BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 584 of 2021
First date of hearing: 16.03.2021
Date of decision : 02.03.2022

Madhukar Mishra
R/o: F-17, Ground Floor, East of Kailash, New Delhi-110065 **Complainant**

Versus

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

CORAM:
Dr. KK Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
None Advocate for the complainant
Shri Rahul Yadav Advocate for the respondent

ORDER

1. The present complaint dated 23.02.2021 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

2. The particulars of the project, the details of sale consideration, the amount paid by the 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	**Registered vide no.** **i. 351 of 2017 dated 20.11.2017 valid till 31.08.2018** **ii. 354 of 2017 dated 17.11.2017 valid till 30.09.2018** **iii. 353 of 2017 dated 20.11.2017 valid till 31.03.2018** **iv. 346 of 2017 dated 08.11.2017 valid till 31.08.2018**
6.	Date of execution of flat buyer's agreement	**05.06.2014** (As per page no. 51 of complaint)
7.	Previous unit no.	Penthouse apartment no. 161 on 16th floor of tower C

		(As per allotment letter dated 26.07.2011 on page no. 24 of the complaint)
8.	Date of shifting of unit from previously allotted unit to new unit	11.09.2013 (As per page no. 25 of the complaint)
9.	New unit no.	Penthouse duplex bearing no. C-201 on 20/21st floor, tower C (As per page no. 55 of complaint)
10.	Super Area	6780 sq. ft. (As per page no. 55 of complaint)
11.	Payment plan	Construction linked payment plan (As per page 70 of the complaint)
12.	Total consideration	Rs. 4,05,25,700/- (As per applicant ledger dated 22.02.2017 on page no. 77 of complaint)
13.	Total amount paid by the complainant	Rs. 3,92,34,483/- (As per applicant ledger dated 22.02.2017 on page no. 78 of complaint)
14.	Due date of delivery of possession (As per ***clause 21 of the agreement***: *The Developer shall endeavour to complete the construction of the said building /Unit within* ***a period of four months, 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*	05.04.2015 (Calculated from the date of the agreement i.e.; 05.06.2014 + grace period of 6 months) **(Grace period of 6 months is allowed)**

	shall within 60 days thereof, remit all dues and take possession of the Unit.)	
15.	Occupation Certificate	12.10.2021 (As per annexure C on page no. 34 of reply)
16.	Offer of possession	Not offered
17.	Delay in delivery of possession till the date of order i.e., 10.02.2022.	6 years 10 months 05 days

B. Facts of the complaint

3. That That the respondent floated a project named "Indiabulls Enigma" (hereinafter "project" or "said project") situated in Sector 110, Gurugram, Haryana. This project was aggressively advertised by the respondent as a hot property. The complainant was impressed with the project and decided to invest his hard-earned money in the aforesaid project. The complainant on 26 May 2011 booked a flat in the said project in terms of an application in the format prescribed by the respondent for provisional booking of flats in the said project and duly paid the booking amount of Rs. 5 lakhs.

4. The said application form detailed the "terms and conditions for provisional reservation of a residential apartment in Enigma Sector 110, Gurgaon". The complainant was provisionally allotted a penthouse apartment being apartment No.161 situate on the 16th floor of building block/tower No. C along with three covered-basement parking spaces in the said project on or about 26 July 2011. Later, due to revision in building plan, duly approved by the concerned authority, the said pent house No. C 161 was shifted to pent

house unit No. C 201(duplex), situate on 20th floor in tower C (" hereinafter apartment/flat") of the said project on 11th September 2013.

5. That the complainant was required to sign a fresh application form for the said penthouse flat and hand over the copy of the old application form along with all other documents in respect of the old penthouse no. C 161, and accordingly the complainant submitted a fresh application form in the prescribed format of the respondent, detailing similar terms and conditions for provisional reservation of the said new penthouse flat. The respondent issued a letter dated 21st November 2013 to the complainant informing about the shifting to the new flat C-201 and enclosing copy of the ledger with regard to the payments made by the complainant till September 2013.

6. That the flat buyer agreement dated 5th June 2014 was signed between the complainant and the respondent with regards to penthouse flat No. C 201 in and as per clause 47 of the said agreement it was stated that "...the terms and conditions as set out in this Flat Buyer Agreement shall supersede the terms and conditions as set out in other document". It is in terms of the said clause, the terms and conditions of the said application form submitted by the complainant, the allotment letters, and other letters issued by the respondent to the complainant in respect of the said flat C-201 stood superseded or in other words, the flat buyer agreement is thus treated as the sole repository of the terms and conditions governing the sale of the said flat C-201 and parking spaces, excluding all other earlier documents.

7. That the respondent company has failed to develop and complete the project in accordance with the sanctioned plans and specification as approved by the competent authorities and to give possession of the said flat together with parking spaces in accordance with and as stipulated in clause 21 of the said flat buyer agreement. As per said clause, the respondent was obliged to deliver possession of the flat within a maximum period of 10 months from the date of execution of the said flat buyer agreement i.e. by about 4th / 5th April 2015. The respondent is therefore in clear breach of the mandate of section 18(1)(a) of the Act of 2016.

8. That in accordance with the flat buyer agreement the basic sale price excluding other charges to be paid by the complainant to the respondent for the aforesaid pent house unit was agreed upon to be Rs.3,54,78,000/- which was to be paid in installments, the said price was exclusive of EDC & IDC, Car parking charges, covered free maintenance security, power backup charges, club membership, gas pipe line charges, and prime location charges.

9. That the complainant duly made payments on time towards the installments of the flat unit as and when the demanded by the respondent. In very few cases where there was some delay in payment of any installment, the complainant has been charged with an interest from the due date as stipulated and in accordance with the said flat buyer agreement.

10. That till date the total amount paid by the complainant or by IBHFL on behalf of the complainant to the respondent amounts to Rs. 3,92,34,483 /-, comprising of Rs. 3,91,42,777/- towards principal amount and Rs. 91,706/-

towards interest on delayed installments. These payments towards principal or towards interest (including earnest money paid at the time of booking), made by or on behalf of the complainant are acknowledged by the respondent in a statement of account sent by the respondent to the complainant with respondent's letter dated 22/02/2017.

11. That to make timely payments for the said flat, the complainant obtained a loan of Rs. 2,50,50,000/- from a sister concern of the respondent namely IBHFL (Indiabulls Housing Finance Ltd.). As per the loan scheme, the complainant also entered into a tripartite agreement dated 14.08.2014. As per said tripartite agreement entered into between the complainant as the borrower, the respondent as the developer and IBHFL (Indiabulls Housing Finance Ltd.) as the grantor of loan (creditor), whereby IBHFL (the grantor of the said loan of Rs. 2,50,50,000/-) agreed to "disburse this loan directly to the developer on behalf of the borrower as per the installments agreed between the borrower & developer in the buyer's agreement dated 05.06.2014".

12. That in pursuance of the tripartite agreement dated 14.08.2014, IBHFL made a payment of Rs. 2,34,24,976/- in various installments to the respondent directly which is included in the principal amount of Rs.3,91,42,777/- paid to the respondent, the remaining amount of Rs. 1,57,17,801/- has been paid by the complainant from his own resources.

13. That the respondent vide letter dated 22/02/2017, enclosed the statement of account and as per said statement of account, the respondent raised a

demand for contingency deposit towards alleged VAT that has become payable on account of a Supreme Court decision dated 26 September 2013, as mentioned in the said letter, holding that "any agreement for Sale of property executed before the completion of the building is liable for payment of VAT on transfer of property, would fall within the description of a sale of goods". The complainant has not paid any amount towards the said alleged VAT claim for the reasons being that the complainant was not bound to comply with a demand for deposit towards a contingent liability, payment under which will only arise "on transfer of property", which is yet to take place as the building/unit is not completed. It is further submitted that there is no assessment and determination of the amount/s by the Haryana VAT authorities which is payable towards VAT by the flat buyers including the complainant. Moreover, the liability towards VAT would not have arisen and be attached to the complainant, if the respondent has delivered the possession of the flat to the complainant within the time as stipulated in and agreed under the flat buyer agreement. The complainant cannot be subjected to the said liability for payment of VAT or for payment of GST, both of which have arisen totally on account of the own default on the part of the respondent in failing to give possession of the said flat on the due date. The complainant therefore has also prayed that if any amount/s are recovered by the respondent towards the alleged VAT or towards GST, the same should be directed to be refunded by way of compensation under Section 18(3) of the Act or otherwise as permissible in law.

14. That the only reason for which the complainant decided to invest in the project was the promises and immense importance laid down by the respondent herein with regard to the timely possession of the pent house unit under this project which subsequently turned out to be false thereby causing financial loss and immense hardship, both physical and mental, to the complainant herein.

15. That according to the said agreement, the complainant ought to have received the physical possession of the flat within a maximum period of 10 months from the date of signing of the said flat buyer agreement i.e., 5th June 2014. However, a period of over 5 ½ years has elapsed from the due date of delivery of possession i.e., 05.04.2015. No force majeure situation has arisen or pleaded by the respondent anywhere permitting any extension of the period of delivery of possession.

16. That the said flat buyer agreement has been so worded as to render it totally one sided in favour of the respondent, containing arbitrary and unconscionable provisions in respect of the complainant as the respondent reserved very high penalties upon the buyer/complainant for delayed payment of even a few days, the respondent protected itself from the similar liabilities by various clauses, e.g., clause 22. The said clause entitles the developer i.e., respondent to reasonable extension in the delivery of the possession of the unit and further subjects the developer/respondent to a meagre penalty of Rs.5 per sq. ft. per month on super area for the delay in the delivery of possession of the said flat.

17. That left aghast, with no assurance as to when the project will be completed and when the physical possession of the said flat will be handed over, the complainant was left with no other option but to send a notice dated 30.12.2019 to the respondent. The said notice whilst clearly informing the respondent that the complainant is continuing with the project.

C. Relief sought by the complainant:

18. The complainant has sought following relief:

i. Direct the respondent to pay interest on the total amount of Rs. 3,91,42,777/- paid by the complainant for every month of delay till handing over of possession at the prescribed rate, which for delay of 69 months (April 2015 to January 2021) aggregates to Rs. 2,38,76,452.96/-

ii. Direct the respondent to refund of the amount of interest recovered by the respondent from the complainant at 18% p.a. towards delay payments of installments by the complainant.

iii. Direct the respondent to pay cost of litigation.

iv. Direct the respondent to refund any amount recovered from the complainant towards VAT or towards GST by way of compensation u/s 18(3) or otherwise as permissible in law.

19. 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:

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

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. That it was only based on the request of the complainant that the respondent allotted to the complainant a residential unit bearing no. C-161 in tower "C" of the project of the respondent.

22. That the complainant after due inspection of the project site voluntarily signed/executed a flat buyers agreement dated 05.06.2014 for the subject unit.

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

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

employee or advocate of the company or is otherwise connected to the Company and the Applicant(s) confirms that notwithstanding such relationship / connection, the Applicant(s) shall have no doubts as to the independence or impartiality of the said Arbitrator. The courts in New Delhi alone shall have the jurisdiction over the disputes arising out of the Application/Apartment Buyers Agreement ....."

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

24. 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. The complainant has purchased the subject unit with a sole purpose of investment and monetary gains out of the said investment.

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

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

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

26. 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, which is at page 40 of 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 are now evading from the truth of its existence and does not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainant is rescinding from the duly executed contract between the parties.

27. That the basis of the present complaint is that there is a delay in delivery of possession of the unit in question, and therefore, interest on the deposited amount has been claimed by virtue of the present complaint. It is further submitted that the flat buyer's agreement itself envisages the scenario of delay and the compensation thereof. Therefore, the contention that the possession was to be delivered within 4 months and 6 months of execution

of the flat buyer's agreement is based on a complete misreading of the agreement.

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

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

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

29. That it is a universally known fact that due to adverse market conditions viz. delay due to reinitiating of the existing work orders under GST regime, by virtue of which all the bills of contractors were held between, delay due to the directions by the Hon'ble Supreme Court and National Green Tribunal whereby the construction activities were stopped, non-availability of the water required for the construction of the project work & non-availability of drinking water for labour due to process change from issuance of HUDA slips for the water to totally online process with the formation of GMDA, shortage of labour, raw materials etc., which continued for around 22 months, starting from February'2015.

30. That as per the license to develop the project, EDCs were paid to the state government and the state government in lieu of the EDCs was supposed to lay the whole infrastructure in the licensed area for providing the basic amenities such as drinking water, sewerage, drainage including storm water line, roads etc. That the state government terribly failed to provide the basic amenities due to which the construction progress of the project was badly hit.

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

the resultant non-availability of raw materials required in the construction of the project also affected the timely schedule of construction of the project.

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

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

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

b) Moreover, due to active implementation of social schemes like National Rural Employment Guarantee Act and Jawaharlal Nehru National Urban Renewal Mission, there was a sudden shortage of labour/workforce in the real estate market as the available labour preferred to return to their respective states due to guaranteed employment by the Central /State

Government under NREGA and JNNURM schemes. This created a further shortage of labour force in the NCR region. Large numbers of real estate projects, including our project were struggling hard to timely cope up with their construction schedules. Also, even after successful completion of the commonwealth games, this shortage continued for a long period of time. The said fact can be substantiated by newspaper article elaborating on the above-mentioned issue of shortage of labour which was hampering the construction projects in the NCR region.

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

34. That the complainant has invested its money is an on-going project and is registered under Act of 2016. It is pertinent to note that the construction of

the said project is already completed and occupation certificate for all the towers have been received from Director Town & Country Planning Department, Chandigarh. That the construction of the alleged tower in which the unit of the complainant was booked is also completed wherein the OC of the concerned tower was applied by the respondent on 19.04.2021 and the same was already received on 12.10.2021.

35. 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.

36. 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 05.06.2014 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. Hence, cannot be relied upon till such time the new agreement to sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainant.

37. That the respondent has made huge investments in obtaining requisite approvals and carrying on the construction and development of 'INDIABULLS ENIGMA' project not limiting to the expenses made on the advertising and marketing of the said project. Such development is being carried on by developer by investing all the monies that it has received from the buyers/ customers and through loans that it has raised from financial institutions. In spite of the fact that the real estate market has gone down badly the respondent has managed to carry on the work with certain delays caused due to various above mentioned reasons and the fact that on an average more than 50% of the buyers of the project have defaulted in

making timely payments towards their outstanding dues, resulting into inordinate delay in the construction activities, still the construction of the project "INDIABULLS ENIGMA" has never been stopped or abandoned and has now reached its pinnacle in comparison to other real estate developers/promoters who have started the project around similar time period and have abandoned the project due to such reasons.

38. That a bare perusal of the complaint will sufficiently elucidate that the complainant has miserably failed to make a case against the respondent and has merely alleged in its complaint about delay on part of the respondent in handing over of possession but have failed to substantiate the same. That the complainant has made false and baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in flat buyer's agreement dated 05.06.2014 entered into between the parties.

39. 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

40. 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

41. 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;*
>
> *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.*

42. 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.

43. 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 provisions regarding initiation of arbitration

proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

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

44. 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 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 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 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."

45. 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."*

46. 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 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

47. 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 05.06.2014 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 whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of 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."*

48. 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."

49. 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

50. The respondent has taken a stand that the complainant are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not 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 observed 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 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 apartment buyer's agreement, it is revealed that the complainant are buyer and they have paid total price of Rs.3,92,34,483/- to the promoter towards 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;"*

51. 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 are allottee(s) as the subject unit was allotted to them 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.

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

i. Direct the respondent to pay interest on the total amount of Rs. 3,91,42,777/- paid by the complainant for every month of delay till handing over of possession at the prescribed rate, which for delay of 69 months (April 2015 to January 2021) aggregates to Rs. 2,38,76,452.96/-

ii. Direct the respondent to refund of the amount of interest recovered by the respondent from the complainant at 18% p.a. towards delay payments of installments by the complainant.

iii. Direct the respondent to pay cost of litigation.

iv. Direct the respondent to refund any amount recovered from the complainant towards VAT or towards GST by way of compensation u/s 18(3) or otherwise as permissible in law.

G.I Direct the respondent to pay interest on the total amount of Rs. 3,91,42,777/- paid by the complainant for every month of delay till handing over of possession at the prescribed rate, which for delay of 69 months (April 2015 to January 2021) aggregates to Rs. 2,38,76,452.96/-

G. II Direct the respondent to refund of the amount of interest recovered by the respondent from the complainant at 18% p.a. towards delay payments of installments by the complainant

53. 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

54. As per clause 21 of the flat buyer's agreement dated 05.06.2014, the possession of the subject unit was to be handed over by of 05.04.2015. Clause 21 of the flat buyer's agreement provides for handover of possession and is reproduced below:

As per clause 21 The Developer shall endeavour to complete the construction of the said building /Unit within a period of four months, 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.

55. 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.

56. 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.

57. **Admissibility of grace period**: The respondent promoter has proposed to complete the construction of the said building/ unit within a period of 4 month, 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 05.04.2015.

58. **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.*

59. 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.

60. 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., 02.03.2022 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

61. 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 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 pay cost of litigation.

62. The complainant is claiming compensation in the above-mentioned reliefs. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

G.IV Direct the respondent to refund any amount recovered from the complainant towards VAT or towards GST by way of compensation u/s 18(3) or otherwise as permissible in law.

63. There is nothing on record to show that any amount has been charged by the complainant on pretext of GST whereas as per applicant ledger dated 22.02.2017 on page no. 77 of complaint, the respondent has charged an amount of Rs. 6,07,886/- towards contingency deposit for VAT on 03.03.2017. As per clause 23 of the flat buyer's agreement dated 05.06.2014, the buyer is liable to reimburse the developer towards government demand, rates, cess, wealth tax, etc. whether levied or leviable. Relevant part of the buyer's agreement is reproduced hereunder: -

> *"Clause 23*
>
> *The Buyer shall reimburse to the Developer and shall be liable to pay on demand Govt. rates, cesses, charges, wealth tax or taxes of all and any kind by whatever named called, whether levied, or leviable now or in future, on land and/or the building, as the case may be from the date of its due and in proportion to the super area of the Unit prior to the execution of the sale deed in respect of the said Unit irrespective of the fact that the Buyer has not taken over possession or has not been enjoying the benefit of the Unit...."*

64. The promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT) under the amnesty scheme. The promoter shall not charge any VAT from the allottees/prospective buyers during the period 01.04.2014 to 30.06.2017 since the same was to be borne by the promoter-developer only. If for this period any VAT has been charged the same is refundable in case of availing amnesty scheme availed by the promoter.

65. On consideration of the circumstances, the evidence and other record and submissions made by the complainant and the respondent and based on the findings of the authority regarding contravention as per provisions of Act,

the authority is satisfied that the respondent is in contravention of the provisions of the Act. As per page no. 34 of reply, the occupation certificate has been obtained on 12.10.2021 but there is nothing on record to show that the possession has been offered to the complainant. By virtue of clause 21 of the flat buyer's agreement executed between the parties on 05.06.2014, possession of the booked unit was to be delivered within a period of 4 months from the date of execution of the agreement with a grace period of 6 months, which comes out to be 05.04.2015.

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. 05.04.2015 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:

66. 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. 05.04.2015 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 10th of each succeeding month.

iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the 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.

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

67. Complaint stands disposed of.

68. File be consigned to registry.

V.I -

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated:02.03.2022