HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	**2790 of 2023**
Date of filing:	**27.12.2023**
Date of first hearing:	**30.01.2024**
Date of decision:	**04.02.2025**

Sh. Dinesh Kumar Bedi, S/o Sh. Surinder Kumar Bedi,
R/o B-104, Sai Niketan Apartment, Plot no.9A, Sector-20,
KharGhar-410210, Navi Mumbai, Maharashtra.

....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. Ram Mohan, Ld. Counsel for complainant through VC.

Adv. Viren Sibel, Ld. Counsel for respondent, through VC.

ORDER:

1. Present complaint was filed on 27.12.2023 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, details of sale consideration, 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-0205, 2nd 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	20.02.2017
7.	Date of Apartment Buyer Agreement	20.02.2017
8.	Deemed date of possession as provided in apartment buyer's agreement (36+6)	19.12.2019 *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 19.06.2016 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. 29,41,820/-
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. On 27.05.2016, complainant was allotted apartment no.D-0306 in tower-D, Type- 3BHK, Level 03 (Corner + Park Facing) having an area of 1405 sq. ft., in the respondent's project namely, ASHA Panchkula. And after successful allotment of said unit, complainant submits that he paid the booking amount of Rs.2,52,683/- which was duly realised by respondent by issuance of receipt on 19.06.2016. Thereafter, on 08.08, 2016, a letter was issued by respondent for execution of apartment buyer agreement in respect of that unit.

4. That after 2 days i.e. on 10.08.2016, respondent sent a letter to the complainant intimating the change of Bank account for all due instalments with reference to apartment allotted to him. And within a further few days, a

mail was then sent to complainant by respondent intimating that they are not continuing with Tower-D in which the unit of complainant was allotted. Thus complainant was allotted another apartment on 20.02.2017 bearing no. A-0205, 3 BHK (corner+ park facing) apartment on 2nd floor admeasuring the same area as apartment allotted previously i.e. of 1405 sq. ft., in the same project of respondent company- ASHA Panchkula. Thereafter, an apartment buyer agreement was executed on 20.02.2017 between 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 club membership, EDC, IDC, IFMS, power backup. For the payments already made, new receipts were issued with same date and amount but with newer allotted apartment number.

5. That complainant submits that as per clause 9 of apartment buyer agreement dated 20.02.2017, possession was to be delivered within a period of 36 months from the date of receipt of first instalment, plus a grace period of 6 months. The first instalment was made on 19.06.2016, therefore, possession has been due since 19.12.2019. However as per the status of construction at the site, still delivery of possession of the allotted apartment in Asha Panchkula is far away from reality. It is submitted that the present status of

the project can be gauged from the quarterly update of the project on the HRERA website which completely falsifies claims and representations of the respondent. Further, it is submitted that no work is being carried out at the site which shows the intention of the respondent to handover the possession of apartment to the complainant.

6. That it is submitted, complainant had availed a loan against the said apartment from State Bank of India for an amount of Rs.25,00,000/- and also executed a Tripartite agreement for the same with the bank and respondent company.

7. That complainant submits that in the last demand made by respondent company, respondent had malafidely changed the bank account form Yes Bank to IDBI Bank. Complainant submits that he had duly informed respondent that the scheduled payment of the instalment is to be paid by the bank as there is a loan from HDFC Bank, wherein the respondent need to justify and certify that the bank accounts of the project are duly changed with HRERA. However, it is submitted by complainant that respondent failed to certify and inform the change of bank account from Yes bank to IDBI bank.

8. That further it is submitted by complainant that he is residing in a rented accommodation and paying the home loan interest as well. Complainant

submits that he has on several occasions visited the site and had written letters to the respondent asking for the tentative date of the handover of the apartment. However, respondent has failed to reply to them.

9. Possession has not be offered and delivered till date; hence, the present complaint.

C. RELIEF SOUGHT:

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

a) Initiate a Suo - moto complaint, investigate and prosecute the respondent for taking booking amounts prior to the registration under Real Estate (Regulation and Development) Act, 2016 and rules framed thereunder. A severe penalty be imposed on the respondent for contravening the provisions of the Real Estate (Regulation and Development) Act, 2016 and rules framed thereunder so that an example be set for the real estate industry to not to indulge in such sort of mal-practices;

b) Pass appropriate orders and directions to respondent to complete the Asha Panchkula residential project and deliver the actual, vacant and peaceful physical possession of the allotted Apartment to the complainant;

c) Pass an order directing respondent to pay interest at the prescribed rate on the amount deposited by the complainant to the respondent for the delay in delivery of possession of the allotted apartment as this Hon'ble Authority may deem fit and proper;

d) Pass an order directing respondent to pay a sum of Rs. 5,00,000/- for harassment, pain and mental agony to complainant;

e) Pass an order directing respondent to pay a sum of Rs. 1,50,000/-towards damages caused and incurred by the complainant including legal costs and expenses incurred in filing the present complaint against the respondent; and

f) Pass such other and further orders as this Hon'ble Authority may deem fit and proper.

D. REPLY:

11. Learned counsel for respondent filed reply on 29.04.2024 pleading therein:

a. That the present complaint filed by complainant is not maintainable before this Hon'ble Authority as this Hon'ble Authority does not have the subject matter jurisdiction to try, entertain and adjudicate upon the present complaint. By way of the present complaint, the complainant is seeking relief of interest and compensation under Section 18 of the Real Estate (Regulatory & Development) Act, 2016 and in view of Section 71

of the said Act, a complaint for seeking relief under the aforementioned provision of law can only be entertained, tried upon and adjudicated by the l.d. Adjudicating Officer of this Hon'ble Authority. Section 71 of the said Act provides that

> *"71. Power to Adjudicate.- (1) For the purpose of adjudging compensation under Sections 12, 14, 18 and Section 19, the Authority shall appoint in consultation with the appropriate Government, one or more Judicial Officer as deemed necessary, who is or has been a District Judge to be an Adjudicating Officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard.*
> *(2) The Application for adjudging compensation under Sub-section (1), shall be dealt with by the Adjudicating Officer as expeditiously as possible and dispose of the same within a period of Sixty Days from the date of receipt of the application."*

b. That the present complaint filed by the complainant is liable to be dismissed as 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***

Rattee

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.

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 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 l.d. 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.

e. That even 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. 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 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), 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.

h. That it is further submitted that at present, the construction work at the said project is going on in full swing, and in the most effective and efficient manner and possession of the apartment will be given to the complainant at the earliest, however, the respondent is not in a position to give immediate possession of the said apartment to the complainant or per delay interest till delivery of possession as it would stall the whole

project and would hamper the interests of rest of the allottees. In case the respondent is directed to pay delay compensation to its allottees, the respondent would not be left in a position to complete the construction work at all.

i. That it is further submitted that respondent has been regularly filing the monthly compliance reports before the Haryana Real Estate Regulatory Authority, Panchkula and the same are available on the website of HRERA. Further, at the end of each month, respondent sends the monthly progress report of the said project to all of its allottees on their respective email addresses and therefore, all the allottees are well aware of the up to date status of development of the Asha Panchkula project of the respondent. The said report specifically provides the tower wise construction update along-with coloured photographs of the work done and details of number of labour/mason workers involved in the construction work. It is further submitted that recently, the respondent has sent the monthly progress report for the month of March, 2024 to the complainant vide email dated 02.04.2024. Thus, respondent submits that complainant has falsely alleged that no work is being carried out the project site for the sole purpose of fabricating a false cause of action in his favor.

j. That lastly respondent submits that complainant has made bald and baseless allegations against the respondent in their entire complaint. None of their averments are supported with any supporting proof/evidence. It is pertinent to note here that complainant has till date not paid their outstanding dues towards the said apartment/unit and the respondent has charged delay interest upon the said delay in payment. It is submitted that respondent has duly intimated the said change in bank accounts to this Hon'ble Authority and only after approval of this Hon'ble Authority, the said changes in bank accounts were communicated to the complainant. Further complainant has failed to place on record any document or other proof to show that they had made any such query from the respondent or demanded any such certification from the respondent as falsely alleged in the para under reply. The respondent hereby undertakes that if so directed by this Hon'ble Authority, the respondent shall place on record all the necessary proof in regard to the said change in bank accounts.

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:

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

F. ISSUE FOR ADJUDICATION:

13. 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 RESPONDENT:

G.1. Objection raised by respondent that this Hon'ble Authority does not have the jurisdiction to try, entertain or adjudicate upon the present complaint.

14. Respondent has averred in its written submissions that complainant cannot seek relief of interest and compensation under section 18 of the RERA Act, 2016 before the Hon'ble Authority as in view of provision under Section 71 of the RERA Act, 2016, jurisdiction to try the same lies with the Adjudicating Officer of the Authority.

15. In this regard, Authority observes that as per Section 71(1) of the RERA Act, 2016, power to adjudicate compensation is bestowed upon Adjudicating Officer. Further, it has been observed by the 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."*** 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 and litigation expense shall be adjudged by the learned Adjudicating Officer having due regard to the factors mentioned in Section 72. Same is reproduced as under:

> *"86.....*
> *...At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

16. Thus, 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 compensation and other litigation expenses. Nonetheless besides this relief of compensation, complainant is claiming relief of possession

along-with delay interest and for the same Authority has sole jurisdiction to try, entertain or adjudicate upon. Hence, complaint is maintainable and argument of respondent is rejected to such extent.

G.2. Objection raised by respondent as to the fact that time was not the essence of contract.

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.

18. Authority observes that as per section 11(4) (a) of RERA Act, 2016, promoter shall be responsible for all obligations, responsibilities and functions under the provisions of the Act or the Rules and Regulations made thereunder or to the allottees as per the agreement for sale. By incorporating clause (9) the apartment buyer agreement, respondent has made the commitment that possession shall be handed over within a period of 36 months from the date of the first instalment plus a grace period of 6 months, 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.

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

19. 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.

20. 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 8 of the Arbitration Act."

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

22. 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 as follows:

> *"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.

23. 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. Thus, present complaint for delayed possession is maintainable under provisions of RERA Act, 2016.

II. OBSERVATIONS AND DECISION OF THE AUTHORITY

24. 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. D-0306 on 3rd floor on 27.05.2016, measuring 1405 sq. ft. Thereafter, respondent intimated complainant that they have discontinued with tower D, due to which they are allotting a unit in Tower A in the same project of the respondent i.e. ASHA Panchkula only. Thus, an allotment letter was issued for apartment no. A-0205 on 20.02.2017, with same specifications as was allotted in tower D. Thus, an apartment buyer agreement was executed on 20.02.2017 between the parties for flat no. A-0205 for total sale consideration of Rs.32,65,900/- against which complainant had amount of Rs.29,41,820/-. On perusal of documents filed by complainant, Authority observes that for the amounts that were paid before the unit was changed from D-0306 to A-0205, new receipts were issued by respondent bearing the same date as and when payment were made and no. of allotted unit was changed to final agreed unit i.e. A-0205 from D-0306.

25. Authority observes that as per clause 9 of the apartment buyer agreement dated 20.02.2017, 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 as per receipt annexed at page no. 50 of the complaint book, first instalment was made on 19.06.2016 2016 under the head- "within 30 days of allotment"; therefore, respondent was liable to deliver possession of said flat by 19.12.2019 {i.e. 42 (36+6) months from the date of first instalment}.

26. It is the stand of respondent that force majeure conditions like legal proceedings initiated in 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 were these events covered under the definition of "force majeure circumstances" or not.

27. 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."*

28. Also 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.

29. 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 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 20.02.2017.

30. 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 19.12.2019, 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.

31. 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.

32. Thus, 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 instalment was made on 19.06.2016; therefore, respondent was liable to deliver possession of said flat by **19.12.2019** {i.e. 42 (36+6) months from the date of first instalment}

33. Thus, 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. Possession of unit should have been delivered by 19.12.2019 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.

34. 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.

35. Authority concludes that complainant is entitled to delay interest from the deemed due date of possession i.e.19.12.2019 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.."

36. 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. 04.02.2025 is 9.10%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e. 11.10%.

37. 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. 19.12.2019 till the date of a valid offer of possession.

38. Authority has got calculated the interest on total paid amount from due date of possession i.e. 19.12.2019 till the date of this order i.e. 04.02.2025 which works out to ₹**16,77,196** /- and further monthly interest of ₹**26,839**/- 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 04.02.2025 (in ₹)**
1.	2,03,114/-	19.12.2019	1,15,817/-
2.	2,56,428/-	19.12.2019	1,46,217/-
3.	2,52,683/-	19.12.2019	1,44,081/-

4.	37,9,021/-	19.12.2019	21,6,120/-
5.	5,64,645/-	19.12.2019	3,21,964/-
6.	62,3,272/-	19.12.2019	3,55,393/-
7.	2,56,429/-	19.12.2019	1,46,217/-
8.	2,03,114/-	19.12.2019	1,15,817/-
9.	2,03,114/-	19.12.2019	1,15,570/-
Total:	**29,41,820/-**		**16,77,196/-**
Monthly interest:	**29,41,820/-**		**26,839/-**

39. Further, the complainant is seeking sum of Rs.5,00,000/- and Rs.1,50,000/- as compensation for causing mental agony, harassment and on account of 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. Same is reproduced as under:

"86.....

...At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

40. Thus, 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.

41. Furthermore, complainant seeks relief of initiating a suo-motu complaint, investigating and prosecuting respondent for taking booking amounts prior to getting the project registered under provisions of RERA Act, 2016 and rules framed thereunder. Further he seeks that penalty be imposed on respondent for contravening provisions of RERA Act, 2016. In this regard, Authority observes that the apartment buyer agreement was executed between the complainant and respondent on 20.02.2017, whereas the RERA Act, 2016 came into effect in entirety on 01.05.2017. Meaning thereby that on the date

of signing of buyer's agreement, Section 3 of the RERA Act, 2016 has not come into force. Therefore, respondent cannot be held liable and penalised for violation of a provision of law that was not in force at the time of execution of buyer's agreement. Hence, said relief is rejected.

I. DIRECTIONS OF THE AUTHORITY

42. 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 **₹16,77,196** /- (till date of order i.e. 04.02.2025) 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 @ **₹26,839**/- till the offer of possession after receipt of occupation certificate.

(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.

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

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

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CHANDER SHEKHAR
[MEMBER]

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