

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

Complaint no. : 1946 of 2021
First date of hearing: 09.07.2021
Date of decision : 24.08.2021

Mr. Saurabh Chopra
R/o: - B-203, Upkari Apartments, Plot no. 9,
Sector-12, Dwarka, New Delhi- 110078

Complainant

Versus

M/s Raheja Developers Limited.
Regd. office: -W4D- 204/5, Keshav Kunj,
Cariappa Marg, Western Avenue,
Sainik Farms, New-Delhi-110062
Also at: - Raheja Mall, 3rd floor,
Sector-47, Sohna Road, Gurugram- 122001

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Ms. Surbhi Garg
Sh. Mukul Kumar Sanwariya
Sh. Saurabh Seth
Ms. Gauri Desai

Advocate for the complainant

Advocates for the respondent

ORDER

1. The present complaint dated 12.04.2021 has been filed by the complainant/allottee 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 allottee 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 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.	Project name and location	"Raheja Sampada", Sector-92&95, Gurugram.
2.	Project area	17 acres
3.	Nature of the project	Residential group housing colony
4.	DTCP license no. and validity status	216 of 2007 dated 05.09.2007 valid till 04.09.2019
5.	Name of licensee	NA Buildwell Pvt. Ltd
6.	RERA Registered/not registered	Unregistered
7.	Date of execution of flat buyer agreement	05.07.2010 [Page no. 50 of complaint]
8.	Date of allotment letter	05.07.2010 [Page no. 35 of reply]



9.	Unit no.	T2-037, 3 rd floor, tower-2 [Page no. 51 of complaint]
10.	Unit measuring	1572 sq. ft. [Super area]
11.	Payment plan	"Installment payment plan" [Page 69 of complaint]
12.	Total consideration	Rs.51,04,263/- [as per customer ledger dated 17.12.020 page 77 of complaint]
13.	Total amount paid by the complainant	Rs.51,57,292/- [as per customer ledger dated 17.12.020 page 77 of complaint]
14.	Due date of delivery of possession as per clause 4.2 of the apartment buyer agreement: within 36 months from the date of execution of agreement and after providing necessary infrastructures in the sector by the govt, but subject to force majeure. [Page 57 of complaint]	05.07.2013
15.	Details of Occupation Certificate if any	Date of OC granted, if any, by the competent Authority: Dated 11.11.2016 Block/Tower for which OC obtained- tower- 2 [page no. 38 of reply]
16.	Date of notice of possession	07.02.2017 [page 80 of complaint]
17.	Delay in handing over possession till the date of this order i.e. 24.08.2021	8 years 1 month and 19 days

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint: -

- I. That in 2009-2010, the respondent advertised about its new group housing project namely "Raheja's Sampada" located in village Wazirpur, Sector-92, District Gurugram. The respondent painted a rosy picture of the project in their advertisement making tall claims and representing that the project aims at providing luxury residential apartments. It was represented that the project is beautifully situated amidst a green landscape to provide with the residence a feeling of staying close to the nature. It was also represented that the said project gives a host of benefits in terms of connectivity, overall ambience and in-campus amenities that have a touch of luxury and lavishness in every aspect.
- II. That believing the representations of the respondent and relying on the goodwill of the respondent company, while being on the lookout for an adobe for himself and his family, on 10.04.2010, the complainant along with his mother, Late Mrs. Neelam Chopra (*co-allottee, now deceased*) booked an apartment in the project of the

respondent by submitting the application form dated 10.04.2010 and paid an amount of Rs.3,46,783/- vide instrument no. 055598 dated 10.04.2010 followed by instrument no. 055599 dated 10.06.2010 amounting to Rs 5,20,175/- towards booking.

- III. That after almost 3 months from the date of booking, on 05.07.2010, the flat buyer's agreement was executed between the complainant (along with his deceased mother) and the respondent for unit bearing no. T2-037 on 3rd floor, located in tower-2, admeasuring a super area of 1572 sq. ft. That as per clause 4.2 of the flat buyer's agreement dated 05.07.2010, the respondent had undertaken to complete the project and handover possession within a period of 36 months from the date of execution of the flat buyer's agreement, i.e. by 05.07.2013. However, the respondent miserably failed in handing over possession of the unit in question till said due date and even after that till date.
- IV. That the complainant kept making payment without fail, in accordance with the demands raised by the respondent only to find out that the respondent has simply duped him out of his hard-earned money. Till date, the complainant

has paid a total sum of Rs.51,57,292/- towards the aforesaid residential flat in the project from 2010 till date as and when demanded by the respondent as against a total sale consideration of Rs.51,56,654/- (this includes *Ad hoc* Charges other escalation charges, cost at the time of booking was Rs 44,97,240/-), i.e. more than 100% of the total sale consideration.

- V. That having already invested almost all of his life savings in order to purchase the unit in question, the complainant had no other option but to believe the representations of the respondent and continue making payment, despite the fact that the respondent had not only delayed the project inordinately but was also not giving any concrete reply to the queries of the complainant regarding the expected date of delivery of possession.
- VI. That the complainant had asked the respondent to clarify about the one-sided and unfair clauses in the agreement, namely stark contrast between the interest being charged by the respondent on the delayed payments and the delayed possession charges for which the complainant were entitled on account of delay in handing over possession in violation of the flat buyer's agreement, to

which the respondent verbally replied that the delayed payment interest, if any, will be charged on the basis of the agreement and the delay in handing over possession of the flat was beyond the control of respondent.

- VII. That the complainant along with the other apartment owners regularly and repeatedly followed up with the representatives of the respondent and enquired about the status of the project. However, the representatives of the respondent on every occasion made false and vague assurances that the possession of the flat would be delivered as per schedule and kept on prolonging the matter unjustifiably without any cogent reason thereby inflicting great mental agony and hardship upon the complainant.
- VIII. That the complainant and his family saw a ray of hope when finally, after a delay of more than 4 years, on 07.02.2017, the complainant received a notice of possession for the unit in question thereby informing that the unit is ready for possession and calling upon the complainant to make the final payment. It was also specified that any delay in making final payment and fulfilment of documentary formalities will attract holding

charges @ Rs 5/- per sq. ft. per month of the super area besides delayed payment charges at a hefty rate of interest.

- IX. That the respondent unduly made the complainant to sign few blank documents like application form for membership of Navodaya Owner Association, member form for Navodaya club, maintenance and service agreement, affidavit regarding payment of generator/ power supply back up consumption and indemnity bond on Rs.100/- stamp paper which says payment of any enhanced IDC/EDC shall be paid by indemnifier & indemnifier is fully satisfied with construction as per specification in the buyer agreement, in addition indemnifier acknowledges that the maintenance of "Raheja Sampada" shall be handed over to Navodaya apartment owners association. However, having deposited a huge sum out of his life savings and in order to avoid imposition of any delayed payment charges or holding charges and expecting early possession of flat, the complainant had no option but to succumb to the pressure of the respondent and sign said documents.



- X. The complainant has submitted that the utter shock of the complainant, when the complainant visited the project site for site inspection in order to take possession of his unit in question, to his utter shock, the unit was not at all ready for taking possession. Rather, the unit appeared to be in a dilapidated state. This left the complainant and his family completely devastated.
- XI. That in order to question the respondent regarding demanding and taking the final installment due 'on offer of possession' and issuing a notice of possession without the unit being in a habitable position, the complainant rushed to the respondent's office. However, the representatives of the respondent did not give a concrete explanation over the unscrupulous conduct of the respondent but assured that the unit shall be complete in every respect in accordance with the specifications promised in the agreement and shall be delivered after two months. Thereafter, the complainant again visited his unit after two months only to find out that the unit was still not ready. The representatives of the respondent company again assured that soon they shall complete the unit and send him a fresh mail/notice offering possession.

Having no other option, the complainant patiently waited for correspondence from respondent's end, but all in vain as till date, the possession of the unit in question has not been handed over to the complainant.

XII. That the complainant again visited the unit in September 2018 in order to take possession of his unit, but all in vain as the unit was still not ready to occupy and full of innumerable snags and irregularities. The respondent again assured the complainant that the unit shall be free from all the irregularities and be habitable soon. Thereafter, receiving no communication from respondent's end, the complainant vide email dated 08.10.2018, sought possession status update to which vide email dated 31.10.2018, the respondent said that due to some unavoidable reason, they were taking more than anticipated time to complete wall paint, wooden flooring, Cp fitting and final finishing work and were expecting the same to be completed in another 45-60 days, but to no avail.

XIII. The complainant has submitted that thereafter, again vide email dated 10.03.2021, the complainant specifically pointed out that he is not liable to pay any maintenance

charges when even after lapse of 10 years from the date of booking, the respondent has pitiably failed in handing over possession to the complainant thereby inflicting extreme hardship and mental agony upon the complainant and his family. However, till date the respondent has not completed the finishing work of the unit in question in order to make it habitable and accordingly, has failed in handing over the possession of the said unit.

- XIV. That the misery of the complainant can be highlighted from the pictures of the unit in question which evidently depict that despite lapse of 10 years from the date of booking, the respondent has failed in finishing the unit and making it fit to occupy and is liable to be penalized for the same. Rather, the complainant is being sent maintenance bills of a unit which is not occupied by him and is not habitable and whose possession has not been handed over to him.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).

- I. To direct the respondent to complete the finishing work of the unit in question and handover physical possession to the complainant;
- II. To pay delay interest at the prescribed rate for every month of delay on amount of Rs.51,57,292/-, from the due date of possession, i.e. 05.07.2017 till actual handing over of possession.
- III. To direct the respondent to charge delay payments, if any, at the prescribed rate in accordance with the Haryana Real Estate (Regulation and Development) Rules, 2017.
- IV. To direct the respondent to not charge anything outside the clauses mentioned in flat buyer's agreement.
- V. To direct the respondent to not impose any holding charges upon the complainant;
- VI. To direct the respondent to levy maintenance charges only from the date of handing over possession;
- VII. To direct the respondent to issue directions to "Navodaya owners association" to levy maintenance charges only from the date of handing over physical possession, waive off outstanding maintenance dues till date and refund of already deducted amount of Rs 50200/- (transferred by Builder to Navodaya Apartment Owners Association on

26.02.2019, from the excess amount deposited by the complainant).

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention 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. The submission made therein, in brief is as under: -
 - I. That the present complaint is based on vague, misconceived notions and baseless assumptions of the complainant and these are, therefore, denied. The complainant has not approached this authority with clean hands and has suppressed the true and material facts. The complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. It is submitted that the instant complaint is absolutely malicious, vexatious, and unjustifiable and accordingly has to pave the path of singular consequence, that is, dismissal.
 - II. That the respondent is traversing and dealing with only those allegations, contentions and/or submissions that are material and relevant for the purpose of adjudication

of present dispute. It is further submitted that save and except what would appear from the record and what is expressly admitted herein, the remaining allegations, contentions and/or submissions shall be deemed to have been denied and disputed by the respondent.

- III. That the complainant booked flat no. T2-037, in 'Raheja's Sampada' a residential group housing colony in sector-92, Gurgaon, Haryana vide application form dated 10.04.2010. The respondent vide letter dated 05.07.2010 issued an allotment letter to the complainant. The booking of the said allotted unit was done prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.
- IV. That the complaint is liable to be out-rightly rejected as this authority does not have the jurisdiction to try and decide the present false and frivolous complaint. It is submitted that the said project has already been developed and completed by them and subsequently, occupation certificate has also been issued by the

Directorate of Town and Country Planning, Haryana on 11.11.2016 with respect to the said project.

- V. 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 15.2 of the buyer's agreement.
- VI. The complainant after checking the veracity of the project namely, 'Raheja's Sampada" had applied for allotment of unit no. T2-037 vide booking application form. The complainant agreed to be bound by the terms and conditions of the booking application form. It is pertinent to mention herein that the complainant was aware as also stated in clause 4.3 of the flat buyer agreement dated 05.07.2010.
- VII. That the construction of the tower in which the flat is allotted to the complainant is located already complete and the respondent has already offered the possession of the same to the complainant. That the respondent was ready to handover the flat as it was ready for the possession and the same fact was already informed to the complainant many times.

VIII. That the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by it 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', 'Raheja Shilas' 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 complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that him

calculations have gone wrong on account of severe slump in the real estate market, and he is now raising untenable and illegal pleas on highly flimsy and baseless grounds. Such malafide tactics of the complainant cannot be allowed to succeed.

- That the respondent raised payment demands from the complainant 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 is 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 period of 36 months for completion of construction of the said Unit was contingent on the providing of necessary infrastructure in the sector by the Government and subject to Force Majeure conditions.
- That there was no delay on the part of the Respondent Company and that whatever delay was attributable

compensation was paid to the Complainant as reflected in the ledger 30.07.2021.

- That the respondent company timely delivered the unit allotted to the complainant. That the respondent vide letter dated 07.02.2017 issued notice of possession and requested the complainant to complete the documentary formalities and come forward to take the possession. The final coat of paint and Deep cleaning of the apartment was left to be done which would be done and handed over to the allottee in next 45 days. These works could not be done earlier as lockdown was imposed and RWA of Sampada didn't allow the respondents to enter the premises on several occasions.
- 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 the relevant work to provide infrastructure facilities is still in progress. The respondent can't be blamed in any manner on account

of non-completion of the work by the government authorities.

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.

D. Jurisdiction of the authority

8. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

E. Findings on the objections raised by the respondents

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

9. Objection raised by 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 apartment 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)*** 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."

10. 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."

11. 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.

E. II Objection regarding complainant is in breach of agreement for non-invocation of arbitration

12. The respondent had raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The clause 15.2 has been incorporated w.r.t arbitration in the buyer's agreement: -

"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".

13. 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. Therefore, by applying the same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

14. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, the National Consumer Disputes Redressal Commission, New

Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

*...
56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

15. 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 paras are 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."

16. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within her 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.

E.III. Objection regarding entitlement of DPC on ground of complainant being investor

17. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, she is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting

provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it 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 unit buyer's agreement, it is revealed that the complainant is buyer and has paid a total price of Rs.51,57,292/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

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 complainant, 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.

F. Findings on the relief sought by the complainant

F.I To pay delay interest at the prescribed rate for every month of delay on amount of Rs.51,57,292/-, from the due date of possession, i.e. 05.07.2017 till actual handing over of possession.

18. In the present complaint, the complainant intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, --

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

19. Clause 4.2 of the flat buyer's agreement (in short, agreement) provides for handing over of possession and is reproduced below:

4.2 Possession Time and Compensation

"That the company shall endeavors to give possession of the Apartment to the Allottee(s) within thirty-six (36) months from the date of the execution of this Agreement and after providing necessary infrastructure in the sector by the Government, but subject to force majeure, circumstances and reasons beyond the control of the Company....."

20. **Due date of handing over of possession:** - The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of execution of the flat buyer agreement. The said agreement was executed inter-se parties on 05.07.2010. The period of 36 months expired on 05.07.2013. Therefore, as per clause 4.2 of the said agreement, the respondent was liable to hand over possession of the said unit to the complainant by 05.07.2013.
21. **Validity of offer of possession:** - The authority observes that the respondent/builder has obtained occupation certificate on 11.11.2016 of the tower in which the buyer unit is situated. The respondent company had filed the reply on 02.08.2021 and has admitted in para 16(L) of its reply that the finishing work (final coat of paint and deep cleaning) of the unit was still

pending and the said work could not be completed on time as lockdown was imposed. Further, it was admitted by the respondent that the RWA of *Sampada* didn't allow the respondents' employees to enter the premises on several occasions. This implies that the development work is still pending, and because of aforesaid reasons, the respondent was not in position to actually handover the said unit to the complainant. It is well settled that for constituting a valid offer of possession, the project in which the allotted unit is situated should be complete in all must be habitable so, that an allottee may be able to occupy the same. But while filing a reply on 02.08.2021, it was admitted by the respondent/builder that besides development works, other works of the allotted unit could not be completed due to lockdown and non-allowing the entry of its employee by RWA of *Sampada*. Therefore, the letter of possession dated 07.02.2017 cannot be considered as valid offer of possession.

22. **Payment of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed

and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

23. 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.

24. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.7/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @ 18% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the

allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

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., 24.08.2021 is **7.30%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **9.30%**.

26. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

27. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **9.30%** by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
28. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a)

of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 4.2 of the agreement to sell executed between the parties on 05.07.2010, the possession of the subject unit was to be delivered within 36 months from the date of execution of this agreement. Therefore, the due date of handing over possession comes out to be 05.07.2013. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the agreement to sell dated 05.07.2010 executed between the parties.

29. 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 complainant is entitled to delay possession charges at rate of the prescribed interest @9.30% p.a. w.e.f. 05.07.2013 till the handing over of possession of the allotted unit after completion of

development work as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

30. 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 is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e. 05.07.2013 till the handing over of possession of the allotted unit after completion of the *finishing / development work;*
- ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;
- iii. The arrears of such interest accrued from 05.07.2013 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules;
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the

prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- v. The respondent shall not charge maintenance charge or anything from the complainant which is not the part of the flat buyer agreement.
- vi. The respondent is also not entitled to claim holding charges from the complainant at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

31. Complaint stands disposed of.

32. File be consigned to registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Vijay Kumar Goyal)

Member

Dated: 24.08.2021