

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

Complaint no. : 187 of 2021
First date of hearing: 16.03.2021
Date of decision : 20.07.2021

Babita Rana

R/o: - House no.57, Village Bajghera, Palam
Vihar, Gurugram

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. Anand Dabas
Shri. Rahul Yadav

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 19.01.2021 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. 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	19.08.2011 (As per page 19 of the complaint)
7.	Unit no.	C-042,4 th floor, Tower/Block C
8.	Super Area	3350 sq. ft
9.	Payment plan	Construction linked payment plan
10.	Total consideration	Rs. 1,76,33,735/- (As per applicant ledger dated 28.04.2018 at page 53 of the complaint)
11.	Total amount paid by the complainant	Rs. 1,75,80,246/- (As per applicant ledger dated 28.04.2018 at page 54 of the complaint)
12.	Due date of delivery of possession (As per clause 21 of the agreement: <i>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>	19.02.2015 (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	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 5 months 1 day

B. Facts of the complaint

3. That somewhere in the first half of year 2011, the respondent through its marketing executives and advertisement via various mediums & means approached Mrs. Indira Tiku and Mr. Subhash Chander Tiku (hereafter called as original allottees) ,with an offer to invest and buy a flat in the proposed real estate project of respondent, namely "Indibulls Enigma" in the Sector-110, Village Pawala-Khusrupur, Gurugram. The respondent represented to the them that the respondent is a very ethical business house in the field of construction of residential and commercial project and in case the complainant would invest in the said project of respondent, then it would deliver the possession of proposed flat on the promised delivery date as per the best quality assured by him. The respondent had further assured that he has already secured all the necessary sanctions and approvals from the appropriate and concerned authorities for the development & completion of said project on time with the promised quality and specification.

4. That respondent arranged the visit of its representatives to the complainant and they also assured the same as assured by respondent to the original allottees, wherein it was categorically promised by the respondent that they already have secured all the sanctions and permissions from the concerned authorities and departments for the sale of said project and would allot the residential flat in the name of Mrs.Indira Tiku and Mr.Subhash Chander Tiku immediately upon the booking. Relying upon those assurances and believing them to be true, original allottees booked a residential flat bearing No. F-011 on 1st floor in Tower-F in the proposed project of the respondent admeasuring approximately super area of 3350 Sq. ft. (311.22 Sq. meter) and covered area of 2570.67Sq. ft. (238.82 Sq. meter) in the township to be developed by respondent. Accordingly, the original allottees have paid Rs.5,00,000/- through cheques bearing No.587660 & 063526 dated 04.05.2011 as booking amount.
5. That the respondent assured that it would issue the allotment letter at earliest and maximum within one week, the complainant will get the builder buyer agreement as a confirmation of the allotment of said residential flat in their name. However, the respondent did not fulfill its promise and assurance and had not executed the flat buyer's agreement as promised by it.
6. That thereafter, the respondent started raising the demand of money /installments from the complainant, which was duly paid by the original allottees as per agreed timelines and along-with the making of payments, original allottees time and again requested the

respondent to execute the flat buyer's agreement as per its promise and assurance but the respondent acting arbitrarily and negligently have refused and ignored the requests and demands of the complainant on lame excuses and deliberately and intentionally delayed the execution of the flat buyer's agreement for nearly 3 months and ultimately it was executed on 19.08.2011.

7. That as per the clause-21 of the said flat buyer's agreement dated 19.08.2011, the respondent had agreed and promise to complete the construction of the said flat and deliver its possession within a period of 3 year with a six (6) months grace period thereon from the date of execution of the said flat buyer's agreement. Clause - 21 of the Flat Buyer's Agreement is reproduced herein:

"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."

However, the respondent has breached the terms of said flat buyer agreement and failed to fulfill its obligations and has not delivered actual and physical possession of said flat even today as on the date of filing of this compliant.

8. That the original allottees of aforesaid flat i.e Mrs. Indira Tiku and Mr. Subhash Chander Tiku sold the aforesaid flat to Mrs. Babita Rana W/o Mr. R.K Rana and after that Mrs Babita Rana stepped into

the shoes of Mrs. Indira Tiku and Mr. Subhash Chander Tiku vide agreement to sale dated 25.01.2018 in respect of the aforesaid flat.

9. That the respondent duly acknowledged the change in ownership of aforesaid flat by endorsing the name of complainant from the original allottees in flat buyers' agreement on 11th April 2018.
10. That from the date of booking and till today, the respondent had raised various demands for the payment of installments on complainant towards the sale consideration of said flat and the complainant have duly paid and satisfied all those demands as per the flat buyer's agreement without any default or delay on its part and have also fulfilled otherwise also their part of obligations as agreed in the flat buyers agreement. The complainant was and have always been ready and willing to fulfill their part of agreement, if any pending.
11. As per the statement dated 28.04.2018, issued by the respondent, upon the request of the complainant, the complainant have already paid Rs.1,75,80,246/- towards total sale consideration as on today as demanded time to time and now nothing major is pending to be paid on the part of complainant. That the total sale consideration for the said flat as mentioned in the ledger statement as issued by the respondent is Rs. 1,76,33,735/-.
12. That on the date agreed as per the builder buyer agreement for the delivery of possession i.e. 04.11.2014 of said unit as per date of booking and according to the flat buyers agreement, the complainant had approached the respondent and its officers

inquiring the status of delivery of possession but none had bothered to provide any satisfactory answer to the complainant about the completion and delivery said flat. The complainant thereafter kept running from pillar to post asking for the delivery of his home but could not succeed as the construction of the said flat and said project was nowhere near to completion and still has not been completed and delivered to the complainant.

13. That the respondent has still not given any date for final inspection of the unit and by committing delay in delivering of the possession of the aforesaid flat respondent has violated the terms and conditions of the flat buyers agreement and promises made at the time of booking of said flat. The respondent has also failed to fulfill the promises and representation made it while selling the said flat to the complainant.
14. That the conduct on part of respondent regarding delay in delivery of possession of the said flat has clearly manifested that respondent never ever had any intention to deliver the said flat on time as agreed. It has also cleared the air on the fact that all the promises made by the respondent at the time of sale of involved flat were fake and false.

C. Relief sought by the complainant:

15. The complainant has sought following relief:
 - (a) To pass an order to direct the respondent to deliver the possession of said flat immediately.

(b) To pass an order to direct the respondent to pay the interest at the prescribed rate on the amount paid by the complainant on account of delay in delivering possession from the date of payment till delivery of physical and vacant possession of the said flat.

16. 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:

17. That the complainant looking into the financial viability of the project and its future monetary benefits willingly approached the respondent and got the said unit transferred from its original owner by way of agreement to sell dated 25.01.2018 after making requisite due diligence on her own. That the complainant after due inspection of the project site and being aware of the constructing stage of the project voluntarily requested for transfer of the allotment from the original allottee namely Mrs. Indira Tiku onto her own name and become allottee of the subject unit on 04.04.2018.

18. 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.

19. It is respectfully submitted that the relationship between the complainant and the respondent is governed by the document dated 11.04.2018 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 that the complainant became the allottee of the subject unit on 11.04.2018 as such the present complaint is pre-mature and is liable to be dismissed for the said reason alone.
20. It is submitted that the complainant is the subsequent allottee who has parched the subject unit from Mr. Indira Tiku W/o. Subhash

Chander Tiku by way of agreement to sell dated 25.01.2018 and subsequently got transferred the allotment of the subject unit on her name on 11.04.2018. It is pertinent to mention herein that the complainant was very well aware of the construction stage of the project and knowing well the proposed time for possession purchased the subject unit with a speculative intent with sole purpose of investment and monetary gains out of the said investment.

21. 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.

22. 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. As shown in the preceding paras it is clear that the complainant has failed in observing his part of liability of the said clause. Moreover, the complainant became the allottee of the subject unit in on 11.04.2018, hence as on date there is no delay in possession as alleged by the complainant in her complaint.

23. 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.
24. 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.
25. 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.

26. 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.
27. 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 about**

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 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. Copy of press release of Environment Pollution (Prevention and Control) Authority (EPCA) for stopping of construction activity in 2018.

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.

h) Nationwide lockdown due to Outbreak of COVID-19 : In view of the outbreak of COVID-19, the Government of India took various precautionary and preventive steps and issued various advisories, time to time, to curtail the spread of COVID 19 and declared a complete lockdown in India, commencing from 24th March, 2020 midnight thereby imposing several restrictions mainly non-supply of non-essential services during the lockdown period, due to which all the Construction work got badly effected across the country in compliance to the lockdown notification. Additionally, the spread of COVID 19 was even declared a 'Pandemic 'by World Health Organization on March 11, 2020, and COVID-19 got classified as a "Force Majeure" event, considering it a case of natural calamity i.e. circumstances to be beyond the human control, and being a force majeure period.

Further, the Haryana Real Estate Regulatory Authority Gurugram also vide its circular / notification bearing no. No.9/3-2020 HARERA/GGM (Admn), dated 25.05.2020 extended the completion date / revised completion date or extended completion date automatically by 6 months, due to outbreak of corona virus.

28. 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 complainant has invested its

money is an on-going project and is registered under The Real Estate (Regulation and Development) Act, 2016. It is pertinent to note that the respondent has already completed 95% construction of the alleged tower wherein the unit was booked by the complainant. It is further pertinent to mention that the respondent is in process of obtaining occupational certificate for the same and shall handover the possession of units to its respective buyers post grant of occupational certificate from the concerned authority.

29. 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.

30. 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.
31. 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 by 3 years.
32. 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. It is further submitted that the basic grievance of the complainant in her complaint pertains to non-delivery of possession of the subject unit, however the complainant became the allottee of the subject unit on 04.08.2018 as such there is no delay as on date.

33. It was admitted by the complainant that he came in the shoes of the original allottee by way of agreement sale dated 11.04.2018. It is pertinent to mention herein that the complainant before execution of the said agreement was satisfied with the construction status of the project and gave her acceptance to the same. It is further submitted that based on the said agreement to sale the complainant became allottee of the subject unit vide allotment letter dated 04.08.2018
34. That it is pertinent to mention herein that the complainant purchased the subject unit from the original allottee based on the representations and promises given by the original allottee to the complainant with respect to the subject unit. It is further submitted that the respondent allotted the subject unit to the complainant based on her request and basis of the agreement to sell entered into between the complainant and the original allottee, as such any grievance of the complainant for violation of promises and representations is to be initiated against the original allottee and not against the respondent who never gave any assurance or representations.

35. It is submitted that the complainant purchased the subject unit from its original allottee through agreement to sell dated 25.01.2018. That the complainant before execution of the said agreement was satisfied with the construction status of the project and gave her acceptance to the same. It is further submitted that based on the said agreement to sell the complainant became allottee of the subject unit vide allotment letter dated 04.08.2018. It is submitted that any grievance with respect to construction status of the subject unit, the complainant ought to have initiated the same with the original allottee with whom the complainant entered into the agreement to sell for not disclosing the true and correct information in this regard while selling the subject unit.
36. It is submitted that the complainant became the allottee of the subject unit on 04.08.2018 knowing well the construction status of the project, as such no negligence can be attributed upon the respondent as alleged by the complainant.
37. 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. Written Synopsis by the respondent:

38. That written synopsis should be considered in addition to the 'Written reply' already filed earlier by the respondent. It is settled law that a subsequent allottee who has entered the transaction substantially after the original allottee, cannot claim the same rights in relation to delay as the original allottee. The Hon'ble

Supreme Court in the leading case of HUDA v Raje Ram (2008) 27 SCC 407 as well as the recent case of Wg. Cdr. Arifur Rahman Khan & ors v DLF Southern Homes Pvt. Ltd. civil appeal No. 6239 of 2019, has clearly set out the difference between an original allottee and a subsequent allottee in relation to delay. The respondent seeks to rely upon para 38 of the judgment in Wg. Cdr. Arifur Rahman Khan & ors v DLF Southern Homes Pvt. Ltd. (supra), which is extracted hereunder:

"38.....The written submissions which have been filed before this Court indicate that "the two buyers stepped into the shoes of the first buyers" as a result of the assignment of rights and liabilities by the first buyer in favour of the second buyer. In HUDA v. Raje Ram, this Court while holding that a claim of compensation for delayed possession by subsequent transferees is unsustainable, observed that:

Respondents in the three appeals are not the original allottees. They are re-allottees to whom re-allotment was made by the appellant in the years 1994, 1997 and 1996 respectively. They were aware, when the plots were reallocated to them, that there was delay (either in forming the layout itself or delay in delivering the allotted plot on account of encroachment etc). In spite of it, they took re-allotment. Their cases cannot be compared to cases of original allottees who were made to wait for a decade or more for delivery and thus put to mental agony and harassment. They were aware that time for performance was not stipulated as the essence of the contract and the original allottees had accepted the delay."

39. Even if the three appellants who had transferred their interest in the apartments had continued to agitate on the issue of delay of possession, we are not inclined to accept the submission that the subsequent transferees can step into the shoes of the original buyer for the purpose of benefiting from this order. The subsequent transferees in spite of being aware of the delay in delivery of possession the flats, had purchased the interest in the apartments from the original buyers. Further, it cannot be said that the

subsequent transferees suffered any agony and harassment comparable to that of the first buyers, as a result of the delay in the delivery of possession in order to be entitled to compensation."

40. In both the cases of HUDA v Raje Ram (supra) & Wg. Cdr. Arifur Rahman, the subsequent allottees were claiming compensation for delay on basis of transaction entered by the original allottees. The counsel for the complainant sought to distinguish the aforesaid judgments on basis of facts of the said cases. It is humbly submitted that the respondent is seeking to rely upon the principle difference between the rights in relation to delay between the original and the subsequent allottee, which difference is clearly set out in the aforesaid judgments of the Hon'ble Supreme Court. The individual facts are not relevant to the legal principle laid down by the Hon'ble supreme court.
41. It needs to be appreciated that in the present case, the difference in time between the transaction with the original allottee and the subsequent allottee was not an insignificant difference in time considering that the overall time of performance under the agreement with the original allottee was 3 years plus 6 months grace, then the fact that the subsequent allottee entered the transaction almost 7 years after the original allottee is not insignificant but is in fact a material fact. Also, it is relevant that the complainant purchased the unit from the original allottee after due inspection of the project site and being aware of the constructing stage of the project and voluntarily requested for transfer of the

unit on her own name, the difference in rights between the original allottee and subsequent allottee becomes even more apparent.

42. As to the date from which delay should be computed in the case of a subsequent allottee, the respondent seeks to rely upon the most recent judgment of this hon'ble commission, in the case of Capital Greens Flats Buyers Association v DLF Universal Ltd. CC/351/2015, which was passed on 03.01.2020. In case of subsequent purchasers, the period expected for the delivery of possession will be computed from the date of purchase by them. This judgment of this Hon'ble Commission in relation to the aforesaid finding was not interfered with by the Hon'ble Supreme Court in its judgment dated 14.12.2020 in DLF Home Developers Ltd. (Earlier Known as DLF Universal Ltd) &Anr v Capital Greens Flats Buyers Association Civil Appeal Nos 3864-3889 of 2020.
43. Therefore, applying the aforesaid judgment to the present case, the period of 3 years plus 6 months grace would have to be computed from the date of purchase by the subsequent allottee, i.e., from 04.04.2018, and would come to 03.10.2021, as such it is humbly submitted that there is no delay as on date of filing of the complaint. hence, no case of even delay compensation is made out in the present complaint.

F. Jurisdiction of the authority

44. 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.

F. 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.

F. 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.

G. Findings on the objections raised by the respondent:

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

45. 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"

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 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 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 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."*

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 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.

G2. Objection regarding delay due to force majeure

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, lockdown due to covid 19 various orders passed by NGT 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 2011 and its possession was to be offered by 19.08.2014 so the events taking place such as holding of common wealth games, dispute with the contractor, demonetisation, incident weather conditions, lockdown due to covid 19 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 interest of all the stakeholders concerned with the said project be put on hold due to fault of minor or major group of defaulters. 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.

H. 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 complainant.

H.1 Admissibility of delay possession charges

49. In the present complaint, the complainant 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

50. As per clause 21 of the apartment buyer's agreement dated 19.08.2011, the possession of the subject unit was to be handed

over by of 19.08.2014 plus 6 months of grace period i.e 19.02.2015. 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

51. 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 residentials, 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.

52. 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.

53. **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 19.02.2015.
54. **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.

55. 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.
56. 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%.
57. The definition of term 'interest' as defined under section 2(z) 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:

"(z) "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.

58. 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 19.08.2011, 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 19.02.2015

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

i.e 19.02.2015 till handing over of possession as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

I. Directions of the authority:


59. 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 i.e. 19.02.2015 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 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

60. Complaint stands disposed of.

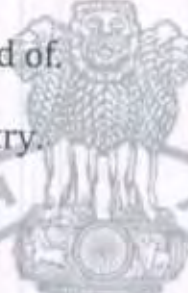
61. File be consigned to registry.



(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:20.07.2021


सत्यमेव जयते


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Judgement uploaded on 18.10.2021.