BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**3981 of 2021**
Date of filing complaint:	**01.10.2021**
First date of hearing:	**02.11.2021**
Date of decision :	**10.08.2022**

1. 2. 3.	Sh. Ankit Talwar S/o Sh. Jagesh Kumar Talwar Smt. Prem Talwar W/o Sh. Jagesh Kumar Talwar Smt. Palak Dua W/o Sh. Ankit Talwar **R/O**: F-203, DLF New Town Heights, Sector-86, Gurugram- 122004	**Complainants**
	Versus	
	M/s Achaleshwar Infrastructure Private Limited **Regd. office:** Adani House, Plot No. 83, Sector 32, Institutional Area, Gurugram - 122001	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
None	Complainants
Sh. Parshant Sheoran (Advocate)	Respondent

ORDER

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

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

A. Unit and project related details

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

S.n	Particulars	Details
1.	Name of the project	"Samsara (part- 4)", Sector-60, Gurugram, Haryana
2.	Nature of project	Residential floors on plotted colony
3.	**RERA registered/not registered**	Registered vide registration no. 37 of 2018 dated 19.12.2018
	Validity status	15.10.2020
	Licensed area	0.76 acres
4.	**DTPC License no.**	64 of 2010 dated 21.08.2010
	Validity status	20.08.2025
	Licensed area	141.66875 acres
	Name of licensee	M/s Brahma City Pvt. Ltd. & others
	Name of developer	M/s Achaleshwar Infrastructure Private Limited
5.	Floor no.	M49-C on 03rd floor of plot No. M49 (type- 3BHK type B1) [As per page no. 33 of complaint]
6.	Floor area admeasuring	1215 sq. ft. [Carpet area]

		[As per page no. 33 of complaint]
7.	Application form dated	16.01.2018 [As per page no. 43 of reply]
8.	Allotment letter	02.01.2019 [As per annexure-4 on page no. 33 of complaint]
9.	Date of builder buyer agreement	Not executed
10.	Total sale consideration	Rs. 2,13,93,642 [As per page no. 33 of complaint]
11.	Amount paid by the complainants	Rs. 21,22,970 /- [As per page no. 64 of reply]
12.	Possession clause	Cannot be ascertained
13.	Due date of possession	Cannot be ascertained
14.	Demand letters dated	22.01.2019, 08.07.2019, 22.07.2019, 07.08.2019 [As per page no. 56-60 of reply]
15.	Pre-cancellation letter dated	02.11.2019 [As per page no. 61 of reply]
16.	Cancellation letter dated	11.11.2019 [As per page no. 61 of reply]
17.	Occupation certificate	09.09.2019 [As per page no. 23 of reply]
18.	Offer of possession	Not offered

B. Facts of the complaint:

3. That the complainants booked a flat in Adani Samsara (Part-4) (hereinafter referred to as the "project") situated at Sector 60, Tehsil Waziarabad, District Gurugram and paid a booking amount of Rs. 5,00,000/- as on 14.01.2018 vide cheque bearing No. 214783 drawn on State Bank of India.

4. That the respondent portrayed that the project was duly registered with RERA. However, after the booking amount was paid, it was realized that the same was not an authorized project in terms of the Act of 2016 & rules as the same was being developed in phases, and there was no approval as such in which the complainants was to be allotted the flat. It has been categorically mentioned in the rules that if a project is being developed in phases, every such phase has to be registered separately with the authority. Admittedly, the sanction for the phase where the complainants booked a flat admittedly came on 19.12.2018.

5. That the act of the respondent is selling the flats in an unregistered project is in complete violation of section 3 of the Act of 2016. It got the phase registered only in 19.12.2018. However, it has received the payment towards the booking of the flat by them on 14.01.2018, which was in complete contravention of the aforementioned section. It is further stated that as the project was not registered at the relevant time, hence any booking done by the respondent was illegal and void ab initio.

6. That on account of the project not being registered until 19.12.2018, the respondent purposely delayed the allotment of the unit by 13 months and finally allotted unit no. M-49 C on 01.02.2019 to the complainants, which was supposed to be done within 30 days from the receipt of the booking amount and in furtherance to which the complainants were supposed to apply for a home loan, as the unit was being purchased under the subvention scheme.

7. Further, due to such delay of the respondent, the complainants were not able to apply for loan for making the further payment of the allotted unit which was the very basis of the payment plan of the subject unit. The complainants were liable to make the payments only once the loan was approved as the said unit was bought under the subvention scheme.

8. Further, when the allotment was done after a delay of 13 months, the complainants tried to approach various banks for sanctioning of loan for the said unit. The total value of the unit was Rs. 2.17 crores and out of which the complainants have already paid Rs. 5,00,000/- at the time of the application. An amount of Rs. 16,22,970/- was paid after the allotment of the unit and cumulatively, they have already paid an amount Rs. 21,22,970/- after the allotment of the unit.

9. That the complainants applied to various banks like State Bank of India, HDFC and Tata Capital for sanctioning of the home loan against the said unit for an amount of Rs. 1.60-1.70 crores against a property valued at Rs. 2.17 crores. Surprisingly every bank stated the same fact that the property

value is not Rs. 2.17 crores and has been inflated by the respondent. As per the market value, the unit allotted to the complainants was to the tune of Rs. 1.70 crores and hence was overpriced to the tune of Rs. 40-50 lakhs and due to which all the banks refused to grant a home loan against the unit allotted and asked for a further security of the same amount from them in the form another collateral of a similar value, which was simply not agreeable to the complainants. The whole intent of the complainants to opt for the subvention scheme was that they would get a loan against the said property or else the complainants would have opted for the construction linked plan.

10. The said fact of non-sanctioning of the home loan was duly informed to the respondent through its customer relationship management team and to which they never gave a satisfactory reply. Despite the fact that they were aware of the factual scenario, the respondent still sent a demand letter for the remaining amount on 22.08.2019 knowing the fact that the stage of raising such demand letters has not arisen. It is further imperative to mention that the respondent's CRM team introduced them to Tata Capital Pvt. Ltd. for securing the loan. However, even they refused the sanctioning of the loan on the same ground that the value of the property is not as per the market value and has been highly inflated by the builder.

11. That despite the fact was duly informed to the respondent about the difficulty being faced by them, it arbitrarily and unilaterally sent a notice before cancellation dated 03.11.2019 wherein it was stated that 7 days are

being given for making the balance payment or else the allotment would stand cancelled and the amount paid till date would stand forfeited. The said notice was duly replied by them vide email dated 08.11.2019 wherein all these reasons were again stated, and it was requested to stop the cancellation of their allotted unit. Further, they also requested for a signed hard copy of the builder buyer agreement from respondent. It is further submitted that the said notice before cancellation dated 03.11.2019 was in complete contraventions of the rules and hence, was not a proper notice of cancellation.

12. That instead of replying to their email, the respondent simply sent another email dated 12.11.2019 wherein a cancellation notice dated 11.11.2019 was attached which stated that on account of non-payment of the remaining amount in terms of the notice dated 02.11.2019, the allotment made to the complainants stands cancelled and the amount paid stands forfeited. It is submitted that this purported final notice of cancellation was against the rule No. 9 where it has been categorically mentioned that the promoter is liable to intimate the allottee at least 30 days prior to such termination. However, herein admittedly that it has hardly given a 7-days period to the complainants before cancelling its allotment, completely contrary to the rules and hence bad in law.

13. The said email of the respondent was duly replied by the complainants vide email dated 13.11.2019 wherein the said reasons were again brought up by them, and a signed copy of the builder buyer agreement was asked

for which has not been provided till date by the respondent. The respondent has in fact not even replied to any of the emails of the complainants and have simply unilaterally and arbitrarily cancelled their allotment despite the fact that the booking of the complainants was not made under a construction linked plan but under the subvention scheme, the very basis of which is that once the complainant would secure a loan against the allotted unit, the respondent was supposed to pay the EMI's till the handing over of the possession and after that the complainant would have to pay the remaining EMI's. However, in the present case, the very first stage of securing the loan did not happen on account of the inflated value of the allotted property by the respondent. Hence, it was only due to the overpricing and misleading by the respondent that they was not able to secure a loan and were asked to provide another property as collateral for securing the loan amount which was never the understanding between the parties.

14. That the complainants have been requesting the respondent for the past many occasions for holding the cancellation on account of the difficulty being faced by them. However, the respondent has unilaterally cancelled the allotment of the complainant and in fact, the cancellation was in contravention to the rules, and never replied to their requests for holding onto the cancellation of the allotted unit.

15. That the complainants got to know that the project was not even registered at the relevant time and hence, the respondent was in violation of the act

which makes the booking of the complainant illegal and void ab initio. Hence, the respondent cannot forfeit the amount of an illegal booking and is liable to refund the whole amount with interest to the complainant on account of the fraud committed by the respondent.

C. Relief sought by the complainants:

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

    i. Declare the booking done by the respondent for the flat of the complainants as void ab initio being in contravention of Section 3 of the Act of 2016.

    ii. Direct the respondent to set aside the termination dated 03.11.2019 and 11.11.2019 as illegal and being in contravention to rule 9.3 (ii) of the rules.

    iii. Direct the to refund the complete amount of Rs. 21,22,970/- paid by the complainants along with interest.

D. Reply by respondent:

The respondent by way of written reply made following submissions

17. That the complainants have quite cleverly concealed all the material facts from the authority in order to attain their ultimate goal of undue benefit which they are trying to derive from the present complaint.

18. That the respondent has already received occupation certificate for the said project in the year 2019 and that too within 9 months of allotment made in favour of the complainants. Since, they have failed to pay the demand raised, it cancelled the allotment and earnest money stood forfeited as per

agreed terms as well as Act of 2016 and deducted 10% of the sale consideration along with taxes. That after calculation, the amount to be deducted was much more than the total payment paid by them, therefore no amount was refunded.

19. That the respondent launched a residential project under the name and style of "Samsara" in Sector 60, in Gurugram, Haryana ("said project") after having purchased various plots in the township Known as "Brahma City". That the said project is duly registered from RERA.

20. That the complainants in the year 2018 approached the respondent to book an independent floor in the project and paid a meagre amount of Rs. 5 lacs only towards booking amount and failed to pay the remaining amount as per payment plan and kept on delaying of allotment as they were seeking other options in the market for profit reasons and paid the part of remaining after much delay.

21. That in fact, the complainants were aware of their ineligibility of availing loan and were trying options therein and thereby kept the allotment under delay due to their own discrepancies and now falsely blaming the developer. A large number of customers have availed loans from multiple government and private banks with respect to allotment of flats in project and are happily enjoying possession of apartment. They cannot take benefit of their own wrongs by unnecessarily blaming of promoter.

22. That in due course, an independent floor bearing no. M49/C was allotted to complainants on 02.01.2019 on the basis of an application form executed 16.01.2018. The complainants have intentionally produced incomplete application form with a motive of concealing the terms and condition agreed by them at the time of execution of application form. That after execution of application form and after issuance of allotment letter, they requested to get the agreement to sale registered before concerned authority and in fact, several reminders were issued to the complainant. That appointment for registration of agreement to sale was also taken and documents like challan etc. were also prepared. The complainants were informed to present to get the agreement registered but they never came forward to get agreement to sale executed and registered.

23. That application form was executed between the parties and majority of the terms and conditions were duly agreed up on. Thus, the allotment could have been cancelled as per terms and conditions of application form in the absence of agreement to sale and the same has been upheld by Hon'ble NCDRC. The present case is exactly the same, as complainants failed to get the agreement executed and registered and to pay the demands raised by the respondent.

24. That after issuance of allotment letter, several demand letters were sent to the complainants in order to pay the balance amount. Even after receiving of said demand letters, the complainant failed to make payment and accordingly left no other option with the respondent but to issue final

notice for cancellation. That respondent gave sufficient time to the complainants for making payment in order to avoid cancellation, but they paid no heed to its genuine requests and kept on making defaults. Ultimately, the respondent sent an email to the complainant whereby a final opportunity was given to them. But even that time, no payment was made by the complainants. Thus, respondent was constrained to cancel the allotment of complainants and accordingly, the allotment was cancelled vide letter dated 11.11.2019.

25. It is pertinent to mention here cancellation was done by the respondent only as last resort and that too after receiving of occupation certificate and after giving ample opportunities to complainants to make payment of due amount. Thereafter, receiving cancellation letter, the complainants even approached the respondent to check as to whether any refund is made out or not after deduction. That respondent got the calculation done at the behest complainants. However, the total amount comes to 28,52,670 whereas complainants have only paid an amount of Rs. 21,22,970. Thus, they are not entitled for any refund.

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

E. Jurisdiction of the authority:

27. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

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

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding the complainants being investors:

28. It is pleaded on behalf of respondent that complainants are investors and not consumers. So, they are not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded 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 the main aims and 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 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 buyer's agreement, it is revealed that the complainants are buyers and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of the term allottee under the Act, and the same is reproduced below for ready reference:

"Z(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."

29. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainants are allottees as the subject unit allotted to them by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition 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) Ltd. and anr.** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being an investor are not entitled to protection of this Act also stands rejected.

G. Findings on relief sought by the complainants:

G.I Declare the booking done by the respondent for the flat of the complainants as void ab initio being in contravention of Section 3 of the Act of 2016.

30. The above-mentioned relief sought by the complainants were not pressed during the arguments. The authority is of the view that the complainants do not intend to pursue the above-mentioned relief sought.

G.II Direct the respondent to set aside the termination dated 03.11.2019 and 11.11.2019 as illegal and being in contravention to rule 9.3 (ii) of the rules.

G.III Direct the to refund the complete amount of Rs. 21,22,970/- paid by the complainants along with interest.

31. The project detailed above was launched by the respondent as residential floors as a plotted colony. The complainants applied for allotment of floor in the project of the respondent vide application form dated 16.01.2018. Subsequently, vide allotment letter dated 02.01.2019, a floor bearing no. M49-C admeasuring 1215 sq. ft. was allotted to the complainants for a total consideration of Rs. 2,13,93,642/-. The complainants paid an amount of Rs. 21,22,970/- constituting 9.93% of total consideration.

32. The complainants' alleged that at the time of booking, the office bearers of the respondent assured them that the said project is RERA registered whereas the said registration certificate was obtained on 19.12.2018. They submitted that due to delay in registration of project by respondent, no financial institution came forward to provide loan to the complainants and the said unit was booked under subvention scheme resulting in failure on part of respondent in handing over of possession. On the other hand, it is submitted that the respondent-builder obtained the occupation certificate for concerned unit on 09.09.2019 and after that cancelled the allotted unit of the complainants vide cancellation dated 11.11.2019 after issuance of pre-termination letter dated 02.11.2019. The respondent issued various demand letters dated 22.01.2019, 08.07.2019, 22.07.2019, 07.08.2019 and the same are evident from page no. 56-60 of reply. The complainant also raised a plea that at the time of issuance of pre-termination letter dated 02.11.2019 it provides a period of 7 days only instead as per rule No. 9 where it has been categorically mentioned that the promoter would intimate the allottee at least 30 days prior to such cancellation. The

authority observes that the complainants after paying booking the amount of Rs. 5,00,000/- paid another installment of Rs. 16,22,970/- at the time of allotment letter dated 02.01.2019, cumulatively totalling Rs. 21,22,970/-. As per demand letter dated 22.01.2019 on page no. 56 of reply, an amount of Rs. 1,06,96,821/- was raised being due against five installments followed by other demand letters dated 08.07.2019, 22.07.2019 & 07.08.2019.

33. The authority is of considered view that sufficient opportunities have been granted by the respondent to the complainant. Moreover, the said unit was cancelled on 11.11.2019 after obtaining occupation certificate on 09.09.2019. Therefore, the said cancellation is held to be valid.

34. As per clause (xxii) of application form entered into between the parties on 02.01.2019, promoter was required to refund the amount after deduction of 10% earnest money. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, provides as under-

> *"5. AMOUNT OF EARNEST MONEY*
>
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"*

35. In view of aforesaid circumstances, the respondent should have refund the amount paid by the complainants after deducting 10% of the sale consideration of the unit being earnest money as per clause xii of application form for allotment dated 16.01.2018 & regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 on the date of cancellation i.e. 11.11.2019. However, the complainants paid an amount of Rs. 21,22,970/- against a total consideration of Rs. 2,13,93,642/- constituting 9.93% of total consideration, which is less than 10% of total consideration. Hence, no direction to this effect can be given.

36. Complaint stands disposed of.

37. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.08.2022