BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1161 of 2020**
Date of filing complaint:	**03.03.2020**
First date of hearing:	**24.03.2020**
Date of decision :	**25.01.2022**

1.	Mr. Sanjeev Kapoor	**Complainants**
2.	Mrs. Asha Kapoor Both R/o: R-664, New Rajinder Nagar, New Delhi	
	Versus	
	M/s Neo Developers Private Limited R/o: 32B, Pusa Road, Delhi-110005	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Anand Dabas (Advocate)	Complainants
Sh. Venket Rao (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees 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 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 the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Neo Square", Sector 109, Gurugram
2.	Project area	2.71 acres
3.	Nature of the project	Commercial project
4.	DTCP license no. and validity status	102 of 2008 dated 15.05.2008 and valid up to 14.05.2022
5.	Name of licensee	Shrimaya Buildcon Pvt. Ltd., Kavita and 3 others
6.	RERA Registered/ not registered	**Registered vide registration no. 109 of 2017 dated 24.08.2017**
	RERA Registration valid up to	**23.08.2021**
7.	Unit no.	420-422,4th floor, Tower A [Annexure 2 at page no.37 of the complaint]
8.	Unit measuring (super area)	3020 sq. ft. [Annexure 2 at page no.37 of the complaint]
9.	Date of allotment letter	N/A
10.	Date of execution of builder buyer agreement	04.02.2013 [Annexure 2 at page no.37 of the complaint]

11.	Date of start of construction of the project	The authority has decided the date of construction as 15.12.2015 which was agreed to be taken as date of start of construction for the same project in other matters. **CR/1329/2019** It was admitted by the respondent in his reply that the construction was started in the month of December 2015 on page 15 of the reply
12.	Construction & Possession clause	5.2 That the company shall complete the construction of the said building/complex within which the said space is located **within 36 months from the date of execution of this agreement or from the start of construction whichever is later** and apply for grant of completion/occupancy certificate. The company on grant of occupancy/completion certificate shall issue final letters to the allottee who shall within 30 days, thereof remit all dues. 5.4 That the allottee hereby also grants an additional period of 6 months after the completion date as grace period to the company after the expiry of aforesaid period. **(emphasis supplied)**
13.	Total sale consideration	Rs.60,36,882/- [As per payment schedule at page no. 47 of the complaint]
14.	Total amount paid by the complainants	Rs.53,73,367/- [As per unit statement dated 28.02.2020 at page 67 of the

		reply]
15.	Payment plan	Construction linked payment plan
16.	Due date of delivery of possession	15.06.2019 [Calculated from the date of start of construction] **Grace period of 6 months is allowed as has been decided in CR no.1329 of 2019**
17.	Offer of possession	Not Offered
18.	Occupation Certificate	Not obtained
19.	Cancellation letter	17.03.2020 [Annexure R8 at page no. 70 of the reply] 14.08.2020 [Annexure R9 at page no. 74 of the reply]
20.	Delay in delivery of possession till the date of decision i.e. 25.01.2022	2 years, 7 months, 10 days

B. Facts of the complaint:

3. That the respondent had executed an agreement for sale dated 01.06.2010 with the complainants Sanjeev Kapoor, his father Mr. B.R. Kapoor and his brother Mr. Pankaj Kapoor. In the said agreement for sale, it was duly recorded that the respondent had already received Rs. 4,70,11,000/- from the all three family members of complainants, including him. As per the said agreement for sale in consideration of sum of Rs. 4,70,11,000/- already paid by the buyer to the respondent in its entirety, the respondent agreed to sell/transfer title and interest in40,000/- sq. ft. super built-up area together with the proportionate indivisible and impartible ownership right in the land underneath. In the said agreement sale consideration was adjusted by the respondent against the advance/unsecured loan of Rs. 4.10 crores paid by Mr.

Sanjeev Kapoor, his father Mr. B.R. Kapoor and his brother Mr. Pankaj Kapoor through a partnership firm M/s Kapoor Sales corporation and Rs. 60.11 lac paid by Mr. B.R. Kapoor.

4. Thereafter, the respondent did not do anything for nearly 2.5 years and keep sitting with the amount collected from the complainants and his family members and after much of persuasion finally executed a builder buyer's agreement dated 04.02.2013. As per the agreement, the complainants booked commercial space for shop/restaurant bearing No. 420-422 on 04th Floor in Tower – A in the said project of the respondent admeasuring approximately super area of approximately 3020 sq. ft. (280.57 sq. meter) and covered area of 1812 sq. ft. (168 sq. meter). It was assured and represented to the complainants by the respondent that it had already taken the required necessary approvals and sanctions from the concerned authorities and departments to develop and complete the proposed project on the time.As per the said agreement the total sale consideration for the said commercial space was agreed as Rs. 60,36,882/- and the respondent had acknowledged the receipt of Rs. 53,57,382/- inclusive of 2 covered car parking's.

5. That in the said builder buyer agreement the respondent has again increased the time for completion of project to be three more years. The same is opposed by the complainants due to the fact that already 2.5 years has already been passed and the complainants wish to increase further time for 3 more years, but the respondent assured the complainants to compensate him for the same. At the time of execution of the said builder buyer

agreement, the respondent misusing its dominant position had coerced and pressurized the complainants to sign the arbitrary, illegal and unilateral terms of the said buyer's agreement and when the complainants had objected to those arbitrary terms and conditions of the said agreement and refused to sign the same, the respondent threatened to forfeit the amount already paid by the complainants as sale consideration in respect of the said shops and also to cancel their booking. The complainants having no other option and to found them-selves helpless and being cheated had under duress and coercion had signed the said shops buyer's agreement.

6. On 01.02.2020 the complainants visited the site of the respondent to see the progress of the project but was completely shocked and surprised to see that respondent has made drastic changes in the layout of the floor in which commercial space for shop/restaurant bearing No. 420-422 was allocated to the complainants. The respondent has completely removed the flooring/Lantern of the 4th floor thereby make double the height of 3rd floor for reasons unknown to the complainants. Later on asking from the sales manager of the project and from other sources it was found out that respondent in lieu of making more profit from the project has revised the building plan of the project thereby converting the 3rd and 4th floor into one and designing some theme restaurants in that place. The respondent has no right to convert the allocated space of the complainants on said floor without the permission of the complainants

7. That as per the clause – 5.2 of the said buyer's agreement dated 04.02.2013, the respondent had agreed and promised to complete the construction of the commercial space and deliver its possession within a period of 36 months with a six (6) months grace period thereon fromthe date of execution of the said buyer's agreement. The relevant portion of clause – 5.2 of the shops buyer's agreement is reproduced herein for the kind perusal of the Hon'ble Authority

> *"The Company shall complete the construction of the said building/complex within which the said space is located within 36 months from the date of execution of this Agreement or from the start of construction, whichever is later."*

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

8. That from the date of booking and till today, the respondent had raised various demands for the payment of on complainants towards the sale consideration of said shops/restaurant space and the complainants have duly paid and satisfied all those demands as per the buyer's agreement without any default or delay on their parts and have also fulfilled otherwise also their part of obligations as agreed in the buyer's agreement. The complainants were and has always been ready and willing to fulfill their part of agreement, if any pending.

9. That the complainants jointly and severally have paid the entire sale consideration to the respondent for the said commercial space as demanded as on day. The respondent has issued a

combined/cumulative ledger statement for three agreement executed with complainants from 01.08.08 to 31.03.14 and as per the saidstatement the complainant have paid a total amount of Rs. 1,79,91,578/-That the respondent has issued receipts from the date of booking inthe name of both the complainants towards the payments made by the complainants to the respondent towards sale consideration for thesaid commercial space.

10. That on the date agreed for the delivery of possession i.e. 03.08.2016 of said commercial space as per date of booking and according to the buyer's agreement, the complainants had approached the respondentand its officers inquiring the status of delivery of possession but none had bothered to provide any satisfactory answer to the complainants about the completion and delivery said shops. The complainants, thereafter kept running from pillar to post asking for the delivery ofthe said space but could not succeed as the construction of the said project was nowhere near to completion and the respondent has still not delivered the completed possession of said shops.

11. That the respondent by committing delay in delivering of the possession of the aforesaid shops has violated the terms and conditions of the buyer's agreement and promises made at the time of booking of said shops. The Respondent has also failed to fulfill the promises and representation made it while selling the said shops to the complainants.

12. That the cause of action accrued in favor of the complainants and against the respondent on 01.06.10 when the agreement for sale was executed and again on 04.02.2013 when the complainants

had booked the said shops and it further arose when respondent failed /neglected to deliver the said shops. The cause of action is continuing and is still subsisting on day-to-day basis, as the respondent has still not paid the interest for the delayed possession to the complainants.

C. Relief sought by the complainants:

13. The complainants have sought following relief(s):

i. Direct the respondent to pay the interest at the rate of 18% p.a. on the total sale consideration amounting to Rs. 53,57,382/- paid by the complainants for the said shops on account of delay in delivering possession from the date of payment till delivery of physical and vacant possession of said shops.

ii. Direct the respondent to handover the possession of commercial space for shop/restaurant bearing No. 420-422 on 04th floor in Tower - A in the said project of the respondent admeasuring approximately super area of approximately 3020 sq. ft. (280.57 sq. meter) and covered area of 1812 sq. ft. (168 sq. meter)

iii. Direct the respondent to restrict the unauthorised construction in the allotted space of the complainants, which was purchased by the complainants against full payment as per builder buyer agreement.

D. Reply by respondent

14. It is further submitted that, the respondent along with the complainants, decided to develop the said project "Neo Square".

That complainants when observed that there will be a critical delay in the development of the Dwarka Expressway, they expressed their desire to dissolve their rights in the respondent, in exchange of area of 40,000 sq. ft. in Tower-C of the project "Neo Square". Thus, leaving the respondent alone midway to develop the project.

15. That, when associated with the respondent, the complainants had invested funds into the project. In lieu of the funds so invested, the complainants requested the respondent to convert these funds as advance payment against booking of units in the project. To this effect, Mr. B.R. Kapoor (father of the complainants) also sent a letter dated 31.05.2010 requesting the respondent to convert the invested amount towards advances.

16. That pursuant to the request of the complainants, the respondent converted the funds into the booking advances and executed an agreement to sale with the complainants and earmarked units in the project against the said advances.

17. Therefore, it is humbly submitted that the complainants cannot fit into the shoes of a regular Allottee, as per section 2 (d) of the Real Estate (Regulation and Development) Act, 2016. The case of the complainants has to be viewed differently as the complainants themselves were the promoters at the initiation of the said project. The complainants were very well aware of the status of the project when they desired for their loans advances to be converted to booking advances. It is pertinent to note that the complainants backed out from the project, with an ulterior motive to extract unjust enrichment from the respondent.

18. That the agreement to sell dated 01.06.2010 and buyer's agreement dated 04.02.2013 were executed between the complainants and the respondent prior to coming into force of the Real Estate (Regulation and Development) Act, 2016. The terms of these agreements were as per the applicable laws at that point of time.

19. That the delay penalty, if any, that can be claimed from the respondent is only as per the terms and conditions of the buyer's agreement dated 04.02.2013. If delay penalty is awarded in addition to the prescribed rate as per the Buyer's Agreement, then the differential amount will be in the nature of "Compensation". It is most humbly submitted that, awarding of compensation is not within the jurisdiction of the Ld. Authority.

20. That in the matter of ***Neel Kamal Realtor Suburban (P) Ltd. Vs. UOI & Ors*** **(SCC Online Bom 9302),** the Hon'ble High Court of Bombay held that the provisions of RERA are prospective in nature and not retrospective. It is further submitted that retrospective application of the provisions of the RERA Act, 2016 is unconstitutional. Therefore, the parties to the agreements should be solely govern by the terms and conditions as laid down in these agreements.

21. That it is further submitted that if a project registered with RERA, it can be held liable only for future deadlines, those it might breach after registration with the Authority. Any default before the registration is beyond the ambit of RERA and beyond the purview of the RERA Act, 2016 and hence beyond the jurisdiction of the Ld. Authority. It is submitted that in this particular case the

obligation of the promoter to complete the project as per RERA registration is 23.08.2021

22. That in terms of the agreement to sale, the booking advances was adjusted towards the basic sale price and EDC/IDC. However, the complainants were still liable to pay stamp duty, registration fee, maintenance charges, service tax, VAT, BOCW cess, other charges including taxes as required by law.

23. At the very outset, the respondent humbly submits that as per the payment plan, attached to the buyer's agreement, 10% of the Basic Sale Price (BSP) was to be paid at the time of application for booking of the said unit, the remaining 90% of BSP + External Development Charges (EDC) + Infrastructure Development Charges (IDC) was to be paid within 45 days of booking or on signing of the agreement. Additionally, as per the payment schedule the complainants were liable to pay, on Notice of Possession- the IFMS, Registration Charges, Stamp duty and other Charges, as applicable. Further, any applicable stamp duty, registration fee, maintenance charges, service tax, BOCW Cess, VAT and other taxes and charges payable under the Buyer's Agreement and/or applicable law of the land, has to be paid as and when demanded.

24. That timely payment of installments and other applicable stamp duty, taxes etc. is the essence of the agreement. Any default in such payments hampers the construction process of the said space. It was clearly agreed by the complainants to make all payments as per the payment plan

25. It is further submitted that, as per the accounts statement, an amount of Rs. 18,16,315/- is still outstanding, including statutory taxes which has not been paid by the complainants till date. While signing the agreement the complainants had agreed in clause 10 of the buyer's agreement to pay all taxes, charges, levies, cess etc. on demand and incase of delay the same shall be paid with interest.

26. That the complainants have been time and again requested to clear all the dues, including the tax amount due on the unit allotted to the complainants. However, over the period, payment has not come through even after repeated reminders. These requests of the respondent is falling on deaf ears all these years and are being blatantly ignored by the complainants and as a result the respondent has not received any payment till date with respect to the outstanding amounts. That a payment request was also sent to the complainants vide payment request letter dated 22.01.2020, requesting the clearance of the dues ASAP. All the requests have been completely ignored by the complainants.

27. That when the outstanding payments did not come in despite of reminders by letters and calls, the Respondent was bound to send a notice dated 17.03.2020 giving a final opportunity to pay the outstanding dues, failing which the respondent will be forced to cancel the allotment.

28. That keeping in mind the covid situation, the respondent afforded the complainants 5 (five) months to clear the outstanding dues after sending the Notice. However, the complainants deliberately ignored the final opportunity and did not clear the outstanding dues. Left with no other option, the respondent exercised its rights

to cancel the allotment as per section 11(5) of the Real Estate (Regulation & Development) Act, 2016.

29. As per section 11(5), the respondent invoked clause 4.5 of the buyer's agreement thereby terminating the buyer's agreement and cancelling the unit allotted to the complainants by sending a letter of cancellation dated 14.08.2020.

30. It is submitted that clause 5.2 of the buyer's agreement provides that the company shall complete the construction of the said building within which the said space is located within 36 months from the date of execution of this agreement or from the start of construction, whichever is later. Further, a grace period of 6 months is also mentioned in the buyer's agreement. It is submitted that the said buyer's agreement was executed on 04.02.2013 and the construction started in the month of December 2015. Accordingly, the due date i.e. 'specified date' for handing over the possession of the unit has not occurred, neither in terms of the buyer's agreement nor in terms of the RERA registration and hence, the complaint should be dismissed.

31. That the Ld. Authority in the matter of ***Ram Avtar Nijhawan vs M/s Neo Developers Pvt. Ltd,*** complaint No. 1328 of 2019 vide order dated 05.09.2019, which pertains to the same project "Neo Square", has held that the construction of the project has started on 15.12.2015 and the due date of possession was 15.06.2019.

32. It is submitted that in this instant project as per the RERA Registration, the date of completion of the project is 23.08.2021. Moreover, due to the on-going Covid-19 situation across the world and the nation, force majure clause has been applied and various

authorities have given extension to promoters for completion of on-going projects. It is also pertinent to note that the Respondent has already applied for the Occupation Certificate on 24.02.2020 for the Project.

33. It is also humbly submitted that the respondent has already received the approval of firefighting scheme vide Memo No. FS/2020/110 dated 20.04.2020

34. That the complainants are trying to shift its onus of failure on the respondent as it is the complainants who failed to comply his part of obligation and miserably failed to pay the instalments in time despite repeated payment reminders being sent by the respondent from time to time.

35. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Written arguments filed by both the parties

36. Both the parties have filed their written arguments. The complainants have submitted the written arguments on 26.07.2021 and the respondent has submitted their written arguments on 23.07.2021 and reiterated their earlier version as contended in the pleadings.

F. Jurisdiction of the authority:

37. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that

it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F. I Territorial jurisdiction

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

F. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

Section 34-Functions of the Authority:

> 34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-

compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

G. Findings on the objections raised by the respondent:

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

38. 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 20: That in case of any dispute/ difference between the parties, including in respect of interpretation of the present agreement, the same shall be referred to arbitration of a sole arbitrator appointed by the chairman of the company. The venue of arbitration shall be New Delhi and the language of arbitration shall be English. The costs of arbitration shall be borne jointly by parties.*

39. 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 Complainant and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

40. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** **decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under

Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act,1986 and Act of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. II. Objection regarding Timely payments:

The respondent has alleged that the complainants having breached the terms and conditions of the agreement and contract by defaulting in making timely payments. Further the above-mentioned contention is supported by the builder buyer agreement executed between both the parties. Clause 4.4 provides that timely payments of the installments and other charges as stated in the payment plan as and when demanded is essence of the agreement.

But The respondent cannot take advantage of this objection of timely payments being himself at wrong firstly by still not obtaining the occupation certificate and offering the possession of the unit despite being delay of 2 years, 7 months, 10 days and the complainants have already paid 90% of the total sale

consideration till date. Therefore, the respondent itself failed to complete its contractual and statutory obligations. Moreover, there is no document on file to support the contentions of the respondent regarding delay in timely payments.

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

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

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is*

given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

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

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

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

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.

H. Findings regarding relief sought by the complainants:

H.1 Direct the respondent to pay the interest at the rate of 18% p.a. on the total sale consideration amounting to Rs.60,36,882/- paid by the complainants for the said shops on account of delay in delivering possession

Admissibility of delay possession charges:

41. In the present complaint, the complainants intend 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*

42. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this

clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning.

43. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

44. 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 apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

45. **Admissibility of grace period:** The respondent promoter has proposed to handover the possession of the unit within 36 months from the date of execution of this agreement or from the start of construction whichever is later. In the present case, the promoter is seeking 6 months' time as grace period. The grace period of 6 months is allowed as has been decided by the authority in CR No.

1329 of 2019. Therefore, the due date of possession comes out to be 15.06.2019.

46. **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.*

47. 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.

48. 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., 25.01.2022 is @ 7.30%. Accordingly, the

prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

49. 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.

50. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5.2 & 5.4 of the buyer's agreement executed between the parties on 04.02.2013. The developer

proposes to hand over the possession of the apartment within 36 months from the date of execution of this agreement or from the start of construction whichever is later with an additional period of 6 months as grace period. The date of start of construction of the project is on 15.12.2015 + six months of grace period is allowed so the possession of the booked unit was to be delivered on or before 15.06.2019. The respondent has been applied for the occupation certificate on 24.02.2020 and same has not been received yet from the competent authority. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 04.02.2013 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement dated 04.02.2013 to hand over the possession within the stipulated period.

51. 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 respondent has been applied for the occupation certificate on 24.02.2020 and same has not been received yet from the competent authority 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 + six months of grace period is allowed i.e. 15.06.2019 till actual handing over of possession or offer of possession plus 2 months whichever is earlier.

Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 15.06.2019 till actual handing over of possession or offer of possession plus 2 months whichever is earlier as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act of 2016.

H.2 Direct the respondent to handover the possession of commercial space for shop/restaurant bearing no. 420-422 on 4th floor in tower A in the said project of the respondent admeasuring approximately super area of approximately 3020 sq. ft.

The respondent has applied for OC of the above-mentioned project on 24.02.2020. So, in such a situation no direction can be given to the respondent to handover the possession of the subject unit, as the possession cannot be offered till the occupation certificate for the subject unit has been obtained.

H.3 Restrict the unauthorised construction in the allotted space of the complainants which was purchased by the complainants against full payment as per builder buyer agreement.

The complainants have alleged in his complaint that the complainants have visited the site on 01.02.2020 to see the progress of the project but the respondent has made drastic changes in the layout of the floor. The respondent has completely removed the flooring/ lantern of the 4th floor thereby make double the height of 3rd floor for unknown reasons Further the complainants have submitted that the respondent in view of making more profit from the project, it has revised the building plans thereby converting 3rd and 4th floor into one and designing some theme restaurants in that place. The photographs of changes in lantern/flooring by the respondent is also annexed. The respondent has denied the changes in its reply and submitted that the unit allocated is as per BBA. The respondent is directed to comply with the provisions of section 14(2) of the Act of 2016 in case there is a revision, addition/alteration in the building plan.

Observations on Cancellation of the unit:

52. The complainants were allotted unit no 420-422 on 4th floor in tower A in the project "Neo Square" by the respondent builder for a total consideration of Rs. 60,36,882/ - under the payment schedule given on page 47 of the complaint. After that BBA was executed on 04.02.2013, the respondent builder continued to receive the payments against the allotted unit. It has brought on record that the complainants had deposited several amounts against the allotted unit and paid a sum of Rs. 53,73,367/- as per unit statement dated 28.02.2020 at page 67 of the reply. It is to be noted that no demands were raised against /for instalments due towards consideration of allotted unit rather the demands vide letters dated 22.01.2020 were raised in respect of outstanding

VAT payments and this led to cancellation of his unit vide letter dated 17.03.2020 and 14.08.2020.

There is nothing on record to show that after cancellation of the allotted unit vide letter dated 17.03.2020 and 14.08.2020 the respondent builder returned the remaining paid up amount to the complainants after deducting 10% of total price of the said unit as per clause 4.5 of the buyer's agreement dated 04.02.2013. So, on this ground alone, the cancellation of allotted unit is liable to be set aside. Even otherwise the cancellation of the allotted unit by the respondent builder is not as per the provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram providing deduction of 10% of total sale consideration as earnest money and sending the remaining amount to the allottee immediately. But that was also not done. So, on this ground also cancellation of allottee unit is not valid in the eyes of law. The complainants have paid 90% payment of the unit and the unit is still not complete. The cancellation letter as per annexures R8 and R9 are of 17.03.2020 and 14.08.2020 whereas the complaint was filed on 03.03.2020. On the date of cancellation of the units, the project is still incomplete and even today there is no OC. It seems that on getting aggrieved by the complaint filed by the allottee, the promoter has cancelled the unit although no substantial amount is due towards allottee and even if it is due, the allottee will not make the payment as project is already delayed. Hon'ble Supreme Court has also observed in many cases that in case of delay in projects, the allottee cannot be forced to make payments when he is not sure about the possession. The project being delayed the allottee is entitled for delayed

possession charges and whatever dues have been shown by the promoter is not the correct depictions of dues as no adjustment of delayed possession charges have been made. The cancellation is also not as per BBA and same is set aside exercising powers under section 11 (5) of the Act, 2016.

53. The complainants have placed Facebook screenshots from the page of neo developers pvt. Ltd. for the date of start of construction such as 29.10.2012,30.01.2013 and 23.04.2013 but whether any authenticity for the same can be given for commencement of construction. The answer is in negative. While taking up complaint no. 1329/2019 which was decided on 05.09.2019 the authority took a view in this project that the date of construction would be 15.12.2015 on the basis of evidence adduced on the file to prove the start of construction so no different view can be taken than the taken earlier to fix the date of start of construction of the project i.e. 15.12.2015

I. Directions of the authority:

54. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act of 2016 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 is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession + six months of grace period is allowed i.e. 15.06.2019 till actual handing over of possession or

offer of possession plus 2 months whichever is earlier. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

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

iii. The rate of interest chargeable from the complainants/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 delay possession charges as per section 2(za) of the Act.

iv. The respondent is directed to comply with the provisions of section 14(2) of the Act of 2016 in case there is a revision, addition/alteration in the building plan.

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

55. Complaint stands disposed of.

56. File be consigned to registry.

HARERA
GURUGRAM

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.01.2022