HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	**1718 of 2023**
Date of filing:	**01.08.2023**
Date of first hearing:	**05.09.2023**
Date of decision:	**14.01.2025**

Rohit Kumar, S/o Sh. Sushil Kumar,
R/o House no. 1043, Sector-46,
Gurgaon, Haryana- 122003.

....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. Abhishek Sharma, ld. counsel for complainant, through VC.

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

ORDER:

1. Present complaint was filed on 01.08.2023 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.	A-0305, 3rd floor

3.	Area	1405 sq. ft.
4.	RERA registered/ not registered	Registered Reg. no.- 173 of 2017 dated 29.08.2017
5.	Date of booking application	23.02.2016
6.	Date of allotment	27.05.2016
7.	Date of Apartment Buyer Agreement	10.08.2016
8.	Deemed date of possession as provided in apartment buyer's agreement (36+6)	06.12.2019 *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 06.06.2016 as per receipt attached with the complaint.
9.	Basic sale price	Rs.24,18,005 /-

10.	Total sale consideration	Rs.32,65,900/-
11.	Amount paid by complainant	Rs.26,85,392/-
12.	Offer of possession	Not offered

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

3. That complainant applied for allotment of an apartment in the real estate project of respondent namely, "Asha Panchkula", situated at sector-14, Panchkula Extention II, village Kot on 23.02.2016 being developed by respondent. Vide letter dated 27.05.2016, respondent confirmed the allotment of flat no. A-0305, a 3 BHK (corner+ park facing) apartment on 3rd floor. Thereafter, an apartment buyer agreement was executed on 10.08.2016 between the complainant and respondent against basic sale price @ Rs.1721 per sq. ft. amounting to Rs.24,18,005/-. The total sale consideration of the said flat was fixed as Rs. 32,65,900/- including additional charges towards EDC, IDC, IFMS, power backup, club membership charges but excludes service tax, VAT as applicable. Complainant opted for a construction linked plan.

4. That it is submitted that there are no outstanding dues against complainant and a total payment of Rs.29,41,820/- had been made uptil 2019. Further it is submitted that as per clause 9 of apartment buyer agreement dated 10.08.2016, 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 first instalment was made on 06.06.2016, therefore, possession has been due since 05.12.2019.

5. That further as per clause 5 of the apartment buyer agreement, complainant is entitled to a compensation at the rate of 12% per annum simple interest for the entire period of such delay in giving possession to the allottee.

6. That as per Section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016, promoter shall be responsible for all the obligation, responsibilities and functions mentioned in the agreement, which the respondent has clearly violated.

7. That respondent made a demand of Rs. 2,52,683/- as earnest money which is 20% of the total cost of the apartment, before the agreement of sale was signed between the parties. This is clear violation of Section 13 (1) of the Haryana Real Estate (Regulation and Development) Act, 2016 which has been reproduced below:

> *Section 13. (1) A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the*

case may be, as an advance payment or an application fee, from a person without first entering into a ritten agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

8. That it is submitted that present complaint has been filed because a previous complaint (RERA-PKL-163-2022) for the same cause, against the same respondent, was dismissed in default by the Hon'ble Authority with liberty to file afresh, as the complainant was not able to attend the hearings of the matter due to exigent circumstances.

9. That since then, no new date of completion of the project has been announced, no new demand has been raised, moreover the respondent has stopped responding to calls and communication from the complainant citing *"that since you have filed a complaint against us, talk to the authority and not us."*

10. Hence the present complaint.

C. RELIEF SOUGHT:

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

a) Delivery of actual vacant possession of the of the apartment as per the specifications mentioned in the Apartment Buyer's Agreement.

b) Payment of interest at the rate of 12% per annum simple interest on the sum paid by the complainant to the respondent for the entire period of delay.

c) Payment of a sum of Rs. 50,000/- as litigation expenses.

d) Any other relief the authority deems fit.

D. REPLY:

12. Learned counsel for the respondent filed reply on 05.12.2023 pleading therein:

a. That the present complaint filed by the complainant is liable to be dismissed as the present complaint is not maintainable. The complainant has filed the present complaint after his previous complaint bearing No. RERA-PKL-163/2023 was dismissed in default due to non-prosecution by the complainant. In the said proceedings, the complainant remained absent for four successive hearings thereby wasting the precious time of this Hon'ble Authority and hard earned money of the taxpayers of our Country. Now, the complainant is again misusing the judicial process by filing another complaint on the same grounds without providing a detailed and satisfactory explanation of his willful non-appearance in the proceedings of the said previous complaint case.

b. That further 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 mandate of 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)*** holding 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.

c. 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.

d. 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 from 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 alongwith 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 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.

e. That the 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."*

f. 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.

g. 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.

h. 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.

i. 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. REPLICATION FILED BY COMPLAINANT TO THE REPLY OF RESPONDENT:

13. An application has been filed by complainant on 05.02.2024 to reply filed by respondent on 05.12.2023. in said application, complainant has made the following submissions:

a. That he is not misusing the judicial process by filing another complaint on the same grounds without providing a detailed and satisfactory explanation of his wilful non-appearance. He submits that he filed the complaint to get justice and not to waste the taxpayers' money or the precious time of the Authority. As per Para 2 of the order dated 28-02-2023 in RERA-PKL-163-2022, it is clearly mentioned that the complainant is well within his rights to file a fresh complaint. It is also quint-essential to mention here that in the previous case (RERA-PKL-163 of 2022), the counsel for complainant was going through such exigent circumstances which were beyond his control that he was unable to appear before the Authority, and the counsel for complainant also renders his unconditional apology for the same.

b. It is submitted that clause 9 of the apartment buyer agreement is one sided and arbitrary in nature and as such is in derogation with the law, as

per the ***Chand Rani Vs Kamal Rani 1993-1-SCC-519 (Para25***) which is reproduced here for the Authority's perusal

> *"25. From an analysis of the above case-law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the court may infer that it is to be performed in a reasonable time if the conditions are. From the express terms of the contract".*

As per ***Govind Prasad Chaturvedi vs Hari Dutt Shastri 1977-2-SCC-539,*** *which is reproduced below for reference:*

> *"4. ...the appellant must get the sale deed executed within two months i.e. upto 24th May, 1964, and in case the appellant did not get the sale deed registered within two months then the earnest money amounting to Rs. 4000 paid by the appellant shall stand forfeited without serving any notice. The clause further provides that in case the respondents in some way evade the execution of the sale deed then the appellant will be entitled to compel them to execute the sale deed legally and the respondents shall be liable to pay the costs and damages incurred by the appellant. It is a settled law that the 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. When a contract relates to sale of immoveable property it will normally be presumed that the time is not the essence of the contract. (vide Gomathinayagam, Pillai & Ors. v. Palaniswami Nadar)(I). It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are*

sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence-of the contract."

The language of both the above mentioned judgements makes it abundantly clear time plays a critical role based on the language of the agreement. The respondent has placed before the Authority only selected portions of the above mentioned judgements which are quoted without context and with intention to mislead the Authority.

c. That the respondent has been provided ample time to complete the project considering the Covid-19 pandemic and the delay caused by it. That the pandemic affected everyone, but the respondents through their response are suggesting that they are the only ones affected by it.

d. That in relation to existence of arbitration clause, he submits that in ***Anil Kumar Arya v. SVS Buildcon Private Limited***, the Madhya Pradesh Real Estate Regulatory Authority (MP RERA) in 2017 held that its jurisdiction would not be ousted by the presence of an arbitration clause in the agreement. The MP RERA, in this decision, observed that the RERA Act would prevail over the Arbitration Act by application of the principle that a special law prevails over a general law and the later law overrides the previous law in effect. The Maharashtra Real Estate Authority ("MahaRERA") has decided in the case of ***Ganesh Lonkar v.***

DS Kulkarni Developers Ltd. that, despite the existence of an arbitration agreement between the parties, it has the authority to decide disputes that are covered by the arbitration agreement. The decision's justification is built on two pillars. First off, as the legislature is assumed to be aware of all legislation it has passed, RERA would take precedence over the Arbitration and Conciliation Act of 1996 ("ACA") because it was passed later. Second, section 89 of the RERA contains a non-obstante language that was explicitly included by the legislature. According to this, the RERA shall be in force despite any inconsistencies with other current) in force laws. Section 8 of the Arbitration and Conciliation Act, which requires a judicial authority to refer to arbitration matters that are covered by an arbitration agreement, is thus superseded by the provisions of RERA. The provisions of Section 89 of the Act clearly state that Act has overriding effect, the section has been reproduced for the Authorities perusal, "Section 89: The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force." Section 79 of the RERA Act does not bar the initiation of proceedings before a fora which cannot be called a Civil Court. Moreover, a contract between the parties cannot prevail over an overriding statutory provision. RERA Act is a special legislation

which is enacted for social welfare, wherein the homebuyers are given a specific remedy, therefore, RERA's jurisdiction cannot be excluded and the dispute cannot be referred to arbitration.

F. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT AND RESPONDENT:

14. During oral arguments learned counsel for the complainant and respondent have reiterated arguments as mentioned in their written submissions.

G. ISSUE FOR ADJUDICATION:

15. 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?

H. FINDINGS ON THE OBJECTIONS RAISED BY THE RESPONDENT:

H.1. Objection raised by respondent that earlier complaint filed by complainant was dismissed in default.

16. The respondent has asserted the fact that present complaint is not maintainable due to the fact that complainant has filed the present complaint after his previous complaint bearing No. RERA-PKL-163/2022 was dismissed in default due to non-prosecution by complainant. In this regard Authority observes that in previous complaint vide no. RERA-PKL-163 of

2022, complainant had raised the same issue and sought similar relief as has been sought in the present complaint. However, the issues were not dealt/ decided on merits, rather the complaint was dismissed due to non-prosecution by complainant. Further, while disposing the complaint, Authority vide its final order dated 28.02.2023 had granted liberty to complainant to file a fresh complaint in future. Accordingly, complainant is well within his right to file present complaint. Hence, captioned complaint is maintainable.

H.2. Objection regarding the fact that time was not the essence of contract as pleaded by complainant.

17. Respondent submits that complainant has wrongly proceeded on the basis that time was the essence of the contract and consequently ignored 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. Authority observes that mandate of the clause in said agreement is ensure that respondent/ promoter fulfils all obligations towards the allottee as per agreement for sale. In the apartment buyer agreement, respondent has made the commitment that possession shall be handed over within a period of 6 months from the date of the agreement, unless there is a delay or failure due

to force majeure conditions or 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. Therefore, respondent is bound to fulfil its obligation towards the complainant/ allottee.

H.3. Objection raised by respondent that complainant is in breach of Agreement (ABA) for non-invocation of arbitration.

18. 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.

19. 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."

20. 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.

H.4. Objection raised by the respondent with regard to deemed date of possession.

21. 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}.

22. 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.

23. 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."*

24. 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.

25. 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

26. 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 Delhi 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.

27. Besides, respondent counsel has taken a defence that HRERA, Panchkula had granted general extension of registration to 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 respondent/ promoter at the time of seeking grant of request of extension of a real estate project had voluntarily declared a date for completion of the project under section 4(2)(l)(C) and such voluntary declaration has no bearing on the date agreed between the parties for handing over of possession as the complainant is a complete stranger to such declaration made before the Authority. Therefore, any extension of the date as declared under section 4(2)(l)(C) shall not alter, modify or extend the date committed by respondent / promoter in the agreement for sale between complainant and respondent. Further 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 its responsibility on pretext of extension granted on other grounds by the Authority.

28. 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 subsequent instalments, 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.

29. By merely 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 installment was made on 06.06.2016; therefore, respondent was liable to deliver possession of said flat by **06.12.2019** {i.e. 42 (36+6) months from the date of first instalment}.

I. OBSERVATIONS AND DECISION OF THE AUTHORITY

30. 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 23.02.2016 and was provisionally allotted a 3 BHK apartment bearing flat no. A-0305 on 3rd floor on 27.05.2016, measuring 1405 sq. ft. Thereafter, apartment buyer agreement was executed on 10.08.2016 between the parties @ Rs.1721 per sq. ft. amounting to Rs.24,18,005/- as the basic sale price and total sale consideration of

Rs.32,65,900/-. The complainant had voluntarily signed the said agreement for the allotted unit and paid amount of Rs. 29,41,820/- by 2019.

31. 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. It is a matter of fact that respondent has failed to fulfil its obligation stipulated in apartment buyer agreement dated 10.08.2016. Possession of unit should have been delivered by 06.12.2019 as observed in preceding paragraph. Now, even after a lapse of more than 5 year, respondent is not in a position to offer possession of the unit since respondent company is yet to receive occupation certificate in respect of the unit.

32. 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 rather interested in getting the possession of his unit. Learned 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.

33. Authority concludes that complainant is entitled to delay interest from the deemed due date of possession i.e.23.12.2019 up to the date on which a valid offer of possession is made 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.."

34. 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%.

35. 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. 06.12.2019 till the date of a valid offer of possession.

36. Authority has got calculated the interest on total paid amount from due date of possession i.e. 06.12.2019 till the date of this order i.e. 14.01.2025 which

works out to ₹ **1670286**/- and further monthly interest of ₹**27,734**/- 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.	2,52,683/-	06.12.2019	1,43,466/-
2.	3,79,021/-	06.12.2019	2,15,198/-
3.	5,64,645/-	06.12.2019	3,20,590/-
4.	6,23,272/-	06.12.2019	3,53,877/-
5.	2,56,428/-	06.12.2019	1,45,593/-
6.	2,56,429/-	06.12.2019	1,45,593/-
7.	2,03,114/-	06.12.2019	1,15,323/-
8.	2,03,114/-	06.12.2019	1,15,323/-
9.	2,03,114/-	06.12.2019	1,15,323/-
Total:	**29,41,820/-**		**16,70,286/-**
Monthly interest:	**29,41,820/-**		**27,734/-**

37. Further, the complainant is seeking sum of Rs.50,000/- as compensation for cost of litigation expenses. It is observed that Hon'ble Supreme Court of India in Civil Appeal Nos. 6745-6749 of 2027 titled as "***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of U.P. & ors.***" (supra,), 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 learned Adjudicating Officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the learned 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, the complainant is advised to approach the Adjudicating Officer for seeking the relief of litigation expenses.

J. DIRECTIONS OF THE AUTHORITY

38. 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 **₹16,70,286** /- (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 @ **₹27,734**/- 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 shall accept the offer of possession as per provision of section 19(10) of the RERA Act, 2016 and shall also 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.

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

.....
CHANDER SHEKHAR
[MEMBER]

.....
DR. GEETA RATHEE SINGH
[MEMBER]