BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**327 of 2020**
First date of hearing:		**08.04.2020**
Date of decision	**:**	**20.07.2021**

1. Sohan Singh Gulia
2. Kavita Gulia

Both RR/o: Hno. 527, Village and Post Badli, Tehsil Bahadurgarh, near Big Chopal, District Jhajjar, Haryana- 124105 **Complainants**

Versus

Athena Infrastructure limited
Regd. office: M-62 & 63, 1st floor, Connaught Place, New Delhi-110001 **Respondent**

CORAM:
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri. Pawan Kumar Ray Advocate for the complainants
Shri. Rahul Yadav Advocate for the respondent

ORDER

1. The present complaint dated 14.02.2020 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations,

responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"Indiabulls Enigma" Sector 110, Gurugram
2.	Nature of the project	Residential complex
3.	Project area	15.6 acres
4.	DTCP License	213 of 2007 dated 05.09.2007 valid till 04.09.2024 10 of 2011 dated 29.01.2011 valid till 28.01.2023
	Name of the licensee	M/s Athena Infrastructure Pvt. Ltd.
		64 of 2012 dated 20.06.2012 valid till 19.06.2023
	Name of the licensee	Varali properties
5.	HRERA registered/ not registered	**Registered vide no.** **i. 351 of 2017 dated 20.11.2017 valid till 31.08.2018** **ii. 354 of 2017 dated 17.11.2017 valid till 30.09.2018**

		iii. **353 of 2017 dated 20.11.2017 valid till 31.03.2018** iv. **346 of 2017 dated 08.11.2017 valid till 31.08.2018**
6.	Date of execution of flat buyer's agreement	**09.12.2011** (As per page 47 of the complaint)
7.	Unit no.	C-154,15th floor, Tower/Block C (As on page 51 of the complaint)
8.	Super Area	2605.54 sq. ft
9.	Payment plan	Construction linked payment plan (As per page 66 of the complaint)
10.	Total consideration	Rs. 1,89,51,000/- (As per page 43 of the complaint)
11.	Total amount paid by the complainants	Rs. 1,60,47,150/- (As alleged by the complainants on page 15 of the complaint and cheques/receipts annexed on page 83- 91 of complaint)
12.	Due date of delivery of possession (*As per clause 21 of the agreement: The Developer shall endeavour to complete the construction of the said building /Unit* ***within a period of three years, with a six months grace period thereon from the date of execution of the Flat Buyers Agreement*** *subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to him or as demanded by the Developer. The*	09.06.2015 **(Grace period of 6 months is allowed)**

	Developer on completion of the construction /development shall issue final call notice to the Buyer, who shall within 60 days thereof, remit all dues and take possession of the Unit)	
13.	Offer of possession	Not offered
14.	Occupation Certificate	Not received for Tower C
15.	Delay in delivery of possession till the date of decision i.e. 20.07.2021	6 years 07 months 11 days

B. Facts of the complaint

3. That the complainants have booked a flat in the project of the respondent namely, **'Indiabulls Enigma'** located at Sector 110, Gurgaon. The complainants have made the booking with the intention to provide residential apartment for themselves and their family after paying the essential booking amount and subsequent instalments.

4. That the complainants are filing this complaint against the respondent for failure on the part of the respondent wherein the respondent has failed to provide the possession of the said unit for which they had accepted the booking in 2011 with the promise to hand over the possession of the unit booked by August 2014. Thus, the complainants seeks the intervention of this Hon'ble Authority to redress it's grievances and direct the opposite party to complete the project and deliver the peaceful possession of the flat along with

delay penalty charges at the prescribed rate of interest fixed by this HRERA Authority.

5. That the respondent company made several representations of their project to the complainants alluring them to book a flat in their project "**Indiabulls Enigma**". The respondent has made several claims pertaining to the architecture and the landscape of the project such as single point access gated community with 24*7 security, convenient shops and departmental stores within the complex, all existing amenities like schools, shopping mall, jogging tracks, quaint walking trails, skating rink, cricket nets, pool tables and kids play area, health club sauna, gym, yoga and aerobics lounge, spa, jacuzzi, swimming pool, relaxing pool, tennis court, coffee shops, kids play area, traffic free podium, party lawn with barbeque counter.

6. That relying on the assurances made by the respondent company and lured by the rosy picture painted by the respondent to it the complainants, it applied for booking in the project of the respondent company and made a payment of Rs. 5,00,000/- in form of booking amount and the same has been acknowledged by the respondent company in clause 5 of the flat buyer agreement.

7. That after the payment of the booking amount the complainants were offered allotment of unit no. C154 on 15th floor of tower C admeasuring 3400 sq. Ft. in the project. The basic sale

consideration of residential apartment was Rs. 1,72,60,000/- and total sale consideration was Rs. 1,89,51,000/-.

8. That a flat buyers agreement was entered into between the parties on 09.12.2011, under which the complainants were constrained to accept various arbitrary and unilateral clauses made in favour of the respondent company. That there was no scope of attaining any mutuality at that time as the complainant have already paid a considerable amount towards the booking of the apartment and could not risk the allotment.

9. That as per the flat buyer's agreement the unit was to be handed over within 3 years from the date of execution of the flat buyers agreement. The relevant clause of flat buyer's agreement has been produced below:

> *"21 The Developer shall endeavour to complete the construction of the said building/unit within a period of three years, with a six months grace period thereon from the date of execution of the Flat buyers agreement subject to the timely payment by the Buyer(s) of Total Sale Price payable according to the payment plan applicable to her or as demanded by the Developer."*

10. That the flat buyers agreement was executed on 09.12.2011 therefore if we calculate the limitation period of the respondent for delivering the unit the same comes around to 09.12.2014. Therefore, the due date of delivery of possession was 09.12.2014. It is submitted that to the utter disregard of the possession clause

the respondent had miserably failed in completing the project and delivering the possession latest by December 2014. The respondent had started making demands from the very first date of booking and was never intimated as to the development stage of the project or regarding the date of possession.

11. That the complainants made most of its payments on time and the respondent company has intimated and has charged interest at the rate of 18% p.a., in cases where the payments were delayed. That despite making payment on time the respondent company had miserably failed to fulfil its promise of delivering the possession of the flat by December 2014.

12. That the complainants were financially incapable of buying this apartment therefore in order to finance the cost of the apartment the complainants took a loan of Rs 1, 48,57,671/- from Indiabulls Housing Finance Limited. Thereafter, the parties herein entered into tripartite agreement dated 29.10.2011 in lieu of the above sanctioned loan in favour of the complainants.

13. That the delay in the delivery of the flat was solely due to the negligence of the respondent company. The respondent never informed the complainants about any force majeure circumstances which have lead to the halt in the construction and there is enough information in the public domain which suggest that the

respondent have deliberately not completed the present project and have hoodwinked the money paid by the allottees like complainants in developing other projects of theirs.

14. That even on the bare perusal of various clauses of the buyers agreement, it represents that the terms and condition are unilateral and arbitrary wherein the respondent has an upper hand in the entire transaction. As per the terms and conditions the respondent had the authority to impose an exorbitant rate of interest on the complainants to the tune of 18% on delayed payments and whereas, the respondent would only liable to pay a meagre amount in case of delayed possession to the tune of Rs. 5/- per sq. Ft. per month for the period of delay. It is requested that as the terms and conditions of the builder buyer agreement are unilateral, this hon'ble authority shall not take into consideration the terms and conditions of the agreement during the adjudication of the case. The relevant Clause 11 and Clause 22 from the flat buyers agreement are reproduced as-

> *"11 In exceptional circumstances, the developer may, in its sole discretion, condone the delay in payment by charging interest at the rate of 18% per annum, compounded quarterly on the amounts in default....."*
>
> *"22 In the eventuality of Developer failing to offer the possession of the unit to the Buyer within the time as stipulated herein, except for the delay attributable to the Buyer/force majeure/vis-majeure conditions,*

the developer shall pay to the Buyer penalty of Rs.5/- (Rupees Five only) per square ft (of the super area) per month for the period of delay....."

The said clauses are unilateral as the respondent has only tried to save itself from compensating the complainants in case of a delay in completion of the project and in giving the possession of the flat to the complainants and has tried to considerably limit its own liability and impose unfair and arbitrary interest on the complainants in order to grab their hard-earned money. Such clauses also create a fear in the minds of the complainants to make the payments as per the whims and arbitrary demands of the companies. These clauses give arbitrary power to the companies to exploit its customers and should be dealt with a heavy hand by the hon'ble authority.

15. That the said clause is also in clear contravention of the provisions of the Real Estate (Regulation and Development) Act, 2016 which has clarified the position that the interest payable by the promoter in case of default shall be the same as the interest payable by the allottees in case of any default made by them.

16. That the complainants till date have made the payment to the tune of Rs. 1,60,47,150/- in favour of the respondent company in lieu of the booking made.

17. That the complainants had many times requested the respondent company to deliver the possession of their property, but the respondent company did not adhere to the requests of the complainants herein and till date has failed to deliver the possession of the unit booked. The payment of the delay compensation at the prescribed rate of interest fixed by the HRERA Authority has also been repeatedly asked for by the complainants but no response has ever been received from respondent company end. The respondent company did not adhere to the requests of the complainants for making the payment of delay compensation.

18. That in this case the respondent company has misused its dominant position resulting in the mental, physical and financial harassment to the complainants. The same is evident as the respondent company by not updating the complainants about the stage of development, no possession of apartment granted despite of receiving huge amount of money from the complainants and no compensation for delay has been granted to the complainants for the period of delay in delivering the possession of the unit. Thus, the complainants were left with no other option but to file the present complaint for granting them the possession of the apartment along with compensation for the delay caused herein at the prescribed rate of interest fixed by this HRERA Authority.

19. That the complainants have requested the respondent several times personally and orally for the redressal of their grievances, but the respondent has never responded to the requests of the complainants to complete the construction of the project.

20. That the complainants are entitled to immediate possession along with compensation for delay. The complainants have been deprived of their flat for several years and during such time the complainants have been mentally and physically harassed by the respondent having been made to run from pillar to post. Therefore, this Hon'ble Authority needs to instruct the respondent company to grant immediate possession along with compensation for delay as prayed by the complainants.

C. Relief sought by the complainants:

21. The complainants have sought following relief:

    i. Direct the respondent to deliver immediate possession of the unit no. C154, located at 15th floor, admeasuring 3400 sq. Ft. in tower-C in the project Indiabulls Enigma at Sector 110, Gurgaon, Haryana along with all the promised amenities and facilities and to the satisfaction of the complainants.

    ii. Direct the respondent to make payment of delay penalty charges at the prescribed rate of interest on the amount already paid by the complainants to the respondent, from

the promised date of delivery of the flat till the actual delivery of the flat to the complainants.

22. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent:

23. That the present compliant filed by the complainants is outside the preview of this Hon'ble Authority as the complainants themselves approached the respondent and showed interest to book unit in the project to be developed by the respondent. Thereafter the complainants post understanding the terms & conditions of the agreement(s) had voluntarily executed flat buyer agreement with the respondent on 09.12.2011

24. It is submitted that as per the terms of the agreement, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the subject transferred unit, the same shall be adjudicated through the arbitration mechanism as detailed therein. Clause no. 49 is being reproduced hereunder:

> *"Clause 49: All or any dispute arising out or touching upon or in relation to the terms of this Application and/or Flat Buyers agreement including the interpretation and validity of the terms thereof and the rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through Arbitration The arbitration shall be governed by Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereof for the time being in force. The venue of the arbitration shall be New Delhi and it shall be held by a sole arbitrator who shall be appointed*

by the Company and whose decision shall be final and binding upon the parties. The Applicant(s) hereby confirms that he/she shall have no objection to this appointment even if the person so appointed as the Arbitrator, is an employee or advocate of the company or is otherwise connected to the Company and the Applicant(s) confirms that notwithstanding such relationship / connection, the Applicant(s) shall have no doubts as to the independence or impartiality of the said Arbitrator. The courts in New Delhi alone shall have the jurisdiction over the disputes arising out of the Application/Apartment Buyers Agreement ....."

Thus, in view of above Section 49 of flat buyer's agreement, it is humbly submitted that, the dispute, if any, between the parties are to be referred to arbitration.

25. It is respectfully submitted that the relationship between the complainants and the respondent is governed by the document dated 09.12.2011 executed between them. It is pertinent to mention herein that the instant complaint of the complainants is further falsifying her claim from the very fact that, the complainant have filed the instant claim on the alleged delay in delivery of possession of the provisionally booked unit however the complainants with malafide intention have not disclosed, in fact concealed the material fact from the hon'ble authority.

26. That the complainants since inception was not diligent in timely payment of their due instalments against the unit / apartment booked by them. It is pertinent to mention here that in terms of "clause 10" of the flat buyer agreement, timely payment of instalments was the very essence of the agreement and that the handing over of the possession of the booked unit to the

complainants was subject to timely payment of dues by the complainants in terms of the payment schedule opted by the complainants at the time of execution of the flat buyer agreement with the respondent. Clause 10 of the Flat Buyer's Agreement is reproduced as below:

> *"10. Timely payment of the instalments/amounts due shall be of the essence of this Agreement. If payment is not made within the period stipulated and or the Buyer commits breach of any of other terms and conditions of this agreement, then this agreement shall be liable to be cancelled..."*

That the timely payment of the instalments being essence of the contract was duly agreed by and between the parties in the flat buyer's agreement dated 0912.2011. However, the complainants made a number of defaults in timely payment of their instalments. Delay in ensuring the timely payment of the instalments has serious repercussions on developer's/ respondent ability to deliver the project in time. Vicious circle created by delayed payments obviously results in delay of range of development issues undertaken by the developer delaying the project eventually. It is submitted that the complainants failed to observe the timely payment contemplated in flat buyer's agreement and hence, cannot take advantage of their own wrongs doings.

27. That it is pertinent to mention that the complainants also availed a loan of Rs. 1,48,57,671/- towards the subject unit and entered into

a tripartite agreement for the same. However, the complainants have defaulted in clearing their due instalments to the bank also for which the reminders were issued by bank to them and the complainants have not come before this hon'ble authority with clean hands and wishes to take advantage of their own misdoings with the help of the provisions of the RERA, which have been propagated for the benefit of innocent customers who are end-users and not defaulters, like the complainants in the present complaint.

28. That it is pertinent to mention here that from the very beginning it was in the knowledge of the complainants, that there is a mechanism detailed in the flat buyer's agreement which covers the exigencies of inordinate delay caused in completion and handing over of the booked Unit i.e. enumerated in the "Clause 22" of duly executed flat buyer's agreement, which is at page 43 of the flat buyer's agreement filed by the complainants along with their complaint. The respondent carves leave of this Hon'ble Authority to refer & rely upon the clause 22 of flat buyer's agreement which is being reproduced hereunder:

> *"Clause 22 in the eventuality of developer failing to offer the possession of the unit to the buyers within the time as stipulated herein, except for the delay attributable to the buyer/force majeure / vis- majeure conditions, the developer shall pay to the buyer penalty of Rs. 5/- (rupees five only) per square feet (of super area) per month for the period of delay. The date of submitting application to the concerned authorities for issue of completion / part completion/*

occupancy/ part occupancy certificate of the complex shall be treated as the date of completion of the unit for the purpose of his Clause / Agreement." ....

That the complainants being fully aware, having knowledge and are now evading from the truth of its existence and does not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainants are rescinding from the duly executed contract between the parties and it is only after being satisfied with the project in totality that the complainants expressed their willingness to book a unit in the project looking into the financial viability of the project and its future monetary benefits got the said unit booked with the respondent.

29. It is submitted that the present complaint is not maintainable, and the period of delivery as defined in clause 21 of flat buyer's agreement is not sacrosanct as in the said clause it is clearly stated that "the developer shall endeavour to complete the construction of the said building/unit" within the stipulated time. Clause 21 of the said agreement has been given a selective reading by the complainants even though he conveniently relies on same. The clause reads:

"The developer shall endeavour to complete the construction of the said building/unit within a period of three years, with a six months grace period thereon from the date of execution of these Flat Buyer' Agreement subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to his or as demanded by the Developer..."

The reading of the said clause clearly shows that the delivery of the unit / apartment in question was subject to timely payment of the

instalments towards the basic sale price. As shown in the preceding paras the complainants have failed in observing his part of liability of the said clause.

30. That the basis of the present complaint is that there is a delay in delivery of possession of the unit in question, and therefore, interest on the deposited amount has been claimed by virtue of the present complaint. It is further submitted that the flat buyer's agreement itself envisages the scenario of delay and the compensation thereof. Therefore, the contention that the possession was to be delivered within 3 years and 6 months of execution of the flat buyer's agreement is based on a complete misreading of the agreement.

31. That the bare perusal of clause 22 of the agreement would make it evident that in the event of the respondent failing to offer possession within the proposed timelines, then in such a scenario, the respondent would pay a penalty of Rs.5/- per sq. Ft. per month as compensation for the period of such delay. The aforesaid prayer is completely contrary to the terms of the inter-se agreement between the parties. The said agreement fully envisages delay and provides for consequences thereof in the form of compensation to the complainants. Under clause 22 of the agreement, the respondent is liable to pay compensation at the rate of Rs.5/- per

sq. Ft. per month for delay beyond the proposed timeline. The respondent craves leave of this hon'ble authority to refer & rely upon the clause 22 of flat buyer's agreement, which is being reproduced as:

> *"Clause 22 : In the eventuality of Developer failing to offer the possession of the unit to the Buyers within the time as stipulated herein, except for the delay attributable to the Buyer/force majeure / vis-majeure conditions, the Developer shall pay to the Buyer penalty of Rs. 5/- (Rupees Five only) per square feet (of super area) per month for the period of delay ....."*

That the complainants being aware, having knowledge and having given consent of the above mentioned clause/terms of flat buyer's agreement, is now evading themselves from contractual obligations inter-alia from the truth of its existence and does not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainants are also estopped from the duly executed contract between the Parties.

32. That it is pertinent to mention that the project of the respondent i.e., Indiabulls Enigma, which is being developed in an area of around 19.856 acres of land, in which the applicant has invested its money is an on-going project and is registered under The Real Estate (Regulation and Development) Act, 2016 and the respondent has already completed the construction of the phase -1 and phase 1A comprising of towers no. A, D, E, F, G, H, I and J of the project. It is pertinent to mention herein that by way of the registration, the subject tower-C of the project of the respondent

was initially granted till 30th September 2018, however, the respondent has already applied for the extension of the said registration for tower C under Rule 6 of Haryana Real Estate (Regulation And Development) Rules, 2017 and has already paid the requisite fees for the extension of the registration under Act of 2016.

33. That it is stated that it is a universally known fact that due to adverse market conditions viz. delay due to reinitiating of the existing work orders under GST regime, by virtue of which all the bills of contractors were held between, delay due to the directions by the Hon'ble Supreme Court and National Green Tribunal whereby the construction activities were stopped, Non-availability of the water required for the construction of the project work & non-availability of drinking water for labour due to process change from issuance of HUDA slips for the water to totally online process with the formation of GMDA, shortage of labour, raw materials etc., which continued for around 22 months, starting from February'2015.

34. That as per the license to develop the project, EDCs were paid to the state government and the state government in lieu of the EDCs was supposed to lay the whole infrastructure in the licensed area for providing the basic amenities such as drinking water, sewerage, drainage including storm water line, roads etc. That the state government terribly failed to provide the basic amenities due to which the construction progress of the project was badly hit.

35. That furthermore, the Ministry of Environment and Forest (hereinafter referred to as the "MoEF") and the Ministry of Mines (hereinafter referred to as the "MoM") had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of kiln which is the most basic ingredient in the construction activity. The MoEF restricted the excavation of topsoil for the manufacture of bricks and further directed that no manufacturing of clay bricks or tiles or blocks can be done within a radius of 50 (fifty) kilometres from coal and lignite based thermal power plants without mixing at least 25% of ash with soil. The shortage of bricks in the region and the resultant non-availability of raw materials required in the construction of the project also affected the timely schedule of construction of the project.

36. That in view of the ruling by the Hon'ble Apex Court directing for suspension of all the mining operations in the Aravalli hill range in State of Haryana within the area of approx. 448 sq. kms in the district of Faridabad and Gurgaon including Mewat which led to a situation of scarcity of the sand and other materials which derived from the stone crushing activities , which directly affected the construction schedules and activities of the project.

37. Apart from the above, the following circumstances also contributed to the delay in timely completion of the project:

a) That commonwealth games were organized in Delhi in October 2010. Due to this mega event, construction of several big projects including the construction of commonwealth games

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

b) Moreover, due to active implementation of social schemes like National Rural Employment Guarantee Act and Jawaharlal Nehru National Urban Renewal Mission, there was a sudden shortage of labour/workforce in the real estate market as the available labour preferred to return to their respective states due to guaranteed employment by the Central/State Government under NREGA and JNNURM schemes. This created a further shortage of labour force in the NCR region. Large numbers of real estate projects, including our project were struggling hard to timely cope up with their construction schedules. Also, even after successful completion of the commonwealth games, this shortage continued for a long period of time. The said fact can be substantiated by newspaper article elaborating on the above-mentioned issue of shortage of labour which was hampering the construction projects in the NCR region.

c) Further, due to slow pace of construction, a tremendous pressure was put on the contractors engaged to carry out various

activities in the project due to which there was a dispute with the contractors resulting into foreclosure and termination of their contracts and we had to suffer huge losses which resulted in delayed timelines. That despite the best efforts, the ground realities hindered the progress of the project.

38. That based upon the past experiences the respondent has specifically mentioned all the above contingencies in the flat buyer's agreement executed between the parties and incorporated them in "Clause 39" which is being reproduced hereunder:

> *Clause 39: "The Buyer agrees that in case the Developer delays in delivery of the unit to the Buyer due to:-*
>
> *a. Earthquake. Floods, fire, tidal waves, and/or any act of God, or any other calamity beyond the control of developer.*
> *b. War, riots, civil commotion, acts of terrorism.*
> *c. Inability to procure or general shortage of energy, labour, equipment, facilities, materials or supplies, failure of transportation, strikes, lock outs, action of labour unions or other causes beyond the control of or unforeseen by the developer.*
> *d. Any legislation, order or rule or regulation made or issued by the Govt or any other Authority or,*
> *e. If any competent authority(ies) refuses, delays, withholds, denies the grant of necessary approvals for the Unit/Building or,*
> *f. If any matters, issues relating to such approvals, permissions, notices, notifications by the competent authority(ies) become subject matter of any litigation before competent court or,*
> *g. Due to any other force majeure or vis majeure conditions,*
>
> *Then the Developer shall be entitled to proportionate extension of time for completion of the said complex....."*

In addition to the reasons as detailed above, there was a delay in sanctioning of the permissions and sanctions from the departments.

39. That the flat buyer's agreement that has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 09.12.2011 executed much prior to coming into force of the Act and the rules. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under Act of 2016 has to be in reference to the flat buyer's agreement for sale executed in terms of said Act and said rules and no other agreement, whereas, the flat buyer's agreement being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA, hence, cannot be relied upon till such time the new agreement to sell is executed between the parties.

40. That the respondent has made huge investments in obtaining requisite approvals and carrying on the construction and development of 'INDIABULLS ENIGMA' project not limiting to the expenses made on the advertising and marketing of the said project. Such development is being carried on by developer by investing all the monies that it has received from the buyers / customers and through loans that it has raised from financial

institutions. In spite of the fact that the real estate market has gone down badly the respondent has managed to carry on the work with certain delays caused due to various above mentioned reasons and the fact that on an average more than 50% of the buyers of the project have defaulted in making timely payments towards their outstanding dues, resulting into inordinate delay in the construction activities, still the construction of the project "INDIABULLS ENIGMA" has never been stopped or abandoned and has now reached its pinnacle in comparison to other real estate developers/promoters who have started the project around similar time period and have abandoned the project due to such reasons.

41. That it is a respectful submitted by the respondent that a bare perusal of the complaint will sufficiently elucidate that the complainants have miserably failed to make a case against the respondent. The complainants have merely alleged in their complaint about delay on part of the respondent in handing over of possession but have failed to substantiate the same.

42. That the complainants have made false and baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in flat buyer's agreement entered into between the parties. In view of the same, it is submitted that there

is no cause of action in favour of the complainants to institute the present complaint.

43. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

E. Jurisdiction of the authority

44. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per the provisions of section 11(4) (a) of the Act of 2016 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding complainants is in breach of agreement for non-invocation of arbitration.

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

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

46. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority

cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders 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 kind 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."

47. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, 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."*

48. 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 their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA 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.

F.II Objection regarding delay due to force majeure

49. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as commonwealth games held in Delhi, shortage of labour due to implementation of various social schemes by

Government of India, slow pace of construction due to a dispute with the contractor and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. First of all the unit in question was booked in the year 2011 and its possession was to be offered by 09.06.2015 so the events taking place such as holding of common wealth games, dispute with the contractor, implementation of various schemes by central govt. etc. do not have any impact on the project being developed by the respondent. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of minor or major group of defaulters. Moreover, the complainant have already been charged with delay payment interest as per the terms of flat buyer agreement dated 09.12.2011, if the concerned has made any default in making payment as per agreed payment plan. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F.III Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

50. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale

as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

> *119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

51. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

52. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings regarding relief sought by the complainants.

Relief sought by the complainants: Direct the respondent to deliver immediate possession of the along with all the promised amenities and facilities and to the satisfaction of the complainants.

G.1 Admissibility of delay possession charges

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

> ***Section 18: - Return of amount and compensation***
>
> *If the promoter fails to complete or is unable to give possession of an apartment, plot or building, -*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed*

54. As per clause 21 of the flat buyer's agreement dated 09.12.2011, the possession of the subject unit was to be handed over by of 09.06.2015. Clause 21 of the flat buyer agreement provides for handover possession and is reproduced below:

> *As per clause 21 : The Developer shall endeavour to complete the construction of the said building /Unit within a period of three years, with a six months grace period thereon from the date of execution of the Flat Buyers Agreement subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to him or as demanded by the Developer. The Developer on completion of the construction /development shall issue final call notice to the Buyer, who shall within 60 days thereof, remit all dues and take possession of the Unit.*

The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

55. The flat buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottees are protected candidly. The flat buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc.

between the buyer and builder. It is in the interest of both the parties to have a well-drafted flat buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision about stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the flat buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

56. **Admissibility of grace period:** The respondent promoter has proposed to complete the construction of the said building/ unit within a period of 3 years, with six months grace period thereon from the date of execution of the flat buyer's agreement. In the present case, the promoter is seeking 6 months' time as grace period. The said period of 6 months is allowed to the promoter for the exigencies beyond the control of the promoter. Therefore, the due date of possession comes out to be 15.03.2015.

57. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

58. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

59. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 20.07.2021 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

60. The definition of term 'interest' as defined under section 2(za) of the Act provides that 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. The relevant section is reproduced below:

> *"(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;"*

Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

61. On consideration of the circumstances, the evidence and other record and submissions made by the complainants and the respondent and based on the findings of the authority regarding contravention as per provisions of Act, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 21 of the flat buyer's agreement executed between the parties on 09.12.2011, possession of the booked unit

was to be delivered within a period of 3 years from the date of execution of the agreement with a grace period of 6 months, which comes out to be 09.06.2015

Accordingly, the non-compliance of the mandate contained in section 11 (4)(a) of the Act on the part of the respondent is established. As such the complainants are entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession i.e. 09.06.2015 till handing over of possession as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

H. Directions of the authority:

62. Hence, the authority hereby passes this order and issue the 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. The respondent shall pay interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 09.06.2015 till handing over of possession as per section 18(1) of the act of 2016 read with rule 15 of the rules.

ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest to be paid till date of handing over of possession shall be paid on or before the 10th of each succeeding month;

iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act

v. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement. The respondent is not entitled to charge holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble supreme court in civil appeal nos. 3864-3889/2020 on 14.12.2020

63. Complaint stands disposed of.

64. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:20.07.2021