BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**428 of 2019**
Date of first hearing	**24.07.2019**
Date of decision	**22.10.2019**

Shri Vijay Kumar,
R/o A-209, Defence colony,
New Delhi. **Complainant**

Versus

1.M/s Bestech India Pvt. Ltd.
Office at: 51, Sector 44, Gurugram.
2.M/s Brahma Centre Development Pvt. Ltd.
Office at: Flat no. 53, Block C, Upper section,
Flattened factory complex, Jhandewalan, **Respondents**
New Delhi:110055.

CORAM:

Dr. K.K. Khandelwal	**Chairman**
Shri Samir Kumar	**Member**
Shri Subhash Chander Kush	**Member**

APPEARANCE:

Shri S.K. Goyal	Advocate for the complainant
Shri Manmeet Arora Respondent no. 1	Advocate for the respondent
Mr Venkat Rao, Mr Samyat Lodha, Mr Kamal Taneja, Ms Aditya Singh, Advocates for Respondent no. 2	

ORDER

1. A complaint dated 08.02.2019 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Shri Vijay Kumar, against the promoters M/s Bestech India Pvt. Ltd. and M/s Brahma Centre Development Pvt. Ltd., on account of violation of clause 11(a) of buyer's agreement executed on 27.10.2014, in respect of unit bearing no. 1108, 11th floor, 2635 sq. ft. in the project "Athena towers" forming part of Brahma Bestech Athena Project at Sector 16, Gurugram for not handing over the possession on due date which is an obligation under section 11(4)(a) of the Act ibid.

2. Since the buyer's agreement has been executed on 27.10.2014, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligations on the part of the promoters/respondents in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

3. The particulars of the complaint are as under: -

1.	Name and location of project	Athena tower, sector 16, NH8, Gurugram
2.	Nature of real estate project	Commercial complex
3.	Project area	12.88 acres

4.	Unit no.	1108, 11th floor
5.	Unit area	2635 sq. ft.
6.	Registered / not registered with RERA	**Registered** 205 of 2017 (8.372 acres) Dated 15.09.2017 239 of 2017 (12.206 acres) dated 20.09.2017
7.	Revised date of completion as per RERA registration certificate	31.12.2019
8.	Allotment letter	20.09.2012
9.	Date of buyer's agreement	27.10.2014
10.	Total consideration as per payment schedule (page 82 of complaint)	Rs. 1,64,68,750/- (including service tax)
11.	Total amount paid by the complainant as per the complaint	Rs. 1,28,22,386/-
12.	Payment plan	Interest free instalment payment plan
13.	Due date of delivery of possession as per clause 11(a) of buyer's agreement: within 36 from the date of signing of the agreement plus 6 months' grace period	27.04.2018
14.	Delay in delivering possession till date	1 years 8 months 27 days
15.	Penalty as per clause 14 of the buyer's agreement	Rs. 10/- per sq. ft. of super area per month

4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. A buyer's agreement dated 27.10.2014 is available on record for unit no. 1108, admeasuring

2635 sq. ft. in the project 'Athena towers' according to which the due date of possession comes out to be 27.04.2018.

5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 24.07.2019. The reply has been filed on behalf of the respondent no. 1 on 25.03.2019 and on behalf of respondent no. 2 on 16.04.2019 and have been perused by the authority.

FACTS OF THE CASE:

6. The complainant came to know in the year 2012 from certain property dealers that some company claiming to be representing an offshore fund was proceeding to undertake the promotion of a commercial project in district Gurgaon. The complainant made enquiries and it was revealed that respondent number 2 had acquired in auction from Haryana State Industrial and Infrastructure Development Corporation Ltd. plot measuring approximately 12 acres situated in sector 16, Gurugram (hereinafter referred to as "said plot"). It was further conveyed to the complainant that respondent number 2 had submitted the highest bid in the sum of Rs. 620 crores for obtaining in auction the commercial property referred to above.

7. The complainant further came to know from officials of respondent number 2 that respondent number 2 had entered into collaboration agreement dated 16th of April 2011 with respondent No. 1 and thereafter first addendum to the aforesaid

agreement was executed between them on 29th of July 2012 in terms of which implementation, construction and development of a commercial complex consisting of retail areas, cineplex and office space over the said plot would be undertaken by respondent number 1 under the name and style of "Brahma Bestech Athena" (hereinafter referred to as "commercial project").

8. The officials of respondent number 2 had conveyed to the complainant that the commercial project referred to above would be one of the most high-profile projects in the entire national capital region. It had also been conveyed by officials of respondent number 2 that an environmental friendly building would be constructed at the spot, which would conform to the highest international standards. It had also been assured to the complainant by the officials of respondent number 2 that the most upmarket specifications of materials would be used therein and therefore it would attract tremendous foot fall and would always command extremely high value for sales and lease purposes.

9. It had been conveyed to the complainant by the officials of respondent number 2 that the value of the said plot itself was the highest in the entire national capital region for the purpose of implementation of such projects. It was repeatedly conveyed to the complainant by officials of respondent number 2 that the project would be one of its kind. The complainant had believed the representations made to him by respondent number 2.

10. The complainant had also thereafter met the concerned officials of respondent number 1 who had also conveyed the same sentiments. It was further disclosed to the complainant by the officials of respondent number 1 that the commercial project would have 4 levels of basements besides other special features. It was conveyed to the complainant by officials of respondent number 1 that a sprawling multi-storeyed high-rise office block would also be an integral part of the commercial project.

11. It had been conveyed to the complainant by officials of respondent number 1 that the aforesaid multi-storeyed high-rise office block would not only have access to 4 levels of basements but it would also be in the immediate proximity of huge retail areas consisting of signature restaurants, state-of-art gymnasiums, upmarket/leading retail outlets and luxurious cineplex. It was also conveyed to the complainant by officials of the respondents that in addition to the contracts referred to above irrevocable general power of attorney had been executed and registered by respondent number 2 in favour of respondent number 1.

12. It had been conveyed to the complainant by officials of both the respondents that booking of office space in the multi-storeyed high rise office block forming part of the commercial project would be an attractive proposition for the complainant and the same would be a cherished asset for the complainant and generations to come. It was conveyed to the complainant by the officials of the respondents that the planning/designing of the project would be done by Chapman Taylor, an internationally

acclaimed architect having offices in several countries worldwide. It was also claimed that professionals with impeccable credentials would be engaged by the respondents for undertaking and monitoring the implementation of the commercial project. The officials of the respondents had conveyed to the complainant that respondent number 1 had successfully undertaken the implementation of several prestigious residential, commercial, hospitality and IT projects in Gurgaon and elsewhere and the implementation of the commercial project would be expeditiously undertaken by respondent number 1.

13. It had been conveyed by officials of both the respondents to the complainant that the implementation of the project would be completed within a period of 36 months. It had been conveyed by the respondents to the complainant that sale consideration at the rate of Rs. 6000/– per square feet (super area) exclusive of taxes would be required to be paid by the complainant for purchase of office space in the multi-storeyed high-rise office block forming part of the commercial project. It was projected to the complainant that the respondents were receiving unprecedented response from customers/lessees for the project and in case the booking was not made expeditiously by the complainant, he would stand to lose an extremely profitable opportunity. A false sense of urgency had been created by officials of the respondents so as to prevail upon the complainant to make the booking. It was conveyed to the complainant by the officials of the respondents that all requisite engineers,

contractors, horticulturists, vendors, and other professionals for the commercial project had been identified and contracts in their favour were being drawn up.

14. Officials of the respondents had repeatedly conveyed to the complainant that they would be the harbinger of change in the real estate sector of district Gurugram. It had been conveyed that a suitable clause would be incorporated in the property buyers agreement, which would provide payment of penalty for delay commensurate with the lease prevailing in the vicinity. The officials of respondents had cited to the complainant the prevailing rent amount for office space in "Signature Towers" project promoted and developed by Unitech Ltd. in the immediate vicinity and had claimed that the compensation amount which would be incorporated in the contract would not be less than Rs. 70/- per square feet.

15. The complainant had called upon the officials of the respondents to supply him the drafts of application for allotment to be submitted by the complainant, allotment letter which would be issued in favour of the complainant as well as the property buyers agreement and maintenance agreement for the commercial project. However, instead of transparently handing over the draft documents referred to above to the complainant, it had been projected by officials of the respondents to the complainant that the drafts of the documents were being finalised and the same would be different from those of other real estate developers as they would contain covenants which would adequately safeguard the rights of the allottees. The

complainant had genuinely believed that commercial project would be a unique one and purchase of property therein would be beneficial for the interests of the complainant.

16. Under these circumstances, the complainant had agreed to purchase from respondent number 1 office space bearing unit number, O – 1108 measuring 2635 square feet (super area) located on 11th floor in Athena tower, forming part of Brahma Bestech Athena project, Sector 16, Gurugram (hereinafter referred to as "said property").

17. The officials of respondent number 1 had called upon the complainant to forthwith pay a sum of Rs.1,00,00,000/ (Rs. One crore Only).

18. The respondent number 1 had issued letter of allotment dated 20th of September 2012 in favour of the complainant containing a reference of the cheques handed over by the complainant to respondent number 1 and only the following averments about terms of sale.

19. It was mentioned in the letter of allotment dated 20th of September 2012 that other standard terms and conditions and charges payable towards services would be applicable as per standard buyer agreement. The complainant was dismayed to receive the aforesaid letter of allotment dated 20th of September 2012 and had immediately voiced his objection to respondent number 1. The officials of respondent number 1 had represented to the complainant that the words "standard buyer agreement"

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referred to a uniform builder buyer agreement for the commercial project.

20. It was repeatedly assured by officials of respondent number 1 to the complainant that the draft of the builder buyer agreement for the commercial project was being finalised and the same would be soon made available to the complainant. However, contrary to representations made by officials of respondent number 1, the draft of the builder buyer agreement was not made available to the complainant by respondent number 1.

21. Eventually the complainant was forwarded the buyer's agreement in the 1st week of October 2014. The complainant was completely shocked when he scrutinised the terms and conditions incorporated in the aforesaid draft contract. The complainant found the terms and conditions/covenants mentioned in the draft contract to be completely in line with the standard similar draft agreements which other real estate developers in district Gurugram were getting executed from the customers.

22. In clause 1.4 of the draft contract made available to the complainant, it had been mentioned that tentative building plans and other approvals/permissions for undertaking the development of the commercial project had been made available to the complainant and the same had been examined by him. The same clause was again elaborated and incorporated as clause number 9 of the draft contract.

23. In order to cause tremendous injustice to the complainant it was unilaterally and arbitrarily incorporated in the draft builder buyer's agreement by way of clause 11 (a) that the respondent number 1 would proceed to undertake the construction of the commercial project within a period of 36 months and would also be entitled to avail a further period of 6 months as grace period from the date of execution of the agreement. This arbitrary stipulation was completely at variance with the initial representations categorically and explicitly made by the respondents to the complainant.

24. The complainant had launched his strong objection with the respondents about the unilateral incorporation of aforesaid clause in the draft builder buyer's agreement. However, instead of acting in a fair manner, the officials of respondent number 1 bluntly conveyed to the complainant that this fact had been orally conveyed to him. Actually, the respondent number 1 realised that after making the substantial payment of Rs.1,00,00,000/- (Rs. One crore only), the complainant had changed his position to its detriment and therefore he would have no option but to accede to the unreasonable demands of respondent number 1.

25. Being in no position to match up to the dominant position of the respondents, the complainant had no option but to execute the builder buyer's agreement dated 27th of October 2014. According to the complainant even at this stage the complete permission/sanctions for the commercial project were not shown to the complainant; that the officials of respondent

number 1 realised that the complainant had become highly agitated and the respondents pacified him by contending that a high-class and modern environmental friendly building would be implemented at the spot; that it was conveyed that GRIHA guidelines were being adopted for implementation of the commercial project and the anaesthetics of the project would be substantially improved and the complainant would be delivered a very high value product.

26. The complainant has further stated that the period of 42 months unilaterally and arbitrarily incorporated by the respondents in the builder buyer's agreement dated 27th of October 2014 by way of clause 11 (a) has expired on 26th of April 2018 and that the grace period of 6 months arbitrarily included in the builder buyer's agreement dated 27th of October 2014 has also expired.

27. The complaint further narrates that in order to cause further loss to the complainant, it had been provided in the aforesaid agreement that in the event of there being any delay in offer of possession of the said property to the complainant, respondent number 1 would be liable to pay compensation at the rate of Rs. 10/- per square feet per month (super area) which compensation amount was/is a pittance and it was/is not the prevailing rate of lease in the vicinity.

28. Since, the construction of the commercial project has not been completed and occupation certificate from the concerned statutory authority has not been obtained by the respondents till date, the provisions of the Real Estate (Regulation and

Development) Act are applicable to the commercial project in question.

29. According to the complainant, somewhere in June/ July 2018 he was astounded to see that the construction activity of the commercial project had almost become negligible over the last several months. The complainant went to the site of the commercial project, entered the same and inspected the construction activity about a month ago and it was revealed that the same had been completely brought to a standstill by respondent number 1. The complainant till date has invested and paid to the respondents amount of Rs.1,28,22,386/-(Rs. One crore twenty eight lac twenty two thousand three hundred eighty six only) for purchasing the said property.

30. It is averred that the complainant approached the officials of respondent number 1 and enquired from them the reason for stoppage of construction/development work of the commercial project at the spot but, however, the persistent queries put forth by the complainant to the officials of respondent number 1 were evasively dealt with by them; that the complainant also pursued the matter with officials of respondent number 2 but they bluntly refused to entertain the complainant on the plea that the complainant was a customer of respondent number 1 and therefore the respondent number 2 was not accountable to the complainant.

31. The complaint further reads that it was revealed to the complainant by the employees of respondent number 2 and also by various real estate consultants that there had allegedly arisen

differences between respondent number 1 and respondent number 2 on account of which the construction activity of the commercial project had been stopped. The complainant had further been informed by officials of respondent number 2 that the respondent number 2 had instructed respondent number 1 to desist from using/utilising the irrevocable general power of attorney executed and registered by respondent number 2 in favour of respondent number 1 for the development/implementation and sale of the commercial project. The complainant even addressed letter dated 1st of September 2018 to respondent number 1 voicing his grievances.

32. The construction work has been illegally and wrongfully stopped by respondent number 1. The alleged disputes between the respondents are completely imaginary and a charade being orchestrated to deceive and mislead purchasers like the complainant. The respondents are both co-developers/co-promoters of the commercial project in accordance with provisions of the Real Estate (Regulation and Development) Act and they are accountable and liable to the complainant for timely completion of the project. According to the complainant he has got nothing to do with the alleged disputes inter se the respondents; that the complainant has come to know that the tenure of the building plans sanctioned by the Haryana State Industrial and Infrastructure Development Corporation Ltd. for the project has expired. It has also come to the knowledge of the complainant that the period made available by the Haryana State Industrial and Infrastructure Development Corporation Ltd. to

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respondent number 1 for undertaking the implementation of the commercial project has also come to an end.

33. According to the complainant the respondents are liable to pay compensation to the complainant at the prevailing rate of Rs. 70/- per square feet per month (super area) for delay in raising of construction and that the liability of the respondents to pay compensation at the aforesaid rate shall commence upon expiry of 36 months from the date of allotment i.e. 20th of September 2012.

34. According to the complainant he has strong reasons to believe that by creating a false impression of disputes/differences, the respondents in collusion with each other intend to compel the unsuspecting purchasers like the complainant to seek refund of amounts paid by them and to cancel the transactions entered into by them for purchase of properties in the commercial project; that the respondents have jointly formed an unholy nexus to loot the complainant and other purchasers. The complainant has come to know from reliable sources that in order to inspire the confidence of concerned statutory authorities/courts of law, the respondent number 2 shall collusively proceed to generate the impression that it has terminated the irrevocable general power of attorney so as to prevent respondent number 1 from undertaking the implementation of the project.

35. It is stated that even if there are the so-called disputes between the respondents they are of financial nature and the same cannot be made a ground/foundation for causing wrongful loss to other

parties who have changed their position to their detriment relying upon the categoric and explicit representations made by the respondents. The respondent number 2 is not entitled to do any act, deed or thing or to execute any document aimed at creating any obstruction or hindrance in the implementation/development of the commercial project and the respondents are liable to handover the actual, physical, peaceful and vacant possession of the said unit allotted to the complainant.

36. The loss sustained by the complainant on account of illegal activities of the respondents is in excess of Rs.1,28,22,386/- at present. Besides this, the complainant has also suffered needless mental agony and torture and has been compelled to bear litigation expenses without there being any fault whatsoever which can be attributed to the complainant. The complainant has reserved his right to file appropriate proceeding before the Adjudicating Officer for appropriate reliefs. According to him the respondents are liable to issue fresh application form and consequent documents of allotment to the complainant in line with provisions contained in Real Estate (Regulation and Development) Act as the terms and conditions contained in buyer's agreement dated 27th of October 2014 are not binding upon the complainant and the same are liable to be declared illegal, null and void. The respondents are liable to execute a fresh contract with the complainant in accordance with the provisions contained in the Real Estate (Regulation and Development) Act. The said fresh contract should be in the

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format provided in the aforesaid statute. Hence this complaint for the reliefs specified hereinbelow.

ISSUES RAISED BY THE COMPAINANT:

37. The complainant has raised the following issues:

i. Whether the respondents are liable to undertake the development of the commercial project and deliver physical possession of the said property to the complainant?

ii. Whether the respondents are liable to pay penalty at the rate of Rs. 70/- per square feet per month to the complainant for delay in delivery of physical possession?

iii. Whether the respondents are liable to issue fresh application form and consequent documents of allotment to the complainant as alleged?

iv. Whether the terms and conditions contained in the agreement are not binding upon the complainant and the same are liable to be declared illegal, null and void as alleged?

v. Whether the respondents are not entitled to stop construction activity of the commercial project on the plea that there exist differences between them as alleged?

vi. Whether the respondent no. 2 is not entitled to do any act, deed or thing or to execute any document aimed at creating any obstruction or hindrance in the implementation/ development of the commercial project as alleged?

RELIEFS SOUGHT BY THE COMPLAINANT:

38. The complainant is seeking the following reliefs:

    a. Payment of penalty to the complainant for the delay in delivery of possession of property till handing over the actual, vacant possession of the commercial unit.

    b. To Direct the respondents to complete the project within a specified time frame and to handover the actual, physical, peaceful and vacant possession of the said commercial unit and also pay penalty for the period of delay.

REPLY BY THE RESPONDENT NO. 1:

The respondent No. 1 has not denied that respondent number 2 had submitted the highest bid in auction in respect of the commercial plot in question mentioned in the corresponding paragraph of the complaint. However, it is denied that it had been conveyed by officials of the respondent no. 1 to the complainant that the implementation of the project would be completed within a period of 36 months. The respondent no. 1 has submitted that the total price of the office unit has been mentioned in the payment plan and the same is exclusive of taxes and other charges payable at the time of offer of possession.

39. The respondent No. 1 has denied that it had been represented to the complainant by the respondent No. 1 that a suitable clause would be incorporated in the buyer's agreement in terms of which penalty for delay commensurate with the lease amount

prevailing in the vicinity would be paid by the respondent to the complainant.

40. The payment of Rs. 1,00,00,000/-(Rs. One Crore only) by the complainant to the respondents towards part payment of the unit price has not been denied by the Respondent No. 1 but it is denied that the complainant had no option but to execute the buyer's agreement dated 27.10.2014 or that complete permissions/sanctions for the commercial project had not been shown to the complainant The respondent No. 1 has denied that the period of 42 months was unilaterally and arbitrarily incorporated by respondent no. 1 in the buyer's agreement dated 27.10.2014 or that the aforesaid period has expired on 26.04.2018 or that the grace period of 6 months was arbitrarily included in buyer's agreement dated 27.10.2014.

41. The respondent No. 1 has also denied that in order to cause any loss to the complainant, it had been provided in buyer's agreement dated 27.10.2014 that in the event of there being any delay in offering possession of the said property to the complainant, the respondent No. 1 would be liable to pay compensation at the rate of Rs. 10/– per square feet per month super area.

42. According to respondent No. 1 the delay in raising construction is not attributable to it as is established from the following facts:

    i. The project in question has been registered in part by respondent No.1 vide registration no. 239 of 2017 dated 20.09.2017 while part project has been registered by

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respondent no.2 vide registration no. 205 of 2017 dated 15.09.2017. The registration of respondent is valid from 20.09.2017 to 31.12.2019.

ii. The complainant had approached respondent No. 1 in September 2012 and had evinced an interest in purchasing an office space/unit in the duly licensed commercial project promoted, developed and promoted by the respondent No. 1 in furtherance of collaboration agreement dated 16.04..2011 executed with Brahma Centre Development Pvt. Ltd. and irrevocable general power of attorney dated 12th of May 2011 bearing vasika number 141 executed and registered by Brahma Centre Development Pvt. Ltd. The said commercial project is known as "Brahma Bestech Athena" (hereinafter referred to as "Commercial Project")" being developed over land measuring 12.88 acres located in Sector 16, Gurugram, Haryana. Prior to making the booking, the Complainant had made elaborate and detailed enquiries with regard to the nature of sanctions/permissions granted for the purpose of undertaking the development/implementation of the commercial project.

iii. The complainant had applied for allotment of office unit to the respondent NO. 1 and accordingly by way of allotment letter dated 20.09.2012 office unit bearing number O-1108, admeasuring 2635 sq. ft. super area approx., at 11th floor, situated in 'Brahma Bestech Athena' Sector-16, Gurugram was provisionally allotted to the complainant.

iv. The allotment letter dated 20.09.2012 was issued by the respondent No. 1 in favour of the complainant and Mr Vibhav Bhardwaj who later on made a request vide letter dated 04.09.2014 to delete his name from allotment of the aforesaid office space in favour of complainant and accordingly after execution of necessary documents by Vaibhav Bhardwaj and complainant, name of Vaibhav Bhardwaj was deleted. Subsequently, buyer's agreement was executed between the complainant and the respondent No. 1 on 03.10.2014 after fully understanding the contents and implications of covenants incorporated therein.

v. The complainant opted for instalment-cum-construction linked payment plan. The complainant had initially made a payment of Rs. 10,00,000/- (Ten Lac) vide cheque no. 007543 dated 18.09.2012, Rs. 25,00,000/- (Twenty Five Lakh) vide cheque no. 007544 dated 30.09.2012, Rs. 25,00,000/- (Twenty Five Lakh) vide cheque no. 007545 dated 30.09.2012, Rs. 25,00000/- (Twenty Five Lakh) vide cheque no. 007546 dated 30.09.2012 and Rs. 15,00,000/- (Fifteen Lakh) vide cheque no. 007547 dated 30.09.2012 total amounting to Rs. 1,00,000,00/- (Rupees One crore). However, later on in accordance with milestones in construction achieved the excess amount of Rs. 28,65,661/- was returned to the complainant vide cheque no. 000159 dated 04.03.2015 drawn on HDFC Bank, Gurugram.

vi. The total consideration of the office unit had been settled at Rs. 1,64,68750/- plus taxes and other payable charges at

the time of offer of possession as per agreed terms; that the complainant till date has paid a sum of Rs. 1,28,22,386/-

vii. It is submitted that in terms of clause 11(a) of the buyer's agreement executed by the complainant and respondent No. 1 possession of the office unit was proposed to be handed over within a period of 36 months plus grace period of 6 months from the date of execution of the buyer's agreement unless any delay occurred due to according of sanctions by the concerned departments (departmental delay) or due to any circumstances beyond the power and control of the developer or force majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the allottee to pay in time the total price and other charges and dues/payments mentioned in the agreement or any failure on the part of the allottee to abide by all or any of the terms and conditions of the agreement occurs.

viii. The respondent No.1 had engaged one of the most accomplished architects "Chapman Taylor" for the said project. The said architectural concern has got its offices located in various parts of the world. It is stated that the respondent No. 1 had all along wanted to establish the said project as a marquee/flagship project in terms of its impeccable planning and execution. As many as 4 levels of basements have been provided in the aforesaid project so as to make available adequate parking to the customers/staff visiting the project.

ix. The respondent no. 2 had agreed for adoption of **Green Rating for Integrated Habitat Assessment ("GRIHA")**. However later there occurred a complete and drastic change in the stance of the respondent no 2 towards availing of additional floor area ratio after complying with GRIHA guidelines. The respondent no. 2 has refused to contribute pro rata payments for availing of additional floor area ratio after complying with GRIHA guidelines and accordingly has brought the construction of the project to a standstill as the total design of the building with or without GRIHA with regard to MEP(Mechanical, Electrical and Plumbing) has a huge impact i.e. with GRIHA total air-conditioning volume is bound to change and the same has a telling impact on the Electrical or all load. So these two parameters i.e. HVAC and Electrical load are very vital in designing and execution of the building. Nothing can proceed without having absolute clarity on both the subjects.

x. The structure work of almost 90% of the complex and additional FAR granted under GRIHA has already been completed at site and thus, from the facts and circumstances set out in the preceding paras, it is evident that the respondent No. 1 has acted strictly in accordance with the terms and conditions of the buyer's agreement and collaboration agreement dated 16.04.2011 and addendums thereof. There is no default or lapse attributable to the respondent No. 1.

xi. The following circumstances (which were beyond the reasonable control of the respondent NO. 1) will comprehensively establish that no lapse can be attributed to the answering respondent insofar implementation of the aforesaid project by the answering respondent is concerned:

a. Respondent no. 2 had approached the respondent No. 1 and submitted represent that it had submitted the highest bid for acquiring in auction plot measuring 12.206 acres situated in Sector 16, Gurugram for undertaking the development of a commercial project thereupon. It had been conveyed by the officials of the respondent no. 2 to the respondent No. 1 that the respondent no. 2 did not have the requisite skill, competence and availability of resources for undertaking the conceptualisation, promotion, construction and implementation of commercial project over the said plot.

b. It had been represented by the respondent no. 2 that it desired that a commercial complex consisting of retail areas, cineplex and office space be developed, promoted and sold over the said plot. The respondent No. 1 enjoys an excellent reputation in the real estate market for its fair and transparent dealings and the disciplined and time bound execution of projects undertaken by it some of which are considered to be architectural landmarks. The respondent No. 1 has successfully undertaken the construction/ development/ implementation and promotion of various

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residential/ commercial/ IT and hospitality projects Pan India. In fact, the capacity, capability and competence of the answering respondent/its office bearers was formally verified by the respondent no. 2 prior to even approaching the respondent no. 1 for making the said offer.

c. In fact, respondent no. 2 after making elaborate and detailed verifications referred to above had been completely satisfied about the profile of the respondent no. 1 and availability of resources with the respondent NO. 1 (human, infrastructural and financial) to successfully undertake the conceptualization, promotion, construction, development and implementation of the said commercial project.

d. After negotiations, collaboration agreement dated 16th of April 2011 registered on 12th of May 2011 bearing Vasika number 3693 had been executed and registered between the respondent NO. 1 and the respondent no. 2. In terms of the aforesaid contract, irrevocable general power of attorney dated 12th of May 2011 bearing vasika number 141 had also been executed and registered by the respondent no. 2 in favour of the respondent no. 1.

e. In furtherance of aforesaid documents, the respondent no. 1 had commenced the development and construction of the aforesaid project consisting of Commercial Tower and Retail Complex known as "Brahma Bestech Athena".

f. In terms of collaboration agreement dated 16th of April 2011 registered on 12th of May 2011 bearing Vasika number 3693, the planning, conceptualisation, construction and implementation of the commercial project was to be undertaken by the respondent no. 1 at its own expense.

g. From the very beginning, the respondent no. 2 had adopted a rigid and high-handedness attitude towards the respondent no. 1 without there being any valid cause for the same. It was explicitly recited in the aforesaid contract that the respondent no. 2 would not create any obstacle in any manner for development of the project. The respondent no. 2 in violation of clause 68 of aforesaid collaboration agreement 16th of April 2011, prepared and circulated a brochure which was/is not only in total variance to the plans submitted before the authorities but also in variance to the actual construction at site. The brochure has not only caused losses to the respondent no. 1 but has also exposed respondent no. 1 as well as itself to claims of cheating of investors/allottees who have proceeded to purchase space in the said project.

h. Till date the respondent no. 2 continues to make irrational, irresponsible, incorrect and distorted statements and representations to the world at large that the project in question is being conceptualized, promoted, constructed, developed and implemented by respondent no. 2 alone.

i. As per the collaboration agreement bearing Vasika No. 3693 dated 12th of May 2011 the building plans were to be

revised and construction was to be completed within 30 months from the revision of the plans. The plans were submitted, but the same were not approved by the Haryana State Industrial and Infrastructure Developer Corporation Ltd, as the said corporation had sought certain clarifications with respect to the plans submitted. The respondent no. 1 had on several occasions requested respondent no. 2 to come forward for discussion so that the plans could be rectified/corrected. In fact in its letter dated 22nd of March 2013 the Haryana State Industrial and Infrastructure Developer Corporation Ltd (HSIIDC) had invited the respondent no. 2 to attend its office along with architects for rectification of errors in the plan, which the respondent No. 2 deliberately failed to do.

j. In the meanwhile first addendum agreement dated 29th of July 2012 had been voluntarily and consciously executed by the respondent no. 2.

k. Delay in finalisation and obtaining of sanction of building plan is attributable to the respondent no. 2. Since the commencement of construction the respondent no. 1 has been approaching the respondent no. 2 for coming forward to take decisions regarding the technical aspects of the project. Several emails were addressed by the respondent no. 1 to the respondent no. 2 in this regard. The respondent no. 2 has always maintained a rigid approach and failed to come forward to address issues with respect to the project. Emails dated 1st of February 2013, 23rd of May 2013, 20th of

July 2013, October 4, 2013 and October 4, 2013 were addressed by the respondent no. 1 to the respondent no. 2 in this regard.

l. Gradually the respondent no. 2 realized that an extremely substantial sum of money had been invested by the respondent NO. 1 in proceeding to undertake construction activity at the spot. In fact, relying on the representations made by the respondent no. 2, the respondent no. 1 had completely changed its position to its detriment.

m. The respondent no. 2 has not only irresponsibly and illegally conducted itself but at the same time has exposed the respondent no. 1 to ridicule in the real estate sector. Taking into reckoning the extremely substantial investment made by the respondent no. 1, the respondent No. 2 had earlier also tried to pose needless hindrances and obstacles in the execution/ implementation of the aforesaid project by the respondent no. 1. The project could not be completed in the initially agreed period of time as set out in Collaboration Agreement dated 16th of April 2011 and registered on 12th of May 2011 bearing vasika number 3693 only on account of the wilful and deliberate non co-operation on the part of the respondent no. 2 and indecisiveness exhibited by the respondent no. 2 due to which the construction of the project came to standstill.

n. In order to put an end to the needless controversy generated by the respondent no. 2, the respondent no. 1 had acceded to execution of second addendum dated 25th of

February 2016 to collaboration agreement dated 16th of April 2011 and registered on 12th of May 2011 bearing Vasika number 3693.

o. In the meantime, the Haryana Government had adopted the Haryana Building Code 2016 with effect from 30.06.2016. The said Code specifically dealt with Green building measures and incentives. It was explicitly provided therein that benefit of additional Floor Area Ratio would be awarded for projects certified from Green Rating for Integrated Habitat Assessment (GRIHA) and achieving the GRIHA rating as specified in sub-code of the said building code.

p. Thereafter, first revision to the Haryana Building Code 2016 was made on 06.01.2017 wherein the procedure for availing incentive in respect of green buildings with GRIHA rating was spelt out. It was further provided in the revision to the Haryana Building Code 2016 that the additional FAR would be given over and above the maximum permissible FAR.

q. In pursuant to the first revision to the Haryana Building Code 2016, the office bearers of the respondent no. 2 as well as the office bearers of the respondent no. 1 had started discussions regarding adoption of Green Rating for Integrated Habitat Assessment ("GRIHA"). The essence of the aforesaid rating was to provide in buildings two fundamental physiological 'comforts' that is visual comfort and thermal comfort.

r. The respondent no. 1 had put in earnest and diligent efforts at considerable expense to be able to fulfil the rigorous GRIHA parameters for obtaining a high rating for the Athena project. The respondent no. 2 is also aware that five-star GRIHA rating for Athena project has been given by the concerned authorities. To the best of the knowledge of the respondent no. 1, Athena project is the first project in Gurugram to be conferred with this remarkable distinction.

s. It has been time and again emphasized to the respondent no. 2 by the respondent no. 1 that additional Floor Area Ratio can be availed in accordance with aforesaid rules and regulations of the Haryana State. Therefore, additional expenses for getting sanctioned additional area and for raising construction against increased floor area ratio are liable to be pro rata paid by the respondent no. 2. The situation is unambiguous.

t. With regard to increased floor area ratio it had been agreed between the respondent no. 2 and the respondent no. 1 and had also been recited in collaboration agreement bearing Vasika no.3693 dated 12th of May 2011 as under.

> "25. That in case floor area ratio is increased under the rules and regulations of Haryana State, additional expenses for getting sanctioned additional area and for raising construction against increased floor area ratio shall be incurred by the developer and owner in the same proportion as provided above for sharing of space. The additional area constructed against

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increased floor area ratio shall also be divided between the owner and the developer as per percentage agreed in this agreement".

43. The respondent no. 1 has submitted that in the meantime the Hon'ble High Court of Punjab and Haryana vide order dated 08.02.2019 has appointed Mr. V.N. Khare, former Chief Justice of India as sole arbitrator to decide the disputes between the respondent no.1 and respondent no.2.

44. The respondent no.1 has submitted that the facts and circumstances set out in the preceding paras, it is evident that the respondent no.1 has acted strictly in accordance with the terms and conditions of the buyer's agreement and collaboration agreement dated 16.04.2011 and addendums thereof. There is no default or lapse on the part of the respondent no. 1 in development of the project.

45. In terms of clause 11(a) and 11(b) of the buyers agreement, also the respondent no. 1 is not responsible or liable for the delay accruing due to circumstances beyond control of the respondent no. 1. Consequently, the aforesaid span of time during which the construction of the project has remained stalled owing to circumstances beyond power and control of the respondent no. 1 is contractually and legally liable to be excluded for computation of span of time for construction/development/ implementation of the project in question.

46. According to respondent no. 1 it is evident from the entire sequence of events that no illegality can be attributed to the

respondent no 1. The delay in completion of the office unit is solely attributable to the respondent no. 2. The allegations levelled by the Complainants qua the respondent no. 1 are totally baseless and against the agreed terms of buyer's agreement and do not merit any consideration by this Authority.

REPLY BY THE RESPONDENT NO. 2:

47. The respondent no. 2 has submitted that the present complaint is not maintainable as against respondent no. 2, in law or on facts. The provisions of the Real Estate (Regulation and Development) Act, 2016 [hereinafter referred to as the "Act"] are not applicable to the respondent no. 2 *vis a vis* the present complaint inasmuch as there is no privity of contract between the complainant and respondent no. 2. Further, no consideration of any kind whatsoever has been paid by the complainant to the respondent no. 2. The respondent no. 2 has submitted that this authority would as such not have the jurisdiction to entertain the present complaint as against respondent no. 2.

48. It is submitted the respondent no. 2 is liable to be deleted from the array of parties in the present complaint. A bare perusal of the complaint demonstrates that there are no specific allegation or averments made in the same against the respondent no.2 and therefore, the respondent no. 2 deserves to be deleted from the array of parties.

49. The present complaint is not maintainable as against respondent no. 2, as no real cause of action has either been pleaded or exists as against respondent no. 2 and it is verily believed that the

present complaint is nothing but an instigated and motivated attempt to pressurise the respondent no. 2 without any basis or cause of action.

50. The so-called cause of action on the basis of which the present complaint has been filed arose prior to coming into force of the Act and since the provisions of the Act cannot be applied retrospectively, the present complaint being not maintainable is liable to be dismissed. It is submitted that this authority would therefore, not have the jurisdiction against the respondent no. 2 to decide the present complaint.

51. It is stated that in any case the complainant had never approached the respondent no. 2, nor were any assurances provided by the respondent no. 2 to the complainant at any point of time. There is no relationship of promotor and allottee between the respondent no. 2 and the complainant within the meaning of the Act and as such the present complaint is liable to be dismissed for want of jurisdiction.

52. A perusal of the documents filed on behalf of the complainant demonstrate that the very basis of the present complaint is the buyers agreement which at clause F clearly states that "*The area subject matter of this agreement has fallen to the allocation of the DEVELOPER and accordingly, the Developer is competent and entitled to execute the instant agreement to sell in favour of the Allottee(s) pertaining to the area in question.*" In view of the aforesaid, as the developer as defined in the agreement is respondent no. 1, no cause of action, whatsoever is made out against respondent no. 2.

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53. It is stated that from a bare perusal of clause 11 of the buyer's agreement dated 27.10.2014, it is the respondent no. 1 who had promised to offer the possession of the unit in question within a period of 36 months from the date of agreement. It is further submitted that the said clause nowhere states that the respondent no. 2 is liable to offer possession of the unit in question to the complainant. Furthermore, even as per clause 14 of the buyer's agreement, it is the respondent no. 1 who is liable to pay compensation @ Rs. 10 per sq. ft. to the complainant in case of failure to offer possession to the complainant. In the absence of there being any liability under the buyer's agreement dated 27.10.2014 on the part of the respondent no. 2, the respondent no. 2 cannot be made to offer possession to the complainant and pay the delayed compensation under clause 14 of the agreement.

54. Further, even as per the collaboration agreement dated 16.04.2011 between respondent no. 1 and respondent no. 2, in terms of clause 32 and clause 42 of the said agreement, the respondent no. 1 is to hold the respondent no. 2 harmless and indemnified against all claims and demands for damages, losses, costs and expenses which the respondent no. 2 may sustain or incur by reason of any claim being preferred by any prospective purchaser. Thus, the present complaint is even otherwise wholly non-maintainable against the respondent no. 2 being an *inter se* dispute between the complainant and the respondent no. 1.

The present complaint is not maintainable against the respondent no. 2 as the reliefs sought are beyond the scope of the buyer's agreement dated 27.10.2014 to which the respondent no. 2 is not a party.

We have heard the learned counsel for the parties and have also very carefully gone through the record.

DETERMINATION OF ISSUES:

55. Before proceeding further we propose to decide the question whether the respondent no. 2 is or is not a promoter as defined in section 2 (zk) of the Act. Section 2 (zk) reads and under:-

(i) A person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for he purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) A person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) Any development authority or any other public body in respect of allottees of—

(a) Buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) Plots owned by such authority or body or placed at their disposal by the Government,

For the purpose of selling all or some of the apartments or plots; or

(iv) An apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) Any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) Such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder".

Further attention is invited to provision given in sub clause (i) of clause (zk) of section 2 which is as under:-

"(i) A person who constructs or causes to be constructed an independent building or a building consisting of apartments or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees".

In the present case the plot was acquired by Ms Brahma City Pvt. Ltd. through auction from HSIIDC. Accordingly, M/s Brahma City Pvt. Ltd. Is license holder/land owner and he is causing to be constructed a building consisting of commercial

units/space for the purpose of selling all or some of the commercial units/space to other persons. Accordingly, he is the promoter in terms of section 2 clause (zk)(i). Similarly sub-clause (i) of clause (zk) of section 2 provides that assignees are also included in the definition of promoter.

Definition of Assignee

Assignee is a person, company or entity who receives the transfer of property title or rights from the contract. The assignee receives the transfer from the assigner for example an assignee receives a title to a piece of estate from the assigner.

Since the Bestech India Pvt. Ltd. is assignee of M/s Brahma City Pvt. Ltd. through development agreement and has been authorised to sell their share of commercial units/space and also authorised to conveyance on the strength of power of attorney by the license holder/land owner promoter. Therefore, both M/s Brahma City Pvt. Ltd. as well as Bestech India Pvt. Ltd. are the promoters. Hence they shall be jointly liable for the functions and responsibilities as specified in the Act or rules and regulations made thereunder.

It is not in dispute that it is the respondent no. 2 who had submitted the highest bid in respect of the land in question

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in the bid in auction and the HSIIDC had allotted the land in question to respondent no. 2. It is also not in dispute that the collaboration agreement dated 16.04.2011 registered on 12.05.2011 bearing Vasika no. 3690 had been entered into between the respondent no. 1 and respondent no. 2 for planning conceptualisation, construction and implementation of the commercial project to be undertaken by the respondent no. 1 on its own expenses and that detailed terms and conditions of the said agreement had been enumerated in the said agreement. Thereafter, first addendum agreement dated 29.07.2012 had been executed between the respondent no. 1 and respondent no. 2. In pursuance of collaboration dated 16.04.2011 in the buyers agreement in question dated 27.10.2014 was executed between the complainant and respondent no. 1. The name of the project is "Brahma Bestech Athena" in which a mention has been made regarding the collaboration agreement dated 16.04.2011 and first addendum to the agreement dated 16.04.2011 on 29.07.2011 with the developer. In the said buyer's agreement it is also mentioned that respondent no. 2 had executed and registered a general power of attorney in favour of respondent no. 1 giving rights to respondent no. 1 has detailed in the collaboration agreement and respondent no. 1 had been

authorized to develop and construct a commercial complex on the total land and was made entitled to enter into Space Buyers Agreement, Sale deeds, lease deeds, license deeds, relinquishment deeds etc. with prospective buyers of spaces in the said complex and to give formal possession with respect to the areas allotted/sold to the prospective buyers (clause -E). It is in pursuance the said collaboration agreement and the first addendum executed between the respondent no. 1 and respondent no. 2 that the buildings plans had been executed building plan has been sanctioned to carry out the construction in the land allotted to the respondent no. 2. From a perusal of the documents placed on the file it is evident that besides respondent no. 1 it is also the respondent no. 2 who had been making correspondence with HSIIDC with regard to the development on the said plot.

For the aforesaid reasons, we reach to the irresistible conclusion that the respondent no. 2 being the owner of the land under the project in question is also one of the promoters as defined in section 2 (zk) of the Act and hence respondent no. 2 has also the responsibility along with respondent no. 2 complete the project and to hand over the possession of the respective unit to the buyers.

56. We further proceed to decide another issue. The issue is whether the stoppage of the construction by the respondents to complete the project is justified or not? It is an admitted fact that the respondents have stopped the further constructions. One of the reasons assigned is that there are internal or inter se dispute between the respondent no. 1 and respondent no. 2 and that the matter is now pending before the arbitrator appointed the Punjab & Haryana High Court to resolve the disputes between them. It is the internal disputes between the respondent no. 1 and respondent no. 2 which have pending adjudication before the arbitrator. The arbitration proceedings, in our opinion, do not have any bearing with the ongoing constructions in the project in order to completed. Respondent no. 1 and respondent no. 2 may take years together to resolve there inter se disputes and differences. However, such inter se disputes between them cannot act as a hurdle or speed breaker so far as the construction in the project is concerned. The buyers including in complainant are not parties to the inter se disputes between the respondents. They cannot be make to suffer because of the problems going on between the respondents. It is not request of the respondents that any

court of law has granted any stay against the construction in the project in question. Therefore, how could the respondent no. 1 or the respondent no. 2 or both could take an unilateral decision without consulting the buyers to stop the construction. Surprisingly enough, they even did not bother to inform the buyers including the complainant that further construction in the project had been stopped by them. The buyers had been left at the mercy of the God or to meet the destiny of their fate themselves.

57. The respondents cannot be allowed to act in such an arbitrary, capricious manner. Due date for handing over possession already stand expired. As stated hereinabove, the buyers cannot be made to suffer for the fault of the respondents or because of the alleged or so-called financial constraints being faced by respondents and the overall interests of the buyers have to be kept in mind while deciding the matter. Construction must not stop further. The buyers must not be made to suffer any more. Therefore, keeping all the facts and circumstances of the case discussed hereinabove and the overall interest of the buyers and the timely completion of the project the Authority exercising its powers under section 37 of the Real Estate (Regulation & Development) Act, 2016 issue

direction to the respondents to start construction within a week, i.e. by 29.10.2019 positively failing which the penalty of Rs. 10 lac per day under Section 63 of the Act ibid shall be payable by the respondents jointly and severally.

58. With respect to the first and second point raised by the complainant, the authority finds that as per clause 11(a) of buyer's agreement, the possession of the said unit was to be handed over within 36 months from the date of signing of agreement with a grace period of 6 months. The agreement was executed on 27.10.2014. Therefore, the due date of possession shall be computed from 27.10.2014. Accordingly, the due date of possession was 27.04.2018 and the delay is continuing as on date. As the promoters have failed to fulfil their obligations under section 11(4)(a) of the Act ibid, the complainant is entitled for delayed possession charges at prevalent prescribed rate of interest i.e. 10.35% per annum w.e.f. 27.04.2018 till offer of possession as per provisions of proviso to section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 read with rule 15 of the Real Estate (Regulation & Development) Rules, 2017.

FINDINGS OF THE AUTHORITY:

59. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore this authority has complete territorial jurisdiction to deal with the present complaint The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

DECISION AND DIRECTIONS OF THE AUTHORITY:

60. After taking into consideration all the material facts adduced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions:

    a. Respondents are directed to pay delayed possession charges at prescribed rate of interest i.e. 10.35% per annum w.e.f. 27.04.2018 as per provisions of proviso to

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section 18(1) of the Act ibid read with rule 15 of the rules ibid till offer of possession.

b. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.

c. Complainant shall pay the outstanding dues, if any, after adjustment of interest for the delayed period.

d. The respondents-promoters shall not charge anything from the complainant which is not a part of the buyer's agreement.

e. Interest on due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.35% by the respondents-promoters which is the same as being granted to the complainant in case of delayed possession.

f. As discussed hereinabove in detail, the respondents-promoters shall commence the construction in the project within a week from today i.e. by 29.10.2019 positively failing which the penalty of Rs. 10 lac per day under Section 63 of the Act ibid shall be payable by the respondents jointly and severally.

g. Both the respondents shall submit certified list of allottees in the project latest by 29.10.2019.

61. The order is pronounced.

Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Date: 22.10.2019

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