

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

Complaint no. : 2038 of 2021  
First date of hearing: 20.07.2021  
Date of decision : 10.02.2022

Arjit Gupta  
R/o: A-1105, Imperial Heights Best Colony Goregaon  
West Mumbai Maharashtra

**Complainant**

Versus

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

**Respondent**

**CORAM:**

Dr. KK Khandelwal  
Shri Vijay Kumar Goyal

**Chairman  
Member**

**APPEARANCE:**

Shri Sukhbir Yadav  
Shri Rahul Yadav

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. The present complaint dated 20.04.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities

and functions to the allottee as per the agreement for sale executed inter-se them.

**A. Unit and Project related details:**

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

S. No.	Heads	Information
1.	Name and location of the project	"Indiabulls Enigma", Sector 110, Gurugram
2.	Nature of the project	Residential complex
3.	Project area	15.6 acres
4.	DTCP License	213 of 2007 dated 05.09.2007 valid till 04.09.2024 10 of 2011 dated 29.01.2011 valid till 28.01.2023
	Name of the licensee	M/s Athena Infrastructure Private Limited
		64 of 2012 dated 20.06.2012 valid till 19.06.2023
	Name of the licensee	Varali properties
5.	HRERA registered/ not registered	<b>Registered vide no.</b> 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	<b>26.06.2014</b> (As per page no. 74 of the complaint)

7.	Unit no.	B-192 on 19th floor, tower B (As per page no. 78 of the complaint)	
8.	Super Area	3400 sq. ft. (As per page no. 78 of the complaint)	
9.	Payment plan	Subvention payment plan	
10.	Date of tri-partite agreement	26.12.2012 (As per page no. 64 of complaint)	
11.	Total consideration	Rs.2,47,08,757/- (As per applicant statement of account dated 02.04.2021 on page no.112 of the complaint)	
12.	Total amount paid towards consideration of allotted unit	Rs. 2,48,74,882/- (As per applicant statement of account dated 02.04.2021 on page no.112 of the complaint)	
		Details of amount taken under subvention scheme and paid by the complainant.	
		Amount taken from IHFL under subvention scheme	Rs. 2,20,00,000/-
		Amount paid by the complainant from its own sourced	Rs. 42,79,557/-
13.	Due date of delivery of possession <i>(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 payment by the Buyer(s) of Total Sale</i>	26.12.2017 (Calculated from the date of the agreement i.e.; 26.06.2014 + grace period of 6 months)  (Grace period of 6 months is allowed)	

	<i>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)</i>	
14.	Occupation Certificate	Not obtained (Applied for vide application dated 19.04.2021)
15.	Offer of possession	Not offered
16.	Delay in delivery of possession till the date of order i.e., 10.02.2022.	4 years 1 months 15 days

### B. Facts of the complaint

3. That the complainant received a marketing call from an authorized agent of the respondent for booking in a residential project "Enigma" situated at sector - 110, Gurugram. The complainant visited the office of the respondent and consulted with the marketing staff/ office bearers of the respondent. The marketing staff showed a rosy picture of the project through glitzy advertisements and colourful brochures, proposing to develop and construct an integrated residential project with features like entranced paved area, water features, parking, swimming pool, lawn, courtyard, children's play area, etc. at the prime location. The respondent claimed that the same to be an oasis of convenience, space and luxury and a perfect example of modern-day residential complexes.
4. That the marketing staff of the respondent through a brochure represented, projected, and assured that the project shall have "Enigma has been

conceived as an extremely tasteful and grandiose set of privileged residences. Elegantly spread across fresh open spaces. Fantastically adorned with acres and acres of Landscaped Greens". It was also assured to the complainant that possession of flat would be handover within 3 years from the booking.

5. That the complainant relied on the representations & assurances of the respondent and booked a flat bearing No. B - 192, on 19<sup>th</sup> floor in tower B admeasuring 3400 sq. ft. in the project "Enigma" marketed and developed by the respondent under subvention plan till possession for a total sale consideration of Rs. 2,56,71,000. According to clause 21 of the said application form, the respondent was to give possession of the said flat within 3 years from the date of execution of the apartment buyer agreement. It is pertinent to mention that the flat buyer's agreement (hereinafter, "FBA") was executed after a long follow-up on 26.06.2014, therefore the due date of possession was 26.06.2017.
6. That on 15.12.2012, the respondent issued a provisional allotment letter conforming the allotment of unit No. B - 192 on 19<sup>th</sup> floor in tower-B for size admeasuring 3400 sq. ft. The flat was booked for a total sale consideration of Rs. 2,56,71,000/-.
7. That the complainant availed a housing loan of Rs. 2,20,00,000/- from Indiabulls Housing Finance Limited against the said unit with the permission of the respondent till the date of issuance of offer of possession by the builder and signed the tripartite agreement (hereinafter, "TPA"). As per

clause No. 3 of TPA, the builder has to pay the Pre-EMI till the date of issuance of the offer for possession.

8. That on 26.06.2014, after a long follow-up a pre-printed, unilateral, arbitrary flat buyer agreement/buyer's agreement was executed inter-se parties. According to clause 21 of the BBA, the respondent has to give possession of the said flat within 3 years from the date of execution of the apartment buyer agreement. It is germane to mention here that the FBA was executed on 26.06.2014, therefore the due date of possession was 26.06.2017.
9. That the respondent sent an email on 17.11.2015 regarding the VAT amount payable and asked the complainant to pay VAT @ 2.75% of Rs. 6,61,650/-. That on 30.11.2015, the complainant sent an email to the respondent and alleged the VAT rate and discrepancies regarding the applicable VAT charges. However, on 12.08.2016, the respondent sent another email to the complainant and sent updates regarding the construction of the unit and stated, "The possession of your tower is tentatively scheduled in the second half of 2017".
10. That on 01.04.2019, the complainant sent an email to the respondent to ask the construction status of the project and stated "I would request you to kindly update me on the status of the project particularly in tower B in which I am the owner of Unit - B192. The Builder Buyer Agreement was executed on 26 June 2014 in my case. The 03 years +6 months grace period was over on 25 Dec 2017. Kindly note the delay in compensation will be applicable and will have to be adjusted. You are already in possession of extra amount

of money INR 1,66,125/- which will be charged at an interest rate of 18% just like any amount that the buyer would have been charged as per the BBA. Expecting a Prompt response". Thereafter, the complainant sent many reminder emails regarding the construction status of the project and when it will get delivered, but there was no satisfactory reply from the respondent.

11. That as per the statement of account issued by the respondent, the complainant has paid an amount of Rs. 2,48,74,882/- which is 96% of the total sale consideration. It is pertinent to mention here that out of the total paid amount, the complainant has paid an amount of Rs. 42,79,557/- from his own sources and the rest amount was financed by the Indiabulls Housing Finance Company Limited.
12. That since 2017, the complainant is regularly contacting telephonically & through emails' to the respondent and making efforts to get possession of the allotted flat but all in vain. Despite several requests by the complainant, the respondent did not give possession of the flat/apartment. The complainant was never able to understand/know the actual state of construction. Though the towers seem to be built up, but there was no progress on finishing and landscaping work and amenities for a long time.
13. That the main grievance of the complainant is that despite having paid more than 96% of the actual cost of flat and ready and willing to pay the justified remaining amount, the respondent has failed to deliver the possession of flat on promised time and till date project is without amenities.

14. That the complainant has purchased the flat with an intention that after purchase, he would be able to stay in a better environment. Moreover, it was promised by the respondent at the time of receiving payment for the flat that the possession of a fully constructed flat and developed project would be handed over to the him within 3 years from the date of execution of FBA i.e. on 26.06.2017.
15. That the facts and circumstances as enumerated above would lead to the only conclusion that there is a deficiency of service on the part of the respondent party and as such, he is liable to be punished and compensate the complainant.
16. That due to the acts of the above and the terms and conditions of the flat buyer agreement, the complainant has been unnecessarily harassed mentally as well as financially, therefore the opposite party is liable to compensate the complainant on account of the aforesaid act of unfair trade practice. There are clear unfair trade practice and breach of contract and deficiency in the services of the respondent party and much more a smell of playing fraud with the complainant and other.

**C. Relief sought by the complainant:**

17. The complainant has sought following relief:
- i. Direct the respondent to handover the fully developer/ constructed flat/ apartment with all the amenities after obtaining occupation certificate.



- ii. Direct the respondent to provide interest at the prescribed from the due date of possession till actual date of possession, complete in all aspects on its own contribution.
  - iii. Direct the respondent to keep paying the pre-EMI on home loan till possession of the flat.
18. 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:**

19. That the present complaint is devoid of any merit 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 complainant is unjustified, misconceived and without any basis as against the respondent.
20. That the present complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The alleged flat buyer's agreement dated 26.06.2014 executed between the parties was prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act, as such same cannot be applied retrospectively.
21. That the complainant looking into the financial viability of the project and its future monetary benefits willingly applied for provisional booking of a residential unit in the project of the respondent. The complainant after due inspection of the project site voluntarily signed/executed a flat buyers agreement dated 26.06.2014 for the subject unit.

22. 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. 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 clause 49 of flat buyer's agreement, it is humbly submitted that, the dispute, if any, between the parties are to be referred to arbitration.

23. That the complainant has not come before this authority with clean hands and wishes to take advantage of his own misdoings with the help of the provisions of the RERA, which have been propagated for the benefit of innocent customers who are end-users and not defaulters, like the complainant in the present complaint.
24. That the complainant from the very beginning was aware, about 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 complainant even though he conveniently relies on same. 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.

25. That it is pertinent to mention here that from the very beginning, it was in the knowledge of the complainant, 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, filed by the complainant 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 complainant being fully aware, having knowledge and is 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 complainant is rescinding from the duly executed contract between the parties.

26. 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, it 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 complainant. Under clause 22 of the agreement, the respondent is liable to pay compensation at the rate of Rs.5/- per sq. ft. per month for delay beyond the proposed timeline.

27. That the complainant at the time of provisional booking of his unit opted for payment plan under subvention scheme till possession, and as such a tripartite agreement dated 26.12.2012 was executed between the complainant, the respondent and the financier. That as per the terms of the tripartite agreement till possession of the unit in question, the liability of payment of interest element on the loan availed by the complainant would be assumed by the respondent. As such, till possession, the respondent is compelled to bear the burden of interest on the loan sanctioned to the complainant against the subject unit, and the respondent has already paid an amount of Rs. 1,90,92,222/- and the same continues till possession is offered to the Complainant.
28. That the basis of the present complaint is that there is a delay in delivery of possession of the unit in question, and therefore, interest on the deposited amount has been claimed by virtue of the complaint. It is further submitted that the flat buyer's agreement itself envisages the scenario of delay and the compensation thereof. Therefore, the contention that the possession was to

be delivered within 3 years and 6 months of execution of the flat buyer's agreement is based on a complete misreading of the agreement.

29. That the project of the respondent i.e., Indiabulls Enigma, which is being developed in an area of around 19.856 acres of land, in which the complainant invested the money is an on-going project and is registered under The Real Estate (Regulation and Development) Act, 2016. It is pertinent to note that the respondent being a customer-oriented company completed the construction of the tower in which the unit allotted to the complainant is located. The respondent applied for the grant of the occupation certificate on 19.04.2021 before the Director, Town & Country Planning Department, Chandigarh, and would offer possession of the unit booked.
30. 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 in 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.
31. 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. The state government miserably failed to provide the basic amenities due to which the construction progress of the project was badly hit.

32. 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 could 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 material required in the construction of the project also affected the timely schedule of construction of the project.
33. 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 and which directly affected the construction schedules and activities of the project.
34. 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 was 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. A large numbers of real estate projects, including the subject 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 had to suffer huge losses which resulted in delayed timelines. That despite the best efforts, the ground realities hindered the progress of the project. Inability to undertake the

**construction for approx. 7-8 months due to Central Government's**

**Notification about Demonetization:** The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f. from 9-10 November 2016 the day when the central government issued notification about demonetization. During this period, the contractor could not make payment in cash to the labour. During demonetization, the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on the site of magnitude of the project in question is Rs. 3-4 lakhs approx. per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence the implementation of the project in question got delayed on account of the issues faced by contractor due to the said notification of central government. That the said event of demonetization was beyond the control of the respondent company. Hence the time period for offer of possession should deemed to be extended for 6 months on account of the above.

**d) Orders passed by National Green Tribunal:** In last four successive years i.e. 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. Also, the hon'ble NGT has passed orders with regard to phasing out the 10-year-old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The contractor of respondent could not undertake construction for 3-4 months in compliance of the orders of hon'ble National Green Tribunal. Due to this, there was a



delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November- December 2016 and November- December 2017. The district administration issued the requisite directions in this regard.

In view of the above, construction work remained very badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondent and the said period would also require to be added for calculating the delivery date of possession if any.

e) **Non-payment of instalments by allottees:** Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.

f) **Inclement weather conditions viz. Gurugram:** Due to heavy rainfall in Gurugram in the year 2016 and unfavourable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions.

g) **Nationwide lockdown due to outbreak of COVID-19:** In view of the outbreak of COVID-19, the Government of India took various precautionary and preventive steps and issued various advisories, time to time, to curtail the spread of COVID 19 and declared a complete lockdown in India, commencing from 24th March, 2020 midnight thereby imposing several restrictions mainly non-supply of non-essential services during the lockdown period, due to which all the Construction work got badly effected

across the country in compliance to the lockdown notification. Additionally, the spread of COVID 19 was even declared a 'Pandemic' by World Health Organization on March 11, 2020, and COVID-19 got classified as a "Force Majeure" event, considering it a case of natural calamity i.e. circumstances to be beyond the human control, and being a force majeure period. Further, the Haryana Real Estate Regulatory Authority Gurugram also vide its circular / notification bearing no. No.9/3-2020 HARERA/GGM (Admn), dated 25.05.2020 extended the completion date / revised completion date or extended completion date automatically by 6 months, due to outbreak of corona virus.

35. That the project Indiabulls Enigma, is being developed in an area of around 19.856 acres of land, in which the complainant has invested his money in an on-going project and is registered under The Real Estate (Regulation and Development) Act, 2016. It is pertinent to note that the respondent has already completed construction of the subject tower wherein the unit was booked by the complainant. It is further pertinent to mention that the respondent has already offered possession of the subject unit to the Complainant.
36. 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.

37. 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 26.06.2014 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 flat buyer's agreement being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA and such agreement as referred herein above, cannot be relied upon till such time the new agreement to sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainant.

38. 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. Jurisdiction of the authority**

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

#### **E. 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.

#### **E. II Subject matter jurisdiction**

40. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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;*

*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.*

41. So, in view of the provisions of the Act of 2016 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 complainant at a later stage.

**F. Findings on the objections raised by the respondent:**

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

42. The respondent has raised an objection that the complainant has not invoked arbitration proceedings as per the provisions of flat buyer's agreement which contains provision 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 ....."*

43. The respondent contended that as per the terms & conditions of the buyer's agreement duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the booked unit by

the complainant, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority based on catena of judgments of the Hon'ble Supreme Court and particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, observes 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 agreement between the complainant 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."*

44. 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."*

45. 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 the right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act 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.

**F.II. Objection regarding delay due to force majeure**

46. 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, demonetisation, lockdown due to covid-19 various orders passed by NGT and weather conditions in Gurugram and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 26.06.2014 and the events taking place such as holding of commonwealth 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 the interest of all the stakeholders concerned with the said project cannot 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.

**F.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 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."*

47. 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."*

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

**F.IV Objection regarding entitlement of DPC on ground of complainant being investor**

49. The respondent has taken a stand that the complainant is an investor and not consumer and therefore, he is not entitled to the protection of the Act and entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the flat buyer's agreement, it is revealed that the complainant is a buyer and has paid a total price of Rs.2,48,74,882/- towards the purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

*"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

50. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is an allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

**G. Findings regarding relief sought by the complainant.**

**51. Relief sought by the complainant:**

- i. Direct the respondent to handover the fully developer/ constructed flat/ apartment with all the amenities after obtaining occupation certificate.
- ii. Direct the respondent to provide interest at the prescribed from the due date of possession till actual date of possession, complete in all aspects on its own contribution.
- iii. Direct the respondent to keep paying the pre-EMI on home loan till possession of the flat.

**G.I Direct the respondent to handover the fully developer/ constructed flat/ apartment with all the amenities after obtaining occupation certificate.**

52. As per section 19(3) of the Act of 2016, the complainant as a matter of right, is entitled to claim the possession of the allotted unit. The relevant part of the section is reproduced hereunder: -

*Section 19...*

*(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (1) of sub-section (2) of section 4.*

Moreover, as per section 19(10) of the Act of 2016, the complainant is also under an obligation to take the possession of the allotted unit within a period of two months of grant of occupation certificate. The relevant part of the section is reproduced hereunder: -

*Section 19...*

*(10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.*

53. In the present case, the respondent has applied to the concerned department for grant of occupation certificate vide application dated 19.04.2021. Since no occupation certificate has yet been obtained, so no offer of possession can be made to the complainant. An offer of possession is a vital element to cover the gap between section 11(4)(b) and section 19(10) wherein as per section 11(4)(b), the promoter is under an obligation to obtain the occupation certificate and shall make it available to the allottee whereas as per section 19(10) of Act of the 2016, the allottee is under an obligation to take the physical possession of the unit within a period of two months. Therefore, the complainant shall be informed about grant of such occupation certificate

vide such offer of possession only and it can be concluded that the obligation conferred upon the allottee can only be fulfilled when an offer of possession is made to the allottee. Therefore, the respondent is directed to offer the possession of the allotted unit to the complainant, complete in all aspects after obtaining occupation certificate. Thereafter, the complainant is also directed to take the possession of the allotted unit after receiving such offer of possession.

**G.II Direct the respondent to provide interest at the prescribed from the due date of possession till actual date of possession, complete in all aspects on own contribution.**

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

***Section 18: - Return of amount and compensation***

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

.....

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

55. As per clause 21 of the flat buyer's agreement dated 26.06.2014, the possession of the subject unit was to be handed over by of 26.12.2017. 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.*

56. 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 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 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/allottees 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.
57. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only

vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the 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 allottee is left with no option but to sign on the dotted lines.

58. In the present case, the unit was booked under subvention scheme and it is pertinent to mention that a total amount of Rs. 2,48,74,882/- has been paid towards total consideration of allotted unit. The complainant has availed a housing loan of Rs. 2,20,00,000/- from Indiabulls Housing Finance Limited and himself paid an amount of Rs. 42,79,557/-.
59. **Admissibility of grace period:** The respondent promoter has proposed to complete the construction of the said building/ unit within a period of 3 years, with six months grace period thereon from the date of execution of the flat buyer's agreement. In the present case, the promoter is seeking 6 months' time as grace period. The said period of 6 months is allowed to the promoter for the exigencies beyond the control of the promoter. Therefore, the due date of possession comes out to be 26.12.2017.
60. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to withdraw from



the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

**Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]**

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%:

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

61. 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.
62. 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., 10.02.2022 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
63. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

*"(z) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*

*Explanation. —For the purpose of this clause—*

- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

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

**G.III Direct the respondent to keep paying the pre-EMI on home loan till possession of the flat.**

64. The tripartite agreement fall within the definition of agreement of sale and can be enforced by the regulatory authority in view of the provisions of The Real Estate Regulation and Development Act, 2016 and held by the *National Consumer Dispute Redressal Commission in case of IDBI Bank Limited Vs Parkash Chand Sharma and Anr, 2018(iii) National Consumer Protection Judgement, 45* and the same was upheld by the Hon'ble Apex court of land in *Bikram Chatterji Vs Union of India and Ors. In writ petition no. 940 of 2017 decided on 23.07.2019* wherein it was held that when the builder fails with the obligations under the subvention scheme, thereby causing a double loss to the allottee then, the court can intervene, and the builder has to comply with the same in case it is proved that there was a diversion of funds.
65. In the present case, there was a tri-partite agreement dated 26.12.2012 executed between the allottee, financial institution and builder, wherein the

financial institution was required to release the loan amount sanctioned in favour of the allottee to the builder as per the schedule of construction. The para 4 of the tripartite agreement is reproduced as below: -

*"That irrespective of the stage of construction of the Project and irrespective of the date of handing over the possession of the residential apartment to the Borrower by the builder shall be liable to pay to IHFL regularly each month the EMIs as laid down in the Loan agreement to be signed by and between IHFL and the Borrower. The Borrower shall execute an indemnity and such other documents as may be required by IHFL in favour of IHFL in this regard."*

It is an obligation on the part of the builder to pay the pre-EMI interest till the date of offer of possession to the financial institution on behalf of the allottee. The clause 3 of the tripartite agreement is reproduce below: -

*"It is agreed that till the commencement of EMI the borrower shall pay Pre-EMI, which is the simple interest on the loan amount disburse calculated at the rate of interest as mentioned in the respective loan agreement of the Borrower, however, the Borrower has informed IHFL of the scheme of arrangement between the Borrower and the Builder in terms whereof the Builder hereby assumes the liability on account of interest payable by the Borrower to IHFL during the period be referred to as the "Liability Period" i.e. till the date of issuance of Offer for Possession by the Builder (and the Liability be referred to as "Assumed Liability"). The assumption of liability by the Builder in no manner whatsoever releases, relinquishes and / or reduces the liability of the Borrower and that same shall not be affected in any manner on account of any difference and / or dispute between the Borrower and the Builder under the arrangement between them and it is agreed that the repayment liability to IHFL is joint and several by and between the Borrower and the Builder as per the terms contained herein."*

66. The authority observes that no doubt, it is the duty of the allottee to make necessary payments in the manner and within the time specified in the agreement for sale as per the obligations u/s 19(6) and 19(7) of the Act reduced into writing or as mutually agreed to between the promoter and allottee and are covered under section 19(8) of the Act. But the tri-partite

agreement both stipulate that the payments are subject to handing over of the possession of the unit within stipulated period as per the agreement to sell. So, the said document being supplementary or incidental thereto is legally enforceable against the promoter. Hence, he cannot absolve himself from its liability from paying the pre-EMI's.

67. The ***National Consumer Disputes Redressal Forum, New Delhi in the case of IDBI Bank Ltd. Vs. Prakash Chand Sharma & Ors. (Supra)*** observed that the complainant drew our attention to the special payment plan, the terms and conditions whereof are detailed as follows: -

*"This special plan has been designed through a special arrangement with IDBI Bank Ltd. In order to avail of this, plan the buyer shall have to take Home Loan only through IDBI Bank Ltd.*

*Under this special payment plan the buyer shall have no liability whatever towards paying any interest or Pre EMI till the time of possession of the apartment. All interest accrued during the period till the time of possession shall stand waived off with respect to the buyer.*

*The obligation of the buyer to pay his EMIs shall be applicable after the possession of the apartment as per the standard terms of IDBI Bank Ltd. (or as specifically agreed between the buyer and the bank through the loan agreement) In the event the buyer wishes to terminate the Apartment Buyers Agreement for any reason whatsoever prior to taking over possession and registration of the property in his/her favour, then he/she shall be liable to pay to 'M/s. Amy HomeServices Ltd. the entire interest amount (with the prescribed 18% penal interest) that has been paid off during the period till the date".*

68. Under the special payment plan, the buyer has no liability whatsoever towards paying any interest or pre EMIs till the offer of possession and all interest amount accrued during the period till the time of possession would stand waived off with respect to the buyer if it is proved that the builder violated the terms and conditions of contractual obligations contained in the

builder buyer agreement/tripartite agreement/memorandum of understanding respectively.

69. Therefore, the terms and conditions of allotment and/or the buyer's agreement and tri-partite agreement clearly shows that the builder is under liability to pay the pre- EMIs or interest part of the loan amount received, and any non-compliance shall be in violation of section 11(4) of the Act in the event promoter fails to keep its obligations under subvention scheme. In such cases, the allottee has the right to seek relief under the RERA Act under section 31 which states that any aggrieved person may file a complaint with the authority or adjudicating officer for any violation or contravention of the provisions of RERA or the rules and regulations framed thereunder against any promoter or real estate agent and the authority may give a direction to the respondent/builder to pay EMI so that the home buyer does not get any notice from the bank or financial institution. A similar direction in this regard was issued by the Hon'ble Apex court in ***Supertech Limited VS Emerald Court owner Resident Welfare Association & Others in SLP(C) no.11595/2014 dated 31.08.2021.***

*"The Amicus Curiae submitted that if the buildings are ordered to be demolished, the appellant may close the home loans and refund the amounts contributed by the homebuyers with such interest as this Court may determine. On the other hand, if the buildings stand, the appellant may be directed to clear the outstanding EMIs and continue paying them until possession. Since the buildings have been ordered to be demolished under the directions of this Court in the present judgment, the appellant shall close the home loans and refund the amounts contributed by each of the above home buyers with interest at the rate of twelve per cent per annum within two months."*

70. A perusal of tri-partite agreement dated 26.12.2012 entered into between the buyer, financial institution and builder shows that the subvention scheme was to be governed as per clause 3 of that document which has already been detailed in para 66 of the order. As per said clause, the builder assumed the liability on account of interest payable by the borrower (i.e. allottee) to IHFL during the period be referred to as the "Liability Period" i.e. till the date of issuance of offer for possession by the builder (and the liability be referred to as "assumed liability").
71. The total sale consideration of the allotted unit as per applicant's statement of account dated 02.04.2021 is Rs. 2,47,08,757/- and as per subvention payment plan, a loan of Rs. 2,20,00,000/- was sanctioned. The complainant has also paid an amount of Rs. 42,79,557/- towards consideration of allotted unit. Both the parties are under an obligation to duly fulfil the contractual liabilities conferred upon them through tri-partite agreement dated 26.12.2012.
72. On consideration of the circumstances, the evidence and other record and submissions made by both the parties 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 26.06.2014, 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 26.12.2017.

Accordingly, the non-compliance of the mandate contained in section 11 (4)(a) of the Act on the part of the respondent is established. As such the complainant is entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession i.e. 26.12.2017 till handing over of possession or offer of possession plus two months, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

#### **H. Directions of the authority:**

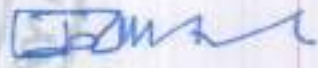
73. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the act of 2016:
- i. The respondent shall pay interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 26.12.2017 till handing over of possession or offer of possession plus two months, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.
  - ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest to be paid till date of handing over of possession shall be paid on or before the 10<sup>th</sup> of each succeeding month.
  - iii. The respondent is directed to offer the possession of the allotted unit to the complainant, complete in all aspects after obtaining occupation certificate.

- iv. The respondent/builder is directed to pay arrears of Pre-Emi/Emi as per the terms and conditions of tri- partite agreement dated 26.12.2012.
- v. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- vi. The respondent shall not charge anything from the complainant which is not the part of buyer's agreement.
74. Complaint stands disposed of.
75. File be consigned to registry.

  
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

  
(Dr. KK Khandelwal)

Chairman

Dated:10.02.2022

**HARERA**  
**GURUGRAM**