

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 4554 of 2020
First date of hearing: 12.01.2021
Date of decision : 20.07.2021

M/s Array Exports & Investment Pvt. Ltd.
R/o: - 4-7C, DDA Shopping Centre, New Friends Colony, New Delhi-110025 **Complainant**

Versus

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

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Shri. Pawan Kumar Ray
Shri. Rahul Yadav

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 09.12.2020 has been filed by the complainant/allottee 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 complainant, 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. 1. 351 of 2017 dated 20.11.2017 valid till 31.08.2018 2. 354 of 2017 dated 17.11.2017 valid till 30.09.2018 3. 353 of 2017 dated 20.11.2017 valid till 31.03.2018

		4. 346 of 2017 dated 08.11.2017 valid till 31.08.2018
6.	Date of execution of buyer's agreement	28.02.2012 (As per page 22 of the complaint)
7.	Unit no.	E-112,11th floor, Tower/Block E (As per page 25 of the complaint)
8.	Super Area	7430 sq. ft
9.	Payment plan	Construction linked payment plan
10.	Total consideration	Rs. 4,37,85,350/- (As per applicant ledger dated 02.11.2018 at page 46 of the complaint)
11.	Total amount paid by the complainant	Rs. 4,31,02,151/- (As per applicant ledger dated 02.11.2018 at page 47 of the complaint)
12.	Due date of delivery of possession <i>(As per clause 21 of the agreement: The Developer shall endeavor 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</i>	28.08.2015 Calculated from buyer's agreement (Grace period of 6 months is allowed)

	<i>/development shall issue final call notice to the Buyer, who shall within 60 days thereof, remit all dues and take possession of the Unit)</i>	
13.	Offer of possession	15.11.2018 (as per page 36 of reply)
14.	Occupation Certificate	06.04.2018 (As per page 34 of reply)
15.	Delay in delivery of possession till the date of offer of possession i.e 15.11.2018+ 2 months = 15.01.2019	3 years 4 months 18 days

B. Facts of the complaint

3. The complainant herein had booked unit in the residential complex, being developed by the respondent by the name of "Indiabulls Enigma" located at Sector 110, Gurugram. That a flat buyer's agreement was executed between the parties on 28.02.2012 for the unit no. E112, 11th floor, Tower E having super area 7430 sq. ft. with a basic sale price Rs.3,65,64,000/-.
4. That the complainant was assured of timely and satisfactory delivery of the possession of the unit within a span of 3 years which only prodded the complainant to make the said booking as the possession was promised to be granted by the year, 2015. That an amount of Rs. 5,00,000/- was deposited by the complainant at the time of the booking in the said project.
5. It is pertinent to note that a construction linked payment plan was adopted by the complainant for making the payments towards the said allotment. The very essence of the said payment plan is that the demand for payment has to be made only after reaching a

particular stage in developing the project. However, in contravention to the said plan, the complainant has been arbitrarily charged by the respondent whether the development for the subsequent stage was completed or not. That the same is evident, as the respondent has till date not been able to grant the possession even after the complainant has deposited a considerable money with them. As per clause 21 of the agreement, the possession of the unit was to be handed over within a period of three years from the date of execution of the agreement. Thus, the possession of the flat was to be given to the complainant by 28.02.2015.

6. The respondent has failed to deliver the possession of the said unit till date, even after diligent payments being made by the complainant. That the complainant has paid a total amount of Rs. 4,31,02,151/- out of the total sale price of the unit, which is Rs. 4,37,85,350/- as per the ledger of the complainant.
7. That the complainant has paid around 98% of the total consideration of the unit but till date has not even been intimated of any due date of possession far from being given the actual possession of the unit way back in 2015. That the complainant tried contacting the respondent several times through phone and personal visits but to no avail, as no satisfactory answer from the respondent was forthcoming regarding the indefinite delay being caused by them.
8. It is submitted that the respondent drew and unfair and arbitrary which was totally one-sided, illegal, unfair, unjust and arbitrary. All

the clauses regarding possession, compensation etc were drawn in their own favour and the complainant had no say in anything whatsoever. In the agreement, the complainant was denied fair scope of compensation, in case of delay of possession and was supposed to pay heavy penalty in case of delay in payment of installments. The arbitrary and unfairness of the apartment buyer agreement can be derived from the perusal of clauses 11 and 22. That as per the terms and conditions the respondent company had the authority to impose an exorbitant rate of interest on the complainant to the tune of 18% on delayed payments and whereas, the respondent was 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.

9. That since booking till date, the respondent never informed the complainant about any force majeure or any other circumstances which is beyond their reasonable control, which has led to the delay in the completion of the project within the time prescribed in the agreement. The delay in the construction is intentional and solely due to the deliberate negligence and deficiency on the part of the respondent. The delay of 5 years is not reasonable, and no reason can be attributed to such delay except the wilful and deliberate negligence and ignorance of the respondent. The respondent started the project with malafide intention and with the intention of cheating the allottees/homebuyers and extracting money from them.

10. That in addition to the unilateral and exorbitant rate of interest imposed on the complainant, the respondent company also had the absolute discretion to make unilateral changes in the allotment of the complainant without any prior consent of the complainant. That the respondent had wielded power to the extent of being the sole authority for making any changes to the allotment of the complainant. That as per the agreement, the building plans, lay out plan and other crucial details were to be managed by the respondents solely without obtaining any consent of the complainants. This does not leave any scope of negotiation or consent from the complainant and they were constrained to accept such changes and alterations and make the payments accordingly. Such a clause is liable to put the allottees in a difficult situation, as they are forced to accept the changes or to get their allotment cancelled. That the relevant clause has been produced below:

"18.The Buyer understand and agrees that the floor plans and other terms and conditions as stated in this proposal are tentative and are liable to change, alteration, modification, revision, addition, deletion, substitution or recast instance of the sanctioning authorities/ Architects or the Developer during the course of construction or otherwise and the Buyer hereby gives his consent to such change, modification etc....."

C. Relief sought by the complainant:

11. The complainant has sought following relief:
- (a) To direct the respondent to deliver immediate peaceful possession of the booked unit complete in all aspect and with full specifications after obtaining the valid occupation certificate from the competent authority.

- (b) To direct the respondent to make the payment of delay interest at prescribed rate of interest on the amount paid by the complainant to the respondent, from the promised date of delivery of the flat till the actual delivery of the flat to the complainants;
12. 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:

13. 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....."

Thus, in view of above Section 49 of FBA, it is humbly submitted that, the dispute, if any, between the parties are to be referred to arbitration. Further the present complaint is liable to be dismissed

on the sole ground for the present complaint being pre-maturely filed.

14. It is respectfully submitted that the relationship between the complainant and the respondent is governed by the document dated 28.02.2012 executed between them i.e. It is pertinent to mention herein that the instant complaint of the complainant is further falsifying her claim from the very fact that, the complainant has filed the instant claim on the alleged delay in delivery of possession of the provisionally booked unit however the complainant with malafide intention have not disclosed, infact concealed the material fact from the Hon'ble authority with clean hands and wished to take advantage of its own misdoings.
15. That a 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 prayer of the complainant 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 complainant. 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 FBA, which is being reproduced hereunder for ready reference:

"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 complainant being fully aware, having knowledge and got the subject unit transferred on her name and came in the shoes of the original allottee in the year 2018.

16. It is submitted that the present complaint is not maintainable, and the period of delivery as defined in clause 21 of FBA is not sacrosanct as in the said clause it is clearly stated that "the developer shall endeavor 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 complainant even though he conveniently relies on same. The clause reads:

"The developer shall endeavor 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 installments towards the Basic Sale Price.

17. 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.
18. Further, 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.
19. 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 top soil 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.

20. 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.
21. 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.

d) **Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard**

to Demonetization: The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f from 9-10 November 2016 the day when the central government issued notification with regard to demonetization. During this period, the contractor could not make payment in cash to the labour. During demonetization, the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on the site of magnitude of the project in question is Rs. 3-4 lakhs approx. per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence the implementation of the project in question got delayed on account of the issues faced by contractor due to the said notification of central government. That the said event of demonetization was beyond the control of the respondent company, hence the time period for offer of possession should be deemed to be extended for 6 months on account of the above.

e) **Orders passed by National Green Tribunal:** In last four successive years i.e. 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble National Green Tribunal had passed orders governing the entry and exit of vehicles in NCR region. Also the Hon'ble National Green Tribunal has passed orders with regard to phasing out the 10 year old diesel

vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The contractor of respondent could not undertake construction for 3-4 months in compliance of the orders of hon'ble National Green Tribunal. Due to this, there was a delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November-December 2016 and November- December 2017. The district administration issued the requisite directions in this regard.

In view of the above, construction work remained very badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondent and the said period would also require to be added for calculating the delivery date of possession if any.

f) **Non-Payment of Instalments by Allottees:** Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.

g) **Inclement Weather Conditions viz. Gurugram:** Due to heavy rainfall in Gurugram in the year 2016 and unfavorable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to

be shut down/closed for many days during that year due to adverse/severe weather conditions.

22. It is pertinent to mention that despite the implementation of the project being affected on account of the above mentioned force majeure conditions, the respondent being a customer oriented company completed the construction of the tower in which unit allotted to the complainant is located and the respondent applied for the grant of the occupation certificate on 21.11.2017 before the Director, Town and Country Planning, Chandigarh and the same was granted by the concerned authorities on 06.04.2018. The respondent completed the construction of the unit on or before 21.11.2017. The respondent has already offered the possession of the unit to the complainant vide offer of possession dated 15.11.2018. However till date the complainants have failed to take possession of their apartment.
23. That based upon the past experiences the respondent has specifically mentioned all the above contingencies in the FBA 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.

24. It is also submitted that the respondent at the time of registration of the project gave revised date for completion of same and also completed the same before expiry of that period, therefore, under such circumstances the respondent is not liable to be visited with penal consequences as laid down. It is also most humbly submitted that the only liability of respondent has is under the agreement according to which the company is liable to pay a delay penalty at the rate of Rs. 5 per sq. mtr. per month for the period of delay to the complainants.
25. It is submitted that the complainant has merely alleged in his complaint about delay on part of the respondent in handing over of possession but have failed to substantiate the same. The fact is that the complainant in order to earn profit from the subject unit

purchased the subject unit from its original allottee, knowing well the construction stage and also that as on date of the purchase the possession of the subject unit was already delayed.

26. That the parties had agreed that the respondent shall "**endeavour**" to complete the construction of the apartment in question within a period of three years, with a six months grace period thereon, from the date of execution of the agreement subject to the terms and conditions laid therein. As such in view of the fact that the time period mentioned in Clause 21 was only a proposed period.
27. 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

28. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.1 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 complainant at a later stage.

F. Findings on the objections raised by the respondent:

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

29. The respondent had raised an objection that the complainant has 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"

30. 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 complainant, 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 complainant 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 Appellate 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."

31. 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."

32. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act, 1986 and Act of 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.

F2. Objection regarding delay due to force majeure

33. The respondent-promoter has sought further extension for a period of 6 months after the expiry of 3 years for unforeseen delays in respect of the said project. The respondent raised the contention that the construction of the project was delayed due to force majeure conditions such as commonwealth games held in Delhi in October 2010, 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, demonetisation, various orders passed by National Green Tribunal and weather conditions in Gurugram and non-payment of installment 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 2012 and its possession was to be offered by 28.02.2015 so the events taking place prior to year 2015 such as holding of common wealth games, dispute with the contractor, demonetisation, incident weather conditions, implementation of various schemes by central govt. and orders passed by National Green Tribunal 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 complainant can be penalised for the same. The answer is in negative. Lastly after completion of the project, the respondent builder applied for OC vide application dated 21.11.2017 which was received on 06.04.2018. As per clause 21 of the agreement the possession of the unit must be offered by 28.02.2015 with a grace period of 6 months which comes out to be

i.e 28.08.2015. It is well settled that a person cannot take benefit of his own wrong.

G. Findings regarding relief sought by the complainant.

Relief sought by the complainant: Direct the respondent to make the payment of delay on the amount already paid by the complainant to the respondent, from the date of delivery of the flat till the actual delivery of the flat to the complainants.

G.1 Admissibility of delay possession charges

34. 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

35. As per clause 21 of the apartment buyer's agreement dated 28.02.2012, the possession of the subject unit was to be handed over by of 28.02.2015 plus 6 months of grace period i.e 28.08.2015 At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provisions of this

agreement and 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 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. Clause 21 of the apartment buyer agreement (in short, agreement) provides for handover possession and is reproduced below:

As per clause 21 : The Developer shall endeavor 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

36. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residential, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment 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 with regard to 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 apartment 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.

37. 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 complainant 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 apartment 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.

38. **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 28.08.2015.
39. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is 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.

40. 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.
41. 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%.
42. 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 complainant 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 complainant in case of delayed possession charges.

43. On consideration of the circumstances, the evidence and other record and submissions made by the complainant 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 buyer's agreement executed between the parties on 28.02.2012, 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 28.08.2015.

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 complainant is entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession with a grace period of 6 months, which comes out to be 28.08.2015 till the expiry of 2 months from the date of offer of possession(15.11.2018) which comes out to be 15.01.2019 as per section 18(1) of the Act read with the rule 15 of the rules and section 19(10) of the Act of 2016.

H. Directions of the authority

44. 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 complainant from due date of possession with a grace period of 6 months, which comes out to be 28.08.2015 till the expiry of 2 months from the date of offer of possession(15.11.2018) which comes out to be 15.01.2019 as per section 18(1) of the Act read with the rule 15 of the rules and section 19(10) of the Act of 2016.
- 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 complainant is 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 complainant which is not the part of buyer's agreement. The respondent is not entitled to charge holding charges from the complainant/allottee 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

45. Complaint stands disposed of.

46. File be consigned to registry.


(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram


सत्यमेव जयते


(Vijay Kumar Goyal)

Member

Dated:20.07.2021

Judgement uploaded on 18.10.2021.

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