

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

Complaint no. : 2002 of 2021
First date of hearing : 27.05.2021
Date of decision : 11.08.2021

Shri Rajinder Wadhawan
R/o: - 761, Ruchi Life Scapes,
Jatkheri, Hoshangabad Road,
Bhopal (MP)

Complainant

Versus

M/s Varali Properties Ltd.
Regd. Office: - Indiabulls House 448-451,
Udyog Vihar, Phase-V, Gurugram-122001

Respondent

CORAM:

Shri. Samir Kumar
Shri. Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Shri Deeptanshu Sharma
Shri Rahul Yadav

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 09.04.2021 has been filed by the complainant/allottee 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 as provided under the provision

of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, 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.	Project name and location	"Indiabulls Enigma", Sector-110, Gurugram
2.	Project area	3.256 acres
3.	Nature of the project	Residential Complex
4.	DTCP license no. and validity status	64 of 2012 dated 20.06.2012 valid upto 19.06.2020
5.	Name of licensee	Varali Properties
6.	RERA Registered/ not registered	346 of 2017 dated 08.11.2017
7.	HRERA registration valid up to	31.08.2018
8.	Unit no.	D093, 9 th floor, Tower/Block- D [page no. 40 of reply]
9.	Unit measuring	3400 sq. ft (Super area)
10.	Date of execution of flat buyer agreement	26.03.2014 [page no. 36 of reply]
11.	Total sales consideration	Rs.1,36,13,000/- [as per applicant ledger dated 22.06.2021 page no. 63 of reply]
12.	Total amount paid by the complainant	Rs.1,45,12,271/-

		[as per applicant ledger dated 22.06.2021 page no. 64 of reply]
13.	Due date of delivery of possession as per clause 21- within 2 years with a five-month grace period thereon from the date of execution of the agreement. [page no. 45 of reply]	26.03.2016 [Note: - 5 Month grace period is not allowed]
14.	Offer of possession to the complainant	03.12.2019 [page no. 31 of reply]
15.	Details of Occupation Certificate, if any	Date of OC granted, if any, by the competent Authority: Dated 17.09.2018 Area/Tower for which OC obtained- D [page no. 29&30 of reply]
16.	Delay in handing over possession till 03.02.2020 i.e. date of offer possession (03.12.2019) + 2 months	3 years 10 months and 8 days

B. Facts of the complaint

3. That in the month of December in 2011, the complainant was looking for a residential apartment to accommodate for the growing need of his family. The officials/representatives of the respondent company having knowledge of the same approached and lured him by brochures, catalogues and several representations. Given the representations and warranties of the representatives and also considering the reputation of the Indiabulls, the complainant agreed to book a residential apartment, admeasuring 3400 sq. ft. in the project

being developed by the respondent in the name and style of "Enigma", on land admeasuring 15.6 acres (approx.) in sector 110, Gurugram. Accordingly, subsequent to the application by the complainant vide application dated 20.01.2012, he was allotted unit no. D-093, Tower - D, floor- 9 in the said project vide allotment letter.

4. That the complainant made upfront payment of Rs.5,00,000/- and another payment of Rs.7,20,643/- against the demand raised by the builder as the booking amount towards the booking of the said unit. The said unit was allotted to the complainant at the total sale price of Rs.1,19,00,000/- inclusive of EDC & IDC.
5. That as per the terms and condition of the flat buyer agreement dated 06.06.2012, executed between the parties, and as per clause 21 of the flat buyer agreement, the possession for the said unit was supposed to be delivered within 2 years from the date of execution of the flat buyer agreement. In addition to the said period, the respondent was also eligible for a grace period of 5 months after the said period of 2 years.
6. That the respondent approached the complainant and asked him to again execute another flat buyer agreement with identical and same terms with Athena Infrastructure Limited

a collaboration partner of the former in developing the project. As instructed the complainant, returned a signed copy of the flat buyer agreement executed with Athena Infrastructure Limited. However, till date he has not received a signed copy of flat buyer agreement from person.

7. That the complainant had to seek finances from ICICI bank, to pay the frequent demands raised by the respondent. Though the same is entirely paid off, the complainant had to pay substantial interest on the said loan taken to finance his purchase. The cost of financing was further compounded by the fact that the complainant had to pay for his alternate accommodation due to respondent being unable to deliver possession in time.
8. Thereafter, the complainant continued to pay the remaining instalments as per the payment schedule plan of the buyer's agreement executed with respondent and has made complete payments of the said unit and no dues remained pending on him part. It is pertinent to mention here that the complainant always made the payments as and when demanded even when the progress of the construction on the site was not informed by the respondent. Pertinently, an excess amount of Rs. 1,23,649/- has been paid by the complainant.



9. That since the possession was to be delivered by the respondent within 2 years plus 5 months grace period i.e. by 05.12.2015, the complainant visited the project site in question and was astonished to note that the project was nowhere near completion. The complainant immediately went to the respondent with his grievances. However, the complainant was assured that the respondent shall adequately compensated him for the period of delay in possession at the time of possession and the respondent is making every endeavour to complete the project and offer possession by 2016. Given the delay, the complainant had to make alternate arrangements for accommodation. The complainant has been requesting the respondent for giving possession along with compensation but the respondent, refused to abide the terms of the buyer's agreement and the prevailing law as per Real Estate Regulation and Development Act,2016 and its rules and regulations. Therefore there being a delay of over 5 years and the complainant has been paying rent and has come to the authority for direction to the respondent to handover possession of the unit complete in all respects and interest for every month of delay caused by the builder, at such rate as may be deemed appropriate by the authority.

10. That as per clause no. 21 of the buyer's agreement between the parties, the project was supposed to be completed in 2 years along with an additional grace period of 5 months and possession of the same ought to have been handed over to the complainant, completed in all respects, by 05.12.2015 as 'time was essence' of the said agreement. That in terms of the agreement the respondent company has been charging compound interest @18% per annum even for the slightest of delay at the end of allottee(s) in paying instalment as per the payment plan as a penalty and/or it also has the right to cancel the buyer's agreement and forfeit the earnest money. That if the builder fails to deliver the possession of the unit in question, then as per clause 22, the respondent company is liable to pay only Rs.5/- per sq. ft. of the super built up area to the complainant which is comparatively less than the interest charged if there was delay in paying the instalment as per the payment schedule plan attached with the buyer's agreement.
11. That the complainant having paid an amount of Rs. 1,45,12,271/- has been following up with, for possession of the residential apartment and credit of delay interest as per Real Estate Regulation and Development Act 2016 and rules made thereunder. However, till date the respondent company having received an excess amount of Rs.1,23,649/- and having

offered possession vide offer of possession letter dated 03.12.2019 (received vide email dated 07.12.2019), has not been able to provide possession as well as has not credited the delay interest to the complainant. Ever since then, the complainant been making several requests for handover of possession along with grant of just and equitable grant of interest for delay. However, the respondent is avoiding giving any definitive answer to the same and is forcing the complainant to waive off all his rights to claim compensation.

C. Relief sought by the complainant:

12. The complainant has sought following relief(s):

- (i) Direct the respondent to pay interest on the delay in handing over possession till realization of the same as well as handover the possession in view of the violation of section 18 of the Act.
- (ii) Direct the respondent to handover the possession of the said unit.

13. 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 respondents

14. The respondents contested the complaint on the following grounds. The submissions made therein, in brief are as under
- i. That the instant complaint filed by the complainant is not maintainable, on facts or in law, and is as such liable to be dismissed/rejected at the thresh hold, being filed superfluously impleading the respondents as a party to the present complaint. Hence the instant complaint against the respondent is liable to be dismissed on the same ground.
 - ii. That the allegations made in the instant complaint against the respondent are wrong, incorrect, and baseless in the fact and law. The respondent denies the same in toto. The instant complaint is devoid of any merit and has been preferred with the sole motive to extract monies and defame the reputation of the respondent in the Real Estate sector. Hence the same is liable to be dismissed in limini.
 - iii. That respondent no.1 is not the just and proper party to be impleaded in the present complaint, as on the date of filling of the complaint, no privity of contract exists between both the parties. Hence in the absence of any relationship between the parties, the complainant is not entitled for any claim/relief from the respondent no.1 as contended in the instant complaint, and as such, the respondent no.1 be

deleted from the arrays of parties from the present complaint.

- iv. That a bare perusal of the documents relied upon by the complainant in his complaint will itself reveal that the complainant has entered into an agreement with Varali Properties Limited, which exists and continues as on date and as the respondent is under no obligation to the complainant and should be discharged from the present complaint.
- v. That the instant complaint filed by the complainant is outside the purview of this authority as the complainant looking into the financial viability of the project and its future monetary benefits willingly approached the respondent with a sole purpose of investment and monetary gains out of the said investment. It is submitted that the complainant pursuant to his own market research applied for provisional booking of a unit in the project of the respondent for maximum commercial gains.
- vi. That the complainant post understanding the terms & conditions of the buyer's agreement voluntarily executed a flat buyer agreement with Varali Properties Ltd. That the existing buyer's agreement dated 26.03.2014 executed between the complainants and Varali Properties Ltd., it was

specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional unit booked by the complainants, the same shall be adjudicated through arbitration mechanism as detailed in the agreement. Thus in view of above section 49 of agreement, the dispute, if any, between the parties are firstly arising out of the said duly executed agreement and it was specifically agreed to refer the dispute, if any, qua the agreement to arbitration. Thus, the complainant is contractually and statutorily barred from invoking the jurisdiction of this authority. Moreover, no cause of action ever arose in favour of the complainant and against the respondent. Accordingly, the authority has no Jurisdiction to entertain the present complaint and decide the same. Hence, the present complaint filed by the complainant is liable to be dismissed on the very same ground.

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

05.12.2015 is based on a complete misreading of the agreement.

- viii. That the complainant has not come before this authority with clean hands and wishes to take advantage of his own misdoings with the help of the provisions of the RERA, which have been propagated for the benefit of innocent customers who are end-users and not defaulters, like the complainant in the present complaint.
- ix. That the project i.e., Indiabulls Enigma, which is being developed in an area of around 19.856 acres of land, in which the complainant invested 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 being a customer-oriented Company completed the construction of the tower in which the unit allotted to the complainant is located and the respondent applied for the grant of the occupation certificate on 30.04.2018 before the Director, Town & Country Planning Department, Chandigarh, and the same was granted by the concerned authorities on 17.09.2018 vide memo bearing no. ZP-617/SD(BS)/2018/26771, as such it is pertinent to mention that the subject project was completed on or before 30.04.2018 wherein the application for grant of

occupation certificate was applied by the respondent before the DTCP, Chandigarh.

- x. That Varali Properties Ltd. vides its letter dated 03.12.2019 issued offer of possession whereby offering possession of the subject unit to the complainant and vide the said letter, the complainant was called upon to remit his remaining outstanding dues towards the total sale consideration of the subject unit. However, the complainant has till date failed to take physical possession of the subject unit.
- xi. 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. Due to the above-mentioned reasons, the project of the Respondent was severely

affected, and it is in these above elaborated circumstances, which were beyond its control, the progress and construction activities, sale of various flats and spaces has not taken place as envisaged.

- xii. That the license to develop the project, external development charges 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. The State Government failed to provide the basic amenities due to which the construction progress of the project was badly hit.
- xiii. That the Ministry of Environment and the Ministry of Mines had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of Kiln which is the most basic ingredient in the construction activity. The MoEF restricted the excavation of topsoil for the manufacture of bricks and further directed that no manufacturing of clay bricks or tiles or blocks can be done within a radius of 50 (fifty) Kilo meters 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 material required in the construction of the project also affected the timely schedule of construction of the project.

- xiv. 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 led to a situation of scarcity of the sand and other material derived from the stone crushing activities, which directly affected the construction schedules and activities of the project.
- xv. It is submitted that there was no intentional delay in the construction on the part of the respondent and delay was due to the reasons detailed in the reply which were beyond its control.
- 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. As a result, it became difficult to cope up with the timelines set for the completion of the project. Such a situation was undoubtedly not foreseen which resulted in delay in the construction scheduled of the project.

- due to active implementation of social schemes like National Rural Employment Guarantee Act (“NREGA”) and Jawaharlal Nehru National Urban Renewal Mission (“JNNURM”), 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. A large number of real estate projects, including the project

in question 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. This certainly was never foreseen or even imagined while scheduling their construction activities. Due to paucity of labour and difference in between demand and supply there were many labour disputes resulting into delay of the project.

- 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.

- Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to Demonetization.
- 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 NGT had passed orders governing the entry and exit of vehicles in NCR region. Also the Hon'ble NGT 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.

The 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.

• **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.

- xvi. That the project Indiabulls Enigma, which is being developed in an area of around 19.856 acres of land, in which the complainant has invested his 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 construction of the alleged tower wherein the subject unit

was booked by the complainant. It is further pertinent to mention that the builder has already offered possession of the subject unit to the complainant.

- xvii. That the flat buyer's agreement which has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 26.03.2014 was executed much prior to coming into force of the RERA Act, 2016 and the HARERA Rules, 2017. Further, the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under RERA ACT, 2016 has to be in reference to the flat buyer's agreement for Sale executed in terms of said Act and said rules and no other agreement, whereas the flat buyer agreement being referred to or looked into in these proceedings is an agreement executed much before the commencement of RERA and such agreement as referred herein above. Hence, cannot be relied upon till such time the new agreement to sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainant on the basis of the new agreement to sell as per RERA, Act 2016.
- xviii. That a bare perusal of the complaint will sufficiently elucidate that the complainant has miserably failed to make

a case against the respondent. 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 has failed to substantiate the same. The fact is that the respondent no.1 has no legal obligation towards the complainant as on date of filling of the present complaint, and also the respondent no.2 has been acting in consonance with the agreement executed and no contravention in terms of the same can be projected on the respondent no.2. It is submitted that there is no cause of action in favour of the complainant to institute the present complaint.

15. 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 and submission made by the parties.

E. Jurisdiction of the authority

16. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act 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 jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

17. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/ situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)* which provides as under:

“119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports.”

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

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

19. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself.

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

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

20. The respondent had raised an objection for not invoking 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: -

"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"

21. 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. Therefore, by applying the same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

22. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate

Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

23. 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 paras are 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."

24. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within his right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

F.III Objection raised by the respondent regarding force majeure condition.

25. The obligation to handover possession within a period of twenty-four months was not fulfilled. There is delay on the part of the respondent the actual date to handover the possession in the year 2016 and various reasons given by the respondent is totally null and void as the due date of possession was in the year 2016 and the NGT Order refereed by the respondent pertaining to year 2015-2016-2017-2018

therefore the respondent cannot be allowed to take advantage of the delay on his part by claiming the delay in statutory approvals. The following reasons are given by the respondent:

- (1) delay in payments by many customers (2) dispute with contractor (3) water shortage (4) lack of infrastructural support from state government (5) delay in approval by the state government (6) Inclement weather condition viz Gurugram (7) NGT Order (8) Demonetization.

26. The due date of possession in the present case as per clause 21 is 26.03.2016, therefore any situation or circumstances which could have a reason prior to this date due to which the respondent could not carry out the construction activities in the project are allowing to be taken into consideration. While considering whether the said situation or circumstances was in fact beyond the control of the respondent and hence the respondent is entitled to force majeure circumstances, however all the pleas taken by the respondent to plead the force majeure condition happened after 26.03.2016. the respondent has not given any specific details with regard to delay in payment of installments by many allottee or regarding the dispute with contractor or about the ban an extracting ground water by the High Court in Haryana. Even no date of any such order has been given. Similar is the position with

regard to the alleged lack of infrastructure support by the state government. So far as, NGT order and demonetization of Rs. 500/- and Rs. 1000/- currency notes are concerned these events are stated to have taken place in the year 2015 and 2016 i.e., the post due delivery of possession of the apartment to the complainant.

G. Findings on the relief sought by the complainant

Relief sought by the complainant: Direct the respondent to pay interest on the delay in handing over possession till realization of the same as well as handover the possession in view of the violation of section 18 of the Act.

27. 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

18(1). 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."

28. Article 21 of the flat buyer agreement provides for handing over of possession and is reproduced below: -

"The developer shall endeavor to complete the construction of the said building/unit within a period of two years, with a five-month 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..."

29. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected 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 and all kinds of terms and conditions of this agreement and application, 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 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 buyer developer 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 its 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.

30. While filing written statement on 06.08.2021, specific plea was taken by the respondent, that M/s Athena Infrastructure Limited is also a party to the flat buyer agreement. Since it is not respondent in the present matter so, the complaint against it is not maintainable and the same is liable to be rejected. But this plea is devoid of merit. A perusal of flat buyer agreement dated 26.03.2014 shows that it was entered into between the parties to the disputed unit in question. Secondly the occupation certificate dated 17.09.2018 with regard to the project in which the unit is located was received by M/s Athena Infrastructure private limited and others. Thirdly, after receipt of occupation certificate, the intimation for offer of possession of the allotted unit was issued by the respondent on 03.12.2019. Lastly, though copy of the alleged flat buyer agreement as has been signed by the allottee and M/s Athena Infrastructure private limited. But the same does not have any signature of its alleged execution between the parties to the dispute. So, all these facts prove that, beyond doubt there was a valid and substituting flat buyer agreement of the allotted unit between the parties to the dispute and non-fulfillment of

contractual obligation give cause of action to the allottee to seek the desired relief i.e. delayed possession charges for the period of delayed as per provisions of the act.

31. Admissibility of grace period: As per clause 21 of the flat buyer agreement, the possession of the allotted unit was to be offered within two years from the date of execution of the flat buyer agreement with a grace period of 5 (five) months, subject to timely payment which comes out to be 26.03.2016. As a matter of record, applicant ledger dated 22.06.2021 issued by the promoter/respondent company in favour of complainant/allottee shows that the complainant/allottee has paid more amount than the total sale consideration. According to the payment plan, the allottee/complainant has fulfilled all certain terms and conditions of the agreement. Hence, the respondent/ promoter company fails to provide the possession of the unit within stipulated time. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 5 months cannot be allowed to the promoter at this stage.

32. Payment of delay possession charges at prescribed rate of interest: 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.

33. 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.
34. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the allotment letter for the period of such delay; whereas the promoter was entitled to interest @ 18% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the

allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumer/allottee in the real estate sector. The clauses of the allotment letter entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

35. 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., **11.08.2021** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

36. 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;"

37. 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 them in case of delayed possession charges.

38. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 21 of the flat buyer's agreement executed between the parties on

26.03.2014, possession of the booked unit was to be delivered on or before 26.03.2016. Occupation certificate has been received by the respondent on 17.09.2018 and the possession of the subject unit was offered to the complainants on 03.12.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 26.03.2014 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement dated 26.03.2014 to hand over the possession within the stipulated period.

39. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 17.09.2018. The respondent offered the possession of the unit in question to the complainant only on 03.12.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date

of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 26.03.2016 till the expiry of 2 months from the date of offer of possession (03.12.2019) which comes out to be 03.02.2020.

40. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 26.03.2016 till 2013 till the expiry of 2 months from the date of offer of possession (03.12.2019) which comes out to be 03.02.2020 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Direction of the authority

41. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure

compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 26.03.2016 till 03.02.2020 i.e. expiry of 2 months from the date of offer of possession (03.12.2019). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iii. The rate of interest chargeable from the complainant /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 delay possession charges as per section 2(za) of the Act.
- iv. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is also not entitled to claim

holding charges from the complainant/allottee at any point of time even after being part of apartment buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

42. Complaint stands disposed of.

43. File be consigned to registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.08.2021

Judgement uploaded on 19.10.2021

(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram