

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

Complaint no. : 99 of 2019
Date of decision : 08.12.2022

Shyam Sunder Chhabra
Neetu Arora
Address:- House no. 301, Sector-12, Huda Colony,
Panipat-132103

Complainants

Versus

M3M India Pvt. Ltd.
Registered address: Paras Twin Towers, Tower-B,
6th Floor, Golf course road, Sector-54, Gurugram-
122002

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

Shri Mahee Arora
Ms. Shreya Takkar

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 16.01.2019 has been filed by the complainants 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 thereunder or to the allottee as per the agreement for sale executed inter se and section 11(5) of the Act

wherein it is inter alia prescribed that the promoter may cancel the allotment only in terms of the agreement for sale/application form .

A. Project and unit 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, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Project name and location	M3M Woodshire, Dwarka Expressway, Sector107, Gurugram
2	Project area	18.88125 acres
3	Nature of project	Group Housing Colony
4	License No. & validity status	33 of 2012 dated 12.04.2012 valid upto 11.04.2018
5	Name of licensee	Cogent realtors Pvt. Ltd.
6	Occupation certificate granted on	20.04.2017 [page 73 of reply]
7.	Provisional allotment letter	25.01.2013 [page 57-59 of reply]
8.	Application form	03.12.2012 [page 41-56 of reply]
9.	Unit no.	MWTW-B05-1401, 14 th floor, Tower- B05
10.	Area of the unit (Super area)	1536 sq. ft.

11.	Date of execution of buyer's agreement	Not executed
12.	Possession clause as per application form	<p>46. <i>Subject to Force Majeure conditions and subject to the Applicant having complied with all obligations under this Application, including but not limited to the timely payment of each. and every Installment of the Total Consideration, stamp duty and other dues and charges and also subject to the Applicant having complied with all documentation as may be required by the Company including but not limited to execution of the maintenance agreement, possession of the Apartment may be offered within a period of thirty-six (36) months from the date of commencement of construction which shall mean the date of laying of the first plain cement concrete/mudmat slab of the Tower in which the Apartment is located or execution of the Agreement, whichever is later/"Commitment Period). In case the Company is unable to offer possession within such time due to any reason, the Applicant agrees that the Company shall be entitled to an extension of One Hundred and Eighty (180) days ("Grace Period") after the expiry of the Commitment Period, If the</i></p>

		<p><i>Company is still unable to offer possession by the end of such Grace Period, subject to compliance of conditions herein above mentioned, the Company shall be liable to pay compensation at the rate of Rs.10/- (Rupees Ten Only) per sq. ft. of the Super Area ("Delay Compensation") of the Apartment for every month of delay thereafter until the date of notice of possession.</i></p> <p>(Emphasis supplied)</p>
13	Due date of possession	<p>15.03.2016</p> <p>[calculated from the date of start of construction i.e., 15.03.2013]</p> <p>Grace period not allowed.</p>
14	Date of start of commencement of construction	<p>15.03.2013</p> <p>[Page 34 of the complaint]</p>
15	Total consideration as per the schedule of payment at page 58 of reply	<p>Rs.87,23,904/-</p>
16	Total amount paid by the complainant as per alleged by the complaint	<p>Rs.21,41,474/-</p>
17	Last and final opportunity for making outstanding dues	<p>07.10.2014</p> <p>[page 64 of reply]</p>
18	Intimation of termination	<p>12.11.2014</p> <p>[page 68 of reply]</p>

19	Surrender by the allottee through email's	27.01.2014, 22.02.2014 [page 40 and 42 of complaint]
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B. Facts of the complaint

3. The complainants made the following submissions in the complaint:

- i. That in 2012, the respondent approached the complainants and offered in lucrative manner for booking a flat/unit in the project "M3M WOODSHIRE", located at Sector-107, Gurgaon, Haryana. After seeing the project plan of the respondent, the complainants made a request that allotment of the flat should be either on first floor or on second floor pursuant to which the representatives of the respondent assured and promised that the prospective flat would be allotted as per your choice. Therefore, the complainants became interested to purchase a flat in the said project.
- ii. That the representative of the respondent got filled up an application letter on 01.06.2012 by the complainants for a flat/unit measuring 142.70 sq. mtrs. in the project for total sale consideration of Rs. 80,00,000/- out of which the complainants paid Rs.5,00,000/- as booking amount to the respondent against the receipt dated 1.6.2012 and it was specially mentioned by the representative of the respondent on the application form that the prospective flat would be allotted either on first or second floor of the tower.
- iii. That soon after entering into the application letter, the respondent started demanding the installments for the booked flat, and the complainants without understanding the misdeeds of the

- respondent started paying the installments of the said booked flat timely. The complainants paid the first installment of Rs.2,23,176/- on 07.07.2012 as demanded by the respondent against the receipt dated 07.07.2012 which is annexed herewith as annexure C2. the complainants paid the second installment of Rs.7,04,474/- (being 20% of BSP) as demanded by the respondent which was paid by the complainants on 03.01.2013 against the receipt of Rs.7,04,474/- dated 03.01.2013.
- iv. That after making the payment of Rs. 14,27,650/-, the complainants asked the respondent for execution of builder buyer agreement, but the respondent stated that builder buyer agreement will only be executed after receiving 40% amount of basic sale price. However, the respondent issued a provisional allotment letter dated 25th Jan 2013 along with buyers agreement intimating the location of flat/unit i.e. apartment no. MW TW-B05/1401 on 14th floor in the project M3M Woodshire.
- v. That on finding the location of the flat on 14th floor, the complainants felt deceived at the hands of the respondent. The complainants visited the office of the respondent on 14.02.2013 and asked reason that why the complainants were allotted a flat on 14th floor despite that the complainants were promised by the representative of the respondent for allotment of the prospective flat either on first floor or on second floor. But the respondent's officials did not give satisfactorily reply stating that the allotment was made through a DRAW. But the complainants have never been informed or called to attend the DRAW by the respondent which clearly depicts that the respondent has misrepresented the

- complainants to deceive them and to have unlawful monetary gains by causing huge loss to the complainants. The respondent did not keep any transparency while making the so-called draw which clearly shows that the respondent is indulged in unfair means and kept the complainants in dark to have the unlawful gains.
- vi. That after lot of requests and persuasion of the complainants, the officials of the respondent agreed to their mistake and promised the complainants that the allotted flat no. shall be changed and the fresh allotment of flat will be made either on first or second floor of the building. Meanwhile the respondent raised a demand of Rs.7,13,824/- for second installment on commencement of excavation or within 60 days, vide letter dated 15th March 2013. The said demand letter clearly indicates that there were no dues pending on the part of the complainants till 15.3.2013.
- vii. That the complainants believing the respondent and their promise to make changes in the flat, paid the said amount of rs.7,13,824/- on 03.04.2013 pursuant to which the respondent issued the receipt of Rs.7,13,824/- dated 03.04.2013. That the complainants got shocked and surprised on receipt of a notice dated 07.05.2013 asking for signature on buyers' agreement for the said apartment no.MW TW-B05/1401 and be submitted the same in the office of respondent. Whereas the respondent had promised the complainants that they will change the location of the flat and issue the fresh allotment letter and buyers' agreement but instead of redressing the grievance of the complainants, the respondent started pressurizing the complainants on phone to sign the buyer's

- agreement for said apartment no.MW TW-B05/1401 otherwise the respondent will forfeit all payments made by the complainants.
- viii. That eventually, the complainants visited the office of respondent on 18.07.2013 and requested either to the change in the floor of the flat allotted by the respondent and to issue a fresh buyer's agreement for obtaining the signature of the complainants or refund the money paid by the complainants. The respondent sought some time from the complainants to resolve the grievance of the complainants.
- ix. That the complainants got shocked and surprised, when the respondent sent payment request letter dated 26.11.2013 of Rs.12,04,655/- without resolving the grievance of the complainants. Although, the respondent earlier promised to issue the fresh buyer agreement for the change of allotment of flat on first floor or second floor, but the respondent started pressurizing the complainants to purchase the said flat/unit on 14th floor for which the complainants were never willing and interested to purchase the same. The complainants again requested the respondent to resolve their grievance first then only the complainants will pay the installment demanded by the respondent. the representatives of the respondent reassured the complainants that some senior official of the respondent are looking in the complainants' matter and will arrange a meeting with the senior representatives within 10-15 days.
- x. That eventually on 16.01.2014, complainants visited the office of the respondent and again requested and made them aware about the commitments made by the respondent. The respondent again

affirmed the complainants that the floor/level of the flat will be changed and the complainants would be given flat on the first or the second floor as it was promised by the respondent to the complainants. Since, the complainants had no faith on the words of the respondent, therefore, the complainants asked the respondent to reiterate their promise in writing through email for which the representatives of the respondent replied that the email would be sent from the head office of the respondent, and it may take a week's time and it would be definitely sent to the complainant. That the complainants waited for the email of the respondent, but the respondent did not send the email as promised by the representative of the respondent. Hence, the complainants have to again send an email dated 27.01.2014 to the respondent asking for the change in the level/floor of the flat/unit allotted by the respondent or to refund the money paid by the complainants. The complainants reiterated all the facts and meeting held in the office of the respondent about the change of flat/unit.

xi. That on 22.02.2014, a reminder email was sent by the complainants to the respondent for cancellation of allotment and demanded the refund of money of rs.21,41,474/- paid by the complainants along with interest. But, the requests of the complainants went in vain as the respondent did not bother to send any reply to the emails of the complainants. The careless and neglect attitude of the respondent towards complainants clearly depicts that the respondent are indulged in unfair trade practice. The respondent in well pre-planned manner firstly lured the complainants to book the flat on lower floors of their project and when they received the

- hefty amount from the complainants, the respondent allotted the flat/unit on the 14th floor as the respondent are aware that the complainants will never accept the flat/unit located at high level/floor and then the respondent may grab all the amount paid by the complainants in view of forfeiture clause.
- xii. That since the respondent have withheld the huge amount of the complainants, the complainants again visited the office of the respondent on 15 November, 2014 and requested the representatives of the respondent to either re allot the flat on first or second floor as it was promised by the respondent or to refund the amount paid in respect of the said flat/unit. But, the respondent in reply demanded the complainants to make the further payments towards the above said flat/unit otherwise the entire payments of the complainants will be forfeited by the respondent. Since, the respondent have had malafide intention to cheat and defraud the complainants, therefore, the complainants decided not to make further payment to the respondent. At last, the complainants pleaded the respondent to refund their amount as they are not interested anymore to purchase the flat/unit in the project of the respondent. But, the respondent refused to refund the amount to the complainants.
- xiii. That the complainants kept visiting the office and contacting over phone to the representatives of the respondent requesting for refund of amount i.e. Rs.21,41,474/- and after great persuasion, the respondent agreed for refund of amount i.e. Rs.21,41,474/- of the said flat subject to filing of the application for cancelation of booking and refund of amount pursuant to which the complainants

visited the office of the respondent at Delhi on 10.02.2016 and gave a handwritten application for cancellation of allotment and for refund of amount paid by them. It is also pertinent to mention here that the representatives of the respondent assured/represented that the amount would be refunded within 2 weeks through cheques. The complainants left the office and waited for the cheques of refund amount but the respondent did not adhere their promise till date. Thus, the conduct of the respondent proves that the respondent has cheated and defrauded the complainants by misrepresenting again and again. The respondent has clear intention to usurp/misappropriate the hard-earned money of the complainants since beginning. This further proves that the respondent is indulged in unfair trade practice, unfair use of their dominant position to cheat the innocent customers like the complainants.

xiii. That the complainants had no other remedy except to send a letter via registered postdated 16.03.2017 demanding the refund of their lawful recoverable amount i.e. Rs.21,41,474/- along with interest withheld by the respondent. The said letter has been served upon the respondent but the respondent replied to the said letter neither did comply with the letter nor replied the same till date. That the complainant again wrote an email to the respondents for refund of the hard earned money of the complainants on 22.03.2017. That it is pertinent to mention here that the complainants are citizen of India and now they are in need of money. Thus, keeping in view the misrepresentation, unfair trade practice and status of allotted flat and the intervening circumstances, the complainants intends to

withdraw from the project and has filed the present complaint under section 31 of the said Act.

C. The complainants are seeking the following relief:

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

- (i) Direct the respondent to refund the entire amount paid by the complainants to the respondent along with interest.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:

- i. That the complaint is liable to be dismissed in view of the preliminary objections set out hereinafter. It is submitted that since the preliminary objections are of a jurisdictional nature which goes to the root of the matter, and as per the settled law, the same should be decided in the first instance. It is only after deciding the question relating to maintainability of the complaint that the matter is to be proceeded with further. The following preliminary and jurisdictional objections are being raised for dismissal of the complaint. Without prejudice to the contention that unless the question of maintainability is first decided, the respondent ought not to be called upon to file the reply on merits to the complaint, this reply is being filed by way of abundant caution, with liberty to file such further reply as may be necessary, in case the complaint is held to be maintainable. It is submitted that the complaint filed by the complainant is baseless, vexatious and is not tenable in the eyes of law therefore the complaint deserves to be dismissed at the very threshold.

- ii. That the competent authority after due inspection and verification of each and every aspect had granted the occupancy certificate on 20.04.2017 and 24.07.2017 respectively. Thus, in view of the statements made above the present project does not fall within the definition of ongoing project and thus the provisions of RERA are inapplicable in the present case. That the unit in question has already been cancelled vide letter dated 12.11.2014 on account of default on the part of the complainants. That the complainants despite having received the same on 15.11.2014 has failed to approach any authority challenging the said cancellation and thus is clearly barred by the law of limitation. It is further submitted that this adjudicating officer has no powers to deal with the such cases where the cancellation of the unit has been done on account of default. The present complaint does not fall within the ambit Section 12, 14, 18 and 19 of the RERA Act and thus this adjudicating officer has no jurisdiction to decide the present complaint.
- iii. That the respondent has acted as per the terms and conditions mentioned in the application for allotment. That the complainant was duly aware that under clause 18 of the application for allotment, that the respondent company shall be entitled to forfeit the earnest money along with the non-refundable amount in case of non fulfilment/ breach of and/or non-adherence to the terms and conditions of the application and agreement. The relevant extract of the said clause is reproduced below:-

Clause 18: The Applicant hereby agrees that due performance of all obligations under this Application including timely payment for the Total Consideration and other applicable dues and charges under the opted Payment plan shall be the essence of this Application. The Applicant shall also be

liable to make timely payment of maintenance charges as and when demanded by the Company/nominated maintenance agency. If the applicant neglects, omits, ignores or fails the timely performance of the obligations agreed and stipulated herein for any reason whatsoever or to pay in time to the Company any of the installments or other amounts or charges due and payable by the Applicant by the respective due days for such payments, the Company shall be entitled to cancel the provisional allotment and terminate the Agreement, if executed, at its sole discretion and forfeit the earnest money and other amounts due and payable to the Company including any interest accrued on delayed instalments, late payment charges and any brokerage/commission/margin that may have been paid by the Company to a channel partner (in case the Application is made through a Channel partner and no objection certificate(NOC) from such Channel partner foregoing its right to claim such brokerage/commission/margin is not submitted) and thereafter, refund the balance amount, if any, without any interest or any other compensation of any nature whatsoever, from the sale proceeds of the further sale/resale of the Apartment. Upon such cancellation, the Applicant shall be left with no right, title, lien or interest over the Apartment and the parking spaces in any manner whatsoever.

- iv. That the terms of the agreement must be examined in its entirety and totality with reference to the relevant clauses 7, 17 along with clause 18 contained therein in order to decide the grievance raised by the complainants. That the complainants failed to execute the apartment buyers agreement the respondent issued reminder letter dated 07.05.2013 thereby advising the complainants to complete the execution of the apartment buyers agreement. That thereafter the respondent raised the demand for the 3rd installment of Rs. 1204655/- /- due on the completion of basement roof slab. The same was payable on or before 16.12.2013. It is submitted that the complainants failed to make the payment of the

- third instalment. Further, the respondent issued a demand notice dated to the complainants for payment of 4th instalment due on the completion of 2nd floor slab however, the complainant failed to make the payment. Further, the respondent had also sent a reminder dated 06.02.2014 to the complainants to make the payments. It is submitted that the complainants in the present case are chronic defaulters. Thereafter, the respondent issued reminder letter dated 07.10.2014 to the complainants to clear their dues. Thereafter, since the complainants did not clear their dues even after repeatedly asking to do so, the respondent issued cancellation letter dated 12.11.2014, to the complainants, cancelling the allotment and forfeiting the amount paid by the complainants as per clause 17 and 18 of the application for allotment. Aforesaid cancellation letter dated 12.11.2014 was delivered to the complainants on 15.11.2014.
- v. Thus in terms of clause 18 of the application for allotment the total amount for which the demand was raised upon the complainants was Rs. 63,43,017.60/- (principal amount) and a sum of Rs. 2,20,632/- (towards service tax) thereby aggregating to Rs. 65,63,649.60/-. As against the said amount only a sum of Rs. 20,77,286/- (principal amount) and Rs. 64,188/- (towards service tax) thereby aggregating to Rs. 21,41,474/- has been received. As per the cancellation letter dated 12.11.2014 in terms of the application for allotment a sum of Rs. 24,64,097/- is the amount which was eligible to be forfeited and thus after the cancellation nothing was payable and due to the complainants. In fact as on the date of the cancellation on 12.11.2014 a sum of Rs. 5,11,024/- has

already been paid by the respondent as brokerage and a further sum of Rs. 8,05,848/- approx. has been paid and received by the respondent towards statutory dues which includes EDC, IDC, service tax etc, and the said amount has been further tendered by the respondent into the state exchequer. Thus, the complainants are not entitled to any amount and on contrary it is the respondent who is entitled to receive a sum of Rs. 3,22,623/- in terms of the application for allotment.

- vi. It is submitted that the complainants out of their own free will and volition chose not to make payment in terms of the agreed schedule of payments as a result of which the respondent was constrained to cancel the allotment made in favour of the complainants. It is submitted that the respondent sent two copies of the apartment buyer agreement to the complainants however, for the reasons best known to the complainants even after repeated reminders and follow ups being sent to the complainants, the complainants did not acted further and executed the apartment buyer's agreement. It is submitted that as per the application for allotment which is binding between the complainants and the respondent, both have agreed upon their respective liabilities and consequences in case of breach of any of the conditions specified therein. In view of the above, the captioned complaint is not maintainable in law and is liable to be dismissed in limine. It is a well settled proposition of law that the courts cannot travel beyond what is provided in the agreement/contract and generate altogether a new contract; the responsibility of the court is to interpret appropriately the existing contract and decide the rights

- and liabilities of the parties within the four corners of the contract.
- vii. That the complainants are chronic defaulters in making payment on time contrary to the agreed terms. It is submitted that on many occasions repeated demand letters and reminders were issued to the complainants for payment and consequently the allotment made in favour of the complainants was cancelled by the respondent. Even after repeated demands complainants were not ready to make the payment. Hence, complainants are not entitled to get any reliefs from this adjudicating officer. It is submitted that the application for allotment and the agreement to be executed in furtherance thereof delineates the respective obligations, covenants and liabilities of the complainants as well as the respondent in case of breach of any of the conditions specified therein. In this view of the matter, the complaint is not maintainable in law and is liable to be dismissed in limine.
- viii. That in the present complaint, the reliefs claimed are in the nature of recovery as the earnest money and non-refundable amounts have been forfeited in the year 2014, after issuance of cancellation letter and as per the terms and conditions of agreement/understanding between the parties. It is submitted that the complainants are now claiming refund of that amount along with interest. That the unit in question has already been cancelled vide letter dated 12.11.2014 on account of default on the part of the complainants. That the complainants despite having received the same on 15.11.2014 has failed to approach any authority challenging the said cancellation and thus is clearly barred by the law of limitation. It is further submitted that this

adjudicating officer has no powers to deal with the cases where the cancellation of the unit has been done on account of default. The present complaint does not fall within the ambit Section 12, 14, 18 and 19 of the RERA Act and thus this adjudicating officer has no jurisdiction to decide the present complaint. It is submitted that such prayers are beyond the jurisdiction of this adjudicating officer, as the complainants in the guise of the present complaint cannot claim for recovery of amount along with interest and, therefore, the present complaint, merits outright dismissal.

- ix. That the complainants are not consumer since they had booked the apartment in question purely for commercial purpose as a speculative investor. In fact, the complainants are not the end user of the apartment. The complainants had invested in the group housing colony / group housing project only as an investor. The complainants had invested in the apartment in question for commercial gains, i.e. to earn income by way of rent and/or re-sale of the property at an appreciated value and to earn premium thereon. Since the investment has been made for the aforesaid purpose, it is for commercial purpose and as such the complainants are not consumer/end user. The complaint is liable to be dismissed on this ground alone. Under these circumstances, it is all the more necessary for the complainants, on whom the burden lies, to show how the complainants are a consumer.

E. Jurisdiction of the authority

6. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E.I Territorial jurisdiction

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

8. Section 11(4)(a) of the Act 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.

9. 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 Pvt. Ltd.*

and other Vs. Union of India and other 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.”

10. 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 Objection regarding complainants are investors not consumer

11. The respondent submitted that the complainants are investor and not consumer/allottee, thus, the complainants are not entitled to the protection of the Act and thus, the present complaint is not maintainable.
12. The authority observes 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 and 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 under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter 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 an allottees/buyers and they have paid total price of Rs. 21,41,474/- to the promoter towards purchase of the said unit 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;"

13. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainants, it is crystal clear that the complainants are allottee as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the complainant-allottee being investors is not entitled to protection of this Act stands rejected.

G. Findings on the relief sought by the complainants/allottees.

G.I Direct the respondent to refund the entire amount paid by the complainants to the respondent along with interest.

14. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by it 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."

15. In this case complainants-allottees already have to make their intention clear to withdraw from the project through an email which was send to the respondent on 27.01.2014 and 22.02.2014. It is evident from perusal of the case file that the allotment of the unit was made in favour of the complainants on the basis of booking dated 25.01.2013 for a sum of Rs. 87,23,904/-. No builder buyer's agreement executed between the parties. The due date for completion of the project and offer of

possession of the allotted unit was agreed upon as 15.03.2016. The complainants paid a sum of Rs.21,41,474/- against the allotted unit and were not offered possession by the due date. Though they requested for withdrawal from the project in January 2014, but their request was not accepted leading to filing of the present complaint 16.01.2019. The counsel for the respondent requests that the statutory dues and brokerage paid be also allowed to be deducted the details of which have been furnished while filing the reply. The amount paid towards EDC, IDC are development charges and not statutory dues and hence, are not deductible except for any amount paid towards VAT and brokerage charges limiting to 0.5% of the consideration amount.

16. There is no proof on record which shows that the cancellation letter was delivered to the complainants by the respondent either through speed post or through email. The complainants have been requesting from time to time for refund or allotment of the unit at a lower floor and copies of which have been annexed with the complaint but no response to these requests were received from the respondent. Therefore, taking note of all the circumstances, the authority holds its view that the complainants-allottees are entitled for refund and hereby, directs the respondent to return the amount received by it after deducting 10% of the basic sale consideration of the unit being earnest money and failing which that amount would be payable along with an interest at the rate of 10.35% p.a. from the date of surrender i.e. 27.01.2014 till the actual date of refund of the deposited.
17. As per the terms of the application form and the relevant clauses of the application form are reproduced under for ready reference:

In case the Applicant withdraws the Application or applies for cancellation of the allotment at any point of time, the Company at its sole discretion, may cancel the allotment after forfeiting the Earnest Money and other charges and dues as may be due and payable to the Company including any brokerage/commission/margin that may have been paid by the Company to a Channel Partner (in case the Application is made through a Channel Partner and NOC from such Channel Partner foregoing its right to claim such brokerage/commission/margin is not submitted) and shall refund the balance amount, if any, from the sale proceeds of the further sale/resale of the Apartment, to the Applicant without any interest or compensation.

18. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

"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."

19. Keeping in view, the request of the complainants, the respondent/promotor directed to refund the balance amount after deducting 10% of the total basic sale consideration from the date of request of withdraw/surrender i.e. 27.01.2014 till the date of its actual realization.

H. Directions of the authority

20. 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 refund the paid-up amount of Rs. 21,41,474/- after retaining 10% of the basic sale consideration of Rs. 87,23,904/- and after deducting VAT and brokerage charges limiting to 0.5% of consideration amount. That amount should have been made on the date of withdraw/surrender i.e. 27.01.2014. Accordingly, interest at the rate of 10.35% p.a. is allowed on the balance amount if any, from the date of request of withdraw/surrender till the date of its actual realisation.
- 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.

21. Complaint stands disposed of.

22. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.12.2022