BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	**4022 of 2020**
First date of hearing:	**23.12.2020**
Date of decision:	**07.04.2021**

Deepak Singh Sawhnwey
R/o: - I-602, Lagoon Apartments,
Ambience Island, NH8, Gurugram — **Complainant**

Versus

M/s Haamid Real Estate Private Limited
Having Regd. office at:- 232B, Okhla Industrial Estate,
Phase III, New Delhi-110020 — **Respondent**

CORAM:
Dr. K.K Khandelwal — **Chairman**
Shri Vijay Kumar Goyal — **Member**
Shri Samir Kumar — **Member**

APPEARANCE:
Sh. Kuldeep Kumar Kohli (Advocate) — Complainant
Sh. M.K Dang (Advocate) — Respondent

ORDER

1. The present complaint dated 05.11.2020 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:

Sno.	Heads			Information	
1.	Project name and location			"Peaceful Homes", Sector 70A, Gurugram	
2.	Project area			27.7163 acres	
3.	Nature of the project			Group housing colony	
4.	DTCP license no. and validity status			16 of 2009 dated 29.05.2019 renewed up to 28.05.2024	
5.	Name of licensee			Haamid Real Estate Pvt. Ltd.	
6.	RERA registration details				
	S no.	Registration No.	Registration date	Valid up to	Area
	i.	63 of 2019	22.10.2019	31.12.2019	8.38 acres
7.	Unit no.			A274	
8.	Unit measuring			2925 sq. ft.	
9.	Date of execution of flat buyer agreement			01.05.2014	
10.	Payment plan			Construction link	

11.	Total consideration	₹ 2,05,46,534/- (As per SOA dated 05.11.2010 at pg. 69 of complaint)
12.	Total amount paid by the complainant	₹ 1,82,41,533.52/- (As per SOA dated 05.11.2010 at pg. 69 of complaint)
13.	Due date of delivery of possession as per clause 11(a) of the flat buyer agreement 36 months from the date of commencement of construction of the project, which shall mean the date of commencement of the excavation work at the project land and this date shall be duly communicated to the allottee. Further the company shall be entitled to a period of 6 months after expiry of the said commitment period to allow for any contingencies or delays in construction including for obtaining the occupation certificate of the project. [Page 49 of complaint]	10.11.2017 (36 months from date of commencement of excavation work i.e., 10.05.2014 + 6 months) **(Note: Grace period allowed)**
14.	Delay in handing over possession till the offer of possession (05.11.2019) plus 2 months i.e., 05.01.2020	2 years 1 month 26 days
15.	Status of the project	ongoing

16.	Occupation certificate	29.10.2019 (pg. 258 of reply)
17.	Offer of possession	05.11.2019

B. Facts of the complaint

3. The complainant pleaded the complaint on the following facts:

a. That the complainant Mr. Deepak Singh Sawhney is a respectable and law-abiding citizen of this nation, residing at I-602, lagoon apartments, ambience island, behind ambience mall, NH8, Gurugram, Haryana 122002, India.

b. In 2012, the respondent company issued an advertisement announcing a residential group housing colony called "peaceful homes" in a land parcel admeasuring a total area of approximately on the 27.7163 acres of land, under the license no. 16 of 2009, issued by DTCP, Haryana, Chandigarh, situated at Sector 84, Gurugram, Haryana and thereby invited applications from prospective buyers for the purchase of unit in the said project.

c. That the complainant was subjected to unethical trade practice as well as subject of harassment in the name and guise of a biased, arbitrary and one-sided buyer's agreement. The respondent not only failed to adhere to the terms and conditions of builder buyers' agreement dated 01.05.2014 but also illegally extracted money from the complainant by making false promises and statements. The respondent company did not leave any stone unturned to illegally extract money from the petitioner.

d. That on 27.06.2012 the complainant paid Rs. 11,00,000.00 vide cheque no. 025166 drawn on HDFC Bank for booking a unit in the project PEACEFUL HOMES located in sector 70 A, Gurugram and opted for a construction linked payment plan.

e. That on 12.07.2013, the respondent company issued an allotment letter no. GTPH0110 to the complainant confirming the receipt of Rs. 45,42,867.00 till date and allotting a 4BHK bearing unit no. A274 in tower A on 27th floor admeasuring 2925 sq. ft.

f. That the respondent company sent one detailed builder buyers' agreement to the complainant and requested for signing the agreement which was signed on 01.05.2014 and returned to the builder, wherein the sale price of the unit (total consideration) payable by the allottee that is the complainant to the company includes the basic sale price (basic sale price / BSP) of Rs.1,76,28,975, cost towards external development charges (EDC) of Rs. 10,55,925.00 infrastructure development charges (IDC) of Rs. 99,450.00 and PLC of Rs. 13,16,250.00/-.

g. That the complainant having dreams of his own residential flat, signed the agreement on 01.05.2014 in the hope that he shall be delivered the flat within 36 months plus six months grace period i.e., by 10.11.2017as per clause 11 of the agreement page no.15. The complainant was also handed over one detailed payment plan which was construction linked plan. It is unfortunate that the dream of possessing one flat of the complainant was shattered due to the capriciousness, dishonest and diabolical attitude of the respondent.

h. As per the demands raised by the respondent, based on the payment plan, the complainant paid a sum of Rs. 1,82,41,533.00 towards the

said plot against total demand of Rs. 22225817.08 from the respondent from 2012 till 2019.

i. The complainant visited the site and was shocked to see the status of the project as no construction was going on at the site and the status of construction was not at all in consonance with the construction plan based on which the payments were collected.

j. That it is quite clear that the respondent is involved in unethical/unfair practices so as to extract money from the complainant despite the fact that the project has not completed even its first phase and the respondent company capriciously involved in demanding money illegally from the petitioner.

k. The complainant after many requests and emails; received the offer of possession on 05.11.2019. That the respondent being very well aware of the guidelines laid in the Real Estate (Regulation and Development) Act, 2016 and the Haryana Real Estate (Regulation & Development) Rules, 2017, and the interest the complainant is entitled for as well as being aware of more than 200 judgments issued by The Haryana Real Estate Regulatory Authority, Gurugram has not given the complainant the interest that he is eligible for in the intimation of possession letter dated 05.11.2019 and have rather decided the delayed compensation based on the BBA which has been ruled by all the courts in the country as being too low and the term in the agreement being one sided.

l. Hence from the language of the letter it is very clear that no offer of possession has been made in the intimation of possession letter dated 05.11.2019, which is in the nature of a notice informing the complainant that all the steps so mentioned in the letter have to be

completed within a period of 60 days of this letter and further stating that adhering to the timeless is very important.

m. That it is pertinent to note that while under clause 13 (b) of the buyer's agreement, upon delay of payment by the allottee, the respondent can charge 18% simple interest per annum. It is submitted that this clause is totally unjust, arbitrary and amounts to unfair trade practice as held by the Hon'ble NCDRC in the case titled as ***Shri Satish Kumar Pandey & Anr. v/s M.s Unitech Ltd. (14.07.2015)*** as also in the judgment of Hon'ble Supreme Court in ***Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017).***

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:

a. Direct the respondent to pay the balance amount due to the complainant on account of the interest, as per the guidelines laid in the RERA, 2016, before signing the sale deed together with the unambiguous intimation / offer of possession.

b. The respondent shall not charge anything irrelevant which has not been agreed to between the parties.

c. The respondent shall not ask for the advance common area maintenance charges for a period of 12 months.

d. The respondent shall not ask for interest free maintenance security as the maintenance security should be interest bearing.

e. The respondent shall not force the complainant to sign any indemnity cum undertaking, indemnifying the builder from anything legal as a precondition for signing the conveyance deed.

f. Direct the respondent to handover the possession of the unit of the complainant, once it is ready, in all respects and not to force an incomplete unit without proper road, electrification of the roads, functioning of the club etc. and other things which were assured in the brochure, as the complainant had booked a unit in a complex based on the brochure and not a stand-alone flat.

g. Any other relief which this Hon'ble authority deems fit and proper may also be granted in favour of the complainant.

5. On the date of hearing, the authority explained to the respondents/promoters 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

6. The respondent has contested the complaint on the following grounds:

a. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The flat buyer's agreement was executed between the complainant and the respondent prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

b. That the complaint is not maintainable as the matter is referable to arbitration as per The Arbitration and Conciliation Act, 1996 in view of the fact that flat buyer's agreement, contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 57 of the flat buyer's

agreement, and the same is reproduced for the ready reference of this Hon'ble Authority:

> *"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The award of the Sole arbitrator shall be final and binding on the Parties. The company and the allottee will share the fees of the Arbitrator in equal proportion".*

c. That the complainant, after checking the veracity of the project namely, 'The Peaceful Homes', Sector 70A, Gurugram had applied for allotment of an apartment vide the booking application form. The complainant agreed to be bound by the terms and conditions of the documents executed by him.

d. That the respondent vide its allotment offer letter dated 12.07.2013 allotted to the complainant unit no. A274 having tentative super area of 2925 sq. ft. for a total sale consideration of Rs.2,14,34,191 (exclusive of the registration charges, stamp duty, service tax and other charges). It is submitted that the complainant executed the flat buyer's agreement on 16.05.2014. It is pertinent to mention herein that when the complainant had booked the unit with the respondent, the Real Estate (Regulation and Development) Act, 2016 was not in

force and the provisions of the same cannot be enforced retrospectively.

e. That the respondent raised payment demands from the complainant in accordance with the mutually agreed terms and conditions of the flat buyer agreement as well as of the payment plan and the complainant has till date made the part-payment out of the total sale consideration. However, it is pertinent to mention herein that the complainant committed several defaults in making timely payments of the demanded amounts despite being aware and admitting vide Clause 33 of Schedule 1 of the Booking Application Form and Clause 8 of the Flat Buyer's Agreement that timely payment of the installment amount is the essence of the allotment. It is submitted that the respondent had raised the payment demand dated 21.04.2014 for the amount of Rs. 18,37,987/-. However, the demanded amount was paid by the complainant only after reminder dated 12.05.2014 was issued by the respondent.

f. That the respondent has throughout acted strictly as per the terms of the builder buyer's agreement, rules and regulations and the provisions laid down by law. However, there have been several unforeseeable events which were beyond the reasonable control of the respondent which have materially and adversely affected the timely completion of the project. It is submitted that more than 60% of the allottees to the instant project have defaulted in their payments, leading to unrealized amount of more than Rs. 150 crores as on date in the project. Due to defaults on part of the allottees, including the complainant, the respondent was constrained to approach financial institutions to raise funds to complete the

construction of the project. Further, the said financial institutions have their own internal compliances before such funds are disbursed to entities like the respondent which led to further delay in procurement of funds. Moreover, during the course of construction, various disputes in relation to quality and delay in work on the project arose with the civil contractors of the respondent viz. Shri Balaji Buildmate Private Limited. The disputes got further aggravated and the resolution of the disputes took a considerable amount of time (around 6 months). During the said period, Shri Balaji Buildmate Private Limited did not allow any other contractor to carry on with the construction as was contemplated in the builder buyer's agreement, and the project was put to a complete standstill. Finally, after the dispute was settled amicably, a new contractor viz. RSV Builders Private Limited was awarded the work. The new contractor thereafter took further time to mobilize its resources and deploy its personnel and carry forward the work from the previous contractor.

g. Furthermore, there was a major accident at the project site which resulted in the untimely death of two laborers and three laborers were hospitalized. Due to this unforeseen accident, the work at the project site had to be stopped for about a month, since the labour union had started raising various demands etc. after the unfortunate incident. The respondent was accordingly constrained to make payments to the said labourers as compensation towards the aforesaid incidents and arrive at an amicable settlement, all of which further took considerable time and resulted in delay in completion of the project. It is pertinent to mention herein that the

demonetization of currency notes of INR 500 and INR 1000 announced vide executive order dated November 8, 2016 further affected the pace of the development of the project. Due to the said policy change by the central government, the pace of construction of the project was severely affected for a period of approximately six months from November 2016 to April 2017 as the withdrawal of money was restricted by Reserve Bank of India as the availability of new currency was limited and unavailable with the banks. It is well known that the real estate sector deploys maximum number of construction workers who are paid in cash which wasn't readily available with the respondent. The effect of such demonetization was that the labourers were (on some occasions) not paid within the stipulated time which consequently which consequently resulted in a huge labour crisis in Delhi and NCR region. Further there are studies of Reserve Bank of India and independent studies undertaken by scholars of different institutes/universities and also newspaper reports of reuters of the relevant period of 2016-17 on the impact of demonetization on real estate industry and construction labour. The Reserve Bank of India has published reports on impact of demonetization. In the report- macroeconomic impact of demonetization, it has been observed and mentioned by Reserve Bank of India at page no. 10 and 42 of the said report that the construction industry was in negative during Q3 and Q4 of 2016-17 and started showing improvement only in April 2017.

h. That beside the aforesaid reasons, on account of various orders passed by the Hon'ble National Green Tribunal, the construction activities had to come to a complete standstill during a considerable

time period which further affected the timely completion of the said project. It is pertinent to mention herein that various approach roads to the said project which are to be constructed by the relevant civic authorities have not been completely developed which are seriously affecting the timely completion of the project. The respondent cannot be held liable on account of non-performance by the concerned governmental authorities.

i. 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.

j. That the aforesaid circumstances fall within the ambit of the definition of the 'force majeure' conditions as stated in clause 46 of the flat buyer's agreement. The complainant has admitted and acknowledged vide the said clause that the respondent shall not be responsible or liable for not performing any obligation if such performance is prevented, delayed or hindered by any act not within the reasonable control of the respondent. Vide clause 11(b) of the builder buyer's agreement, it was agreed upon that if the possession of the unit is delayed due to force majeure conditions then the respondent would be entitled to extension of time for delivery of the possession of the unit.

k. It is submitted that the respondent applied for the grant of occupation certificate vide application dated 18.03.2019 and the

said fact was intimated to the complainant as well through letter dated 30.07.2019. The occupation certificate was granted by the concerned authorities on 29.10.2019. Copies of the application for occupation certificate dated 18.03.2019, letter dated 30.07.2019.

l. That it is submitted that the complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that his calculations have gone wrong on account of severe slump in the real estate market and the complainant now wants to unnecessarily harass, pressurize and blackmail the respondent by filing such baseless, false and frivolous complaint. Such malafide tactics of the complainant cannot be allowed to succeed.

7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.

E. Jurisdiction of the authority

8. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I. Territorial jurisdiction

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

District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II. Subject matter jurisdiction

10. 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 complainant is in breach of agreement for non-invocation of arbitration

11. 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 clause 57 has been incorporated w.r.t arbitration in the buyer's agreement:

> *"All or any disputes arising out or touching upon or in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The award of the Sole arbitrator shall be final and*

binding on the Parties. The company and the allottee will share the fees of the Arbitrator in equal proportion"

12. 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.

13. 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."

14. 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."

15. 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 her 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.II. Objection raised by the respondent regarding force majeure condition

16. The respondent/promoter raised the contention that the construction of the project was delayed due to several unforeseeable events which were beyond the reasonable control of the respondent which have materially and adversely affected the timely completion of the project and are covered under force majeure conditions such as non-payment of instalment by different allottee of the project, slow pace of construction due to a dispute with the contractor, major accident at the project site

which resulted in the untimely death of two laborers and three laborers were hospitalized, demonetisation, lockdown due to covid-19 various orders passed by NGT and heavy rainfall in Gurugram in 2016.

17. The reasons given by the respondent are supported by the documentary proof of the same. Moreover, the due date of possession was in the year 2017 and any situation or circumstances which could have a reason for not carrying out the construction activities in the project prior to this date due are allowing to be taken into consideration. While considering whether the said situations or circumstances were in fact beyond the control of the respondent and hence the respondent is entitled to force majeure clause 46, the authority takes into consideration all the pleas taken by the respondent to plead the force majeure condition happened before 10.11.2017. However as far as the delay in payment of instalments by many allottees or regarding the dispute with contractor is concerned the respondent has not given any specific details with regard to. With regard to NGT order, demonetization of Rs. 500/- and Rs. 1000/- currency notes and heavy rainfall in Gurugram are concerned these events are stated to have taken place in the year 2015 and 2016 i.e., the prior to due delivery of possession of the apartment to the complainants. Accordingly, authority holds that the respondent is entitled to invoke clause 46 for delay with force majeure condition.

G. Findings on the relief sought by the complainant

G.I. Direct the respondent to pay the balance amount due to the complainant on account of the interest, as per the guidelines laid in the RERA, 2016, before signing the sale deed together with the unambiguous intimation / offer of possession.

18. In the present complaint, the complainant intends to continue with the project and is seeking delayed 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."*

19. Clause 11(a) of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

> ***"11. a) SCHEDULE FOR POSSESSION OF THE UNIT: -***
> *Subject to force majeure, as defined herein and further subject to the allottee not being in default under any part of this agreement including but not limited to the timely payment of the total price and also subject to the allottee having complied with all formalities or documentation as prescribed by the company, the company endeavours to hand over the possession of the unit to the allottee within the period of 36 months from the date of commencement of construction of the project which shall mean the date of commencement of the excavation work at the project land and this date shall be duly communicated to the allottee(commitment period). The allottee further agrees and understands that the company shall additionally be entitled to a period of 6 months (grace period) after the expiry of the said commitment period to allow for any contingencies or delays in construction including for obtaining the occupation certificate of the project from the governmental authorities. The company based on its present plans and estimates and subject to all just exceptions endeavours to hand over the possession of the unit as above unless there shall be delay or failure dur to force majeure conditions including but not limited to the reasons mentioned in clause 11(b), 11(c) and clause 46 or due to failure of the allottee to pay in time the total price and other charges and dues/payments mentioned in this agreement or any failure on the part of the allottee to abide by all or any of the terms and conditions of this agreement."*

20. 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 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 promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoters are 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.

Admissibility of grace period: The promoter has proposed to hand over the possession of the apartment within a period of 36 months plus 6 months from date of commencement of construction which means the date of start of excavation work of the project i.e., 10.05.2014. The period of 36 months expired on 10.05.2017. Since in the present matter the BBA incorporates qualified reason for grace period/extended period of 6 months in the possession clause for obtaining occupation certificate. Whereas the promoter has applied for occupation certificate on 18.03.2019 for the tower of the unit in question and has received the O.C on 29.10.2019. As discussed above, the promoter has given the valid reason for delay to complete the project within the time limit prescribed

by the promoter in the apartment buyer's agreement. Accordingly, this grace period of 6 months shall be allowed to the promoter at this stage.

21. **Admissibility 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."*

22. 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.

23. 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., **07.04.2021** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

24. 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;"*

25. 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.

G.II. The respondent shall not ask for the advance common area maintenance charges for a period of 12 months.

26. The Act mandates under section 11(4)(d), that the developer will be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Section 19(6) of the Act also states that every allottee, who has entered into an agreement for sale, to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale/the builder buyer's agreement and shall pay within stipulated time and appointed place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent and other charges, if any.

27. Maintenance charges essentially encompass all the basic infrastructure and amenities like parks, elevators, emergency exits, fire and safety, parking facilities, common areas, and centrally controlled services like electricity and water among others. Initially, the upkeep of these facilities is the responsibility of the builder who collects the maintenance fee from the residents. Once a resident's association takes shape, this duty falls upon them, and they are allowed to change or introduce new rules for consistently improving maintenance. In the absence of an association or a society, the builder continues to be in charge of maintenance. Usually, maintenance fees are charged on per flat or per square foot basis. Advance maintenance charges on the other hand accounts for the maintenance charges that builder incurs while maintaining the project before the liability gets shifted to association of owners. Builders generally demand advance maintenance charges for 6 months to 2 years in one go on the pretext that regular follow up with owners is not feasible and practical in case of ongoing projects wherein OC has been granted but CC is still pending.

28. The maintenance of the project is essential to enjoy the basic facilities provided in the project by the promoter. Therefore, while providing these essential services, the promoter would be required to maintain sufficient funds with him. In order to meet these expenses, the demand of the promoter raised on the allottee to pay advance maintenance charges for a certain period cannot by any stretch of imagination be said to be unreasonable or unjustified. Thus, the authority is of the view that the respondent is entitled to collect advance maintenance charges as per the builder buyer's agreement executed between the parties. However, the period for which advance maintenance charges (AMC) is

levied should not be arbitrary and unjustified. Generally, AMC is charged by the builders/developer for a period of 6 months to 2 years. The authority is of the view that the said period is required by the developer for making relevant logistics and facilities for the upkeep and maintenance of the project. Since, the developer has already received the OC/part OC and it is only a matter of time that the completion of the project shall be achieved; its ample time for a RWA to be formed for taking up the maintenance of the project and accordingly the AMC is handed over to the RWA.

29. Keeping in view the facts above, the authority deems fit that the respondent is right in demanding advance maintenance charges at the rate prescribed therein at the time of offer of possession in view of the judgements (supra). However, the respondent shall not demand the advance maintenance charges for more than one (1) year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than a year.

G.III. The respondent shall not ask for interest free maintenance security as the maintenance security should be interest bearing

30. Almost for every purchase of units in a real estate project, the consideration amount for units includes:

- Basic sale price
- The amount paid towards parking space, electricity and other
- Infrastructure Development Charges (IDC),
- External Development Charges (EDC) and

- Interest Free Maintenance Security (IFMS) (which is security not consideration)

31. IFMS is a lump sum amount that the home buyer pays to the builder which is reserved/accumulated in a separate account until a residents' association is formed. Following that, the builder is expected to transfer the total amount to the association for maintenance expenditures. The system is useful in case of unprecedented breakdowns in facilities or for planned future developments like park extensions or tightening security. The same is a one-time deposit and is paid once (generally at the time of possession) to the builder by the buyers. The builder collects this amount to ensure availability of funds in case unit holder fails to pay maintenance charges or in case of any unprecedented expenses and keeps this amount in its custody till an association of owners is formed. IFMS needs to be transferred to association of owners (or RWA) once formed.

32. In the opinion of the authority, the promoter may be allowed to collect a reasonable amount from the allottees under the head "IFMS". However, the authority directs and passes an order that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain the account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the promoter for the expenditure he is liable to incur to discharge his liability under section 14 of the Act.

G.IV. The respondent shall not force the complainant to sign any indemnity cum undertaking, indemnifying the builder from anything legal as a precondition for signing the conveyance deed.

33. At times, the allottee is asked to give the affidavit or indemnity-cum-undertaking in question before taking possession. The allottee has waited for long for his cherished dream home and now when it is ready for taking possession, he has either to sign the indemnity-cum-undertaking and take possession or to keep struggling with the promoter if indemnity-cum-undertaking is not signed by him. Such an undertaking/ indemnity bond given by a person thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. No reliance can be placed on any such indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on such indemnity cum undertaking. To fortify this view, the authority place reliance on the NCDRC order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015**, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of sections 23 and 28 of the Indian Contract Act, 1872 and therefore, would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below:

"Indemnity-cum-undertaking
30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee.
Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."

34. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.

35. Therefore, in light of the aforesaid discussion and judgements, the authority is of the view that execution of indemnity-cum-undertaking does not preclude the complainant-allottee from exercising his right to claim delay possession charges as per the provisions of the Act.

36. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, 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 11(a) of the agreement executed between the parties on 01.05.2014, the possession of the subject

apartment was to be delivered within 36 months from the date of commencement of construction. The period of 36 months expired on 10.05.2017. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 10.11.2017. The respondent has offered the possession of the subject apartment on 05.11.2019. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 10.11.2017 till the offer of the possession plus two months i.e., 05.01.2020, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

37. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):

i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 10.11.2017 till the offer of possession plus two months i.e., 05.01.2020.

ii. The arrears of such interest accrued from 10.11.2017 till the offer of possession plus two months i.e., 05.01.2020 shall be paid by the

promoters to the allottee within a period of 90 days from date of this order.

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 promoters 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 respondents shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

vi. The respondent is right in demanding advance maintenance charges at the rates' prescribed in the builder buyer's agreement at the time of offer of possession. However, the respondent shall not demand the advance maintenance charges for more than one year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than a year.

vii. It is held that the promoter may be allowed to collect a reasonable amount from the allottee under the head "IFMS". However, the authority directs that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain that account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details

regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the promoter for the expenditure it is liable to incur to discharge its liability and obligations as per the provisions of section 14 of the Act.

viii. The respondent shall not execute indemnity-cum-undertaking which preclude the complainant-allottee from exercising his right to claim delay possession charges as per the provisions of the Act.

38. Complaint stands disposed of.

39. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

(Dr. K.K Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 07.04.2021