

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

Complaint no. : 629 of 2021
First date of hearing: 19.03.2021
Date of decision : 11.03.2022

1. Kokila Jain
2. Sanjay Jain

Both RR/o: Flat no. 1302, New Jai Bharat Apartments,
Plot no. 5, Sector-4, Dwarka, New Delhi-110078

Complainants

Versus

Anand Divine Developers Private Limited
Regd. office: M- 711/92, Deepali Nehru Place, New
Delhi- 110019

Respondent

CORAM:

Dr. KK Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Sashi Kant
Shri M.K. Dang & Garvit Gupta

Advocate for the complainants
Advocates for the respondent

ORDER

1. The present complaint dated 05.02.2021 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations,

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

A. Unit and Project related details:

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

S. No.	Heads	Information
1.	Name and location of the project	"ATS Triump", Sector 104, Village-Dhanwapur, Gurugram
2.	Nature of the project	Group housing colony
3.	Project area	14.093 acres
4.	DTCP License	63 of 2011 dated 16.07.2011 valid till 15.07.2019 10 of 2012 dated 03.02.2012 valid till 02.02.2020
	Name of the licensee	M/s Great Value HPL Infratech Private Limited M/s Kaanha Infrastructure private Limited
5.	HRERA registered/ not registered	Not registered
6.	Date of execution of flat buyer's agreement	10.06.2013 (As per annexure- C1 on page no. 25 of the complaint)
7.	Unit no.	8081 on 8th floor, tower 8 (block- D) (As per annexure- C1 on page no. 26-27 of the complaint)
8.	Super Area	3150 sq. ft. (As per annexure- C1 on page no. 27 of the complaint)
9.	Payment plan	Construction linked payment plan

		(As per page 47 of the complaint)
10.	Total consideration	Rs.2,65,77,250/- (As per payment plan annexed with BBA at page 47 of complaint)
11.	Total amount paid by the complainants	Rs. 2,66,16,240/- (As per statement of account at annexure C4 page 63 of complaint)
12.	Date of commencement of construction of the project	12.06.2013 (Vide annexure R2 at page no. 24 of the reply wherein the respondent had demanded a sum of Rs.24,69,599 + service tax+ interest from the complainants with regard to the commencement of pilling as per the payment plan annexed at annexure III of the buyer's agreement on page 47 of complaint)
13.	Due date of delivery of possession (As per clause 18 of the agreement: Time of handing over possession <i>Barring unforeseen circumstances and force majeure events as stipulated hereunder, possession of the said apartment is proposed to be, offered by the company to the allottee within a period of 36(thirty six) months with a grace period of 6(six) months from the date of actual start of the construction of a particular tower building in which the registration for allotment is made, such date shall hereinafter referred to as "stipulated date", subject always to timely payment of all amounts including the basic sale price, EDC/IDC, IFMS, stamp duty, registration fees and other charges as</i>	12.12.2016 (Calculated from the date of the commencement of construction i.e., 12.06.2013 the date on which the respondent raised the demand equivalent to that of commencement of pilling as per payment plan annexed to the BBA) (Grace period of 6 months is allowed)

	<i>stipulated herein or as may be demanded by the company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/engineer-in-charge of the complex and the said certification shall be final and binding on the allottee.)</i>	
14.	Termination letter	14.03.2015 [Annexure- R10 on page no. 32 of the complaint]
15.	Occupation Certificate	28.05.2019 (As per annexure R16 on page no. 71 of reply)
16.	Offer of possession	30.05.2019 (As per Annexure- C8 on page no. 70 of the complaint)
17.	Delay in delivery of possession till the date of order i.e., 11.03.2022.	5 years 2 months 27 days

B. Facts of the complaint

3. That the complainant along with his wife, visited the sales office of respondent and discussed the details of the said project, wherein respondent has represented, inter alia, to the effect that they have already secured all necessary approvals and permissions in respect of the above said project. That after going through the advertisement and size of the flats, the complainants decided to purchase a residential flat in the above said project.

4. That the sale representative of respondent shown one residential apartment/flat unit bearing No. 8081 on 8th floor, admeasuring 3150 sq. ft. (292.64 mtrs.) located on 8th floor, along with two car parking in project "ATS TRIUMPH", located at Sector 104, Village Dhanwapur, Tehsil and Distt. Gurugram Haryana.
5. That the complainants shown their willingness and interest for purchase of said unit and booked the flat on 29-03-2013 vide application no. 178. According to demand of the respondent the applicants/complainants also paid the entire booking amount on the spot. At the time of booking of the flat it was assured and promised by the respondent that the possession of the flat would be handed over definitely in the month of December 2016 or maximum by first quarter of 2017.
6. That after carrying out all the necessary formalities the complainants booked the above said flat on 29.03.2013 and on 10.06.2013 builder buyer agreement was executed between the parties. As per clause 18 of said agreement the said flat is proposed to be offered by the company to the allottee within a period of 36 months with a grace period of 6 months from the date of actual start of the construction of a particular tower/building.
7. That respondent made continuous demands of payments and complainants paid all installments within the prescribed period in order to save the cordial relationship. That the complainants already paid the entire payment as and when asked for by the respondent. In this regard there is absolutely no

complaint whatsoever. It is pertinent to submit here that the complainants have paid a sum of Rs.1,73,35,926/- till 30.05.2018.

8. That after the expiry of the period of possession the complainants asked the respondent about the delivery of the possession time and again. In this regard every time the respondent replied that the construction is undergoing, and the possession would be given shortly. It is pertinent to mention here that the respondent suggested alternatively to give possession of a flat in tower 7 because the construction of this tower is going on in a speedy pace. On this the complainants visited the site and noticed that the construction of tower 7 is going on comparatively faster than tower No. 8.
9. That during May 2018 the complainants decided to shift his allocation of flat from tower No. 8 to tower 7, unit No. 7171. In this regard the complainants sent a mail to the respondent wherein the respondent finalized the unit No. 7171 of tower no. 7 in favour of the complainants. In the same email the complainant asked for certain other additional documents.
10. That on the said date of email the respondent asked the complainants that in case they want to shift from tower 8 to tower 7 then they will have to deposit a sum of Rs. One Crore approx. immediately with the reason that they will hand over the possession of this unit definitely within 2-3 months. That the complainants were not having sufficient amount for payment thus they have on the basis of old unit at tower No.8 applied for a loan of Rs. 1.00 Crore. Thereafter the complainants seeing the immediate demand of the

respondent, the complainants applied for a loan from PNB Housing Finance Limited and the said loan was sanctioned on the same day and the said amount of Rs.92,80,314/- was transferred in favour of the complainants and subsequently, the same was transferred in the account of respondent through DD no. 215078 Punjab National Bank.

11. That after receipt of above payment the respondent asked for certain additional documents to be provided in this regard. One of the representatives on behalf of respondent namely Braham Parkash Singh (CRM) sent an email on 05.06.2018 wherein he asked for certain documents in order to complete the formalities of change of unit.
12. That thereafter on 11-6-2018 the complainants wrote a letter to Saurabh Arora for giving thanks and in the same letter itself the complainants requested that they should be provided car parking slot near to the lift on ground floor because of medical ground of first applicant namely Mrs. Kokila Jain.
13. That on 14-06-2018 the complainant submitted all the requisite documents as demanded by the respondent through courier and as well as email. That after submission of the documents regarding the change of unit No.8081 in tower No. 8 to unit No. 7171 in tower no. 7. The representative of the respondent assured that within 15 days all the formalities would be completed.

14. That the complainants after submission of the documents, telephonically contacted the representative of the respondent asking about the status of the documents. Every time it was replied that the same is under process and will inform the outcome immediately on its completion.
15. That unfortunately during the end of July 2018, the first applicant namely Mrs. Kokila Jain, remained sick continuously and the second applicant namely Sanjay Jain remained with his wife to take care of her during her treatment. As and when the complainant No.2 asked the respondent about the handing over of the unit then it was assured and promised that they will definitely handover the possession of unit No. 7171 in tower No. 7.
16. That the respondent issued a letter on 30.05.2019 wherein he offered the possession of unit No. 8081 in tower No. 8. The complainants were shocked to receive the possession letter for unit No. 8081 and thereafter, immediately the complainant contacted the representative of respondent Mr. Braham Parkash Singh (CRM) and asked for offer letter in respect of unit no. 7171 on which the representative replied in negative and said that they have already sold the said unit to someone else and the said unit cannot be allotted to the complainants. Thereafter, the representative of the respondent assured to the complainant that if there will be any other unit other than 7171 then they will find out the feasibility of same. On this the representative of respondent again asked for extra amount and requested for immediate payment to them. The complainants refused to pay the said amount and said that they want unit no. 7171 only. On this the representative of respondent replied that you

have not paid the amount of Rs.11,800/- and therefore, they have sold the said unit to 3rd party. On this the petitioner verified that he has already paid Rs.1,00,000/- extra on 28.09.2013.

17. That the complainants paid to the respondents Rs. 5,00,000/- whereas the entries in record shows the amount of Rs. 3,85,696/- + Rs. 14,302/-. For this the complainants number of times reminded the respondent and in reply the respondent submitted that the said difference of Rs.1,00,000/- would be adjusted at the time handing over the possession.

C. Relief sought by the complainants:

18. The complainants have sought following relief:
- Direct the respondent to pay interest @10.75 % per annum on the amount already paid by the complainants that is Rs. 2,66,16,240/- from the due date of possession i.e., December 2016 till handing over of the possession of the flat.
 - Direct the respondent that after payment of the above amount of interest the possession should be handed over to the complainants within the stipulated time period as per the direction of the authority.
 - Direct the respondent to transfer unit no. 7171 in tower 7 in the name of complainants and handover the possession peacefully.
 - Direct the respondent that if he is not in capacity of allotment of requisite flat no. 7171, then refund the entire amount along with interest @ 18 % per annum from the date of payment till its realization.

v. Direct the respondent to refund the amount of Haryana VAT @2,46,343/- and GST @14,20,350/- because of respondent had delayed their project more than 36 months.

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 complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The complainants are estopped from filing the present complaint by their acts, omissions, admissions, acquiescence and laches.
21. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 39 of the buyer's agreement, which is reproduced for the ready reference of this authority-

"All or any dispute arising out of or touching upon or in relation to the terms of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 as amended up to date. A sole arbitrator who shall be nominated by the Board of Directors of the company shall hold the arbitration proceedings at the office of the Company at Noida. The allottee hereby confirms that he shall have no objection to this appointment, more particularly on the ground that the Sole Arbitrator being appointed by the Board of Directors of the company likely to be biased in favour of the company. The Courts

at Noida, Uttar Pradesh shall to the specific exclusion of all other courts alone have the exclusive jurisdiction in all matters arising out of/touching and/or concerning this Agreement regardless of the place of execution or subject matter of this Agreement. Both the parties in equal proportion shall pay the fees of the Arbitrator.

22. That the complainants, after checking the veracity of the project namely, 'ATS Triumph', Sector 104, Gurugram has applied for allotment of a residential unit and agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint. Based on the application of the complainants, the buyer's agreement was executed on 10.06.2013 for unit bearing no. 8081 in tower no. 8 having super area of 3150 sq. ft.
23. That it was agreed that as per clause 4 of the buyer's agreement, the sale consideration of Rs. 2,52,96,000/- was exclusive of other costs, charges including but not limited to maintenance, stamp duty and registration charges, service tax, proportionate taxes and proportionate charges for provision of any other items/facilities. As per clause 12 of the buyer's agreement, timely payment by the complainants of the basic sale price and other charges as stipulated in the payment plan was to be the essence of the agreement.
24. That the complainants made payment of some of the instalment amounts on time and then started defaulting in payment of the remaining due consideration. The respondent has sent a demand letter dated 11.04.2013 for the net payable sum of Rs. 61,83,518/-. However, the due amount was

credited only after a reminder dated 12.06.2013 was sent by the respondent to the complainants.

25. That vide demand letter dated 05.07.2013, the respondent has raised the demand for net payable amount of Rs. 64,02,931/- followed by reminders dated 16.08.2013 and 10.09.2013 and the remaining amount was adjusted in the next installment demand dated 07.05.2014 as arrears.
26. That again vide payment request dated 31.12.2014, respondent had raised the demand for net payable amount of Rs.40,10,526 followed by reminder dated 05.01.2015 and notice dated 18.08.2015. However, the complainants failed to remit the due amount and the respondent was constrained to terminate the allotment of the unit vide its letter dated 14.03.2015. However, the complainants requested the respondent to restore the allotment and the same was done by the respondent.
27. That the possession of the unit was to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement, clause 18 of the buyer's agreement clearly states that

"Barring unforeseen circumstances and Force majeure events as stipulated hereunder, the possession of the said Apartment is proposed to be offered by the Company to the Allottee within a period of 36 months with a grace period of (6) six months from the date of actual start of the construction of a particular Tower Building in which the registration for allotment is made, such date shall hereinafter referred to as 'Stipulated Date', subject always to timely payment of all amounts including the Basic Sale Price, EDC/IDC, IFMS, Stamp Duty, Registration Fees and Other Charges as stipulated herein or as may be demanded by the Company from time to time in this regard. The date of actual construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as

per certification by the Company's architect/engineer-in charge of the Complex and the said certificate shall be final and binding on the Allottee."

28. That the possession of the unit was subject to the occurrence of the force majeure events. The relevant clause of the agreement pertaining to force majeure event is as under:-

"22. The Company shall not be held liable or responsible for performing nay of its obligations or undertakings in this Agreement is such performance is prevented, delayed or hindered by 'Force Majeure Events' such as non-availability of necessary infrastructure facilities being provided by the government for carrying development activities, non-availability or inadequate supply of steel and/or cement or other building materials, or water or electric power or labor, slow down, strike or due to dispute with the constriction agency employed by the company, lock out or civil commotion, war or enemy action or by reason or by reason of earthquake, major fire, abnormal rains, floor, other Act of God, terrorist action or by reason of change of law, act, notification, prohibitory order, rule of Government and/or any other public or competent authority or due to delay in the grant of Environmental Clearance, completion/occupancy certificate, by any competent authority or if competent authority refuses, delays, withholds, denies the grant of necessary approvals of the said apartment/building for any amenities, facilities intended to be created therein or if any matters, issues relating to such approvals, permissions, notice by competent authority become subject matter of any suit/writ/litigation before a competent court or for any reason beyond the control of the Company, in such event, the Company shall not be liable for any compensation or damages in any manner whatsoever."

29. That the implementation of the said project was hampered due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of the respondent and which have materially affected the construction and progress of the project. Some of the force majeure events/conditions which were beyond the control of the

respondent and affected the implementation of the project and are as under:

1) Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to demonetization:

This only happened second time in 71 years of independence hence beyond control and could not be foreseen. 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 with regard to demonetization. During this period, the contractor could not make payment to the labour in cash and as majority of casual labour force engaged in construction activities in India do not have bank accounts and are paid in cash on a daily basis. During demonetization the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on a site of the magnitude of the project in question are Rs. 3-4 lakhs 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 due on account of issues faced by contractor due to the said notification of Central Government. Further there are studies of Reserve Bank of India and independent studies undertaken by scholars of different institutes/universities and also newspaper reports of Reuters of the relevant

period of 2016-17 on the said issue of impact of demonetization on real estate industry and construction labour. The Reserve Bank of India has published reports on impact of demonetization. In the report-macroeconomic impact of demonetization, it has been observed and mentioned by Reserve Bank of India at page no. 10 and 42 of the said report that the construction industry was in negative during Q3 and Q4 of 2016-17 and started showing improvement only in April 2017. Furthermore, there have been several studies on the said subject matter and all the studies record the conclusion that during the period of demonetization the migrant labour went to their native places due to shortage of cash payments and construction and real estate industry suffered a lot and the pace of construction came to halt/ or became very slow due to non-availability of labour. Some newspaper/print media reports by Reuters etc. also reported the negative impact of demonetization on real estate and construction sector.

That in view of the above studies and reports, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should be deemed to be extended for 6 months on account of the above.

II) 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 has 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 NGT. Due to following, 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 is also required to be added for calculating the delivery date of possession.

(III) 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 resulting in badly impacting and delaying the implementation of the entire project.

(IV) 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. The said period is also required to be added to the timeline for offering possession by the respondent.

30. That, furthermore, the time period covered by the above-mentioned force majeure events is required to be added to the time frame mentioned above. It is pertinent to mention herein that the respondent has even offered the possession of the unit No. 8081 to the complainants vide letter dated 30.05.2019 after obtaining the occupation certificate on 28.05.2019. The respondent after the receipt of the due amount has handed over the possession of the unit to the complainants and the same is evident from a bare perusal of letter dated 23.09.2020. The complainants were intimated to remit the outstanding amount of Rs. 21,93,476/- on the failure of which the delay penalty amount would accrue. However, the complainants have till date did not remitted the due amount despite reminders dated 30.05.2019, 03.07.2019, 02.08.2019, 12.09.2019, 18.10.2019, 08.01.2020 and 14.08.2020 and final notice dated 21.01.2021.
31. That the complainants have made part-payment towards the total sale consideration and are bound to make payment towards the remaining due amount along with registration charges, stamp duty, service tax as holding charges are being accrued as per the terms of the buyer's agreement. The complainants have never been ready and willing to abide by the contractual

obligations and have instead filed the present baseless, false and frivolous complaint.

32. That the complainants are real estate investors who have invested their money in the project of the respondent with an intention to make profit in a short span of time. However, their calculations have gone wrong on account of slump in the real estate market and they are now deliberately trying to unnecessarily harass, pressurize and blackmail the respondent to submit to their unreasonable demands instead of abiding by contractual obligations of making timely payment towards the due amount.
33. That the date of commencement of piling was 05.07.2013 and it is pertinent to mention that the possession was offered strictly as per the terms of the allotment and no delay of whatsoever nature could be attributed to the respondent. It is reasserted that on account of certain unforeseeable circumstances, the implementation of the project was affected, and the respondent cannot be held accountable for the same. No defaults or illegality in offering the possession of the unit to the complainants by respondent was made and the respondent has throughout adhered to the terms of the allotment, rules and regulations, law and the directions issued by the concerned authorities.
34. That no suggestion to shift the unit was given by the respondent to the complainants and it was the complainants themselves who had suggested to shift from tower No.8 to tower No.7. It is submitted that the complainants

have informed the respondent vide their email dated 18.05.2018 that due to the guidelines by their astrologer, the sum of numeric digits was not suitable for the horoscope of the complainants and hence they want the unit number to be changed. Although, there was no such obligation on the part of the respondent, it being a customer oriented company intimated to the complainants that their request would be considered and that they were asked by the respondent vide email dated 5.6.2018 to submit the relevant documents along with administrative fees. However, the complainants failed to do so and no finalization of transfer/shifting of unit was done by the respondent. It is pertinent to mention here that when several reminders were being issued to the complainants by the respondents after alleged finalization of the unit, in all such reminders, the unit number was mentioned as 8081 in tower No.8 and no objections whatsoever were raised by the complainants.

35. 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

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

E.1 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

37. 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.

38. 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 complainants at a later stage.

F. Findings on the objections raised by the respondent:

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

39. The respondent has raised an objection that the complainants have 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 39: All or any dispute arising out of or touching upon or in relation to the terms of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 as amended up to date. A sole arbitrator who shall be nominated by the Board of Directors of the company shall hold the arbitration proceedings at the office of the Company at Noida. The allottee hereby confirms that he shall have no objection to this appointment, more particularly on the ground that the Sole Arbitrator being appointed by the Board of Directors of the company likely to be biased in favour of the company. The Courts at Noida, Uttar Pradesh shall to the specific exclusion of all other courts alone have the exclusive jurisdiction in all matters arising out of/touching and/or concerning this Agreement regardless of the place of execution or subject matter of this Agreement. Both the parties in equal proportion shall pay the fees of the Arbitrator"

40. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*,

wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

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

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

41. 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 complainants have 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."

42. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are 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 events

43. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as demonetisation, various orders passed by NGT, weather conditions in Gurugram and non-payment of instalment by different allottees of the project, etc. But all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 10.06.2013 and as per clause 18 of said agreement, the due date of handing over of possession comes out to be 12.12.2016. The event of demonetization occurred in November 2016. The date of notification enforcing demonetization was only 2 months before the date of handing over of possession. So, by that time the construction of the said project must be near completion. But the respondent obtained the occupation certificate from the concerned authority on 28.05.2019 i.e. after more than 2 years of passing of due date of handing over of possession. Therefore, it is nothing but obvious that the project of the respondent was already delayed, and no extension can be given to the respondent in this regard. The events taking place such as NGT orders, restriction on construction due to weather conditions were for a shorter period of time and not yearly one and do not 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 on hold due to fault of some of the allottees. Thus, the promoter/respondent cannot be given any leniency based on aforesaid reasons and the plea advanced in this regard is untenable.

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."

44. 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."

45. 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 complainants being investor

46. The respondent has taken a stand that the complainants 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 complainants are buyer and they have paid total price of Rs. 2,66,16,240/- 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;"

47. 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 complainants, it is crystal clear that the complainants 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. 000600000010557 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 complainants.

48. Relief sought by the complainants:

- i. Direct the respondent to pay interest @10.75 % per annum on the amount already paid by the complainants that is Rs. 2,66,16,240/- from the due date of possession i.e., December 2016 till handing over of the possession of the flat.
- ii. Direct the respondent that after payment of the above amount of interest the possession should be handed over to the complainants within the stipulated time period as per the direction of the authority.
- iii. Direct the respondent to transfer unit no. 7171 in tower 7 in the name of complainants and handover the possession peacefully.
- iv. Direct the respondent that if he is not in capacity of allotment of requisite flat no. 7171, then refund the entire amount along with interest @ 18 % per annum from the date of payment till its realization.

- v. Direct the respondent to refund the amount of Haryana VAT @2,46,343/- and GST @14,20,350/- because of respondent had delayed their project more than 36 months.

G.I Direct the respondent to pay interest @10.75 % per annum on the amount already paid by the complainants that is ₹ 2,66,16,240/- from the due date of possession December 2016 till handing over of the possession of the flat.

G.II Direct the respondent that after payment of the above amount of interest the possession should be handed over to the complainants within the stipulated time period as per the direction of the authority.

49. In the present case, In the present case, the complainants were offered possession by the respondent on 30.05.2019 in respect of unit no. 8081 after receipt of OC dated 28.05.2019. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 10.06.2013 executed between the parties.

Validity of offer of possession

50. It is necessary to clarify this concept because after valid and lawful offer of possession liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and allottee remains entitled to receive interest for the delay caused in handing over valid possession. The authority is of considered view that a valid offer of possession must have following components:

- i Possession must be offered after obtaining occupation certificate;

- ii The subject unit should be in habitable condition;
- iii Possession should not be accompanied by unreasonable additional demands.

51. In the present matter the respondent has issued offer of possession dated 30.05.2019 i.e., after obtaining OC from the concerned department without any unreasonable additional demands. Therefore, two out of three above mentioned conditions for valid offer of possession are satisfied but the complainants raised the issue on the completion of the unit in all respect as promised. The authority to take a considerate view in this regard appointed a local commission to visit the project site and submit its report w.r.t the status of the unit as well as the project. The local commission submitted its report on 26.10.2021 with the findings as under:

"The site of project named "ATS Triumph" being developed by M/s Anand Divine developers Pvt Ltd has been inspected and the report is based upon the actual construction at site:

The promoter has completed the construction of all the four blocks/eight towers along with community building, EWS and obtained the occupation certificate vide memo No. ZP-760/AD/(RA)/2019/12813 dated 28.05.2019 for Block A, Block B, Block C, Block D, EWS Block, Community Building & Convenient Shopping from DTCP, Haryana. Further the construction of four villas out of nineteen villas in the project is progressing on site. Therefore, the complete project is registrable as the occupation certificate has been obtained after publication of the Haryana Real Estate (Regulation and Development) Rules, 2017.

The complainant unit was checked specifically, and it is submitted that the internal finishing works such as internal doors, wooden flooring in two bedrooms, electrical wiring along with accessories, modular kitchen, wardrobes, sanitary wares in bathrooms, final coat of internal paint and installation of air conditioner are pending. Further some tiles in bathrooms

and balcony area are damaged. Therefore, the unit is not fit for possession as maximum finishing works are pending.”

52. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of the subject unit with such minor defects under protest. Suitable relief for rectification of minor defects after taking over of possession under protest shall be provided whereas if the unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit will not be considered a legally valid offer of possession. Also, as per said report, there are 19 number of villas in the project out of which the promoter has started the construction of 4 villas only and which are not complete till date. It is pertinent to mention here that the instant unit of the complainants is not part of any of these villas.
53. In the present case, as per specifications annexed with BBA dated 10.06.2013, on page no. 48 of the complaint, various specifications were agreed upon by the parties. Upon perusal of documents on record following deficiencies can be traced-

S.no	Specifications as per BBA	Pending work as per the report of LC
1.	Flush shutters with polished wood veneer and solid wood/ timber frame/ stainless steel/ brass finished hardware fittings for main door & aluminium powder coated hardware fittings and locks of branded marks. Window frames/ panels of seasoned hardwood/aluminium/ UPVC sections. All hardware in powder coated aluminium. Size and section as per the design of the architect.	No internal doors are fitted
2.	Wooden/ premium imported flooring in bedrooms	Wooden flooring in two bedrooms are pending
3.	All electrical wiring in concealed conduits; provision for adequate light & power points. Telephone & T.V. outlets in Drawing, Dining and all bedrooms; modular plastic switches & protective MCB's	Electrical wiring along with accessories are not done. HVAC/VRC is not started.
4.	All kitchen counters in pre-polished granite/ imported marble stone, electrical points for kitchen chimney & hob, fully fitted with premium brand hob, chimney, stainless steel sink imported CP fittings, kitchen will	Modular kitchen work is pending. Only kitchen floor & tiles are completed.

	be provided with modular cabinets of appropriate finish.	
5.	Modular wardrobes in all bedrooms	No wardrobes are fitted
6.	Premium sanitary fixtures of Kohler/Duravit or equivalent, premium chrome plated fittings to be of Grohe or equivalent	No sanitary wares in bathrooms
7.	Appropriate finish of texture paint of exterior grade POP punning with acrylic emulsion paint in living, dining & bedrooms on interior walls & ceiling.	Final coat of internal paint is pending
8.	VRV/VRV AC System in living room, dining, family room & bedrooms with integrated automation system.	Installation of air conditioner is not done
9.	Designer ceramic flooring in toilets & Balconies will be in anti-skid ceramic flooring	Some tiles in bathroom & balcony are damaged.

54. So, in the present case, it can be concluded that the unit was not as per the specifications promised in BBA at the time of offer of possession and thus, the said offer of possession cannot be considered a legally valid offer of possession.
55. Therefore, considering the said report and applying above principle on facts of this case, the respondent is directed to complete the unit in all respects

within 2 months from the date of this order and make it ready for possession. The respondent is further directed to make a fresh offer of possession accompanied with fresh statement of accounts deleting all demands which are not as per buyer's agreement and including therein interest payable to the complainants for delay caused in offering possession as the offer of possession dated 30.05.2019 is quashed hereby and at the same time the complainants are directed to take possession of the said unit after a valid offer of possession.

56. Considering the above-mentioned facts, the authority calculated due date of possession as per clause 18 of the buyer's agreement i.e., 36 months from the date of commencement of construction of the particular tower in which the unit of the complainants is located plus grace period of 6 months i.e., the date on which the respondent demanded on account of commencement of the pilling i.e., 12.06.2013 as per documents placed on record. As such the due date of possession comes out to be 12.12.2016.
57. In the present complaint, the complainants intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

Section 18: - Return of amount and compensation

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

.....

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

58. As per clause 18 of the buyer's agreement dated 10.06.2013, the possession of the subject unit was to be handed over by 12.12.2016. The due date of handing over of possession is calculated from the date of the commencement of construction i.e., 12.06.2013 the date on which the respondent raised the demand equivalent to that of commencement of pilling as per payment plan annexed to the BBA. Clause 18 of the buyer's agreement provides for handover of possession and is reproduced below:

As per clause 18 : Time of handing over of possession

Barring unforeseen circumstances and force majeure events as stipulated hereunder, possession of the said apartment is proposed to be, offered by the company to the allottee within a period of 36(thirty six) months with a grace period of 6(six) months from the date of actual start of the construction of a particular tower building in which the registration for allotment is made, such date shall hereinafter referred to as "stipulated date", subject always to timely payment of all amounts including the basic sale price, EDC/IDC, IFMS, stamp duty, registration fees and other charges as stipulated herein or as may be demanded by the company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/engineer-in-charge of the complex and the said certification shall be final and binding on the allottee.

59. 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 residential, 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.

60. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

61. **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 actual start of construction of the particular tower/building in which the allotment is made. 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 12.12.2016.

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

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

- (1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%:- Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

63. 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.

64. 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., 11.03.2022 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
65. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

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

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

G.III Direct the respondent to transfer unit no. 7171 in tower 7 in the name of complainants and handover the possession peacefully.

G.IV Direct the respondent that if he is not in capacity of allotment of requisite flat no. 7171, then refund the entire amount along with interest @ 18 % per annum from the date of payment till its realization.

66. In the present case, the complainants were offered possession by the respondent on 30.05.2019 in respect of unit no. 8081 after receipt of OC

dated 28.05.2019. Though the complainants have requested for change of unit from 8081 to 7171 but there is no document to support this fact is available on record that the respondent has considered their request and changed the unit. During the course of proceedings, the complainants through counsel agreed to proceed with the originally allotted unit i.e. 8081. Therefore, the said relief cannot be granted to the complainants. The complainants cannot ask for a particular unit in lieu of allotted unit if same is not agreed to by the respondent for any reason although not explained in the proceedings. The complainants did not take the possession of unit No.8081, in Tower-8, Block D and insisted for giving possession of unit No.7171 in Tower-7. The possession was delayed by the complainants himself.

G.V Direct the respondent to refund the amount of Haryana VAT @2,46,343/- and GST @14,20,350/- because of respondent had delayed their project more than 36 months.

67. The authority has decided this issue in the complaint bearing no. 4031 of 2019 titled as Varun Gupta V/s Emaar MGF Land Ltd, wherein the authority has held that for the projects where the due date of possession was prior to 01.07.2017 (date of coming into force of GST), the respondent/promoter is not entitled to charge any amount towards GST from the complainants/allottees as the liability of that charge had not become due up to the due date of possession as per the buyer's agreements.
68. In the present complaint, the possession of the subject unit was required to be delivered by 12.12.2016 and the incidence of GST came into operation

thereafter on 01.07.2017. So, the complainants cannot be burdened to discharge a liability which had accrued solely due to respondents' own fault in delivering timely possession of the subject unit. So, the respondent/promoter is not entitled to charge GST from the complainants/allottees as the liability of GST had not become due up to the due date of possession as per the said agreement.

69. It is to be noted that 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. Moreover, if the respondent company has opted for composition levy, then also the incidence of such taxes shall be borne by the respondent only. If for this period any VAT has been charged the same is refundable in case of availing amnesty scheme availed by the promoter.
70. On consideration of the circumstances, the evidence and other record and submissions made by the complainants and the respondent and based on the findings of the authority regarding contravention as per provisions of Act, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 18 of the buyer's agreement executed between the parties on 10.06.2013, possession of the booked unit was to be delivered within a period of 3 years from the date of start of construction of tower in which the unit is allotted with a grace period of 6 months. The date of commencement of construction i.e., 12.06.2013 the date

on which the respondent raised the demand equivalent to that of commencement of pilling as per payment plan annexed to the BBA. Therefore, the due date of handing over of possession comes out to be 12.12.2016.

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 complainants are entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession i.e. 12.12.2016 till handing over of possession as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

H. Directions of the authority:

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

- i. The respondent shall pay interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 12.12.2016 till actual handing over of possession 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 on or before the 10th of each succeeding month.
- iii. The respondent is directed to complete the unit in all respects within 2 months from the date of this order and make it ready for possession.

- iv. The respondent is directed to make a fresh offer of possession accompanied with fresh statement of account deleting all demands which are not as per buyer's agreement and including therein interest payable to the complainants for delay caused in offering possession as the offer of possession dated 30.05.2019 is quashed hereby and at the same time, the complainants are directed to take possession of the said unit after a valid offer of possession.
- 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(zb) of the Act.
- vi. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement.
72. Complaint stands disposed of.
73. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated:11.03.2022