BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1117 of 2018
First date of hearing: 27.02.2019
Date of decision : 09.08.2022

1. Vandana Kumar
2. Ashutosh Kumar

Both RR/o: - Manoram Cottage, Vachaspati Nagar Colony, Kumhrar, Patna - 800016 **Complainants**

Versus

M/s Raheja Developers Limited.
Regd. Office at: W4D, 204/5, Keshav Kunj, Cariappa Marg, Western Avenue, Sainik Farms, New Delhi-110062 **Respondent**

CORAM:
Shri K.K. Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Sh. Rohita (Advocate) Complainant
None Respondent

ORDER

1. The present complaint dated 22.10.2018 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 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 under the provision of the Act or the Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, 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. N.	Particulars	Details
1.	Name of the project	"Raheja's Aranya City", Sectors 11&14, Sohna Gurugram
2.	Project area	107.85 acres
3.	Nature of the project	Residential Plotted Colony
4.	DTCP license no. and validity status	i. 19 of 2014 dated 11.06.2014 valid up to 10.06.2018 ii. 25 of 2012 dated 29.03.2012 valid up to 28.03.2018
5.	Name of licensee	Standard Farms Pvt. Ltd and 9 others
6.	Date of approval of building plans	29.01.2016
7.	RERA Registered/ not registered	Registered vide no. 93 of 2017 dated 28.08.2017
8.	RERA registration valid up to	27.08.2022

9.	Unit no.	Plot no. E- 76 (Page no. 32 of the complaint)
10.	Unit area admeasuring	317.140 sq. yds. (Page no. 32 of the complaint)
11.	Allotment letter	17.03.2015 (Page no. 27 of the complaint)
12.	Date of execution of memorandum of understanding	17.03.2015 (Page no. 46 of the complaint)
13.	Date of execution of tripartite agreement	13.01.2016 (Page no. 57 of the complaint)
14.	Date of execution of agreement to sell	17.03.2015 (Page no. 29 of the complaint)
15.	Possession clause	**4.2 Possession Time and Compensation** *That the Seller shall sincerely endeavor to give possession of the plot to the purchaser* ***within*** *thirty-six (36) months* ***from the date of the execution of the Agreement to sell*** *and after providing of necessary infrastructure specially road sewer & water in the sector by the Government, but subject to force majeure conditions or any Government/ Regulatory authority's action, inaction or omission and reasons beyond the*

		control of the Seller. ***However, the seller shall be entitled for compensation free grace period of six (6) months in case the development is not completed within the time period mentioned above****. In the event of his failure to take over possession of the plot, provisionally and /or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be lie at his/her risk and cost the purchaser shall be liable to pay @ Rs.50/- per sq. Yds. of the plot area per month as cost and the purchaser shall be liable to pay @ Rs.50/- per sq. Yards. Of the plot area per month as holding charges for the entire period of such delay……."* (Page no. 37 of the complaint).
16.	Grace period	**Allowed** As per clause 4.2 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 36 months plus 6 months of grace period. It is a matter of fact that the respondent has not completed the project in which the allotted unit is situated

		and has not obtained the occupation certificate by March 2018. As per agreement to sell, the construction of the project is to be completed by March 2018 which is not completed till date. **Accordingly, in the present case the grace period of 6 months is allowed.**
17.	Due date of possession	17.09.2018 (Note: - 36 months from date of agreement i.e., 17.03.2015 + six months grace period)
18.	Basic sale consideration as per BBA at page 32 of complaint	Rs.1,11,87,114/-
19.	Total sale consideration as per applicant ledger dated 31.08.2015 at page 60 of complaint	Rs.1,27,92,981/-
20.	Amount paid by the complainants	Rs.1,05,44,411/- [As per averment of complainant, page no. 9 of complaint]
21.	Payment Plan	Development Link Payment Plan (As per applicant ledger dated 31.08.2015 at page 60 of complaint)
22.	Occupation certificate /Completion certificate	Not received

23.	Offer of possession	Not offered
24.	Delay in handing over the possession till date of filing complaint i.e., 22.10.2018	1 month and 5 days

B. Facts of the complaint

3. The complainants have made the following submissions: -

I. That the complainants under the impression that the respondent has good market reputation and believing their fake assurances and promises to be true booked a plot in the project namely "Raheja Aranya City" situated at Sectors 11 & 14 Sohna Gurugram, Haryana. That for the purpose of the same, the complainants paid advance booking amount to the tune of Rs.12,79,718/- acknowledged by the respondent via mail as well as through receipt. Thereafter, the complainants were allotted a plot bearing number E 76, admeasuring 317.14 sq. yards. in the said project vide allotment letter dated 17.03.2017, issued by the respondent company.

II. That after the booking of the plot was done an agreement to sell was executed between the parties on 17.03.2015 with respect to the purchase of the plot for a basic sale price consideration of Rs.1,11,87,114/- exclusive of the other payments, in the name of the complainants under the subvention scheme proposed by the

respondent. That as per the agreement to sell, the possession of the plot was to be handed over after 36 months from the date of execution of the agreement to sell i.e., 17.03.2018. However, as per clause 4.2 of the agreement in case the possession of the plot was delayed even after 36 months, the respondent was liable to pay compensation at the rate of Rs.50/- per sq. yard of the super area per month for the period of delay.

III. That as per the proposed subvention scheme the respondent had agreed that in case the possession of the plot was not handed over to the complainants after the expiry of 36 months from the date of the booking of the plot due in November 2017, they were entitled to withdraw/cancel their allotment and in that event, the respondent would buy back the same by returning the entire amount paid by them along with the taxes as well as also pay guaranteed premium compensation @ Rs.6,350/- per sq. yard. That in reiteration of the proposed subvention scheme of the respondent, a Memorandum of Understanding (hereinafter referred to as " MOU ") was executed between both the parties on 17.03.2015 itself.

IV. That the complainants in furtherance of the purchase of the said plot, applied for home loan with Axis Bank for an amount of Rs.82,94,226/-. However, no tripartite agreement was entered into at that point of time since the layout plan of the project was

different as per the plan approved by the Government. That for the purposes of the clarification of the same, a letter was issued by the respondent to Axis Bank on the basis of which loan was sanctioned vide sanction letter dated 22.08.2015.

V. That the complainants in consonance to the payment plan as given by the respondent has paid Rs.1,05,44,411/- till date without any delay, which amounts to 93% of the sale price consideration. The remaining amount of Rs.8,29,533/- is to be paid.

VI. That the complainants owing to their financial constrains were unable to take the burden of the easy monthly installments of the loan amount. So, they wrote several mails to the respondent citing the reason but the same did not bother the respondent owing to its deceitful intentions. However, after numerous requests by the complainants to the respondent it agreed to pay the EMI's of the loan amount for a period of one year and after which the complainants paying a certain sum could also retain the plot with them or otherwise, the respondent would buy back the same. That after commitment, the respondent yet again changed his stance wherein the EMI's were not paid on time resulting into degradation of the cibil score of the complainants.

VII. That the respondent has not only harassed the complainants mentally and financially but has also breached the terms and condition of the agreement to sell and MOU dated 17.03.2015,

thereby infringing the rights of the innocent buyer's, who have spent their entire hard earned savings in buying the plot and the irresponsibility of the respondent becomes abundantly clear by the fact that the respondent has not even registered its project with Real Estate Regulatory Authority as per the mandate of Section 3 of the Act. The complainants have given due notice to the respondent demanding cancellation of the allotment as per the terms of the agreement and MOU. That complainants demand refund of the entire amount already paid to the respondent and the Axis bank. That clause 4.2 of the agreement clearly specifies that in the event of delay in handling of the possession, the respondent would be liable to pay an amount @ Rs.50/- per sq. yard per month of the super area.

VIII. That in furtherance of the above, as per section 18(1) of the Real Estate Regulation and Development Act, the compensation for delay in delivery and possession as agreed, be paid immediately to the complainants. The amount calculated as per the above-mentioned clause till **date shall be paid** with an interest @1% per month from the date on which the amount becomes due till the date of actual payment of the same. The complainants be granted Rs.1,00,000/- as legal fee incurred in filing of this complaint together with mental agony suffered by them due to breach of its statutory obligations by the respondent.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s).

   I. To pass an order for refund of Rs.1,11,87,114/- along with pendente lite and future interest thereon @18% from the due date of payment till the date of actual payment, in favour of complainants and against the respondent.

   II. To pass an order for payment of penalty for delay as per the allotment, agreement at the rate of Rs.50/- sq. yard. i.e., Rs.15,870/- of the 317.14 sq. yard. per month for the period of delay in favour of complainants and against the respondent.

   III. Pass an order for payment of Rs.20,13,839/- @ Rs.6,350/- per sq. yard. towards premium compensation as per the agreement on exercise of option of cancellation of the allotment of the plot.

   IV. To award of Rs.1,00,000/- as the cost of the complaint in favour of the complainants and against the respondent.

5. 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

6. The respondent contested the complaint on the following grounds: -

   I. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The agreement to sell was executed between the parties prior to the enactment of the Act, 2016 and the provisions laid down in the said Act cannot be applied

retrospectively. Although the provisions of the Act, 2016 are not applicable to the facts of the present case in hand yet without prejudice and in order to avoid complications later on, the respondent has registered the project with the authority. It is submitted that the respondent has obtained license from the Haryana Government, Town and Country Planning department for development of residential plotted/group housing colony.

II. That the State Environment Impact Assessment Authority, Haryana vide letter dated 15.10.2013 granted environmental clearance to the respondent company. Further, the Dakshin Haryana Bijli Vitran Nigam vide its letter dated 10.03.2016 assured that the respondent company the power requirement of tentative load of 12.8 MW.

III. That the Directorate of Town and Country Planning, Haryana granted part completion certificate to the opposite party vide its letter dated 11.11.2016. That the part completion certificate was granted in response to the application dated 15.09.2014 to the respondent company. Thereafter, that vide letter dated 27.04.2017, the respondent company wrote to the Director General, Town & Country Planning for grant of completion/occupation certificate.

IV. That this authority does not have the jurisdiction to decide on the compensation and interest as claimed by the complainants. It is

submitted that in accordance with section 71 of the Act 2016 read with Rules 21(4) and 29 of the rules, 2017, the authority shall appoint an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard. It is submitted that even otherwise, it is the adjudicating officer as defined in section 2(a) of the Act 2016, who has the power and the authority to decide the claims of the complainants.

V. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. Clause 13.2 of the buyer's agreement.

VI. That the complainants have not approached this authority with clean hands and have intentionally suppressed and concealed the material facts. The complaint has been filed maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows: -

- That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as 'Raheja Atlantis' 'Raheja Atharva', and 'Raheja Vedanta' and in most of these projects, a

large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.

- That the complainants, after checking the veracity of the project namely, 'Raheja's Aranya City', Sectors 11 and 14, Sohna, Gurgaon had applied for allotment of a plot vide booking application form. The complainants agreed to be bound by the terms and conditions of the booking application form. The complainants were aware from the very inception that the plans as approved by the concerned authorities are tentative in nature and that the respondent might have to effect suitable and necessary alterations in the layout plans as and when required.
- That the complainants are real estate investors and they have booked the unit in question with a view to earn quick profit in a short period. However, it appears that its calculations have gone wrong on account of severe slump in the real estate market, and they are now raising untenable and illegal pleas on highly flimsy and baseless grounds. Such malafide tactics of the complainants cannot be allowed to succeed.
- That despite the respondent fulfilling all its obligations as per the provisions laid down by law, the government agencies have

failed miserably to provide essential basic infrastructure facilities such as water and electricity supply in the sector where the said project is being developed. The laying down of water and electricity supply lines has to be undertaken by the concerned governmental authorities and is not within the power and control of the respondent. The respondent cannot be held liable on account of non-performance by the concerned governmental authorities. The respondent company has even paid all the requisite amounts including the external development charges (EDC) to the concerned authorities. However, yet, necessary infrastructure facilities like 60-meter sector roads including 24-meter-wide road connectivity, water and sewage which were supposed to be developed by HUDA parallelly have not been developed.

- That the development of the township in which the plot allotted to the complainants is located is 50% complete and the respondent shall hand over the possession of the same after its completion subject to the complainants making the payment of the due installments amount and on availability of infrastructure facilities such as sector road and laying providing basic external infrastructure such as water, sewer, electricity etc. as per terms of the application and agreement to sell. It is submitted that due to the above-mentioned conditions

beyond the reasonable control of the respondent, the development of the township in question has not been completed and the respondent cannot be held liable for the same. The respondent is also suffering unnecessarily and badly without any fault on its part. Due to these reasons, the respondent has to face cost overruns without its fault. Under these circumstances, passing any adverse order against the respondent at this stage would amount to complete travesty of justice.

7. 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 on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

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

11. 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 complainant at a later stage.

12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** *and reiterated in case of* ***M/s Sana Realtors Private***

Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022wherein it has been laid down as under:

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent

F.I. Objections regarding the complainants being investors.

14. The respondent has taken a stand that the complainants are 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 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 he 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 have paid total price of **Rs.1,05,44,411/-**to the promoter towards purchase of unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottees 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;"*

15. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement cum provisional allotment letter executed between promoter and complainants, it is crystal clear that they are allottee(s) as the subject unit 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 allottees being investors are not entitled to protection of this Act also stands rejected.

F. II Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

16. The objection raised the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date

of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 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."*

17. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***,in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and <u>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</u>. 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."

18. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the 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.III Objection regarding agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement.

19. The agreement to sell entered into between the two side on 17.03.2015 contains a clause 13.2 relating to dispute resolution between the parties. The clause reads as under: -

"All or any disputes arising out or touching upon in relation to the terms of this Application/Agreement to Sell/ Conveyance Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereof for the time being in force. The arbitration proceedings shall be held at the office of the seller in New Delhi by a sole arbitrator who shall be appointed by mutual consent of the parties. If there is no consensus on appointment of the Arbitrator, the matter will be referred to the

concerned court for the same. In case of any proceeding, reference etc. touching upon the arbitrator subject including any award, the territorial jurisdiction of the Courts shall be Gurgaon as well as of Punjab and Haryana High Court at Chandigarh".

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

21. 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."*

22. 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.

G. Findings on the relief sought by the complainants.

G. I To pass an order for refund of Rs.1,11,87,114/- along with pendente lite and future interest thereon @18% from the due date of payment till the date of actual payment, in favour of complainants and against the respondent.

G. II To pass an order for payment of penalty for delay as per the allotment, agreement at the rate of Rs.50/- sq. yard. i.e., Rs.15,870/- of the 317.14 sq. yard. per month for the period of delay in favour of complainants and against the respondent.

23. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

> *"**Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-*
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
> ***he shall be liable on demand to the allottees**, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, **to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest***

at such rate as may be prescribed *in this behalf including compensation in the manner as provided under this Act:*
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."
(Emphasis supplied)

24. Article 4.2 of the agreement to sell provides for handing over of possession and is reproduced below:

4.2 Possession Time and Compensation

That the Seller shall sincerely endeavor to give possession of the plot to the purchaser ***within*** *thirty-six (36) months* ***from the date of the execution of the Agreement to sell*** *and after providing of necessary infrastructure specially road sewer & water in the sector by the Government, but subject to force majeure conditions or any Government/ Regulatory authority's action, inaction or omission and reasons beyond the control of the Seller.* ***However, the seller shall be entitled for compensation free grace period of six (6) months in case the development is not completed within the time period mentioned above****. In the event of his failure to take over possession of the plot, provisionally and /or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be lie at his/her risk and cost the purchaser shall be liable to pay @ Rs.50/- per sq. Yds. of the plot area per month as cost and the purchaser shall be liable to pay @ Rs.50/- per sq. Yards. Of the plot area per month as holding charges for the entire period of such delay....."*

25. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission

and reason beyond the control of the seller. 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 making payment as per the plan 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 a clause in the agreement to sell 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 a mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

26. **Due date of handing over possession and admissibility of grace period:** As per clause 4.2 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 36 months plus 6 months of grace period. It is a matter of fact that the respondent has not completed the project in which the allotted unit is situated and has not obtained the occupation certificate by March 2018. However, the fact cannot be ignored that there were circumstances beyond the control of the respondent which led to delay incompletion of the project. Accordingly, in the present case the grace period of 6 months is allowed.

27. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the rate of 18%. However, the allottees intend to withdraw from the project and are seeking refund of the amount paid by her in respect of the subject unit with interest at prescribed rate as provided 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.*

28. 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.

29. 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., 09.08.2022 is **7.80%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **9.80%.**

30. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule **28(1),** the authority is satisfied that the respondent

is in contravention of the provisions of the Act. By virtue of clause 4.2 of the agreement to sell dated form executed between the parties on 17.03.2015, the possession of the subject unit was to be delivered within a period of 36 months from the date of execution of buyer's agreement which comes out to be 17.03.2018. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over of possession is 17.09.2018. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottees intend to withdraw from the project and are well within it right to do the same in view of section 18(1) of the Act, 2016.

31. 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 they have 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....."

32. Further in the judgement of the Hon'ble Supreme Court of India in the cases ***of Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) 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."*

33. 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 they 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.

34. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 9.80% p.a. (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.

G.III Pass an order for payment of Rs.20,13,839/- @ Rs.6,350/- per sq. yard. towards premium compensation as per the agreement on exercise of option of cancellation of the allotment of the plot.

G. IV To award of Rs.1,00,000/- as the cost of the complaint in favour of the complainants and against the respondent.

35. The complainants are seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)***, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall

be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses.

H. Directions of the authority

36. 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 function entrusted to the authority under section 34(f):

i. The respondent/promoter is directed to refund the amount received by it 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 deposited amount.

ii. The amount paid by the respondent/builder to the financial institution under the subvention scheme if any would be deducted while refunding the paid-up amount to the complainants.

iii. 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.

iv. The planning branch of the authority is directed to conduct an enquiry of the project and shall submit its detailed report within a period of one month of this order.

37. Complaint stands disposed of.

38. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.08.2022