BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**2377 of 2019**
First date of hearing:		**18.09.2019**
Date of decision	**:**	**20.07.2021**

1. Puneet Gupta
2. Babita Gupta

Both RR/o: H no. 37, Inder Enclave, Rohtak Road, New Delhi- 110087

Complainants

Versus

1. Athena Infrastructure Limited

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

2. Indiabulls Real Estate Limited

Regd. office: Indiabulls House 448-451, Udyog Vihar, Phase-V, Gurgaon, Haryana- 110066

Respondents

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

APPEARANCE:
None — Advocate for the complainants
Shri. Rahul Yadav — Advocate for the respondents

ORDER

1. The present complaint dated 12.06.2019 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of

section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

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

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

		ii. **354 of 2017 dated 17.11.2017 valid till 30.09.2018** iii. **353 of 2017 dated 20.11.2017 valid till 31.03.2018** iv. **346 of 2017 dated 08.11.2017 valid till 31.08.2018**
6.	Date of execution of flat buyer's agreement	**01.10.2011** (As per page 25 of the complaint)
7.	Date of endorsement of unit	17.04.2014 (As per page 22 of the complaint)
8.	Unit no.	H-041, 4th floor, Tower/Block H (As on page 29 of the complaint)
9.	Super Area	3880 sq. ft.
10.	Payment plan	Construction linked payment plan (As per page 42 of the complaint)
11.	Total consideration	Rs. 2,22,26,600/- (As per customer ledger dated 15.04.2019 on page 44 of complaint)
12.	Total amount paid by the complainants	Rs. 2,16,27,132/- (As per customer ledger dated 15.04.2019 on page 45 of complaint)
13.	Due date of delivery of possession (*As per clause 21 of the agreement: The Developer shall endeavour to complete the construction of the said building /Unit* ***within a period of three years, with a six months grace period thereon from the date of execution of the Flat Buyers Agreement*** *subject to timely*	01.04.2015 **(Grace period of 6 months is allowed)**

	payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to him or as demanded by the Developer. The Developer on completion of the construction /development shall issue final call notice to the Buyer, who shall within 60 days thereof, remit all dues and take possession of the Unit)	
14.	Offer of possession	31.12.2018
15.	Occupation Certificate	17.09.2018
16.	Delay in delivery of possession till the date of offer of possession (31.12.2018) + 2 months i.e. 28.02.2019	3 years 10 months 27 days

B. Facts of the complaint

3. That Mr. Puneet Gupta (hereinafter, complainants no. 1) along with his wife Mrs. Babita Gupta (thereinafter, complainant no. 2) are Non-Resident Indians (NRIs) for about 10 years (2009-2018). During this period, they were searching for a house in NCR to permanently settle upon their return to India. Finally, after a lot of search, the residential unit built by the respondents was chosen.

4. That the respondent 'Athena Infrastructure Ltd'(hereinafter, respondent no. 1) is the developer and 'Indiabulls Real Estate Limited'(hereinafter, respondent no. 2) is the parent company which has undertaken the project in question and the same is

enlisted as one of the projects of Indiabulls Real Estate limited before the BSE/NSE as well as their website.

5. That the complainants had various other options in the market, however they were enticed by the respondent to book flat in the aforesaid project based on various representations. The complainants came across one Mr. Nitin Sood who had already booked an apartment (no. H041) in the same project and was willing to sell the same. The aforesaid apartment was purchased on construction linked plan and as per the said allotment the possession was agreed to be delivered within 36 months.

6. That the respondent agreed to transfer the ownership of the apartment to the present complainants against a transfer fee of Rs. 3,88,000/- plus taxes which was duly paid. On 17 April 2014, the respondents endorsed the flat buyer agreement in favour of current complainants along with "all rights and liabilities" in relation to aforesaid apartment for a total consideration of Rs. 2,36,46,387/- inclusive of taxes.

7. That in addition to the total consideration, there were other charges which were meant to be paid on actuals - some of the heads were "cost of installation of electricity meter, security deposit, energizing charges".

8. That at the time of endorsement in the name of aforesaid complainants, a sum of Rs 1,94,00,557 has already been paid to the respondents which amounted to almost 90% of total purchase price. The entire superstructure was ready, and the finishing work was about to commence. There was absolutely no indication whatsoever from respondents' side that the project would get so inordinately delayed. That in order to purchase this house, the complainants had to take a loan from ICICI Bank at a high rate of interest. The repayment of this loan and interest thereon put a huge burden on complainants. That so far, the complainants have paid Rs.2,16,27,132 plus Rs 4,35,957 (towards transfer fee).

9. That the respondents are a very large company listed on BSE/NSE and they have to regularly report their performance to their shareholders as well as to stock exchanges and the concerned regularly authorities. The complainants, in order to be 100% sure, also went through such information (publicly available on respondents' own website). That as per their own official claims, the project was due to handover by Aug 2015.

10. That on 10 October 2018, the respondents wrote to the complainants that the occupancy certificate has been received and that they are in process of handing over the dream home with utmost satisfaction. Further on 31st Dec 2018, the respondents

wrote a letter to the complainants claiming that "We are immensely happy to inform that flat is now ready for possession." As certified by the respondents, the entire work was completed, and the complainants could move into the house immediately. Along with the letter.

11. That the complainants were very keen to take the possession of their house and immediately, upon receipt of 'offer of possession' visited the apartment on 19 Jan 2019. The senior officials of the respondents accompanied the complainants for this visit. The complainants was shocked to see the extremely shoddy and poor workmanship of the project. It was truly disappointed by the harried manner in which the possession was being forced upon them. The quality of workmanship was far from acceptable. No one from respondents' side had bothered to do any quality check before offering possession. The complainants highlighted to respondents that there were dozens of broken marble pieces and tiles, not even a single skirting was proper, most of walls weren't straight, the tile joints weren't grouted, the walls weren't plain (too many undulations all over the apartment), the grill finish was very poor, wall POP finish poorly done shafts, shaking windows and doors, missing glass partitions, poorly done exteriors, no landscaping, etc.

12. That in view of such major defects, complainants were in no position to accept the possession and on January 24, 2019, the complainants wrote a detailed email to the Chairman (Mr. Gahlaut), CEO (Mr. Singh) and rest of the team listing each of the defects.

13. That on February 01, 2019, the respondents sought 30 days' time and asked the complainants to visit the apartment after Feb 28, 2019. However, before undertaking the visit, the complainants sought confirmation from respondents if the apartment is ready or not. The respondents sought another 15 days' time to complete the pending work vide mail dated 1.3.2019.

14. That, at the same time, the respondents confirmed that it would inform complainants once the apartment was ready. However, the respondents didn't revert to the complainants who, after waiting for 15 days, again wrote to the respondents about the pending site visit and curing of defects pointed in mail dated. 24.1.2019.

15. That during last 4 months, the complainants have sent many emails to the respondents seeking confirmation about the removal of defects and deficiencies. However, the respondents have always been tight lipped on this subject and has steadfastly refused to confirm the same. When the complainants discussed this over phone, the respondents verbally told him to go and check for himself but refused to write anything formally.

16. That after extracting about Rs 2.20 crore from the complainants, the respondents were still not satisfied and used the clause 6 (ii) of the flat buyer agreement as per which the buyer would pay "cost of installation of electricity meter, security deposit and energizing charges."

> *"Clause 6 is reproduced below for easier understanding:*
>
> *6. Total sale of the unit shall be the basic price plus the following mandatory charges shall be payable as and when demanded by the developer, unless otherwise stated specifically in the agreement. (ii) Costs on installation of electricity meter, security deposit, energizing charges, etc."*

That the clause 6 of the agreement deals with mandatory charges which can be split into two categories:

a. Amount not specified: e.g. stamp duty and other charges payable on registration, change in EDC/IDC, taxes and "cost of installation of electricity meter, security deposit and energizing charges".

b. Amount well defined: e.g. preferential location charges (Rs 300 psf), security deposit (Rs 100 psf), club house charges (Rs 2 lakh).

17. Now, "cost of installation of electricity meter, security deposit and energizing charges" falls under first category where the amounts are not defined (but the larger context is that such charges are payable, on actuals, to the govt authorities and since the exact amounts are not known, it cannot be fixed at the time of agreement.

However, the respondents, made a demand of Rs 4.65 lakh + 18%. taxes (total amount approximately Rs 5.50 lakh) under this 'head'.

18. After multiple follow-ups, personal visits and harassment, finally the respondents shared the break-up of charges under the above-mentioned

19. That the actual legitimate charges are only Rs 8 per sq. ft. (Rs 3 + Rs 5). All others are illegal and fictitious charges (Rs. 112 per sq. ft. towards 'Energizing charges') which are already covered in the "flat buyer. agreement" and cannot be charged again.

20. That this is completely illegal, unprofessional and unethical to raise such a huge demand on the pretext of electricity meters and electricity security deposit. If the amount were so large, the respondents should have estimated this as part of project cost and built this into the calculations upfront. It cannot charge Rs 5.50 lakh on pretexts of aforesaid charges. Therefore, there is illegal demand explained and sought for electricity meter installation, deposit, energizing charges amounting to Rs. 5,50,000/-.

21. That during past one year, the complainants wrote to respondents, at least 4 times, questioning the inordinate delay in possession and the poor quality of work done. That from the conduct of the respondents, it is crystal clear that the respondents and its officials misrepresented the facts at every stage. The conduct of the

respondents has been deceitful since beginning and it doesn't have any other intention but to cheat the complainants.

22. That the complainants have invested their hard-earned money and due to the dishonest intentions and despicable attitude of the respondents, they are experiencing extreme mental, physical and financial stress. That the complainants haven't only parted with their money, they have also lost their sleep, peace and happiness.

23. That the complainants lived in Saudi Arabia (for about 10 years) in tough conditions, sacrificing their personal, family and social life just to fulfil one dream, having a house of their own. It is for this dream that they vested all their savings (and taken a loan too) with the respondents. That the respondents have adopted unfair and deceptive trade practice and has made itself liable to compensate the complainants.

24. The respondents imposed totally biased terms and conditions on the complainants tilting the scale in their favour. The respondents exercised arbitrary power and their high handed and unfair attitude is apparent on face of record, thereby imposing all liabilities on buyers and conveniently relieving themselves from the obligations on their part. The respondents have charged interest @ 18% p.a. on delayed payments, while the complainants have been promised compensation @ Rs. 5/- per sq. ft. per month

for the delay period and that too after expiry of six months grace period. As per settled law, the respondents are liable to compensate the complainants by paying them interest for the period of delay at the rate which respondents charge on delayed payments. The period has to be counted from the date of signing of the application and / or the date of making the booking payment.

C. Relief sought by the complainants:

25. The complainants have sought following relief:

i. Direct the respondent to deliver the possession of the unit no. H041 in its project Enigma as per quality promised and marketed through brochure and flat buyer's agreement.

ii. Direct the respondents to pay interest @ 18% per annum with monthly rests on the amount paid by the complainants w.e.f. 36 months from the date of booking until the date of actual physical possession of the flat.

iii. Direct the respondents to awarded to complainants for delayed possession is @ less than 18% per annum, then direct the respondents also to charge the interest at the same rate for late payments by the complainants so that the parity between the parties is maintained.

iv. Direct the respondents to refrain from charging the exorbitant sum of Rs. 4.65 lakh + 18% taxes (on the false pretext of electricity meter installation, security deposit, etc.) and reduce this amount form the demand letter.

v. Direct the respondents to that 36 months completion period ought to be reckoned from the date of booking and the delay penalty should be paid till 'Date of actual Possession'.

vi. Direct respondent to make a fresh 'offer of possession after completion of pending works.

vii. Direct the respondent to reissue the revised demand letter after adjusting all the above payments which are due from it.

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

D. Reply by the respondent no. 1:

27. That the present complaint is devoid of any merits and has been preferred with the sole motive to harass the respondent and is liable to be dismissed on the ground that the said claim of the complainants is unjustified, misconceived and without any basis as against the respondent.

28. That the complainants looking into the financial viability of the project being developed by the answering respondent and its future monetary benefits approached the original allottee i.e. Mr. Nitin Sood and Mrs. Gurdeep Kaur Sood and purchased the flat in question from the original allottees on 27.04.2014.

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

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

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

It is respectfully submitted that the relationship between the complainants and the respondent is governed by the document dated 01.10.2011 executed between them. It is pertinent to mention herein that the instant complaint of the complainants is further falsifying her claim from the very fact that, the

complainants has filed the instant claim on the alleged delay in delivery of possession of the provisionally booked unit however the complainants with malafide intention have not disclosed, in fact concealed the material fact from the hon'ble authority.

30. That the complainants have not come before this hon'ble 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 complainants in the present complaint.

31. That it is pertinent to mention here that from the very beginning it was in the knowledge of the complainants, that there is a mechanism detailed in the flat buyer's agreement which covers the exigencies of inordinate delay caused in completion and handing over of the booked unit i.e. enumerated in the "clause 22" of duly executed flat buyer's agreement, which is at page 27 of the flat buyer's agreement filed by the complainants along with their complaint. The respondent carves leave of this authority to refer & rely upon the clause 22 of flat buyer's agreement which is being reproduced hereunder:

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

That the complainants being fully aware, having knowledge and are now evading from the truth of its existence and does not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainants are rescinding from the duly executed contract between the parties.

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

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

The reading of the said clause clearly shows that the delivery of the unit / apartment in question was subject to timely payment of the instalments towards the basic sale price. As shown in the preceding paras the complainants have failed in observing his part of liability of the said clause.

33. That the basis of the present complaint is that there is a delay in delivery of possession of the unit in question, and therefore, interest on the deposited amount has been claimed by virtue of the

present complaint. It is further submitted that the flat buyer's agreement itself envisages the scenario of delay and the compensation thereof. Therefore, the contention that the possession was to be delivered within 3 years and 6 months of execution of the flat buyer's agreement is based on a complete misreading of the agreement.

34. That the bare perusal of clause 22 of the agreement would make it evident that in the event of the respondent failing to offer possession within the proposed timelines, then in such a scenario, the respondent would pay a penalty of Rs.5/- per sq. ft. per month as compensation for the period of such delay. The aforesaid prayer is completely contrary to the terms of the inter-se agreement between the parties. The said agreement fully envisages delay and provides for consequences thereof in the form of compensation to the complainants. Under clause 22 of the agreement, the respondent is liable to pay compensation at the rate of Rs.5/- per sq. ft. per month for delay beyond the proposed timeline. The respondent craves leave of this authority to refer & rely upon the clause 22 of flat buyer's agreement, which is being reproduced as:

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

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

35. 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.

36. That as per the license to develop the project, EDCs were paid to the state government and the state government in lieu of the EDCs was supposed to lay the whole infrastructure in the licensed area for providing the basic amenities such as drinking water, sewerage, drainage including storm water line, roads etc. That the state

government terribly failed to provide the basic amenities due to which the construction progress of the project was badly hit.

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

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

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

a) That commonwealth games were organized in Delhi in October 2010. Due to this mega event, construction of several big projects including the construction of commonwealth games village took place in 2009 and onwards in Delhi and NCR region. This led to an extreme shortage of labour in the NCR region as most of the labour force got employed in said projects required for the commonwealth games. Moreover, during the commonwealth games the labour/workers were forced to leave the NCR region for security reasons. This also led to immense shortage of labour force in the NCR region. This drastically affected the availability of labour in the NCR region which had a ripple effect and hampered the development of this complex.

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

mentioned issue of shortage of labour which was hampering the construction projects in the NCR region.

c) Further, due to slow pace of construction, a tremendous pressure was put on the contractors engaged to carry out various activities in the project due to which there was a dispute with the contractors resulting into foreclosure and termination of their contracts and we had to suffer huge losses which resulted in delayed timelines. That despite the best efforts, the ground realities hindered the progress of the project.

40. That it is pertinent to mention that the project of the respondent i.e., Indiabulls Enigma, which is being developed in an area of around 19.856 acres of land, in which the applicants have invested its money is an on-going project and is registered under The Real Estate (Regulation and Development) Act, 2016 and it is pertinent to note that the respondent have already offered the possession of the unit to the complainants on 31.12.2018 and it is now the complainants who are not coming forward to take possession of the flat in question.

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

> *Clause 39: "The Buyer agrees that in case the Developer delays in delivery of the unit to the Buyer due to:-*
>
> ***a.*** *Earthquake. Floods, fire, tidal waves, and/or any act of God, or any other calamity beyond the control of developer.*

b. War, riots, civil commotion, acts of terrorism.
c. Inability to procure or general shortage of energy, labour, equipment, facilities, materials or supplies, failure of transportation, strikes, lock outs, action of labour unions or other causes beyond the control of or unforeseen by the developer.
d. Any legislation, order or rule or regulation made or issued by the Govt or any other Authority or,
e. If any competent authority(ies) refuses, delays, withholds, denies the grant of necessary approvals for the Unit/Building or,
f. If any matters, issues relating to such approvals, permissions, notices, notifications by the competent authority(ies) become subject matter of any litigation before competent court or,
g. Due to any other force majeure or vis majeure conditions,

Then the Developer shall be entitled to proportionate extension of time for completion of the said complex....."

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

42. That Section 4(2)(1)(C) provides only for, the extension of time period stipulated in the flat buyer agreement and does not affect other provisions of the agreements for sale so that the promoter is not visited with penal consequences laid down under Real Estate (Regulation and Development) Act, 2016. It is also submitted that the respondent at the time of registration of the project gave revised date for completion of same and also completed the same before expiry of that period, therefore, under such circumstances the respondent is not liable to be visited with penal consequences as laid down under Real Estate (Regulation and Development) Act, 2016. It is also most humbly submitted that the only liability of

respondent has is under the flat buyer agreement according to which the company is liable to pay a delay penalty at the rate of Rs. 5 per sq. mtr. per month for the period of delay to the complainants.

43. That the flat buyer's agreement has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 01.10.2011 executed much prior to coming into force of the Act of 2016 and the rules of 2017. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under Act of 2016 has to be in reference to the flat buyer's agreement for Sale executed in terms of said Act and said rules and no other agreement, whereas, the FBA being referred to or looked into in this proceedings is an agreement executed much before the commencement of Act of 2016 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.

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

45. That the respondent has made huge investments in obtaining requisite approvals and carrying on the construction and development of 'INDIABULLS ENIGMA' project not limiting to the expenses made on the advertising and marketing of the said project. Such development is being carried on by developer by investing all the monies that it has received from the buyers/ customers and through loans that it has raised from financial institutions. In spite of the fact that the real estate market has gone down badly the respondent has managed to carry on the work with certain delays caused due to various above mentioned reasons and the fact that on an average more than 50% of the buyers of the project have defaulted in making timely payments towards their outstanding dues, resulting into inordinate delay in the construction activities, still the construction of the project "INDIABULLS ENIGMA" has never been stopped or abandoned and has now reached its pinnacle in comparison to other real estate developers/promoters who have started the project around similar time period and have abandoned the project due to such reasons.

46. That a bare perusal of the complaint will sufficiently elucidate that the complainants have miserably failed to make a case against the respondent and has merely alleged about delay on part of the respondent in handing over of possession but have failed to

substantiate the same. The fact is that the respondent, has been acting in consonance with the flat buyer's agreement dated 01.10.2011 executed and no contravention in terms of the same can be projected on the respondent. The complainants have made false and baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in flat buyer's agreement entered between the parties. In view of the same, it is submitted that there is no cause of action in favour of the complainants to institute the present complaint.

47. 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 based on these undisputed documents.

E. Reply by the respondent no. 2:

48. That the instant complaint filed by the complainants are 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 respondent no.2 as a party to the complaint. Hence the instant complaint against the respondent no.2 is liable to be dismissed on the same ground.

49. That there is no privity of contract between the complainants and the respondent no.2 and the complainants have not made any payment in the name and account of respondent no.2 with respect

to his alleged booked unit., hence the contentions taken in the instant complaint by the complainants against the respondent no.2 are false, baseless and without any veracity and with the sole motive to extract monies from the respondent no.2 and defame its reputation in the real estate sector.

50. That the complainants have made false and baseless allegations against the respondent no.2 and further impleaded them as a party in the instant complaint with a mischievous intention to take illicit benefits from the respondent no.2. It is submitted that there is no cause of action in favour of the complainants and against the respondent no.2 to institute the present complaint against respondent no.2 and hence needs to be dismissed.

F. Written Arguments on behalf of complainants

51. That the apartment was booked on Feb 22, 2011. The respondent(s) deliberately delayed signing the agreement by about 8 months to Oct 01, 2011. This was obviously delayed with the mala-fide and fraudulent intent so that the respondent(s) can postpone the date of handing over of possession of the apartment. The entire builder community is blatantly engaging in this malpractice for a long time and its high time that their bluff be called off. This is a great opportunity for this hon'ble court and the complainants requests the court to please declare this practice as

unacceptable and reckon the period of 36 months for apartment completion from the date of apartment booking (and not from the date of agreement signing). The unfair clauses pertaining to this aspect of the agreement may please be declared as null and void.

52. That If the counting of 36 months period for completion of construction is taken from the date of apartment booking, the due date for handing over the project should be Feb 22, 2014. As of now, the project is already delayed by over 6 ½ years. In this regard, the complainants, would like to further place reliance on the judgment of the Hon'ble Supreme Court in ***Kolkata West International City Pvt. Ltd. Vs. Devasis Rudra - II (2019) CPJ 29 SC***, in which the Hon'ble Apex Court has observed as hereunder:

> *"It would be manifestly unreasonable to construe the contract between the parties as requiring the buyer to wait indefinitely for possession. By 2016, nearly seven years had elapsed from the date of the agreement. Even according to the developer, the completion certificate was received on 29 March 2016. This was nearly seven years after the extended date for the handing over of possession prescribed by the agreement. A buyer can be expected to wait for possession for a reasonable period. A period of seven years in beyond what is reasonable".*

The above-mentioned case fits in the present matter and this hon'ble forum may peruse the same accordingly.

53. That the complainants most sincerely request this hon'ble court to examine carefully and pass its judgment on it. For years, the builder community has exploited and looted the gullible flat buyers by giving themselves a grace period of 6 months by taking refuge

under this clause. The respondent(s) are also trying to take unfair and illegal advantage of this clause and the complainants, most humbly, requests this hon'ble court to define the circumstances under which the benefit under this clause can be taken. Following arguments are being extended by the complainants:

A. Clause 21 of the flat buyer agreement talks about this Grace Period. The clause reads as under:

> *"The developer shall endeavour to complete the construction of the said building/unit within a period of three years, with a six months grace period thereon from the date of execution of the Flat Buyer Agreement....."*

Now, the opening statement of this clause is that "The developer shall endeavour to complete the construction...". Therefore, the most fundamental condition for the respondent(s) to take advantage of grace period is that it must sincerely endeavour to complete the construction. The respondent(s), after collecting over 90% of the payments, deliberately stopped the construction of the project. The respondent(s)' intention was not to complete the project but was to extract as much money as possible from the flat-buyers. Once, it extracted its pound of flesh, the respondent(s) deliberately brought the construction speed to grinding halt. Therefore, after committing such a heinous fraud on thousands of flat buyers, the respondent(s) cannot be allowed to make fool of the civil society and the judiciary.

B. The concept of Grace period in Life Insurance Corporation of India (LIC): The complainants would like to draw the attention of this court to the grace period concept used by LIC of India which allows 15/30 days of grace period after the due date of insurance premium payment during which time the insurance premium can be paid without any interest. However, once the grace period lapses, the insurance policy can be revived only if the interest is paid from the payment due date (and not from the grace period end date).

C. The Concept of "Grace Marks" by CBSE (Central Board of Secondary Education):

The complainants would like to through some lights on "Grace Marks". The grace marks are given in cases where a student's score narrowly misses the passing-mark. e.g., if the minimum number of marks required to pass the examination is 33 and the maximum grace marks allowed are 3. If a student has scored 30 marks, CBSE can give him 3 grace marks which will take his score to passing marks and the candidate would be considered as passed. However, if a student has scored only 20 marks and by giving 3 grace marks, he wouldn't pass the examination, CBSE cannot give him any grace marks and he would be declared fail with a score of 20 marks only.

D. Outer limit for availing the benefit of Grace Period: In view of the foregoing, grace period should only be allowed if the respondent(s) have made sincere endeavour to complete the project and has actually handed over the possession within the grace period. It is very clear the concept of grace period being used by the respondent(s) is flawed and has been created by it for its own illegal benefits. If the project gets delayed beyond grace period, the respondent(s) cannot be allowed to take the benefit of grace period and the delay has to be counted from the expiry of 36 months.

The clauses through which the respondent(s) is trying to take unfair advantage of grace period may please be declared as null and void.

54. That the complainants have been charged delay payment penalty @ 18% per annum and Rs 1,97,327 has been paid by the complainants as late payment interest. As against this, the respondent(s) is paying only Rs 5 per sq. ft. which works out to about 1% per annum. This is extremely unfair and complete travesty of justice especially when the delay in handing over the possession is so huge, completely deliberate, done with fraudulent/criminal intention to cheat and when the respondent(s) have earned, illegally, huge amount of money by holding onto this

amount for years. Following arguments are being extended by the complainants:

A. It is humbly requested that the parity between interest charged and the compensation for delayed possession being paid by the respondent(s) be maintained. If the respondent(s) is allowed to charge interest @ 18% per annum for late payments, it should also be asked to pay the interest @ 18% for delayed possession.

B. In case if the interest awarded to complainants for delayed possession is @ less than 18% per annum, then direct the respondent(s) also to charge the interest at the same rate for late payments so that the parity between the parties is maintained. The excess money charged needs to be refunded to the complainants. The complainants would like to take this hon'ble court attention to a judgment passed by the Hon'ble National Consumer Dispute Redressal Commission, New Delhi titled as ***"Amit Soni & Anr. Vs. M/s Umang Realtech Private Limited & Anr", consumer case no. 2524/2017,*** where it was held that:

> *"The next question which arises for consideration is how much interest is to be paid to the Complainants on the principal amount. Logically, if the seller is charging interest from the buyer @ 18% p.a., we should have no hesitation in awarding the same rate."*

This hon'ble court may peruse the same while deciding the penal interest rate against the respondent(s).

55. That the Complainants wishes to put forth an argument in support of the illegal and illicit gains made by the respondent(s) on this project. As per the quarterly update submitted by the respondent(s) to NSE and BSE for period ended Dec 31st 2014, the saleable value of Indiabulls Enigma project was Rs.1134 crore out of which, the units worth Rs.957 crore were already sold by 31st Dec 2014. This implies that the respondent(s) have already collected about Rs 850 crore from the flat-buyers by 31st Dec 2014 (actually this amount would have been collected much before but the complainants don't have access to prior period data; complainants themselves have paid about 90% by March 2014). The respondent(s) by sitting on Rs.850 crore for 5 extra years. Assuming the cost of funding for respondents(s) be 14%, it would have made a profit of approximately Rs.800 crore. This profit is in addition to their normal profit margin. It is humbly requested that the respondent(s) not be allowed to get away lightly after making such huge illicit gains.

56. That the respondent(s) raised arbitrary and illegal demands were raised for electricity meter installation, deposit, energizing charges amounting to Rs. 5,50,000/-. Following arguments are being extended by the complainants:

A. Clearly, the clause 6 of the agreement deals with charges which can be split into two categories such as amounts not specified, e.g. stamp duty and other charges payable on registration, change in EDC/IDC, taxes and "cost of installation of electricity meter, security deposit and energizing charges" and amounts well defined, e.g. preferential location charges (Rs 300 per sq ft), security deposit (Rs 100 per sq ft), club house charges (Rs 2 lakh).

B. The "cost of installation of electricity meter, security deposit and energizing charges, etc falls under first category where the amounts are not defined (but the larger context is that such charges are payable, on actuals, to the govt authorities and since the exact amounts are not known (the government tariff may change e.g. stamp duty, VAT, taxes, EDC/IDC, security deposits, etc), it couldn't have be determined at the time of signing of agreement.

C. Wherever it was possible to estimate the amounts, they have been very clearly specified in the agreement e.g. club charges, preferential location charges, security deposit, etc.

D. However, the respondent(s), made a demand of Rs 4.65 lakh + 18% taxes (total amount approximately Rs 5.50 lakh) under clause 6(ii) whose wordings were deliberately kept vague so that the respondent(s) can misuse it later on. Initially, the respondent(s) weren't willing to share information on the break-up of Rs. 5.50

lakh. After multiple follow-ups, personal visits and harassment, finally the respondent(s) shared the break-up of charges under the above-mentioned head.

E. That the actual legitimate charges are only Rs 8 per sq. ft. (Rs 3+ Rs 5) which covers electricity meter and security deposit. Other demand (Rs. 112 per sq. ft. towards 'Energizing charges') is completely illegal and arbitrary which are already covered in the flat buyer agreement and cannot be charged again. It is completely illegal, unprofessional and unethical to raise such a huge demand on the pretext of "Energising Charges".

F. If the amount were so large, the respondent(s) should have estimated this as part of project cost and built this into the estimates upfront. With all the sophisticated technology available to these respondent(s), they can estimate the cost of such mega-projects up to the last rupee. There is absolutely no justification for the respondent(s) to raise such a huge demand after the project is nearing completion.

G. The complainants would also like to draw the attention of this hon'ble court towards three seemingly innocuous and harmless letters "etc." attached at the end of clause 6(ii) under which the respondent(s) have raised the claim of Rs 5.50 lakh. The word "etc." looks very benign but the implications of "etc." could be disastrous

for gullible flat buyers. The mere insertion of this word "etc" proves the fraudulent intentions of the respondent(s).

This court is requested to kindly quash the entire demand on this account. as null and void. The respondent(s) may please be asked to reduce this amount from its demand letter.

57. That the respondents(s) made an 'offer of possession' dated 03 Dec 2018 which shall be declared as null and void, since possession was offered without completing even the basic work. Upon protest by complainants, the respondent(s) themselves asked for more multiple extensions till March 2019 to complete the pending work and even then, they couldn't finish the pending work. Therefore, this 'offer of possession' has no meaning. Once the defects were admitted by the respondent(s), the complainants sent them several emails to send a fresh Offer of possession' but the respondent(s) didn't bother to reply. The complainants most respectfully submit herein that this hon'ble court may kindly direct respondent(s) to make a fresh 'offer of possession only after completing the unit of the complainants. The offer of possession letter dated 03.12.2018 is issued for the uncompleted and unfinished flat of the complainants and the complainants have fundamental rights to reject the same.

58. That the respondent(s) threatened the complainants of termination of allotment and forfeiture of money paid by complainants: The harassment of complainants didn't end here. In order to inflict more pain on complainants, the respondent(s) vide notice dated June 17, 2020 informed that they would start the proceedings for termination of allotment and threatened the complainants with the forfeiture of money paid by them. The complainants were hugely shocked that after extracting Rs 2.20 crore, delaying the possession by over 6 years, and profiting illegally by holding onto their hard-earned money, the respondent(s) wanted to terminate the allotment. This case is pending before this hon'ble court and sending such termination notice is a serious contempt of this hon'ble court and the complainants(s) requests this court to order this termination notice null and void.

59. That the respondent(s) should be held accountable for the fraudulent statements/promises made in its sales brochure as the sales brochure of this project was nothing, but a bunch of elaborate fraudulent statements and the respondent(s) should be held liable making such fraudulent statements. Due to paucity of time, all of them cannot be listed here but the complainants can place all of them before this hon'ble court should there be a need. Just few of

them would be enough to expose the fraudulent character of respondent(s) e.g.:

A. "We work round the clock to deliver on-time your homes in Indiabulls Enigma are being built advanced technologies that GUARANTEES on-time delivery with the highest standards in quality.

B. This project was marketed by the respondents as the most enigmatic, gorgeous, mesmerising, magical, amazing, picture perfect, mystical, extravagance extraordinary, ultimate, lavish, awe-inspiring, exotic, world class, grandiose set of privileged residences.

C. The marketing brochure, printed on a very expansive artistic paper of A3 size, starts with "Gurgaon has never seen anything so gorgeous". As against its tall claims, the respondent(s) has delivered a project with extremely poor quality of construction and with zero aesthetics. Its high time that respondent(s) are held liable for their fraudulent promises. The respondent(s) must realize that collecting Rs.1134 crore by fraudulently deceiving home-buyers is not a marketing strategy.

D. The court is requested to direct the respondent(s) to pay a sum of Rs 40 lakh for not delivering the promised quality (which was expected to be magnificent, grand, mystical, never seen before

quality, etc, etc) and for mis selling and deliberately engaging into fraudulent and deceitful marketing campaigns.

60. That the complainants are agreeable to deposit the amount due to the respondents with this court. The respondent(s) be directed to handover the possession immediately:

A. The complainants have purchased this apartment so that their only child can use the swimming pool and its sports facilities. They purchased so that their ailing parents can walk in its landscaped lawns and they themselves can use its recreation facilities.

B. Due to the inordinate delays, their child would be leaving his hometown for higher education; the parents are bed-ridden and they may not live to see this apartment. The complainants themselves are entering fifties. The whole purpose of buying this luxury apartment would cease to exist if the possession is further delayed.

C. The court is requested to kindly order the respondent(s) to handover the possession without further delay. In order to get the possession, the complainants are also agreeable to deposit the amount due to the respondent(s), if any, with this hon'ble court.

61. That Athena Infrastructure Limited (Respondent no. 1) is just a dummy front and a wholly owned subsidiary of Indiabulls Real

Estate Limited (Respondent no. 2). The entire project is being executed, marketed, operated and sold by respondent no 2. Therefore, both these respondents be made, jointly and severally liable for the cheating, shortcomings, delay and to pay the compensation.

62. That this case was due to be heard on Feb 19, 2020. The complainants travelled from Mumbai to Gurgaon only for this hearing whereas the lawyer for respondent didn't appear for the hearing. This court took strong exception to the non-appearance of the respondent's lawyer and ordered them to pay the airfare of the complainants. The same hasn't yet been paid. The amount of actual fare is Rs. 5187. The details of these amounts have been sent to the respondent(s) but there is no response so far. This court is requested to kindly intervene and order the respondent(s) to pay the amount without any further delay. The complainants also wish to draw the attention of the court to the fact this non-appearance from respondent's lawyer was deliberate and has further delayed the justice by another 8 months and counting.

63. Considering the above-mentioned facts and circumstances, it is prayed that this this hon'ble court may kindly allow the complaint of complainants and grant the relief prayed for. The complainants

shall be highly obliged for the kind consideration of this hon'ble court.

G. Written Synopsis by the respondent no.1 :

64. That written synopsis should be considered in addition to the 'Written reply' already filed earlier by the respondent. It is settled law that a subsequent allottee who has entered the transaction substantially after the original allottee, cannot claim the same rights in relation to delay as the original allottee. The Hon'ble Supreme Court in the leading case of ***HUDA v Raje Ram (2008) 27 SCC 407*** as well as the recent case of ***Wg. Cdr. Arifur Rahman Khan & Ors v DLF Southern Homes Pvt. Ltd. civil appeal No. 6239 of 2019***, has clearly set out the difference between an original allottee and a subsequent allottee in relation to delay. The respondent seeks to rely upon para 38 of the judgment in ***Wg. Cdr. Arifur Rahman Khan & Ors v DLF Southern Homes Pvt. Ltd. (supra),*** which is extracted hereunder:

> *"38.....The written submissions which have been filed before this Court indicate that "the two buyers stepped into the shoes of the first buyers" as a result of the assignment of rights and liabilities by the first buyer in favour of the second buyer. In HUDA v. Raje Ram, this Court while holding that a claim of compensation for delayed possession by subsequent transferees is unsustainable, observed that:*
>
> *Respondents in the three appeals are not the original allottees. They are re-allottees to whom re-allotment was made by the appellant in the years 1994, 1997 and 1996 respectively. They were aware, when the plots were reallotted to them, that there was delay (either in forming the layout itself or delay in delivering the allotted plot on account of encroachment etc). In spite of it, they took re-allotment. Their cases cannot be compared to cases of original allottees who were made to wait for a decade or more for delivery and thus put to mental agony and harassment. They were aware that time for performance was not*

stipulated as the essence of the contract and the original allottees had accepted the delay."

65. Even if the three appellants who had transferred their interest in the apartments had continued to agitate on the issue of delay of possession, we are not inclined to accept the submission that the subsequent transferees can step into the shoes of the original buyer for the purpose of benefiting from this order. The subsequent transferees in spite of being aware of the delay in delivery of possession the flats, had purchased the interest in the apartments from the original buyers. Further, it cannot be said that the subsequent transferees suffered any agony and harassment comparable to that of the first buyers, as a result of the delay in the delivery of possession in order to be entitled to compensation."

66. In both the cases of ***HUDA v Raje Ram (supra) &Wg. Cdr. Arifur Rahman***, the subsequent allottees were claiming compensation for delay on basis of transaction entered by the original allottees. The counsel for the complainants sought to distinguish the aforesaid judgments on basis of facts of the said cases. It is humbly submitted that the respondent is seeking to rely upon the principal difference between the rights in relation to delay between the original and the subsequent allottee, which difference is clearly set out in the aforesaid judgments of the Hon'ble Supreme Court. The individual facts are not relevant to the legal principle laid down by the Hon'ble Supreme Court.

67. It needs to be appreciated that in the present case, the difference in time between the transaction with the original allottee and the

subsequent allottee was not an insignificant difference in time considering that the overall time of performance under the agreement with the original allottee was 3 years plus 6 months grace, then the fact that the subsequent allottee entered the transaction almost 7 years after the original allottee is not insignificant but is in fact a material fact. Also, it is relevant that the complainants purchased the unit form the original allottee after due inspection of the project site and being aware of the constructing stage of the project and voluntarily requested for transfer of the unit on her own name, the difference in rights between the original allottee and subsequent allottee becomes even more apparent.

68. As to the date from which delay should be computed in the case of a subsequent allottee, the respondent seeks to rely upon the most recent judgment of this Hon'ble Commission, in the case of ***Capital Greens Flats Buyers Association v DLF Universal Ltd. CC/351/2015***, which was passed on 03.01.2020. In case of subsequent purchasers, the period expected for the delivery of possession will be computed from the date of purchase by them. This judgment of this hon'ble commission in relation to the aforesaid finding was not interfered with by the Hon'ble Supreme Court in its judgment dated 14.12.2020 in ***DLF Home Developers Ltd. (Earlier Known as DLF Universal Ltd) & Anr vs Capital Greens Flats Buyers Association Civil Appeal Nos 3864-3889 of 2020.***

69. Therefore, applying the aforesaid judgment to the present case, the period of 3 years plus 6 months grace would have to be computed from the date of purchase by the subsequent allottees, i.e., from 17.04.2014.

H. Jurisdiction of the authority

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

H. I Territorial jurisdiction

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

H. II Subject matter jurisdiction

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

I. Findings on the objections raised by the respondent no. 1:

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

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

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

72. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within

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

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

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

73. 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 Hon'ble Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Hon'ble 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 complainants 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."

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

I.II. Objection regarding delay due to force majeure

75. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as commonwealth games held in Delhi, shortage of labour due to implementation of various social schemes by Government of India, slow pace of construction due to a dispute with the contractor, and non-payment of instalment by different allottee of the project but all the pleas advanced in this regard are devoid of merit. First of all the unit in question was booked in the

year 2011 and its possession was to be offered by 01.04.2015 so the events taking place such as holding of common wealth games, dispute with the contractor, implementation of various schemes by central govt. etc. do not have any impact on the project being developed by the respondent. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of some of the allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

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

76. 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 flat 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."*

77. 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 <u>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</u>. 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."

78. 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.

I.IV Objection regarding handing over possession as per declaration given under section 4(2)(l)(C) of RERA Act

79. The counsel for the respondent no. 1 has stated that the respondent at the time of registration of the project gave revised date for completion of same and also completed the same before expiry of that period, therefore, under such circumstances the respondent is not liable to be visited with penal consequences as laid down under RERA. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.

80. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

> *Section 4: - Application for registration of real estate projects*
>
> *(2)The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —.....*
>
> *(l): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: — .....*
>
> *(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."*

81. The time period for handing over the possession is committed by the builder as per the relevant clause of flat buyer's agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the

possession by the due date as per the apartment buyer agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors***. and has observed 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..."*

J. Findings regarding relief sought by the complainants.

Relief sought by the complainants:

i. Direct the respondent to deliver the possession of the unit no. H041 in its project Enigma as per quality promised and marketed through brochure and flat buyer's agreement.

ii. Direct the respondents to pay interest @ 18% per annum with monthly rests on the amount paid by the complainants w.e.f. 36 months from the date of booking until the date of actual physical possession of the flat.

iii. Direct the respondents to awarded to complainants for delayed possession is @ less than 18% per annum, then direct the respondents also to charge the interest at the same rate for late payments by the complainants so that the parity between the parties is maintained.

iv. Direct the respondents to refrain from charging the exorbitant sum of Rs. 4.65 lakh + 18% taxes (on the false pretext of electricity meter installation, security deposit, etc.) and reduce this amount form the demand letter.

v. Direct the respondent to reissue the revised demand letter after adjusting all the above payments which are due from it.

J.I Admissibility of delay possession charges

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

Section 18: - Return of amount and compensation

If the promoter fails to complete or is unable to give possession of an apartment, plot or building, -

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed

83. As per clause 21 of the flat buyer's agreement dated 01.10.2011, the possession of the subject unit was to be handed over by of 01.04.2015. Clause 21 of the flat buyer's agreement provides for handover of possession and is reproduced below:

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

84. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single

default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

85. The flat buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottees are protected candidly. The flat buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted flat buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision about stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyers/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the

promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

86. **Admissibility of grace period:** The respondent no.1 promoter has proposed to complete the construction of the said building/ unit within a period of 3 years, with six months grace period thereon from the date of execution of the flat buyer's agreement. In the present case, the promoter is seeking 6 months' time as grace period. The said period of 6 months is allowed to the promoter for the exigencies beyond the control of the promoter. Therefore, the due date of possession comes out to be 01.04.2015.

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

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at*

the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:
Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

88. 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.

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

90. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
Explanation. —For the purpose of this clause—
(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.
(ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any*

part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

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

91. On consideration of the circumstances, the evidence and other record and submissions made by the complainants and the respondent and based on the findings of the authority regarding contravention as per provisions of Act, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 21 of the flat buyer's agreement executed between the parties on 01.10.2011, possession of the booked unit was to be delivered within a period of 3 years from the date of execution of the agreement with a grace period of 6 months, which comes out to be 01.04.2015.

92. 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 complainants only on 31.12.2018, so it can be said that the complainants came to know about the occupation certificate only

upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has 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. 01.04.2015 till the expiry of 2 months from the date of offer of possession (31.12.2018) which comes out to be 28.02.2019.

93. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement dated 01.10.2011 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., 01.04.2015 till 28.02.2019, 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.

K. Directions of the authority:

94. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the act of 2016:

i. The respondent shall pay interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 01.04.2015 till the expiry of two months from offer of possession i.e. 28.02.2019 as per section 19(10) of the Act of 2016.

ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order.

iii. The respondent is directed to re-imburse the actual to and fro travelling expenses incurred by the complainants incurred while travelling from Mumbai to Gurgaon.

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

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

vi. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement.

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

95. Complaint stands disposed of.

96. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:20.07.2021