

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

**Complaint no.** : 170 of 2021  
**First date of hearing:** 19.03.2021  
**Date of decision** : 11.03.2022

1. Kavita Singh  
2. Vikram Singh

**Both RR/o:** E-1/24 Palam Extension, Sector 7, Near  
Ramphal Chowk, Dwarka, New Delhi- 10075

**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 Pankaj Yadav  
Shri M.K. Dang & Garvit Gupta

Advocate for the complainants  
Advocates for the respondent

**ORDER**

1. The present complaint dated 02.02.2021 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	<b>Not registered</b>
6.	Date of execution of flat buyer's agreement	<b>18.12.2012</b> (As per annexure- P1 on page no. 41 of the complaint)
7.	Unit no.	2211 on 21st floor, tower 2 (block A) (Aa per annexure- P1 on page no. 43 of the complaint)
8.	Super Area	2290 sq. ft. (As per annexure- P1 on page no. 43 of the complaint)



9.	Payment plan	Construction linked payment plan (As per page 65 of the complaint)
10.	Total consideration	Rs.1,16,34,750/- (As per BBA on page no. 65 of complaint)
11.	Total amount paid by the complainants	Rs. 1,23,36,627/- (As per statement of account as annexure P8 on page no. 75 of complaint)
12.	Date of commencement of construction of the project	05.07.2013 (Vide annexure P2 at page no. 66 of the complaint wherein the respondent has demanded a sum of Rs.10,07,600 + service tax from the complainants with regard to the commencement of piling as per the payment plan annexed at annexure II of the buyer's agreement on page no. 65)
13.	Due date of delivery of possession <i>(As per clause 18 of the agreement: Time of handing over 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</i>	05.01.2017 [Calculated from the date of the commencement of construction i.e., 05.07.2013 the date on which the respondent raised the demand equivalent to that of commencement of piling as per payment plan annexed to the BBA] <b>(Grace period of 6 months is allowed)</b>

	<i>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.)</i>	
14.	Occupation Certificate	28.05.2019 (As per annexure R11 on page no. 68 of reply)
15.	Offer of possession	30.05.2019 (As per Annexure- P7 on page no. 71 of the complaint)
16.	Delay in delivery of possession till the date of order i.e., 11.03.2022.	5 years 2 months 6 days

**B. Facts of the complaint**

3. That the complainants booked a residential apartment with the respondent in the project called 'ATS Triumph' located at Dwarka Expressway Sector 104, Gurgaon being constructed and developed by the respondent.
4. That an amount of Rs. 30,22,800/- has been paid by the complainants for the booking and it was confirmed that a residential apartment bearing unit No. 2211 on 21st floor in tower/building 2 having super area of approx. 2290 sq. ft. (212.74 sq. mt.) with 2 exclusive covered/open car parking in the said



project, stood provisionally allotted to the complainants in pursuance of the application No. 70.

5. That subsequently, a "buyer's agreement" dated 18.12.2012 was executed between the parties and in clause 5 and the annexure-ii to the said agreement dated 18.12.2012, the respondent acknowledged the receipt of Rs. 30,22,800/-.
6. That the complainants have opted for the construction linked payment plan, whereby the possession was to be handed over within 36 months with an additional grace period of 6 months from the date of start of construction. The respondent issued a demand letter dated 05.07.2013 for an instalment of Rs. 10,44,962/- to the complainants, the due date for the same was 20.07.2013. This instalment was due on commencement of piling or to say from laying of foundation, therefore, it would be expedient for the complainants to submit that as per their knowledge the construction started from 05.07.2013 when this demand letter dated 05.07.2013 was send by the respondent. Hence, the residential apartment should have been delivered to the complainants by 05.07.2016 or 05.01.2017.
7. That the complainants made payments of Rs. 44,962/- vide cheque dated 15.07.2013 and Rs. 10,00,000/- vide cheque dated 24.07.2013, which have been duly acknowledged in the account statement issued by the respondent.
8. That vide demand letter dated 01.12.2013, an instalment of Rs. 11,60,848/- was raised from the complainants, the due date for the same was

20.12.2013. The said amount of Rs. 11,60,848/- was paid vide two cheques dated 15.12.2012 which was duly acknowledged in the account statement issued by the respondent.

9. That vide demand letter dated 07.05.2014, an instalment of Rs. 6,26,977/- was again sought from the complainants. The due date for the same was 27.05.2014. The complainants vide a cheque dated 24.06.2014 remitted the aforesaid amount of Rs. 6,26,977/-. However, the respondent charged an interest @ 18% on the delayed payment(s) and vide another cheque dated 24.06.2014 an amount of Rs. 9,242/- was paid to the respondent out of which Rs. 8,944/- was paid towards the interest amount.
10. That vide demand letter dated 07.07.2014, an instalment of Rs. 6,26,678/- was sought from the complainants. The due date for the same was 26.07.2014. The complainants vide a cheque dated 24.08.2014 remitted an amount of Rs. 6,26,678/- but the respondent charged an interest @ 18% on the delayed payment(s) and vide another cheque dated 24.08.2014 an amount of Rs. 9,400/- was paid to the respondent out of which Rs. 8,642/- was again paid as interest amount. All the amounts paid by the complainants have been duly acknowledged in the account statement issued by the respondent.
11. That vide demand letter dated 06.09.2014, an instalment of Rs. 6,26,219/- was sought from the Complainants. The due date for the same was 25.09.2014. That this instalment was made good vide two cheques dated



21.01.2015, but the respondent charged an interest @ 18% on the delayed payment(s) and then separately an amount of Rs. 36,031/ towards interest was paid inter-alia amongst other payments vide separate cheque dated 21.01.2015. From 23.03.2015 to 03.08.2015, the following amounts were paid by the complainants vide various cheques:

(i) Rs. 37,566/- vide cheque dated 23.03.2015 and 07.04.2019 being 18% interest on delayed payment(s).

(ii) Rs. 4,29,375/- vide cheque dated 23.03.2015.

(iii) Rs. 6,03,072/- vide cheque dated 23.03.2015.

(iv) Rs. 6,04,560/- vide cheque dated 23.03.2015.

(v) Rs. 5,03,544/- vide cheque dated 23.03.2015.

(vi) Rs. 63,450/- vide cheque dated 23.03.2015.

(vii) Rs. 1,01,016/- vide cheque dated 14.04.2015.

(viii) Rs. 3,746/- vide cheque dated 14.04.2015.

(ix) Rs. 6,04,560/- vide cheque dated 13.05.2015.

(x) Rs. 22,417/- vide cheque dated 13.05.2015.

(xi) Rs. 6,04,560/- vide cheque dated 08.03.2015.

(xii) Rs. 25,392/- vide cheque dated 08.03.2015.

(xiii) Rs. 5,03,800/- vide cheque dated 07.04.2019.

(xiv) Rs. 3,46,618/- vide cheque dated 07.04.2019.

(xv) Rs. 1,02,050/- vide cheque dated 07.04.2019.

12. That on 31.03.2018, the following amounts were paid by the complainants vide NEFT transfer:

(i) Rs. 1,00,508/- vide NEFT dated 31.03.2018.

(ii) Rs. 9,822/- vide NEFT dated 31.03.2018.

- (iii) Rs. 1,768/- vide NEFT dated 31.03.2018.
- (iv) Rs. 15,178/-vide NEFT dated 31.03.2018.
- (v) Rs. 2,732/- vide NEFT dated 31.03.2018.
- (vi) Rs. 41,956/- vide NEFT dated 31.03.2018.
- (vii) Rs. 5,035/- vide NEFT dated 31.03.2018.

13. That a letter dated 30.05.2019 was sent by the respondent to the complainants with the subject offer of possession and registration of conveyance deed for apartment number 2211 at ATS Triumph. Along with that letter, there was a demand letter dated 30.05.2019, dues on offer of possession. Pursuant to this demand letter dated 30.05.2019, an amount of Rs. 13,74,756/- was sought from the complainants for possession and registration of conveyance deed for apartment number 2211 at ATS Triumph.
14. That as the possession was offered highly belated, the respondent illegally and arbitrarily gave a paltry benefit of Rs. 3,32,050/- for delayed offer of possession to the complainants.
15. That till date, a total of Rs. 1,23,36,627/- stands credited/paid and acknowledged towards the possession and registration of conveyance deed for apartment number 2211 at ATS Triumph. It is submitted that the entire payments as required having been paid and the possession has still been not given to the complainants.

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

16. The complainants have sought following relief:



- i. Direct the respondent to handover possession of residential apartment having super area of approx. 2290 sq. ft. bearing unit no. 2211 on 21st floor tower 2 with 2 exclusive covered parking in the project "ATS Triumph" located at Dwarka Expressway, Sector 104, Gurugram to the complainants, complete in all respects and in conformity with the buyer's agreement, with all additional facilities and as per quality standards promised and execute all necessary and required documents in respect of the said apartment in favour of the complainants within 6 months of this petition being filed before this authority or as directed by this authority.
- ii. Direct the respondent to pay interest per month at 18% per annum on the amount deposited by the complainants with the respondent, with effect from date of each respective deposit or in the alternative with effect from 05.07.2016 i.e., date when possession was promised, till the date of actual valid possession as per clause a) above is handed over by the respondent along with all necessary documents and common areas and facilities as promised to the complainants.
- iii. Direct the respondent to pay compensation, by way of interest as deemed appropriate or at the prescribed rate on the deposited amount to the complainants w.e.f. the date of respective deposit till the date of actual valid possession as per clause a) above is handed over by the respondent along with all necessary documents and common area and facilities as promised to the complainants as the complainants are entitled for the same after the issues raised in this complaint are decided in his favour.

- iv. Declare the one-sided clauses and stipulations in favour of the respondent as non-est and illegal.
  - v. Direct the respondent to pay cost in the sum of Rs. 5,00,000/- on account of mental agony and physical harassment caused to the complainants as the complainants are entitled for the same after the issues raised in the complaint are decided in their favour.
  - vi. Direct the respondent to pay cost of litigation to the tune of Rs. 55,000/-.
  - vii. Direct the respondent to refund wrongfully charged taxes and other charges along with the appropriate interest on that amount from the date of receipt of such wrongful levied charges and taxes.
17. On the date of hearing, the authority explained to the respondent/promoter about the contraventions 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:**

18. 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.
19. 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 as per clause 39 of the buyer's agreement.
20. That the complainants, after checking the veracity of the project namely, 'ATS Triumph', Sector 104, Gurugram 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. That based on the application of the complainants, the buyer's agreement was executed on 18.12.2012 for unit bearing no. 2211 in tower no. 2 having super area of 2290 sq. ft.

21. That the complainants made payment of some of the instalments on time and then started defaulting in payment of the remaining due consideration. The respondent has sent a demand letter dated 06.09.2014 for the net payable sum of Rs. 6,26,219/-. However, the complainants failed to remit the due amount and the same was adjusted in the next instalment amount dated 20.11.2014. The respondent was even constrained to issue reminder dated 05.01.2015.
22. That the complainants failed to pay the due amount and the amount was accordingly adjusted in the next installment demand dated 15.01.2015 for net payable sum of Rs. 23,69,594/- as outstanding amount . The complainants yet again, defaulted in making payments and the due amount was adjusted in the next installment demand dated 16.03.2015.
23. 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."*

24. 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, flood, 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."*

25. 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:

**I) 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 company 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 did not have bank accounts and were paid in cash on a daily basis. During demonetization the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially and whereas cash payments to labour on a site of the magnitude of the project in question were Rs. 3-4 lakhs per day. 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 i.e. 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 improvements 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 level of NCR region has 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 that, 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. Thus, in view of the above, construction work remained very badly affected for 6-12 months which was beyond the control of the respondent and the said period is also required to be added while 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.

26. 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 to the complainants vide letter dated 30.05.2019 after obtaining the occupation certificate on 28.05.2019. It is pleaded that 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.
27. 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.

28. That the due 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.
29. 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**

30. 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**

32. 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.*

33. 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.**

34. 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"*

35. The respondent contended that as per the terms & conditions of the agreement dated 18.12.2012 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."*

36. 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."*

37. 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**

38. 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 18.12.2012 and as per clause 18 of said agreement, the due date of handing over of possession comes out to be 05.01.2017. 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 authorities 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 are 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.**

39. 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. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. Even 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."*

40. Then, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, vide 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."*

41. 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**



42. 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 observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and they have paid total price of Rs. 1,23,36,627/- to the promoter towards purchase of an apartment in its project. 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;"*

43. 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 they 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 complainants.**

**44. Relief sought by the complainants:**

- i. Direct the respondent to handover possession of residential apartment having super area of approx. 2290 sq. ft. bearing unit no. 2211 on 21st floor tower 2 with 2 exclusive covered parking in the project "ATS Triumph" located at Dwarka Expressway, Sector 104, Gurugram to the complainants, complete in all respects and in conformity with the buyer's agreement, with all additional facilities and as per quality standards promised and execute all necessary and required documents in respect of the said apartment in favour of the complainants within 6 months of this petition being filed before this authority or as directed by this authority.



- ii. Direct the respondent to pay interest per month at 18% per annum on the amount deposited by the complainants with the respondent, with effect from date of each respective deposit or in the alternative with effect from 05.07.2016 i.e., date when possession was promised, till the date of actual valid possession as per clause a) above is handed over by the respondent along with all necessary documents and common areas and facilities as promised to the complainants.
- iii. Direct the respondent to pay compensation, by way of interest as deemed appropriate or at the prescribed rate on the deposited amount to the complainants w.e.f. the date of respective deposit till the date of actual valid possession as per clause a) above is handed over by the respondent along with all necessary documents and common area and facilities as promised to the complainants as the complainants are entitled for the same after the issues raised in this complaint are decided in his favour.
- iv. Declare the one-sided clauses and stipulations in favour of the respondent as non-est and illegal.
- v. Direct the respondent to pay cost in the sum of Rs. 5,00,000/- on account of mental agony and physical harassment caused to the complainants as the complainants are entitled for the same after the issues raised in the complaint are decided in their favour.
- vi. Direct the respondent to pay cost of litigation to the tune of Rs. 55,000/-.

- vii. Direct the respondent to refund wrongfully charged taxes and other charges along with the appropriate interest on that amount from the date of receipt of such wrongful levied charges and taxes.

**G.I Direct the respondent to handover possession of residential apartment having super area of approx. 2290 sq. ft. bearing unit no. 2211 on 21st floor tower 2 with 2 exclusive covered parking in the project "ATS Triumph" located at Dwarka Expressway, Sector 104, Gurugram to the complainants, complete in all respects and in conformity with the buyer's agreement, with all additional facilities and as per quality standards promised and execute all necessary and required documents in respect of the said apartment in favour of the complainants within 6 months of this petition being filed before this authority or as directed by this authority.**

45. In the present case, the complainants were offered possession of allotted unit on 30.05.2019 after receipt of OC dated 28.05.2019.

#### ***Validity of offer of possession***

It is necessary to clarify this concept because after valid and lawful offer of possession, the liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, the liability of promoter continues till a 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 a habitable condition;



iii. The possession should not be accompanied by unreasonable additional demands.

46. In the present matter, the respondent has offered the possession of the allotted unit on 30.05.2019 i.e., after obtaining occupation certificate from the concerned department on 28.05.2019 without any unreasonable additional demands. Therefore, two out of three above mentioned conditions for valid offer of possession are satisfied but the complainants raised an issue with regards to 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. 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 complainants unit was checked specifically and it is submitted that the internal finishing works such as internal doors, wooden flooring in one bedrooms, electrical switches, modular kitchen, wardrobes, sanitary wares in bathrooms, final coat of internal paint and installation of air conditioner are*

*pending. Further, some tiles in bathrooms are damaged. Therefore, the unit is not fit for possession as maximum finishing works are pending."*

47. 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. A 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. However, it is pertinent to mention here that the instant unit of the complainants is not part of any of these villas.
48. In the present case, as per specifications annexed with BBA dated 18.12.2012, various specifications were agreed upon by the parties. Upon perusal of documents on record the following facts can be ascertained-



S.no	Specifications as per BBA	Pending work as per the report of LC
1.	Flush doors- polished/ enamel painted, stainless steel/ brass finished hardware fittings for main door & aluminium powder coated hardware fittings and locks of branded marks, door frames & window-panes of seasoned hardware/ aluminium/ UPVC sections. All hardware in powder coated aluminium. Size and section as per the design of the architect.	Internal doors are pending
2.	Wooden/ vitrified tiles flooring in bedrooms	Wooden flooring in one bedroom is 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 switches are not attached/fitted
4.	All kitchen counters in pre-polished granite, marble stone, electrical points for kitchen chimney & hob, washing machine & fridge to be provided. Kitchen will be provided with modular cabinets of appropriate finish.  &	Modular kitchen work is pending.

	600 mm height above kitchen counter slab in appropriate colour & paint	
5.	No specification can be traced	No wardrobes are fitted
6.	Premium sanitary fixtures, premium chrome plated fittings	No sanitary wares in bathrooms
7.	Appropriate finish of texture paint of exterior grade -water proof paint	Final coat of internal paint is pending
8.	No specification can be traced	Installation of air conditioner is not done
9.	Ceramic tiles & glazed tiles of required heights in the toilets	No report except mentioning of fact in the photograph of bathroom having no floor tiles.

49. A perusal of the report of local commission dated 26.10.2021 shows that fitting of internal doors, fixing of wooden floor in one-bedroom, fixation of electrical switches, work of modular kitchen, wardrobes, fixation of sanitary wares, final coat of internal paint and the bathroom is having no floor tiles. Though as per specifications of flat buyer's agreement dated 18.12.2012, these fixtures were to be provided at the time of possession. A period of 2 months is given to the builder to make the allotted unit fit for possession on the basis of offer of possession & the allottee depositing the remaining amount due. In this case, the unit was allotted to the complainants for a sum of Rs. 1,23,36,627/- and they have already paid a sum of Rs. 1,16,34,750/- till date. It is a fact that possession of the allotted unit has been offered to the complainants on 30.05.2019 on the basis of occupation certificate dated



25.05.2019 received from the competent authority and the same is not accompanied by any unreasonable demand. So, now the question arises as to whether the unit is fit to be occupied as per specifications given under FBA vis-à-vis the report of local commission dated 26.10.2021. The answer is positive, as the deficiencies pointed out above by the report of local commission are such which may not take more than 2 months & which is usually given to the developer to complete the unit and make it fit for possession after making payment of the amount due from the allottees. So, the plea of the complainants that the allotted unit is not fit for occupation & habitable is untenable. However, the counsel for the respondent stated at bar that it will take at least 3 months to complete the subject unit. Hence, it can be concluded that the said offer of possession cannot be considered as a legally valid offer of possession.

**G.II Direct the respondent to pay interest per month at 18% per annum on the amount deposited by the complainants with the respondent, with effect from date of each respective deposit or in the alternative with effect from 05.07.2016 i.e., date when possession was promised, till the date of actual valid possession as per clause a) above is handed over by the respondent along with all necessary documents and common areas and facilities as promised to the complainants.**

**G.III Direct the respondent to pay compensation, by way of interest as deemed appropriate or at the prescribed rate on the deposited amount to the complainants w.e.f. the date of respective deposit till the date of actual valid possession as per clause a) above is handed over by the respondent along with all necessary documents and common area and facilities as promised to the complainants as the complainants are entitled for the same after the issues raised in this complaint are decided in his favour.**

50. 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 are located plus grace period of 6 months. As per documents placed on record, the respondent raised demand on account of commencement of the pilling on 05.07.2013. As such the due date of possession comes out to be 05.01.2017.

51. 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*

52. As per clause 18 of the buyer's agreement dated 18.12.2012, the possession of the subject unit was to be handed over by of 05.01.2017. The due date of handing over of possession is calculated from the date of the commencement of construction i.e., 05.07.2013 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.*

53. 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.
54. 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.

55. **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 a particular tower building in which the registration for 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 05.01.2017.
56. **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.*

57. 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.
58. 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%.
59. 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.IV Declare the one-sided clauses and stipulations in favour of the respondent as non-est and illegal.**

60. A buyer's agreement is a vital document, that defines rights and obligation of the parties. Thus, it is of utmost important that the agreement must be drafted fairly, keeping in view the interest of both the parties and only specific provisions are to be declared void on account of being arbitrary, unjust or unfair. In present case, the complainants have not mentioned one sided clause particularly in its complaint except from the interest charged by the respondent on delayed payment @ 18% p.a. The explanation regarding this is already provided in the above stated relief.

**G.V Declare the respondent to pay cost in the sum of ₹ 5,00,000/- on account of mental agony and physical harassment caused to the complainants as the complainants are entitled for the same after the issues raised in the complaint are decided in their favour.**

**G. VI Direct the respondent to pay cost of litigation to the tune of ₹ 55,000/-.**



61. The complainants are 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 complainants 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. VII Direct the respondent to provide adequate car parking space and to refund amount charged towards car parking space along with interest from the date when the payment was made.**

62. As per clause 3 of buyer's agreement, the subject unit was allotted with the right to exclusively use two parking spaces along with the undivided pro-rata ownership but nothing has been said on the above relief in the complaint neither have been contended by them in the hearing before the court. The respondent has also not commented on the above relief. Merely on such allegation the authority is not in a position to deliberate upon this relief.

**G. VIII Direct the respondent to refund wrongfully charged taxes and other charges along with the appropriate interest on that amount from the date of receipt of such wrongful levied charges and taxes.**

63. 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.

64. In the present complaint, the possession of the subject unit was required to be delivered by 05.01.2017 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.
65. 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.
66. 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 18.12.2012, 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., 05.07.2013 the date on which the respondent raised the demand equivalent to that of commencement of piling as per payment plan annexed to the BBA. Therefore, the due date of handing over of possession comes out to be 05.01.2017.

Accordingly, the non-compliance of the mandate contained in section 11 (4)(a) of the Act on the part of the respondent is established. As such the complainants are entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession i.e. 05.01.2017 till handing over of possession or offer of possession plus two months, whichever is earlier as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

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


67. 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. 05.01.2017 till actual handing over of possession or offer of possession plus two months,

whichever is earlier as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

- ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest to be paid till date of handing over of possession shall be paid on or before the 10<sup>th</sup> of each succeeding month.
- iii. The 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.
- iv. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement.


68. Complaint stands disposed of.

69. File be consigned to registry.

  
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

  
(Dr. KK Khandelwal)

Chairman

**Dated:11.03.2022**