BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	3898 of 2019
Date of filing complaint:	02.09.2019
First date of hearing:	01.10.2019
Date of decision :	02.08.2022

Prabhat Kumar **R/o:** -39 AB, Tagore Garden, Ambala-133001	**Complainant**
Versus	
1.M/s Mascot Build cone Pvt. Ltd. 2.M/s Hometown Properties Private Limited 3.V Square Development Company Private Limited **Regd. office:**294/1, Vishwakarma Colony, Opposite Lal Kuan, New Delhi-110044	**Respondents**

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

APPEARANCE:	
Complainant in person	Advocate for the complainant
Shri Rahul Bhardwaj	Advocate for the respondents

ORDER

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

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

A. Unit and Project related details:

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

S. No	Heads	Information
1.	Name and location of the project	"Oodles skywalk", Sector 83, Village sihi, Gurugram
2.	Nature of the project	Commercial complex
3.	Project area	3.0326 acres
4.	DTCP License	08 of 2013 dated 05.03.2013 valid up to 04.03.2017
5.	Name of the licensee	Dharam Singh
6.	RERA registered/ not registered	**Registered vide no.294 of 2017 dated 13.10.2017 valid up to 31.12.2019**
7.	Date of allotment	12.03.2014 [Page 69 of the complaint]
8.	Date of execution of space buyer's agreement	08.04.2015 [Page 72 of the complaint]
9.	Date of commencement of construction of the project	26.03.2014 [As per the details in complaint no. 171/2018]
10.	Unit no.	G-124, Ground floor [Page 75 of the complaint]
11.	Super area	432.50 sq. ft. [Page 75 of the complaint]
12.	Payment plan	Construction linked payment plan

		[Page 95 of the complaint]
13.	Total consideration	Rs.60,74,462/- [Page 74 of the complaint]
14.	Total amount paid by the complainants	Rs.33,07,429/- [Page 23 of the complaint]
15.	Possession clause	As per clause 38 of the agreement: within 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later
16.	Due date of delivery of possession *(As per clause 38 of the agreement: within 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later)*	08.07.2018 Calculated from the date of agreement i.e. 08.04.2015 Grace period of 3 months is allowed
17.	Offer of possession	Not offered
18.	Occupation certificate	Not obtained
19.	Cancellation letter	11.6.2019 [Page 122 of the reply]

B. Facts of the complaint

3. That the complainant booked the shop measuring 432.5 sq. ft. in the project named" Oodles Skywalk" situated at Sector 83, Gurugram, Haryana on the advertisement and booking received on 03.01.2013 with the objective to start business and earn livelihood for his family. That thereafter the complainant filed a complaint dated 19.04.2018 before the Haryana Real Estate Regulatory Authority Gurugram under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules,

2017 against the promoter Mascot Buildcon Private Limited and others. The Authority, after following the due process to its discretion of noticing of respondents and arguments on various dates between the parties, passed a order dated 30.10.2018. Thus, the Authority exercising power under section 37 of Real Estate (Regulation & Development) Act, 2016 issued following directions:

(i) The respondent is duty bound to hand over the possession of the said unit by 08.07.2018 as committed by the respondent.

(ii) As per the provisions of section 19 (a) of the Real Estate (Regulation and Development) Act, 2016 the complainant is also duty bound to pay the due instalment in time.

(iii) The complainant is eligible for delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum from the committed date of delivery of possession i.e. 08.07.2018 as per agreement dated 08.04.2015. Issue w.r.t. PLC charges shall be decided finally at the time of delivery of possession.

(iv) If the possession is not given on the date committed by the respondent then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions, i.e. Section 19(4) of the Act ibid.

4. That after being left with many non-redressed issues of the complaint, the complainant preferred an Appeal No. 162 of 2019 before the Haryana Real Estate Appellate Tribunal, Chandigarh which is pending for 20.09.2019. It is pertinent to mention here that during the pendency of the above said appeal the Hon'ble Tribunal on date 22.05.2019 directed to the director of the respondents/ promoters to file the affidavit on 14.06.2019 stating

therein as to what is the exact measurement of shop No.G-124, the possession of which is being offered/ will be offered to the appellant and the next dated of hearing was fixed for 14-06-2019 and before filing of the affidavit, the respondents without intimation to the complainant or the Hon'ble Appellate Tribunal transferred an amount of Rs. 31,77,823/- into complainant's fathers account in HDFC Bank on dated 11-06-2019 after deducting 10% i.e. Rs. 4,48,719/- of Basic Sales Price and also adding delayed interest of Rs. 3,19,113/-. That for this, an application was moved by the complainant on the very next date of hearing on 14-06-2019 to put this fact into the knowledge of the Hon'ble Tribunal. Thereafter the respondent no. I sent a letter for cancellation dated 11-06-2019, which was received on the very next day of bearing Le 15-06-2019. It is most pertinent to mention here that during the pendency of the above said appeal the respondents not only wilfully disobeyed the Hon'ble Tribunal proceedings and have shown disrespect to the proceeding of the Hon'ble Tribunal but also caused irreparable loss and injury to the complainant which cannot be compensated in terms of money,

5. That thereafter on dated 29-07-2019 the complainant filed an application u/s 151 CPC in his appeal before the Hon'ble Tribunal and placed on record statement of the appellant, cheque no. 000007 of Rs. 31,77,823 and cheque No. 000006 of Rs. 24,74,421/-of HDFC bank remaining balance amount against the

unit in question to show the bonafide intention of the appellant to take possession.

6. Beside above, below noted facts were also stated:-

- That the respondents are in violation of the provisions of Haryana Development and Regulation of Urban Areas Act, 1975 and have committed prelaunch of the project "Oodles Skywalk" for which FIR No. 0007 dated 06.01.2019 was lodged on complaint from District Town Planner, Enforcement, Gurugram and is pending in Court.
- That the complainant had objected to the unlawful demands raised by the respondent no.1 after the implementation of GST tax law and also had sent an email to this regard but the respondents continued to impose wrongful taxes against all such demands raised under GST era, even till date. That due to the adamant stand of the respondent no.1 a complaint was filed to the Anti-Profiteering department as a result of which it has been found in the report dated 27.02.2019 by the Director General Anti-Profiteering on investigation against M/s. Mascot Builcon Pvt. Ltd., that profiteering amounting to Rs. 46,60,426/- has been established under section 171 of the CGST Act, 2017.
- Furthermore, Directorate of Town and Country Planning Haryana has 2014 issued show cause notice dated: 25-03-219 wherein it directed Hometown Property Pvt. for submission of change in beneficial interest in favour of

Mascot Buildcon pvt. Ltd. after confirming that Hometown Property Pvt. Ltd. transferred obligations against the license no. 8 of 2013 dated 05.03.2013 in favour of Mascot Buildcon Pvt. Ltd. without permission from the department and for violating provisions of Haryana Development and Regulation of urban Areas Act, 1975.

7. That the respondents cancelled the unit G-124 during the pendency of the appeal No.162 of 2019 before the Appellate Tribunal and when the Hon'ble Tribunal has called for an affidavit of actual space measurements of the unit no. G-124 from the respondents for final calculation of the amount. The directions of the order dated 22.05.2019 is reproduced herewith as:

"The appellant/ complainant has contended that he has allotted shop no. G-124 measuring 432.5 sq. ft. He contended that in fact, now he is being offered the shop having an area of around 180 sq. ft.

Let, the affidavit of the director of the respondent/promoter be filed stating therein as to what id the exact measurement of shop no. G-124, the possession of which is being offered/ will be offered to the appellant. Now the case to come up on 14.06.2019 for filing the said affidavit and consideration".

8. Further, when the matter was heading for the possession of the unit after removing the disputes regarding actual size, PLC charges the respondents cancelled the unit unilaterally without taking permission from the Hon'ble Tribunal and without intimating the complainant and showing disrespect to the proceeding of the Hon'ble Tribunal.

9. That the complainant has made a ground of non-payment of instalments at right time after receiving the demand notices that the dispute/grievances regarding the shop no G- 124 was pending in the RERA authority and then the appeal was pending before the appellant authority. As a settled law appeal is the continuation of the suit. It was mentioned that no prior intimation was given by the respondents before cancellation and now the respondents manipulated/ planted a false and frivolous cancellation notice which was never received to the complainant.

10. The complainant alleged that said cancellation was done during default of the respondents and the RERA Authority had said in the judgment that the 70% construction is completed so refund can't be granted to the complainant and complainant cannot withdraw from the project and now per contra when the complainant has paid 8 instalments continuously in time out of 11 instalments demanded which equals more than 60% of the total payments of the unit G-124 i.e. hard earned money of the complainant is already deposited with the respondents for last more than 7 years and when there is a clause for delayed interest as given to the complainant at a rate of 10.45% during the default of respondents. Then the respondents should not be allowed to cancel the unit in the interest of equity and justice. However, respondents deliberately, knowingly and maliciously without taking consideration of these facts cancelled the shop no. G-124 and also

refunded the amount of Rs. 31,77,823/- according to their own calculations.

11. It is further stated by the complainant that the cancellation was done when the PLC charges and actual space was not decided and an affidavit from the respondents were called for exact size of the shop no. G-124 by the Hon'ble Tribunal and in that particular time they had cancelled the unit unilaterally without taking prior permission from the Ld. Authority and without informing the complainant.

12. That the respondents could have gone for an execution of the judgment order dated 30.10.2019 of the Ld. Authority rather than for deliberate and unilateral cancellation of the shop no. G-124 without intimation to the complainant and without taking prior permission from the Hon'ble Appellate Tribunal.

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

13. The complainant has sought following relief:

    (a) Direct the respondents to restore the unit in question G124 by setting aside the wrongful cancellation and accepting the refunded amount with pending outstanding decided by this Hon'ble Authority.

    (b) Direct the respondents to pay an amount of Rs. 1,00,000/- to the complainant towards the cost of litigation.

    (c) Direct the respondents not to interfere in the rights of the complainant by any means whatsoever in future.

(d) Direct the respondents to disclose the actual carpet area, covered area and common area of the unit no. G-124 to avoid unwanted further litigations.

D. Reply by the respondent:

The respondent has taken grounds for rejection of complaint on the ground of jurisdiction along with reply. The respondent has contested the complaint on the following grounds:

14. That the complainant vide an application form applied to the respondents for provisional allotment of a unit in the project. The complainant, in pursuance of the aforesaid application form, was allotted an independent unit bearing no G-124, located on the ground floor, in the project vide an allotment letter dated 12.03.2014. The complainant consciously and willfully opted for a construction linked payment plan for remittance of the sale consideration for the unit in question and further represented to the respondents that he shall remit every installment on time as per the payment schedule. The respondents had no reason to suspect the *bonafide* of the complainant and proceeded to allot the unit in question in their favor.

15. That it is pertinent to mention that the allotment letter being the preliminary and the initial draft contained the basic and primary understanding between both the parties, to be followed by the space buyer agreement to be executed between the parties. After fulfilling certain documentation and procedures the allotment letter dated 12.03.2014 in favour of the complainant allotting a

commercial unit bearing no. G-124 ground floor. Thereafter, on 08.04.2015, the space buyer agreement was executed between the complainant and the respondents which contained the final understandings between the parties stipulating all the rights and obligations.

16. That, the complainant filed before this Hon'ble Authority filed a complaint bearing no. 171 of 2018 for the delay possession charges on account of delay of possession in the delivery of the complainant's unit in the project. The complainant in the said 2018 complaint made several false and misleading allegations against the respondents amounting to fraud and cheating while also including a prayer of refund of the entire amount deposited by the complainant with the respondents. The said complaint was decided by this Hon'ble Authority dated 30.10.2018 granting delay payment charges to the respondent stating that the customer is duty bound to make timely payments as well as delay of possession charges to the complainant. However, this Hon'ble Authority also directed the complainant that such relief is granted subject to the clearing of the outstanding dues towards the total sale consideration of the unit. The reliefs are reproduced hereinunder:

DECISION AND DIRECTIONS OF THE AUTHORITY

Thus, The Authority exercising power under section 37 of Real Estate (Regulation & Development) Act, 2016 issue directions:

i. The respondent is duty bound to hand over the possession of the said unit by 08.07.2018 as committed by the respondent.

ii. As per the provisions of section 19 (a) of the Real Estate (Regulation and Development) Act, 2016 the complainant is also duty bound to pay the due instalment in time.

17. That vide the above-mentioned order, this Authority granted a relief to the complainant by directing the respondents to pay the delay possession charges subject to the condition that the complainant would clear all the pending dues immediately. The Authority also noted that the complainant at the time of filing the complaint bearing no. 171 of 2018, had only deposited 52% of the total consideration despite acknowledging the fact that the project in 2018 was on time and was already completed more than 70%. This Hon'ble Authority vide its judgment dated 30.10.2018 in the said complaint noted that the Complainant was bound by the terms and conditions of the space buyer agreement as at the time of signing the agreement the complainant consciously chose to pay the consideration in terms of construction linked payment plan. Therefore, the complainant was bound to deposit balance due consideration of the unit with the respondents, whereas the complainant only deposited 52% of the amount.

18. That vide the same order this Hon'ble Tribunal directed the complainant to clear the outstanding dues with the respondents, to which the complainant has failed miserably to deposit any amount. The complainant not only has breached the terms and conditions of the space buyer agreement entered with the

respondents but also has failed to comply the directions of this hon'ble authority and since then has only acted in the derogation of the space buyer agreement as well as the final order of this Hon'ble Authority thereby committing an act of contempt.

19. That, the respondents from time to time raised numerous demand letters to the complainant requesting him to clear the dues as well as complying with the orders of this Hon'ble Authority, but the complainant turned his deaf ear to the requests and demands raised by the respondents. The respondents kept raising the demand/reminder letters. The complainant was very well aware of the continuous delays and were reminded on continuous basis through the demand letters and despite numerous requests the complainant never paid any amount.

20. That due to the ongoing continuous defaults by the complainant, the respondents were constrained to send a letter of non-payment of dues final notice dated 26.12.2018 in terms of the space buyer agreement executed between the parties. The complainant even after receiving the letter of cancellation did not pay any heed by clearing the outstanding dues towards the total sale consideration. Eventually, on 11.6.2019 the respondents as per the space buyer agreement cancelled the said unit of the complainant without committing any breach of the terms and conditions of the agreement entered with each other and refunded the said amount to the complainant.

21. The complainant after being the willful defaulter in complying with the terms and conditions of the space buyer agreement went on for an extra mile by filing an appeal before the Hon'ble Appellate RERA Tribunal against the cancellation of the unit and tried to shift the burden on the part of the Respondents for its own wrong. During the pendency of the appeal before the Hon'ble Appellate Tribunal the complainant filed this complaint bearing no. 3898 of 2019 before the authority. The complainant went against the law and by filing two cases at the same time with similar issues and falsely concealed the said fact with this authority. Moreover, in fear of losing the case with the Hon'ble Appellate RERA Tribunal he withdrew his case thereafter as he was a defaulter.

22. That the Hon'ble Authority in this complaint bearing no.3898 of 2019, vide its order dated 05.03.2020, directed the complainant in affirmative to pay his remaining outstanding dues to the respondents, failing which the allotted unit to the complainant would stand cancelled. It is submitted that even after being categorically directed by this Hon'ble Authority, the complainant failed to comply the order and again miserably failed to pay the remaining amount to the respondents. The complainant chose to ignore all these aspects and willfully defaulted in making timely payments.

23. It is to be stated that it shall be the respondents who shall be entitled for the relief from this Hon'ble Authority for the breach in

the terms and conditions of the space buyer agreement by the complainant. That as per the clause 23 of the space buyer agreement, the respondents are entitled to forfeit the earnest money as well as the brokerage along with the taxes and interest. Clause 23 has been produced hereinbelow:

> *"23. The "Company" and the Allottee hereby agree that the amounts paid on booking/on allotment and/or in installments as the case may be, to the extent of 10% of the Basic Sale Price of the said unit will collectively constitute the earnest money. Non-fulfillment of any of the terms and conditions of the sale and those of the agreement as also in the event of failure to sign this agreement by Allottee within the time allowed, may entail the forfeiture of the earnest money together with interest on delayed payments and any other amount of non-refundable nature including but not confined to brokerage paid by the "Company".*

24. Similarly, the respondents through the space buyer agreement clearly stipulated to the complainant that "time being the essence", the allottees are entitled and duty bound to pay the charges on or before the due date or as and when demanded by the respondents as the case may be.

> *"24. That the timely payment of the installment and other charges as stated in schedule of payment (Annexure-III) is the essence of this Agreement. It shall be incumbent on the Allottee to comply with the terms of payment and or other terms and conditions of the is Agreement failing which he/she shall forfeit to the "Company" the entire of earnest money together with interest on delayed payments and any other amount of non-refundable nature including but not confined to brokerage paid by the "Company" and the allotment/this Agreement shall stand cancelled and the Allottee shall be left with no lien, right ,title, interest or any claim of whatsoever nature in the said Unit alongwith parking space(s).The "Company" shall thereafter be free to resell and/or deal with the said Unit in any manner whatsoever at its sole discretion. The amount(s) if any, paid over and above the earnest money would be refunded to the Allottee by the "Company" after making deductions*

> *referred to above and only when such amounts are realized by the "Company" from another prospective purchaser on resale of the unit but without any interest or compensation of whatsoever nature. The "Company" shall have the first lien and charge on the said Unit (s) for all its dues payable by the Allottee to the Company."*

25. Also, the respondents are squarely covered under section 11(5) of the RERA Act, 2016, which states that:

> *"11(5) The promoter may cancel the allotment only in terms of the agreement for sale: Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause."*

26. That the complainant has no cause of action to file the present complaint as the present complaint is based on an erroneous interpretation of the provisions of the act as well as an incorrect understanding of the terms and conditions of the space buyer agreement dated 08.04.2015. It is further submitted that the complainant is an investor and has booked the unit in question to yield gainful returns by selling the same in the open market. the complainant does not come under the ambit and scope of the definition an allottee under section 2(d) of the Act, as the complainant is an investor and booked the unit in order to enjoy the good returns from the project. The same can be envisaged from the fact that the complainant in 2019 made an advertisement of the unit for selling the same in the open market in order to receive the monetary gains without paying his due amount.

27. Moreover, on his repeated requests he was given one last chance by this authority to get his unit by depositing his entire due

amount by 31.03.2020 and no later. He purposely did not deposit the same and breached the order issued. He even agreed to the same by sending an email whereby he stated that he has not paid his entire due amount.

28. Thereafter, the complainant misrepresented this authority that he deposited the entire due, on which a CA was appointed by the authority to calculate the same to which the CA appointed by this Hon'ble Authority issued a letter dated 8.10.2021 stating that amount of Rs. 18 lacs were due on the complainant on 31.03.2020.

29. That due to the ongoing continuous defaults by the complainant, the respondents were constrained to send a letter of non-payment of dues final notice dated 26.12.2018 in terms of the space buyer agreement executed between the parties. The complainant even after receiving the letter of cancellation did not pay any heed by clearing the outstanding dues towards the total sale consideration.

30. 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:

31. 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 promoters, 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 entitlement of DPC on ground of complainant being investor.

32. The respondent is contending that the complainants have invested in the unit in question for commercial gains, i.e to earn income by way of rent and/ resale of the property at an appreciated value and to earn premium thereon. Since the investment has been made for commercial purpose therefore the complainant is not consumers but are investors, 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 respondents 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 it contravenes or violates any provisions of the Act or rules or regulations made thereunder. 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;"*

33. 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 complainant is an allottee(s) as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr***. has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings regarding relief sought by the complainant:

G.1 Direct the respondents to restore the unit in question G124 by setting aside the wrongful cancellation and accepting the

refunded amount with pending outstanding decided by this Hon'ble Authority and to disclose the actual carpet area, covered area and common area of the unit no. G-124 to avoid unwanted further litigations.

34. The complainant was allotted the above-mentioned unit by the respondent on 12.3.2014 for a total sale consideration of Rs. 60,74,462/- which leads to execution of space buyer agreement on 08.04.2015 and the complainant paid a total sum of Rs.33,07,429/- against that unit. Pleading delay in handing over of possession of the unit, the complainant filed a complaint bearing no. 171 of 2018 before the authority on 19.04.2018 who vide orders dated 30.10.2018 directed as under:

    i. The respondent is duty bound to handover the possession of the said unit by 08.07.2018 as committed by the respondent.

    ii. As per the provisions of section 19(a) of the Real Estate (Regulation and Development) Act, 2016 the complainant is also duty bound to pay the due instalment in time.

    iii. The complainant is eligible for delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum from the committed date of delivery of possession i.e. 08.07.2018 as per agreement dated 08.04.2015 issue w.r.t PLC charges shall be decided finally at the time of delivery of possession.

    iv. If the possession is not given on the date committed by the respondent, then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions, I.e. Section 19(4) of the act ibid.

35. Feeling aggrieved with the same, the complainant filed an appeal bearing no. 162 of 2019 with the appellate tribunal. But during the pendency of that appeal the respondents cancelled the unit on 11.06.2019 on ground of non-payment of the amount due and returned the remaining paid-up amount of Rs.31,77,823/- after

deducting 10% of the sale consideration and other charges. So, in view of cancellation of the allotted unit, the complainant withdrew that appeal on 20.09.2019. Meanwhile, he has also filed the present complaint on 02.09.2019 seeking setting aside the cancellation of the allotted unit, its restoration, acceptance of the refunded amount received by him besides some other reliefs. The respondents filed reply to the same controverting the pleas taken by the complainant and validating the cancellation of the allotted unit on the ground of non-payment of the amount due. The complainant reiterated his pleas as taken in the complaint by way of written submissions filed on 18.07.2022

36. The authority vide its orders dated 06.09.2019 restrained the promoter from creating third party rights or alienating the allotted unit in any manner till further orders. Similarly vide orders dated 05.03.2020, the authority directed the complainant to make payment of the outstanding amount along with prescribed rate of interest to the respondent by 01.04.2020 otherwise, the unit would stand cancelled, and that order is reproduced for a reference as under:

> *Part arguments heard.*
>
> *The unit of the complainant was cancelled by the respondent vide cancellation letter dated 11.06.2019 for non-payment of amount due towards him. Complainant has filed complaint for restoration of the unit. Complainant is directed to make the outstanding payment along with the prescribed rate of interest to the respondent by 01.04.2020 otherwise the unit stands cancelled.*

37. In pursuance to above mentioned orders of the authority the complainant transferred the sums of Rs. 35,00,000/-,

Rs.16,00,000/- and Rs.3.5 lacs through RTGS in the account of Mascot Buildcon Private Limited that is respondent builder on 21.03.2020, 23.03.2020 and 26.03.2020 respectively totaling to Rs.54,50,000/-.

38. Since there was dispute with regard to amount due against the complainant and to be paid to the respondents, so the authority vide orders dated 17.11.2020 directed both the parties to submit calculation sheets with an advance copy to the other side to ascertain the outstanding amount and who submitted the same. During the course of hearing on 08.09.2021 the matter with regard to amount due was referred to CA of the authority for giving his opinion on the following points:

    i. Whether the complainant has deposited some amounts after the passing of order dated 05.03.2020.

    ii. Whether the respondent company has adopted due process of law while cancelling the unit i.e., by way of issuing notice to the home buyer before actual cancelling the unit.

    iii. It will also be in the fitness of the things that how much amount has actually been paid by the complainant towards the total consideration of the unit.

    iv. What are the dues to be paid to the complainant as per BBA along with interest, if any.

39. A report in this regard dated 05.10.2021 was received and the same was superseded by another report dated 08.10.2021 on the basis of orders dated 08.10.2021 passed by the authority. Objections to the same have been filed by the complainant on

18.07.2022. Now the issue for consideration before the authority areas under:

(i) Whether the complainant was competent to challenge the cancellation of the allotted unit made on the basis of letter dated 11.06.2019 when his appeal against the order dated 30.10.2018 was pending before the appellate tribunal.

(ii) Whether the complainant failed to comply with the orders of the authority dated 05.03.2020 directing him to pay the amount due against the allotted unit by 01.04.2020.

40. As regards issue no. 1, it is an admitted position that when the cancellation of the allotted unit was issued vide letter dated 11.06.2019 by the respondents, the matter was sub judice before the Hon'ble Appellate Tribunal by way of appeal against the order dated 30.10.2018 passed by the authority in complaint bearing no. 171 of 2018. It is settled proposition of law that an appeal is continuation of the suit. If any adverse order during the pendency of appeal has been passed against any of the party to the litigation, then the same can be challenged in those proceedings and not by way of separate suit or complaint. The appeal against the order dated 30.10.2018 passed by the authority was admittedly withdrawn by the complainant on 20.09.2019. But prior to withdrawal of that appeal, he filed the instant complaint on 02.09.2019 before the authority and which is not legally maintainable without seeking leave of the court to file complaint even prior to withdrawal of the appeal.

41. As regards issue no. 2, vide orders dated 05.03.2020, specific directions were given to the complainant to pay the amount due against the allotted unit to the respondents by 01.04.2020. No doubt the complainant paid a total sum of Rs.54,50,000/- up to 26.03.2020 but did not pay the remaining amount and took a plea of non- uploading of the zimni dated 05.03.2020 on the website of the authority and the limitation being extended from time to time by the Government of India and Hon'ble Apex Court of the land and the calculations made being incorrect by CA of the authority on 08.09.2021. But all the pleas taken in this regard are devoid of merit. Though there were lock down due to Covid 19 in the third week of March 2020 extended from time to time, but the complainant admittedly deposited in the account of the respondents the sum of Rs. 54,50,000/- on different dates up to 26.03.2020 through RTGS. No doubt, the limitation being extended from time to time due to Covid 19 by different authorities but the plea of complainant with regard to non-deposit of remaining amount due cannot be considered in view of his depositing Rs. 54,50,000/- up to 26.03.2020. Thus, his plea with regard to uploading of zimni dated 05.03.2020 on the website of the authority cannot be taken into consideration. The other plea raised by him with regard to the incorrect calculations of the CA of the authority is also untenable. While giving report dated 08.10.2021 the CA of the authority has taken into consideration the payments made by the complainant against the allotted unit and the amount of delay possession charges. After adjusting the

amount of delayed possession charges and the amount paid by the complainant to the respondents in pursuance to orders dated 05.03.2020, the due amount payable by him was Rs.4,77,996.88/-. That amount was not even deposited by the complainant, though he challenged the report of the CA of the authority but could have deposited the amount due under protest reserving his rights to recover the same from the builder. But that was not done disregarding the orders of the authority passed during the proceedings subsequent to expiry of lockdown period.

42. Since the complainant failed to pay the amount due as per the directions of the authority contained in order dated 05.03.2020 so, no conclusion can be reached except the cancellation of the allotted unit being valid.

43. Consequently, in view of above mentioned legal as well as factual position no case for setting aside cancellation of allotted unit made on the basis of letter dated 11.06.2019 is made out. And same is held to be valid. However, the complainant has already made payment of Rs.54,50,000/- to the respondents up to 26.03.2020 so that amount is ordered to be refunded to him along with interest at the prescribed rate i.e. 9.80% from the date of re-deposit i.e. 26.03.2020 up to the date of actual re-payment within a period of 30 days.

44. The complainant also requested that the respondent be restrained from creating third party rights over the allotted unit till the period prescribed for filing an appeal against this order expires.

Keeping in view the facts detailed earlier and the issues involved, the respondents are directed not to create third party rights over the allotted unit till 60 days i.e. the period prescribed for filing appeal against the order.

H. Directions of the authority:

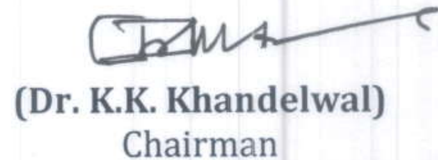
45. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act of 2016:

    i. The respondents are directed to refund an amount of Rs.54,50,000/- along with interest at the prescribed rate i.e. 9.80% from the date of re-deposit i.e. 26.03.2020 up to the date of actual re-payment within a period of 30 days.

    ii. The respondents are directed not to create any third-party rights over the allotted unit till 60 days i.e. the period prescribed for filing appeal against the order.

46. Complaint stands disposed of.

47. File be consigned to registry.



(Vijay Kumar Goyal) Member

(Dr. K.K. Khandelwal) Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated:02.08.2022