - and 'Govind Prasad Chaturvedi Vs Hari Dutt Shastri' 1977-2-SCC-539 (Para 5)*** held that fixation of the period within which the contract has to be performed does not make the stipulation as to time, the essence of the contract and when a contract relates to a sale of immovable property it will normally be presumed that time is not the essence of the contract.

b. That clause 9 of the apartment buyer agreement executed between the parties provides that the "estimated time of delivery" was subject to the other terms and conditions of the said agreement. Clause 9 of the said agreement is being reproduced hereunder:

> *"The company based on the present plans and estimates contemplates to offer possession of the said Apartment to Allottee within a period of 36 months from the receipt of first instalment against allotment of the said Apartment plus a grace period of 6 months, unless there shall be delay or failure due to Force Majeure Conditions and due to failure of Apartment Allottee(s) to pay in time the total sale price and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Apartment Allottee(s) to abide by the terms and conditions of this Agreement."*

Thus, delay in offering possession of the said unit to the complainant was due to force majeure events and not due to willful negligence of the respondent. Respondent submits that it never guaranteed or assured that the possession will be offered within 36+6 months rather it merely contemplated about estimated time of possession. It is submitted that in real estate sector, there are various factors that affect the regular development of projects and as such no guarantee can be given to the allottees regarding offer of possession of the project. It is always subject to other terms and conditions as agreed upon in said agreement.

c. Respondent submits that a series of force majeure events took place during the period of development of the said project which are stated in detail hereunder:

i. In the month of February, 2018, the respondent company had executed a purchase order to buy 216 metric tons of TMT Steel from M/s Fortune Metals Ltd. for the purpose of construction in the said project and gave two cheques towards advance payment, however, M/s Fortune Metals Ltd. only delivered 72.28 metric tons of steel and did not fulfil the remaining order. Aggrieved by the same, the respondent tried to contact the said supplier but neither the said order

was completed, nor the money of the respondent was refunded by the said supplier. Finding no alternative, the respondent approached the Hon'ble Delhi High Court vide Art. Pet. 147/2019 for appointment of an Arbitrator and vide order dated 05.04.2019, the Hon'ble Delhi High Court appointed a sole arbitrator for the purpose of adjudicating the claim of the respondent. During the arbitration proceedings, the respondent substantiated its claim with all the necessary proofs and ultimately on 14.01.2020, an Arbitration Award was passed in favor of the respondent by the Ld. Arbitrator and the said supplier was directed to return the amount of the respondent along-with 12% interest. Due to the said non-supply of raw material and illegal forfeiture of respondent's money, the development at the said project was severely hampered and thus, the respondent despite its best efforts and reasonable diligence, could not complete the construction of the project within the estimated time and as such the same amounts to force majeure.

ii. Initially, at the time of starting of development work at the said project, the contract for the civil and structural work of the said project was given to *M/s Bucon Infratech Pvt. Ltd.* in the year 2016 for a total contract value of Rs.44,29,12,101/-. The work was to be

completed within a period of 27 months so that the project could get ready before 2019 and possession could be offered to the allottees of the respondent. However, in the year 2018, the said contractor stopped the construction at the said project and started to raise illegal demands of money which were not at all payable to them and therefore, the respondent did not succumb to the said illegal demands of the said constructor and stopped his further payments. Unfortunately, the construction work at the said project came to a complete halt and the respondent faced huge losses due to the same. Finding no alternative, the respondent had to engage another contractor to get the construction work of the said project completed. Thereafter, the said Contractor filed a Mediation Petition No. 284/2020 before the Hon'ble Delhi High Court but the said mediation failed as the respondent did not again agree to the illegal demands of the said contractor. Later, the said contractor filed a Civil Suit (Commercial) bearing CS No. 147/2022 before the Hon'ble Delhi High Court for the recovery of his alleged outstanding amount. On 13.10.2022, a consent decree was passed in the said case by the Hon'ble Delhi High Court on account of settlement between the parties. Due to the said non completion of construction work by the main contractor of the said project, the

development of the project got delayed and the respondent had to suffer huge losses. The said delay was beyond the control of the company and as such, amounts to force majeure.

iii. Thereafter in the month of March, 2020, the whole country faced massive backlash due to Covid-19 pandemic when nation-wide lockdown was imposed by the Central Government which caused reverse migration of labourers, break in supply chain of construction material etc. and thus, all the construction activities across the country came at a halt.

iv. Further in the month of May, 2020, the Ministry of Housing and Urban Affairs issued an advisory for extension of registration of real estate project due to the force majeure event of covid-19 pandemic for a period of six months w.e.f. March, 2020. In furtherance of the said advisory, all the RERA Authorities including the Haryana Real Estate Regulatory Authority, Panchkula granted general extension for all the projects. The said extension was further extended in the year 2021 for a period of three months due to the second wave of covid-19 pandemic.

d. That Hon'ble National Consumer Disputes Redressal Commission has held in the case titled as ***'Ramesh Malhotra &Ors. Versus Emaar MGF***

Land Ltd. &Anr.' 2019, that some delay in large housing projects is inevitable and cannot be termed as unreasonable. The relevant para of the said judgment provides that *"I am in agreement with the learned counsel for the builder that some delay in such large project is inevitable and in the facts and circumstances of the case, the delay on one year and two months cannot be said to be unreasonable."*

e. That further, respondent submits that it is not in a position to give immediate possession of the said apartment to the complainant or per month interest till delivery of possession as it would stall the whole project and would hamper the interests of rest of the allottees. The said project of the respondent was highly undersubscribed due to which the respondent could not arrange adequate funds. As on 31.10.2023, out of the total saleable units i.e., 452 units (residential & commercial both), the respondent could sell only 159 units which is not even 50% of the total inventory. If in such circumstances, the respondent is directed to pay per month delay interest to the complainant till offering possession of the unit, the respondent would not be able to even complete the construction of the said project.

f. Further, respondent submits that the present complaint filed by the complainant against respondent is not admissible before this Hon'ble

Authority as the apartment buyer agreement clearly provides a binding arbitration clause. The clause no. 33 of the said agreement provides that

> *"All or any dispute arising out of or relating to or concerning or in relation to the terms of this agreement shall be settled through amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration shall be governed by the Arbitration & Conciliation Act, 1996 or any statuary amendment/modification thereof for the time being in force. The arbitration proceedings shall be at an appropriate location in Delhi in English language by a sole arbitrator who shall be appointed by the company and whose decision shall be final and binding upon the parties. That the Respondent is hereby ready to settle the issue raised by the complainant amicably through mutual discussion failing which proper proceedings under Arbitration & conciliation Act could be carried on as per agreed terms and conditions by the parties in BBA."*

Thus, this Hon'ble Authority does not have the jurisdiction to entertain the present complaint as it has been specifically stated/mentioned in the buyer's agreement that all the disputes shall be referred to an Arbitrator to be appointed as per provisions of Arbitration and Conciliation Act, 1996.

g. That respondent submits that the present complaint filed by the complainant is liable to be dismissed as the construction work at the said project is going on in full swing and in the most effective and efficient manner and respondent is ready to deliver the possession of the said

project to its allottees as soon as the development work is completed, therefore, no indulgence of this Hon'ble Authority is required in the present case.

h. It is further submitted that neither any false representation was ever made to the complainant, nor any false hope of possession was ever given to the complainant by the respondent. The complainant invested his money in the said project after going through all the documentation including the approved building plans, licenses, and sanctions etc. of the said project and no false representation was ever made by the respondent in this respect. It is further submitted that the respondent never engaged in any illegal, arbitrary and/or unfair trade practice and the complainant has imputed false and frivolous allegations against the respondent without placing on record any proof or supporting material to show as to how and when the respondent engaged in illegal or unfair trade practices. Respondent submits that it never made any false promise to lure the buyers and always showed the actual picture of the project to its customers and the delay in delivering possession of the said project to the allottees was never due to the fault or mistake of the respondent but due to the force majeure circumstances stated hereinabove.

i. It is submitted that the said apartment buyer agreement does not contain any unilateral term or condition, and this is evident from the fact that the complainant is himself relying on most of the provisions of the said agreement in the present case. It is pertinent to mention here that even the Real Estate (Regulation and Development) Act, 2016 provides for extension of registration of real estate projects due to force majeure events. It is further submitted that the complainant had never made any objection to any of the clauses of the said agreement and it is clear from the fact that the complainant has not placed on record the proof of any communication made to the representatives of the respondent company regarding the alleged unilateral terms in the said agreement. The complainant has made baseless allegations against the respondent company in the present complaint without there being any fault on the part of the respondent. It is submitted that the complainant did not even mention the clause number of any such provision of the said agreement which is allegedly unilateral and favoring the respondent company.

j. It is submitted that the complainant defaulted in making payments on various occasions which could be inferred from the Customer Information Sheet of the complainant attached herewith as ANNEXURE- R-5. It is further submitted that as per the said sheet, the

respondent company had levied interest upon the late payments by the complainant and the complainant has paid the said interest. If there was no delay on the part of the complainant in making payments, then the complainant would have never paid delay interest upon the same. It is submitted that the complainant has made false averments that the respondent has demanded any amount of the complainant without reaching the relevant milestone. It is pertinent to mention here that from the perusal of the demand letters and receipts placed on record by the complainant himself, it can be seen that the respondent has only claimed the amount for the work already done by the respondent. It is clear from the said record that the respondent had demanded the installment towards the completion of masonry and brick work only in the month of May 2021 after the completing the said milestone and the respondent has not yet demanded the installment towards completion of flooring as the said milestone is yet to be achieved. All the above stated facts clearly conclude that the respondent never demanded any amount without reaching the relevant milestone. It is further submitted that the complainant defaulted in making timely payments on various occasion and the said fact is amply clear from the customer information sheet of the complainant (Annexure R-5).

k. It is further submitted that the respondent is trying its level best to complete the development work of the said project and will handover possession of the said unit to the complainant at the earliest. However, in case the respondent is directed to pay monthly delay compensation to its allottees, the respondent would not be left in a position to complete the construction work at all.

Therefore, respondent submits that the present complaint is liable to be dismissed as no right accrues in favour of complainant for filing the same against respondent.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT AND RESPONDENT:

14. During oral arguments, learned counsel for the complainant and respondent reiterated the facts mentioned in para 3-11 of this order. Therefore, he requested to dispose off the case and decide the matter on the basis of facts in complaint file as it is exhaustive and self-explanatory and requires no further arguments on his end.

15. Learned counsel for respondent reiterated the facts mentioned in para 13 of this order. He submitted that the facts that are stated in his written submissions vide reply dated 05.12.2023, may be taken as his oral submissions.

F. ISSUE FOR ADJUDICATION:

16. Whether complainant is 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?

G. FINDINGS ON THE OBJECTIONS RAISED BY THE RESPONDENT:

G.1. Objection raised by respondent that complainant is in breach of Agreement (ABA) for non-invocation of arbitration.

17. The respondent in its reply has submitted that the present complaint filed by the complainant is not admissible before this Hon'ble Authority as this Authority does not have the jurisdiction to entertain the present complaint as it has been specifically stated/mentioned in the buyer's agreement that all the disputes shall be referred to an arbitrator to be appointed as per provisions of Arbitration and Conciliation Act, 1996. 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 Real Estate (Regulation and Development) Act, 2016 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 on ***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.

18. 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."

19. 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 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 u 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."*

Furthermore, Delhi High Court in 2022 in ***Priyanka Taksh Sood V. Sunworld Residency, 2022 SCC OnLine Del 4717*** examined provisions that are "Pari Materia" to section 89 of RERA act; e.g. S. 60 of Competition act, S. 81 of IT Act, IBC, etc. It held "*there is no doubt in the mind of this court*

that giving a purposive interpretation to sections 79, 88 and 89 of the RERA Act, there is no bar under the RERA Act from application of concurrent remedy under the Arbitration & Conciliation Act, and thus, there is no clash between the provisions of the RERA Act and the Arbitration & Conciliation Act, as the remedies available under the former are in addition to, and not in supersession of, the remedies available under the Arbitration & Conciliation Act." Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.

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 Real Estate (Regulation and Development) 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.

G.2. Objection raised by the respondent with regard to deemed date of possession.

20. As per clause 9 of the apartment buyer agreement dated 08.08.2016, possession of the unit was to be delivered within a period of thirty six (36) months from the date of receipt of first instalment against allotment of the said apartment plus a grace period of 6 months from the date of the agreement. Relevant clause is reproduced for reference:

> *"the company contemplates to offer possession of the said apartment to the allottee within a period of 36 months from the receipt of the first instalment against allotment of the said apartment plus a grace period of 6 months from the date of the agreement, unless there is a delay or failure due to force majeure conditions and due to failure of apartment allottee(s) to pay in time the total sale price and other charges and dues as mentioned in the agreement or any failure by allottee(s) to abide by all or any of the terms and conditions of the agreement."*

It is pertinent to note that first instalment was made on 23.06.2016; therefore, respondent was liable to deliver possession of said flat by 23.12.2019 {i.e. 42 (36+6) months from the date of first instalment}.

21. It is the stand of respondent that force majeure conditions like default in making timely payments, proceedings going on since 2019 with award passed in 2020 with supplier of raw material, mediation proceedings with contractor from 2020 till October 2022 and ceasement of construction

activities during the COVID-19 period lead to delay in completion of the project. Now question that arises is whether these situations or circumstances were in fact beyond the control of the respondent or not and did the same amounted to force majeure circumstances or not.

22. Force majeure is a french expression which translates, literally, to *"superior force"*. To appreciate its nuances, jurisprudence of the concept under the Indian Contract Act, 1872 need to be elucidated. In the context of law and business, the Merriam Webster dictionary states that force majeure usually refers to *"those uncontrollable events (such as war, labor stoppages, or extreme weather) that are not the fault of any party and that make it difficult or impossible to carry out normal business. A company may insert a force majeure clause into a contract to absolve itself from liability in the event it cannot fulfill the terms of a contract (or if attempting to do so will result in loss or damage of goods) for reasons beyond its control"*. Black's Law Dictionary defines Force Majeure as follows, *"In the law of insurance, superior or irresistible force. Such clause is common in construction contracts to protect the parties in the event a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care. Typically, such clauses*

specifically indicate problems beyond the reasonable control of the lessee that will excuse performance."

23. Various courts have, over time, held that the term force majeure covers not merely acts of God, but may include acts of humans as well. The term "*Force Majeure*" is based on the concept of the doctrine of frustration under the Indian Contract Act, 1872; particularly Sections 32 and 56. The law uses the term "impossible" while discussing the frustration of a contract, i.e., a contract which becomes impossible has been frustrated. In this context, "impossibility" refers to an unexpected subsequent event or change of circumstance which fundamentally strikes at the root of the contract. In the case of ***Alopi Parshad and Sons Ltd vs Union of India, AIR 1960 SC 588 and the landmark Energy Watchdog and Ors. Vs. Central Electricity Regulatory Commission and Ors (2017) – 2017 3 AWC 2692 SC***, the Supreme Court of India has categorically stated that mere commercial onerousness, hardship, material loss, or inconvenience cannot constitute frustration of a contract. Furthermore, if it remains possible to fulfill the contract through alternate means, then a mere intervening difficulty will not constitute frustration. It is only in the absence of such alternate means that the contract may be considered frustrated.

24. In the present case, respondent is taking the defence of "force majeure condition" from the period 2018 onwards. Reason such as dispute between respondent and its contractor/ suppliers are only normal commercial difficulties being faced by promoters engaged in the business of real estate development. Any dispute inter-se the respondent and third party shall not per-se push the timeline for delivery of project as agreed between complainant and respondent vide agreement to sell dated 08.08.2016

25. Further, another defence adopted by respondent is that the possession got delayed due to outbreak of covid 19 pandemic. In this regard it is observed that due date of possession was 23.06.2019, whereas covid 19 pandemic engulfed the country in March, 2020 and lockdown was imposed. As far as delay in construction due to outbreak of Covid-19 is concerned Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. vs Vedanta Ltd & Anr. bearing OMP (1) (Comm.) No. 88/2020 and I.A.s 3696-3697/2020*** dated 29.05.2020 has observed that:

> "69... *The past non-performance of the contractor cannot be condoned due to Covid-19 lockdown in March, 2020 in India. The contractor was in breach since September, 2019. Opportunities were given to the contractor to cure the same repeatedly. Despite the same, the contractor could not complete the project. The outbreak of pandemic cannot be used as an excuse for non-performance of a contract for which the deadline was much before the outbreak itself.*

> *... The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by September,2019 and is claiming the benefit of lockdown which came into effect on 23.03.2020, whereas the due date of handing over possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, Authority is of view that outbreak of pandemic cannot be used an excuse for non-performance of contract for which deadline was much before the outbreak itself."*

In view of the ratio laid down by the Hon'ble High Court, respondent cannot be given the benefit of halt in work due to covid-19 pandemic, an event that occurred subsequent to the lapse of due date for handling over possession as per agreement.

26. Besides, respondent counsel has taken a defence that HRERA, Panchkula had granted general extension of registration of respondent's project due to covid 19 in 2020 for 6 months w.e.f. March, 2020 and in 2021 for a period of 3 months due to second wave of covid 19 pandemic. In this regard, authority observes that the promoter at the time of seeking request of extension of a real estate project had voluntarily declared a date for completion of the project u/s 4(2)(l)(C) and such voluntary declaration has no bearing on the date agreed between the parties for handling over of possession. Therefore, any extention of the date as declared u/s 4(2)(l)(C) shall not alter, modify or extend the date committed by respondent /

promoter in the agreement. Section 11(4) (a) of the RERA Act, 2016 clearly provides that promoter shall be responsible for all obligations and responsibilities and function as per agreement for sale. Thus, as per contract/ agreement executed with the complainant, respondent was duty bound to offer possession within the time stipulated in said agreement and it cannot shed away its responsibility on pretext of extension granted on other grounds by the Authority.

27. Furthermore, respondent has averred that default was committed by complainant in making timely payments to them; however it is unable to explain that how grave was such default and how did it lead to delay in completion of construction of the project. Authority is of a view that it is a commercial practice that when allottee delays in payment of instalments, then he is made to pay interest for the delay as a penalty and that too at a much higher rate than what a promoter pays if there is a delay of its part. In present case, complainant admits delay in payments by him and submits that interest was duly paid on the delay committed by him with every next instalment. Thus, Authority observes that when complainant/ allottee has duly paid delayed interest as demanded by respondent and even continued to pay next instalments due, then delay in completion of project cannot be solely attributed to default by complainant/ allottee which was remedied in

time and delay in completion of project cannot be solely attributed to delay in payment by one allottee. Thus, respondent cannot be allowed to claim this as a force majeure for delay in completion of construction of this project.

28. By mere pleading "force majeure conditions" without fulfilling its obligations, respondent cannot be allowed to take benefit of his own wrong. Therefore the plea of respondent to consider force majeure conditions towards delay caused in delivery of possession is without any basis and the same is rejected. Authority holds that deemed date of possession will be 36 months from the date of first instalment plus 6 months grace period. It is pertinent to note that first instalment was made on 23.06.2016; therefore, respondent was liable to deliver possession of said flat by **23.12.2019** {i.e. 42 (36+6) months from the date of first instalment}.

H. OBSERVATIONS AND DECISION OF THE AUTHORITY

29. The Authority has gone through the rival contentions. In light of the background of the matter as captured in this order and also the arguments submitted by both parties, Authority observes that complainant made a booking application on 04.03.2016 and was provisionally allotted a 2 BHK apartment with flat no. B-0706 on 7th floor on 27.05.2016, measuring 1110 sq. ft. Thereafter, apartment buyer agreement was executed on 08.08.2016 between the parties @ Rs.1521 per sq. ft. amounting to Rs.16,88,310/- as

basic sale price. There is no dispute w.r.t. total sale price of the apartment which is Rs.23,58,800/-. Complainant had voluntarily signed the said agreement for the allotted unit and paid amount of Rs.22,60,886/- against the total sale price by 2021.

30. Complainant has alleged that respondent has acted in illegal and fraudulent manner and practiced unfair trade practice by illegally demanding instalments from him without actually reaching the milestones in the actual site of construction. He submitted in his written submissions that respondent has failed to keep the pace of construction as per the promised schedule but demanded instalments from him and also coerced him to enter into an "unfair contract" which contained arbitrary and unilateral terms. However, complainant has failed to prove as to what acts of respondent classify them as illegal and fraudulent and what act constitutes unfair trade practice. Hence, this argument of the complainant cannot be sustained in absence of proof and is therefore dismissed *in limine*.

31. Further, facts set out in the preceding paragraphs demonstrate that construction of the project had been delayed beyond the time period stipulated in the apartment buyer agreement. Authority observes that respondent has failed to fulfil its obligation stipulated in apartment buyer agreement dated 08.08.2016. Possession of unit should have been delivered

by 23.12.2019 as observed in preceding paragraph. Now, even after a lapse of more than 5 years, respondent is not in a position to offer possession of the unit as respondent company is yet to receive occupation certificate in respect of the unit. Fact remains that respondent in his written statement has not specified as to when possession of booked unit will be offered to the complainant. Moreover, complainant does not wish to withdraw from the project and is only interested in getting the possession of his unit. Ld. counsel for complainant has clearly stated that complainant wants immediate possession of the apartment. In these circumstances, 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, allottee is entitled to interest for the entire period of delay caused, at the rates prescribed. It is observed that respondent in this case has not made any offer of possession to the complainant till date.

32. Authority concludes that complainant is entitled for delay interest from the deemed date i.e.23.12.2019 up to the date on which a valid offer is offered to him after receipt of occupation certificate. 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.."

33. 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. 14.01.2025 is 9.10%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e. 11.10%.

34. 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 11.10% (9.10 % + 2.00%) from the due date of possession i.e. 23.12.2019 till the date of a valid offer of possession.

35. Authority has got calculated the interest on total paid amount from due date of possession i.e. 23.12.2019 till the date of this order i.e. 14.01.2025 which works out to ₹ **12,40,394** /- and further monthly interest of ₹ **21,314**/- as per detail given in the table below:

Sr. No.	**Principal Amount (in ₹)**	**Deemed date of possession or date of payment whichever is later**	**Interest Accrued till 14.01.2025 (in ₹)**
1.	1,76,428/-	2019-12-23	99,259/-

2.	2,64,644/-	2019-12-23	1,48,889/-
3.	4,30,442/-	2019-12-23	2,42,168/-
4.	4,32,799/-	2019-12-23	2,43,494/-
5.	1,84,446/-	2019-12-23	1,03,770/-
6.	3,33,681/-	2019-12-23	1,87,730/-
7.	1,46,042/-	2019-12-23	82,164/-
8.	1,42,740/-	2019-12-23	80,306/-
9.	1,49,664/-	2021-11-16	52,614/-
Total:	**22,60,886/-**		**12,40,394/-**
Monthly interest:	22,60,886/-		**21,314/-**

I. DIRECTIONS OF THE AUTHORITY

36. Hence, 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 **₹ 12,40,394/-** (till date of order i.e. 14.01.2025) 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 @ **₹21,314/-** till the offer of possession after receipt of occupation certificate. Further, respondent shall remain liable to pay delay interest to complainant as per section 2(za) of the RERA Act, 2016.

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

(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., 11.10% by the respondent/ promoter which is the same rate of interest which the promoter shall be liable to pay to the allottees.

(iv) The respondent shall not charge anything from the complainant which is not part of the apartment buyer's agreement.

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

CHANDER SHEKHAR
[MEMBER]

DR. GEETA RATHEE SINGH
[MEMBER]