BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**4732 of 2020**
Date of filing complaint:	**18.12.2020**
First date of hearing:	**06.04.2021**
Date of decision :	**25.07.2022**

1. 2.	Sh. Ambrish Bajaj S/o Sh. Brij Mohan Bajaj Smt. Kanika Bajaj W/o Sh. Ambrish Bajaj **Both R/O**: House no. 1393, Sector-15, Part-II Gurugram	**Complainants**
	Versus	
	M/s ATS real Estate Builders Private Limited **Regd. office:** 711/92, Deepali Nehru Place, New Delhi South Delhi-110019	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Complainant-in-person with Sh. Vaibhav Joshi (Advocate)	Complainants
Sh. M.K. Dang (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under

the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Name and location of the project	"ATS Marigold", Sector 89A, Gurugram
2.	Nature of the project	Residential Group Housing
3.	Project area	11.125 acres
4.	DTCP License	87 of 2013 dated 11.10.2013 valid till 10.10.2017
	Name of the licensee	Dale Developers Private Limited & Gabino Developers Pvt. Ltd.
5.	HRERA registered/ not registered	**Registered vide no. 55 of 2017 dated 17.08.2017 valid till 31.07.2021**
6.	Application dated	01.07.2014 (A per page no. 11 of CRA)
7.	Allotment letter dated	27.07.2015 (As per page no. 11 of CRA)
8.	Date of execution of flat buyer's agreement	27.05.2015 (As per page no. 21 of CRA)
9.	Unit no.	5144 on 14th floor, tower 05

		(As per page no. 22 of CRA)
10.	Super Area	1750 sq. ft. (As per page no. 22 of CRA)
11.	Total consideration	BSP- Rs. 1,09,37,500/- (As per page no. 13 of CRA)
12.	Total amount paid by the complainants	Rs. 1,14,49,190/- (As per page no. 14 of CRA) (inadvertently recorded wrong as Rs. 1,14,59,190/- in proceedings dated 25.07.2022)
13.	Possession clause	**Clause 6.2** *(The Developer shall endeavor to complete the construction of the Apartment* ***within 42 (forty two) months from the date of this Agreement, with the grace period of 6 (six) months ie. ("Completion Date").. subject always*** *to timely payment of all charges including the basic sale price, stamp duty, registration fees and other charges as stipulated herein. The Company will send possession Notice and offer possession of the Apartment to the Applicant(s) as and when the Company receives the occupation certificate from the competent authority(ies)..)*
14.	Due date of possession	27.05.2019 (Calculated from the date of the agreement i.e.; 27.05.2015 + grace period of 6 months) ***Grace period is allowed***
15.	Occupation Certificate	Not obtained

16.	Offer of possession	Not offered
17.	Tri-partite agreement dated	22.04.2016 (As per page no. 96 of complaint)

B. Facts of the complaint:

3. That the complainants applied for allotment, purchase and registration of a flat in the respondent's group housing complex namely "ATS Marigold" (hereinafter referred to as the "project") in Sector 89A, Gurgaon, Haryana and paid the booking amount of Rs. 10,00,000/- vide cheque dated 11.07.2013 bearing no. 162384 drawn on Yes Bank. The receipt for the same was issued by the respondent on 25.08.2014 which was nearly a year later after the actual payment. That the booking form indicated that the area of the flat would be 1700 sq. ft the basic rate would be Rs. 6000 per sq. ft. The booking form further had a hand-written note which stated that 30% of BSP to be paid in two months from date of booking.

4. That vide allotment letter dated 27.09.2014, the complainants were allotted type "C" flat on 14th floor in tower no. 5 bearing unit no. 5144 and having build-up area of 1400 sq. ft. (hereinafter referred to as the "unit") for a total consideration of Rs. 1,19,06,250/-. The timeline of payment was specified in the schedule to the allotment letter and payment plan was a construction linked plan divided into stages of construction. However, the letter did not contain any date of delivery or indicative timelines.

5. That on 20.07.2015, the flat buyer's agreement was executed between the parties (hereinafter referred to as the "agreement"). That the said

agreement was executed after a delay of over 2 years from the date of booking and one-year delay of allotment. This is despite the fact that as on the date of the agreement, a sum of Rs. 42,00,000/- was already been paid by the complainants and the same has been admitted in clause 4.1 of the agreement. Therefore, at that stage, the complainants' had no choice but to sign the agreement. Clause 6.2 of the said agreement specifically provided for the timelines for completion of construction and stated that the construction of the apartment would be completed within 42 months from the date of the agreement with the grace period of 6 months.

6. That the said agreement was executed after a delay of over 2 years from the date of booking and thus, deliberate as per clause 6.2 due date is to be calculated from the date of execution of the agreement. It is thus apparent that the respondent deliberately held off on signing of the agreement to gain more time at the cost of the complainant.

7. That the grace period of six months as mentioned in clause 6.2 of the agreement is not applicable in the present facts and circumstances, as it is accepted trade practice that grace period for delivery of possession of a flat/apartment by the builder is for the specific purpose of obtaining of occupancy certificate from the concerned government department, and hence possession of the unit was to be handed by 27.01.2019.

8. That there are still many stages pending for completion of the said project and there is no estimate regarding the amount of time that it will take to complete the same. The last indication that was given by the respondent is

that the project is delayed by 24 months. The complainants visited the project site to verify the status of construction of the project thereafter on various occasions. However, there was very little construction activity being carried out on the site. Out of the total six towers, only four have been constructed. Thereafter, the complainants' also contacted the officials of the respondent; however no proper estimate has been given by them as to the date of completion of the unit.

9. That the complainants executed a tripartite agreement (hereinafter referred to as "loan agreement or subvention agreement") with the respondent and ICICI Bank Limited vide which the ICICI Bank sanctioned a loan of Rs. 70,00,000/-. It is noteworthy that the particulars of the unit have been specifically mentioned in the subvention agreement. The complainants had already paid a sum of Rs. 5,,15,664/- to the respondent and the said fact has been mentioned in clause (i) of the subvention agreement

10. That the respondent wrote to the complainants vide letter stating that the payment of pre-EMI inter-se being the obligation of the respondent till the offer of possession. ICICI Bank sanctioned the loan to the Complainants vide their letter dated 02.05 2016 for an amount of Rs 70,00,000/- with an EMI of Rs. 65,021/- payable monthly. The letter dated 08.08.2016 containing inter alia the terms and conditions of the sanction of home loan, loan amount, term and effective rate of interest was issued by ICICI Bank to the complainants.

11. That the respondent wrote an email to complainant which was an intimation of the change of account to an escrow account. Further, the complainant no. 1 received an email from ICICI Bank about a default in crediting in Pre EMI for the month of April 2019 and that the account was reported in delinquency. It was discovered that a cheque issued by respondent had bounced and the same had happened earlier as well.

12. The complainant no. 1 immediately wrote to the respondent for resolving the issue at their end and was subsequently assured by the respondent that the matter would be resolved at the earliest. However, the same was not resolved.

13. The Pre EMIs before June 2019 were borne by respondent as part of the 36 months loan agreement starting from May 2016 to May 2019. Thereafter, the ICICI Bank changed the lien of the loan to complainant no. 1's Citibank Bank Savings Account. The Pre EMIs as per the terms of the loan agreement with ICICI began to be debited from the complainant no. 1's account and except for three initial reimbursements by respondent, no reimbursement was made by the respondent. The complainant no. 1 wrote several emails to ATS requesting for reimbursement of the pre-EMIs, as the complainants were not in a position to bear this unforeseen expense due to delay totally on the part of the builder.

14. That, in the intervening period, the complainants during one of the visits to the project site, to his shock, discovered that they had been allotted the 13th floor in the 5th tower in the project and that was the first time, this

fact came to their attention. They immediately reached out to the respondent and objected to being allotted a flat on the 13th floor and asked for a change of the floor as 13th floor was not acceptable to him. The complainant at the time was informed by the respondent that no alternate apartment on a different floor could be allotted to them and there was none left in the category in which they had been allotted. It is submitted that 14th floor was actually 13th floor and the number 13 was skipped from counting. The agreement specifically mentioned that complainants would be allotted a unit on the "14th floor and not on "floor no. 14". In view of the above, in mutual discretions the respondent offered to upgrade their apartment to a larger apartment (i.e., 2150 sq. ft. As large amount was already been invested by them, there was no option but to consider the possibility of an upgrade. An email was written by a representative of the respondent seeking details of adjustment of the Pre EMI amount already deducted from the account of the complainants for unit and future Pre EMI payable to the ICICI Bank till offer of possession for Unit No. 4192.

15. That the complainants wrote an email seeking formal confirmation of a few keys points which were replied by the respondent that after adjusting the amount already paid for the unit what would be the outstanding amount to be paid by the complainants and second that no extra charges such as swapping charges, upgradation charges would be payable by the complainants. The complainant also requested for a draft of the updated builder buyer agreement, to ensure that all the terms had been captured in

the new agreement as per the ongoing discussions. It was to be noted that these conditions were never expressly agreed by respondent. The respondent replied to the email dated 01.04.2020 vide their email dated 17.04.2020 and provided calculation of the balance to be paid by the complainants and confirmed that there would be no extra charges for swapping.

16. That the complainant no. 1 wrote to respondent giving consent after adjusting the amount of Rs 1,10,21,083/- and asked for the draft of the new agreement to be signed. Through the email, the complainant also sought for email confirmation relating to Pre EMI reimbursement.

17. That the complainant no. 1 sent several follow up emails to the respondent asking for the status of the transaction as the ICICI bank and about the new agreement with respect to the proposed unit no. 4192. In response, the respondent wrote to the complainants stating that it would close the in case within a week. The complainant wrote to respondent stating that in light of the recent communication with one Mr. Ranjeet, being a representative of the respondent, who informed the complainant that the delivery of the apartment had been pushed by 24 months and the arrangement of Pre EMIs would have to be continued till then, the changes in the agreement and adjustment of Pre EMIs was not agreeable to complainants and they were not in a position to bear the financial burden of the same. Furthermore, the new agreement was not shared with them.

The complainants wrote an email to the respondent requesting for clarification on certain issues.

18. That it wrote back to them asking to visit the site of the construction to see the alternate flat being unit no. 4182 which they were proposing to allot to the complainants, but they were informed that units 5144 and 4192 had already been sold. It is submitted that the respondent has failed to hand over possession of the unit to the complainants, till date within the stipulated time period under the agreement in violation of section 11(4)(a) of the Act. The complainants have lost trust in the respondent and in accordance with section 18(1) read with section 19(4) of the Act seek refund of Rs. 1,13,71,155/- paid by them to the respondent. This amount includes the payments made by the complainants towards the instalments and TDS payments.

C. Relief sought by the complainants:

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

    i. Direct the respondent to refund the entire amount of Rs. 1,14,49,190/- paid by the complainant to the respondent till date along with interest at the prescribed rate under Act of 2016.

D. Reply by respondent:

The respondent by way of written reply made following submissions

20. That the complaint is not maintainable for the reason that the agreement contains clause 21, an arbitration clause which refers to the dispute

resolution mechanism to be adopted by the parties in the event of any dispute.

21. That the complainants after checking the veracity of the project namely, 'ATS Marigold', Sector 89A, Gurugram had 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. It is submitted that based on the application, the respondent company vide its allotment offer letters dated 27.09.2014 and 27.07.2015 made the allotment of the unit bearing no. 5144 having super built up area of 162.58 sq. meter.

22. That the possession of the unit was supposed to be offered to the complainants in accordance with the agreed terms and conditions of clause 6.2 of the buyer's agreement wherein the construction was to be completed within a period of 42 months from the date of the agreement and the same was subject to the occurrence of force majeure conditions. The possession of the unit is to be handed over to the complainants only after the receipt of the occupation certificate from the concerned authorities.

23. That the complainants were short of finance for purchasing the property hence in order to make up their finance for the purchase approached ICICI Bank Limited for grant of the housing loan and accordingly entered into a tripartite agreement dated 22.04.2016. As per clauses 26 and 27 of the tripartite agreement, the liability of the respondent for payment of interest on the loan amount disbursed by the bank was for the subvention period i.e. period of 36 months or possession whichever was earlier. They made

part-payment out of the total sale consideration and are bound to make payment towards the remaining due amount along with applicable charges at the appropriate stage.

24. That the complainants requested the respondent to upgrade the unit to a bigger size and accordingly the respondent vide its email dated 25.03.2020 acceded to their demand and the amount paid by them towards unit no. 5144 of 1750 sq. ft. was accordingly adjusted in the new allotted unit no. 4192 of 2150 sq. ft.

25. That the implementation of the said project was hampered and most of the work was stalled due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of respondent and which have affected the 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: [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 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 whereas cash payments to labour on a site of the magnitude of the project in question were 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.

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 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 had passed orders governing the entry and exit of vehicles in NCR region. Also, the Hon'ble NGT has passed orders with regard to phasing out the 10 year old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The contractor of the respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. 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 or not made 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.

(V) Covid-19 Outbreak-: The outbreak of the deadly Covid-19 virus has resulted in significant delay in completion of the construction of the projects in India and the real estate industry in NCR region has suffered tremendously. The outbreak resulted in not only disruption of the supply chain of the necessary materials but also in shortage of the labour at the construction sites as several labourers have migrated to their respective hometowns. The Covid-19 outbreak which has been classified as 'pandemic' is an Act of God and the same is thus beyond the reasonable apprehension of the respondent.

26. The time period covered by the above-mentioned force majeure events is required to be added to the time frame mentioned above. The respondent cannot be held responsible for the circumstances which were beyond its control.

27. That the respondent has already completed the construction of the tower in which the unit allotted to the complainants is located and it shall soon apply for the grant of the occupation certificate. It is pertinent to mention here that only finishing work in the said tower in question is left and is being undertaken by the respondent currently. The respondent has vide its email dated 24.02.2021 even invited the complainants to complete the registration formalities and make payment towards the registration charges. However, the complainants are not coming forward to abide by their contractual obligations.

28. That the complainants are real estate investors who had 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.

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

E. Jurisdiction of the authority:

30. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as

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

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> **Section 34-Functions of the Authority:**
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be

decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

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

31. The respondent has raised an objection that the complainant has not invoked arbitration proceedings as per the provisions of 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 21: All or any disputes that may arise with respect to the terms and conditions of this Agreement, including the interpretation and validity of the provisions hereof and the respective rights and obligations of the parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 and any statutory amendments/modifications thereto by a sole arbitrator who shall be mutually appointed by the parties or if unable to be mutually appointed then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties"*

32. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainant, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this

Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builders could not circumscribe the jurisdiction of a consumer.

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

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

on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

34. 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 the right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 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 entitlement of refund on account of complainants being investors.

35. 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 the 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. 1,14,49,190/- 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;"*

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. 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 investors are not entitled to protection of this Act also stands rejected.

F.III Objection regarding force majeure conditions:

36. The respondent- promoter alleged that period over and above such grace period of 6 months be allowed on account of force majeure conditions. The respondents-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as demonetization, shortage of labour, various orders passed by NGT and weather conditions in Gurugram and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 27.05.2015 and as per terms and conditions of the said agreement due date of handing over of possession along with 6 months grace period comes out to be 27.05.2019. The events such as demonetization and various orders by NGT in view of weather condition of Delhi NCR region, were for a shorter duration of time and were not continuous where as there is a delay of more than three years even after due date of handing over of possession and there is nothing on record that the respondent has even made an application for grant of occupation certificate. Hence, in view of aforesaid circumstances no period more that specified grace period of 6 months can be allowed to the respondent-builder. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F.IV Objection regarding delay in completion of construction of project due to outbreak of Covid-19

37. The Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020*** dated 29.05.2020 has observed that-

> *"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."*

38. In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 27.05.02019. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession

G. Entitlement of the complainants for refund:

G.I Direct the respondent to refund the entire amount of Rs. 1,14,49,190/- paid by the complainant to the respondent till date along with interest at the prescribed rate under Act of 2016.

39. The project detailed above was launched by the respondent as group housing complex and the complainants were allotted the subject unit in

tower 05 on 27.07.2015 against total sale consideration of Rs. 1,09,37,500/-. It led to execution of builder buyer agreement between the parties on 27.05.2015, detailing the terms and conditions of allotment, total sale consideration of the allotted unit, its dimensions, due date of possession, etc. A period of 42 months along with grace period of 6 months was allowed to the respondent for completion of the project and that period has admittedly expired on 27.05.2019. It has come on record that against the total sale consideration of Rs. 1,09,37,500 the complainants have paid a sum of Rs. 1,14,49,190/- to the respondent.

40. The complainants-allottees raised their concern that as per allotment letter and buyer's agreement, they were allotted subject unit on 14th floor, whereas it was later came to their knowledge that the 13th floor is named as 14th floor. In view of issue raised by the complainants, respondent offered the complainant a unit of comparatively larger area. The complainants agreed to opt for unit no. 4192 bearing 2150 sq. ft. but meanwhile, it was informed to the complainants that this unit also got sold and again offered another option to the complainants. Thus, keeping in view the fact that the allottees- complainants wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on his failure to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016. The due date of possession as per agreement for sale as mentioned in the table above is **27.05.2019** and there is delay of 1 years 06 months 21 days on the date of filing of the initial complaint i.e. 18.12.2020.

41. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by ***Hon'ble Supreme Court of India in Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019,*** decided on 11.01.2021

> *" .... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."*

42. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoter and Developers Private Limited Vs State of U.P. and Ors. (2021-2022(1)RCR(Civil),357)*** reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022. it was observed

> *25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from*

the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed

The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as the allottees wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

43. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

The authority hereby directs the promoter to return the amount received by him i.e., **Rs. 1,14,49,190/-** *(inadvertently recorded wrong as Rs. 1,09,37,500/- in proceedings dated 25.07.2022)* with interest at the rate of 9.80% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the Authority:

44. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

    i) The respondent /promoter is directed to refund the amount i.e. **Rs. 1,14,49,190/-** received by him from the complainants along with interest at the rate of 9.80% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.

    ii) A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

45. Complaint stands disposed of.

46. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.07.2022