BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2055 of 2018
First date of hearing: 14.05.2019
Date of decision : 30.08.2022

1. Ajay Kumar Garg
2. Neetu Garg

Both RR/o: - House No. 352, Sector- 9, Faridabad - 121006 **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. R.K. Solanki (Advocate) Complainants
None Respondent

ORDER

1. The present complaint dated 12.12.2018 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 Revanta", Sector 78, Gurugram, Haryana
2.	Project area	18.7213 acres
3.	Nature of the project	Residential group housing colony
4.	DTCP license no. and validity status	49 of 2011 dated 01.06.2011 valid up to 31.05.2021
5.	Name of licensee	Sh. Ram Chander, Ram Sawroop and 4 Others
6.	Date of approval of building plans (revised)	24.04.2017 [As per information obtained by the planning branch]
7.	Date of environment clearances (revised)	31.04.2017 [As per information obtained by the planning branch]
8.	RERA Registered/ not registered	Registered vide no. 32 of 2017 dated 04.08.2017
9.	RERA registration valid up to	31.07.2022

		5 Years from the date of revised Environment Clearance
10.	Unit no.	A-421, 42nd floor, Tower/block- A (Page no. 36 of the complaint)
11.	Unit area admeasuring	1623.330 sq. ft. (Page no. 36 of the complaint)
12.	Date of execution of agreement to sell	11.05.2012 (Page no. 34 of the complaint)
13.	Possession clause	**4.2 Possession Time and Compensation** *That the Seller shall sincerely endeavor to give possession of the Unit to the purchaser* ***within*** *thirty-six (36) months in respect of 'TAPAS' Independent Floors* ***and forty eight (48) months in respect of 'SURYA TOWER' 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 construction is not completed within the time period mentioned above.*** *The seller on obtaining certificate for occupation and use by the Competent Authorities shall hand over the Unit to the Purchaser for this occupation and*

16.	Basic sale consideration as per BBA at page no. 69 of complaint	Rs.1,12,04,561/-
17.	Total sale consideration as per applicant ledger dated 13.11.2018 page no. 86 of complaint	Rs.1,18,56,799/-
18.	Amount paid by the complainant as per applicant ledger dated 13.11.2018 page no. 86 of complaint	Rs.1,10,61,273 /-
19.	Payment plan	Installment payment plan [Page no. 68 of the complaint]
20.	Occupation certificate /Completion certificate	Not received
21.	Offer of possession	Not offered
22.	Delay in handing over the possession till date of filing complaint i.e., 12.12.2018	2 years 1 month and 1 day

B. Facts of the complaint

3. The complainants have made the following submissions: -

I. The respondent advertised through newspapers and hoardings for the project namely "Raheja's Revanta" situated at sector-78, Gurgaon in the year 2011.

II. That complainants were need of a dwelling house and therefore applied for an apartment containing two-bedroom, one hall, one

kitchen and bathrooms attached with bedrooms, total super area 1623.33 sq. ft. (inclusive of 1194.8 sq. ft. built up area) under the scheme of respondent company.

III. That complainants paid a sum of Rs.23,47,791/- during the period from 29.11.2011 to 30.1.2012 towards booking and other demands of the respondent company on different dates before entering in agreement. This amount is mentioned under Article 3 of the agreement to sale. Thereafter, the respondent company issued a letter dated 11.05.2012 to complainants, titled as allotment letter and thereby informed them that the screening committee has approved the application of allotment and has allotted apartment no. A-421 in tower-A at 42nd floor of the building, admeasuring 1623.33 sq. ft. (Super Area) and 1194.80 sq. ft. built up area.

IV. That both the parties, entered into an agreement dated 11.05.2012. The respondent company also demanded a sum of Rs.1,72,949/- towards ad-hoc charges which were not intimated to the complainants. It also charged Rs.4,79,289/- towards service tax. Thus, the total cost of the apartment was calculated to Rs.1,18,56,799/-

V. That respondent company after having received the booking amount of Rs.23 Lakh from complainants, executed the agreement on 11.5.2012 and added Rs.9,73,998/- towards preference location charges (PLC). It is a fact that complainants never made any special

request of their choice of the apartment like pool facing, park facing, any particular floor, to the respondent company to allot any particular apartment. It was only respondent company who have allotted the apartment at its own choice and complainants were not taken into confidence while allotting the apartment. therefore, this amount needs to be refunded to the complainants from the respondent company.

VI. That the respondent company got signed all the documents of agreement to sale along with annexures, relating to cost of apartment, payment plan, affidavits of both the complainants, application for membership of association, formation of association of owners of Raheja's Revanta, Gurgaon, declaration of complainants regarding binding of byelaws of the resident association and membership form. The entire agreement to sale nowhere mentions 1194.80 sq. ft. as covered area containing how many bedrooms, bathrooms, dining hall, drawing room, kitchen would be constructed by them and what would the respective areas.

VII. That the complainants have made a total payment of Rs.1,10,99,053/- (as shown in the ledger of the respondent company as on 13.11.2018) against the total amount of Rs.1,18,56,799/-. As on 13.11.2018, the complainants were to pay only Rs.3,495/-. Further, the respondent charged Rs.4,79,289/- as service tax from the complainant but never given any proof of

deposit of the service tax to the government exchequer. Further, That the respondent has charged the entire amount from the complainants except Rs.7,95,526/- which was to be paid by them to it at the time of receipt of occupancy certificate.

VIII. That till date since the building is not complete, hence it is impossible that the respondent company would get the occupancy certificate from the concerned government agency. Further, the respondent has charged the interest from the complainants @ 18% per annum on the late deposit of amount on 26.06.2012, 06.11.2012, 16.07.2013, 19.03.2014, 03.07.2015, 08.09.2015, 22.01.2016, 31.03.2016. It is also mentioned in para 3.14 of Article 3 of the agreement to sale that if there is any delay or default in making the payment of installment on time by the purchase, then purchaser would pay interest of @ 18% per annum to the seller from the due date of payment of installment on monthly compounded basis.

IX. That complainants persuaded for the completion of the building and for taking of physical possession of apartment to the respondent, personally, telephonically and through email. On 15.11.2019 the customer care of the respondent replied to the mail of the complainants intimating that high rise units are targeted to be completed by the end of the year 2019 tentatively.

X. That the complainants have saved the money paid to the respondent and also taken a loan of Rs.34 lakh from State Bank of

India and are still paying the EMI to the bank and also paid the interest of the bank on the above said loan amount. The respondent was extorting money in the name of the property booked by the complainants. Thus, the respondent/builder is a fraudster and never has any intention to give peaceful possession of the apartment to the complainants, for which they are having a lawful right.

C. Relief sought by the complainants:

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

i. The respondent be directed to pay a sum of Rs.1,10,99,053/- as principal amount paid to respondent.

ii. The respondent be directed to pay a sum of Rs.2,05,68,481/- as interest on principal amount calculated @18% per annum on monthly rest. The interest be calculated till November 2018. Further, the interest be paid by respondent to complainant till actual payment of the amount.

iii. The respondent be directed to pay Rs.9,73,998/- towards preference location charges the respondent received fraudulently from the complainant.

iv. The respondent be directed to pay a sum of Rs.4,20,442/- towards compensation for non-delivering the unit.

v. The respondent be directed to adjust the amount receivable, if any, from the amount of compensation payable to the complainants and balance amount be paid to them.

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. The aforementioned complainants have not come with clean hands before the authority. The true facts of the case have been maliciously concealed/twisted for personal gain by the complainants.

ii. That the provisions of the Act of 2016 are not applicable to the present case and the pleadings based on the said provisions are made only with the intension to mislead this authority. Nevertheless, it is clarified to avoid complications at the later stage of the case of that the complainant booked a unit no. A- 421, 42nd floor, independent floor, in the project namely 'Raheja Revanta', in October 2011. The booking on the said unit was done much prior to the coming of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid therein cannot be applied retrospective effect. The said project is registered under the authority vide registration no. 32 of 2017 dated 04.08.2017.

iii. That the construction of the tower in which the unit is allotted to the complainant is 80% complete and the respondent would hand over the possession of the same to them after its completion

subject to their making the payment of the due installments amount and on availability of infrastructure facilities such as sector road and laying providing basic external infrastructure as water supply, sewer, electricity etc. as per terms of the application and agreement to sell.

iv. That the complainants have not approached the authority with clean hands and have intentionally suppressed and concealed the material facts in the complaint. 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/builder 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 residents welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.
- That the project is one of the most Iconic Skyscraper in the making, a passionately designed and executed project having many firsts and is the tallest building in Haryana with highest

infinity pool and club in India. The scale of the project required a very in-depth scientific study and analysis, be it earthquake, fire, wind tunneling facade solutions, landscape management, traffic management, environment sustainability, services optimization for customer comfort and public heath as well, luxury and iconic elements that together make it a dream project for customers and the developer alike. The world's best consultants and contractors were brought together such as Thorton Tamasetti (USA) who are credited with dispensing world's best structure such as Petronas Towers (Malaysia), Taipei 101(Taiwan), Kingdom Tower Jeddah (world' tallest under construction building in Saudi Arabia and Arabtec makers of Burj Khalifa, Dubai (presently tallest in the world), Emirates palace Abu Dhabi etc.

- That compatible quality infrastructure (external) was required to be able to sustain internal infrastructure and facilities for such an iconic project and service for over 4000 residents and 1200 Cars which cannot be offered for possession without integration of external infrastructure for basic human life be it availability and continuity of services in terms of clean water, continued fail safe quality electricity, fire safety, movement of fire tenders, lifts, waste and sewerage processing and disposal, traffic management etc. Keeping every aspect in mind this iconic complex was conceived as a mixture of tallest high-rise

towers & low-rise apartment blocks with a bonafide hope and belief that having realized all the statutory changes and license, the government would construct and complete its part of roads and basic infrastructure facilities on time. Every customer including the complainants were well aware and made cautious that the respondent cannot develop external infrastructure as land acquisition for roads, sewerage, water, and electricity supply was beyond its control. Therefore, as an abundant precaution, the respondent company while hedging the delay risk on price offered made an honest disclosure in the agreement to sell.

- That timely payment of installments within the agreed time schedule is the essence of allotment and the same has been admitted and acknowledged by the complainants in the agreement to sell. They are very well aware that the respondent had undertaken the construction of the project and if such like defaults were committed in timely payment of installments, the entire project would be jeopardized. It is submitted that the complainants have been a regular defaulter from the very inception in making timely payment towards the installment demands issued by the respondent as per the terms of the allotment and the agreed payment plan. The complainants have failed to make timely payments and accordingly demand letters and reminders were also issued.

- That the respondent raised payment demands from the complainants in accordance with the mutually agreed terms and conditions of allotment as well as of the payment plan and the complainant made the payment of the earnest money and part amount of the total sale consideration and are bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, stamp duty, service tax as well as other charges payable at the applicable stage.
- 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 roads, sewerage line, water and electricity supply in the sector where the said project is being developed. The development of roads, sewerage, 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 supposed to be developed by HUDA parallelly have not been developed. The picture/google images of the project site when the project was launched along with the latest pictures of the project site and the area surrounding it shows no development of sector roads on sector 78, Gurugram. There is no infrastructure activities /development in the surrounding area of the project-in-question. Not even a single sector road or services have been put in place by HUDA/GMDA/HSVP till date.

- That the respondent had also filed RTI application for seeking information about the status of basic services such as road, sewerage, water, and electricity. Thereafter, the respondent received reply from HSVP wherein it is clearly stated that no external infrastructure facilities have been laid down by the concerned governmental agencies. The copies of replies to the RTI application dated 15.06.2018, 02.07.2018 and 11.07.2018 are filed accordingly. The respondent can't be blamed in any manner on account of inaction of government authorities.
- That furthermore two high tension (HT) cables lines were passing through the project site which clearly shown and visible in the zoning plan dated 06.06.2011. The respondent was required to get these HT lines removed and relocate such HT Lines for the blocks/floors falling under such HT Lines. The respondent proposed the plan of shifting the overhead HT wires to underground and submitted building plan to DTCP,

Haryana for approval and which was approved. The revised and approved Zoning plan of the area falling under HT Lines. It is pertinent to mention that such HT Lines have been put underground in the revised Zoning Plan. The fact that two 66 KV HT lines were passing over the project land was intimated to all the allottees as well as the complainant. The respondent had requested to M/s KEI Industries Ltd for shifting of the 66 KV S/C Gurgaon to Manesar Line from overhead to underground Revanta Project Gurgaon vide letter dated 01.10.2013. The HVPNL took more than one year in giving the approvals and commissioning of shifting of both the 66KV HT Lines. It was certified by HVPNL Manesar that the work of construction for laying of 66 KV S/C; D/C 1200 Sq. mm. XLPE Cable (Aluminium) of 66 KV S/C Gurgaon – Manesar line and 66 KV D/C Badshahpur – Manesar line has been converted into 66 KV underground power cable in the land of the respondent's project, executed successfully by M/s KEI Industries Ltd. and 66 KV D/C Badshahpur – Manesar Line was commissioned on 29.03.2015. Thereafter, HVPNL, Gurgaon issued the performance certificate for the same to the respondent dated 14.06.2017.

- That respondent got the overhead wires shifted underground at its own cost and only after adopting all necessary processes and procedures and handed over the same to the HVPNL and

was brought to the notice of District Town Planner vide letter dated 28.10.2014 requesting to apprise DGTCP, Haryana of the same. As multiple government and regulatory agencies and their clearances were involved/required and frequent shut down of HT supplies was involved, it took considerable time/efforts, investment and resources which falls within the ambit of the force majeure condition.

- The respondent has done its level best to ensure that the complex is constructed in the best interest and safety of the prospective buyers. It is pertinent to mention that during such time when all such procedure and process were taking place, concurrently some amendments took place in Haryana Fire Safety Act, 2009 due to which it was further technically advised and mandated to have additional service floors/fire refuge area in the high-rise tower as additional safety norms, to which the respondent complied in letter and spirit. After revision of zoning plan, the respondent applied for revision of building plan incorporating all the advised changes and left-over area due to overhead HT wires to be built and shown as to be shower and presented in first/original building and marketing plan. The application for revision of Building Plans was made vide application dated 14.01.2016 to DTCP, Haryana as per initiated committed project layout and design only. Pursuant to such

application, the DTCP, Haryana was pleased to revise the building plan in conformity with revised Zoning Plan.

- That the construction of the tower in which the unit allotted to the complainants is located is 80% complete and the respondent would hand over the possession of the same to them after its completion subject to their 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 supply, sewer, electricity etc. as per terms of the application and agreement to sell. The photographs show the current status of the construction of the tower of the unit allotted to the complainants are attached. It is submitted that due to the above-mentioned conditions which were 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 the passing any adverse order against the respondent at this stage would amount to complete travesty of justice.
- That GMDA, office of Engineer-VI, Gurugram vide letter dated 03.12.2019 has intimated to the respondent company that the

land of sector dividing road 77/78 has not been acquired and sewer line has not been laid. The promoter wrote on several occasions to the Gurugram Metropolitan development Authority (GMDA) to expedite the provisioning of the infrastructure facilities at the said project site so that possession can be handed over to the allottees. However, the authorities have paid no heed to or request till date.

- That the origin of the complaint is because an investor is unable to get required return due to bad real estate market. It is increasingly becoming evident, particularly by the prayers made in the background that there are other motives in mind by few who engineered this complaint using active social media.
- That the three factors: (1) delay in acquisition of land for development of roads and infrastructure (2) delay by government in construction of the Dwarka Expressway and allied roads; and (3) oversupply of the residential units in the NCR region, operated to not yield the price rise as was expected by a few. This cannot be a ground for complainants for refund as the application form itself has abundantly cautioned about the possible delay that might happened due to non-performance by Government agencies.

- That amongst those who booked (as one now sees) were two categories: (1) those who wanted to purchase a flat to reside in future; and (2) those who were looking at it as an investment to yield profits on resale. For each category a lower price for a Revanta type Skyscraper was an accepted offer even before tendering any money and bilaterally with full knowledge and clear declarations by taking on themselves the possible effect of delay due to infrastructure.
- That in the present case, keeping in view the contracted price, the completed (and lived-in) apartment including interest and opportunity cost to the Respondent may not yield profits as expected than what envisaged as possible profit. The completed building structure as also the price charged may be contrast with the possible profit's v/s cost of building investment, effort and intent. It is in this background that the complaint, the prevailing situation at site and this response may kindly be considered. The present complaint has been filed with malafide motives and the same is liable to be dismissed with heavy costs payable to the respondent.

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 complainants 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 12.05.2022*** wherein 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 cases 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 complainant being investor.

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 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 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 paid total price of **Rs.1,10,61,273/-** 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;"

15. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the agreement to sell 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 investors 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. An objection has been 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 will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

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.

G. Findings on the relief sought by the complainants.

G.I. The respondent be directed to pay a sum of Rs.1,10,99,053/- as principal amount paid to respondent.

G. II The respondent be directed to pay a sum of Rs.2,05,68,481/- as interest on principal amount calculated @18% per annum on monthly rest. The interest be calculated till November 2018.

Further the interest be paid by respondent to complainant till actual payment of the amount.

G.III. The respondent be directed to pay Rs.9,73,998/- towards preference location charges the respondent received fraudulently from the complainants.

19. 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)*

20. As per clause 4.2 of the agreement to sell dated 11.05.2012 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 Unit to the purchaser **within** thirty-six (36) months in respect of 'TAPAS' Independent Floors **and forty eight (48) months in respect of 'SURYA TOWER' 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 construction is not completed within the time period mentioned above****. The seller on obtaining certificate for occupation and use by the Competent Authorities shall hand over the Unit to the Purchaser for this occupation and use and subject to the Purchaser having complied with all the terms and conditions of this application form & Agreement To sell. In the event of his failure to take over and /or occupy and use the unit 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 liable to compensation @ Rs.7/- per sq. ft. of the super area per month as holding charges for the entire period of such delay..... "*

21. 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.

22. **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 48 months plus 6 months of grace period, in case the construction is not complete within the time frame specified. 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 May 2016. 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.

23. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the prescribed rate interest. However, the allottee intend to withdraw from the project and are seeking refund of the amount paid by them 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.

24. 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.

25. 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., 30.08.2022 is **8%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10%.**

26. 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 11.05.2012, the possession of the subject unit was to be delivered within a period of 48 months from the date of execution of buyer's agreement which comes out to be 11.05.2016. 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 11.11.2016.

27. Keeping in view the fact that the allottee/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 failure of the promoter to complete or inability to give possession of the plot 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.

28. The due date of possession as per agreement for sale as mentioned in the table above is **11.11.2016** and there is delay of 2 years 1 month and 1 day on the date of filing of the complaint.

29. 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....."*

30. 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."*

31. 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.

32. 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., @ 10% 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. IV. The respondent be directed to pay a sum of Rs.4,20,442/- towards compensation for non-delivering the unit.

G.V. The respondent be directed to adjust the amount receivable, if any, from the amount of compensation payable to the complainant and balance amount be paid to them.

33. 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 compensation.

H. Directions of the authority

34. 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 i.e., Rs.1,10,61,273/- received by it from the complainants along with interest at the rate of 10% 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. 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.

35. Complaint stands disposed of.

36. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.08.2022