

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

**Complaint no. :** 333 of 2020  
**First date of hearing:** 07.04.2020  
**Order reserved on:** 14.12.2022  
**Order pronounced on:** 16.02.2023

Sohan Singh Gulia  
S/o Sh. Ram Kanwar Gulia  
R/o: - House No. 527, Village and Post Badli, Tehsil  
Bahadurgarh, Near Big Chopal, District Jhajjar, Haryana -  
124105

**Complainant**

Versus

M/s Raheja Developers Limited.  
**Regd. Office at:** W4D, 204/5, Keshav Kunj, Cariappa  
Marg, Western Avenue, Sainik Farms, New Delhi-  
110062

**Respondent**

**CORAM:**

Shri Ashok Sangwan  
Shri Sanjeev Kumar Arora

**Member**  
**Member**

**APPEARANCE:**

Sh. Pawan Kumar Ray (Advocate)  
Sh. Garvit Gupta (Advocate)

Complainant  
Respondent

**ORDER**

1. The present complaint dated 14.02.2020 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. N.	Particulars	Details
1.	Name of the project	"Raheja Atharva", Sector 109, Gurugram, Haryana
2.	Project area	14.812 acres
3.	Nature of the project	Residential Group Housing Colony
4.	DTCP license no. and validity status	257 of 2007 dated 07.11.2007 valid up to 06.11.2017
5.	Name of licensee	Brisk Construction Pvt. Ltd and 3 others
6.	RERA Registered/ not registered	Registered vide no. 90 of 2017 dated 28.08.2017
7.	RERA Registered valid up to	5 years from the date of revised environment clearances
8.	Unit no.	IF11-03, 2 <sup>nd</sup> Floor, Tower/block- IF 11 (Page no. 37 of complaint)



9.	Unit area admeasuring	2102 sq. ft. (Page no. 38 of the complaint)
10.	Date of execution of agreement to sell	04.07.2011 (Page no. 35 of the complaint)
11	Allotment letter	04.07.2011 [Page no. 16 of the complaint]
12	Possession clause	<b>4.2 Possession Time and Compensation</b> <i>That the Seller shall sincerely endeavor to give possession of the Unit to the purchaser within twenty-four (24) months <b>from the date of the execution of the Agreement to sell</b> and after providing of necessary infrastructure specially road sewer &amp; water in the sector by the Government, but subject to force majeure conditions or any Government/ Regulatory authority's action, inaction or omission and reasons beyond the control of the Seller. <b>However, the seller shall be entitled for compensation free grace period of six (6) months in case the construction is not completed within the time period mentioned above. The seller on obtaining certificate for occupation and use by the</b></i>



		<p><i>Competent Authorities shall hand over the Unit to the Purchaser for this occupation and use and subject to the Purchaser having complied with all the terms and conditions of this application form &amp; Agreement To sell. In the event of his failure to take over and /or occupy and use the unit provisionally and/or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be liable to compensation @ Rs.7/- per sq. ft. of the super area per month as holding charges for the entire period of such delay..... "</i></p> <p>[emphasis supplied]</p> <p>(Page no. 45 of the complaint).</p>
13	Due date of possession	<p>04.01.2014</p> <p>[Note: - 24 months from the date of agreement i.e., 04.07.2011 + 6 months grace period]</p>
14	Grace period	<p><b>Allowed</b></p> <p>As per clause 4.2 of the agreement to sell, the possession of the allotted unit was supposed to be offered</p>



		within a stipulated timeframe of 24 months plus 6 months of grace period. It is a matter of fact that the respondent has not completed the project in which the allotted unit is situated and has not obtained the occupation certificate by July 2013. As per agreement to sell, the construction of the project is to be completed by July 2013 which is not completed till date. <b>Accordingly, in the present case the grace period of 6 months is allowed.</b>
15	Basic sale consideration as per BBA at page 60 of complaint	Rs.99,92,679/-
16	Total sale consideration	Rs.93,49,612/- (As per applicant ledger dated 19.09.2020 page no. 133 of the reply)
17	Amount paid by the complainant	Rs.82,32,635/- (As per applicant ledger dated 19.09.2020 page no. 133 of the reply)
18	Payment plan	Installment linked payment plan [Page no. 60 of the complaint]
19	Occupation certificate	Not obtained



20.	Offer of possession	Not offered
21.	Delay in handing over the possession till date of filing of complaint i.e., 14.02.2020	6 years 1 month and 10 days

**B. Facts of the complaint**

3. The complainant has made the following submissions: -

- I. That the complainant is a law-abiding citizen of India and is residing at the abovementioned address. He is an allottee of a flat in the project of the respondent and is aggrieved on its failure to deliver the flat even after a delay of almost 6 years.
- II. That the complainant was approached by the respondent company's agents and representatives who made various exorbitant claims regarding the project, its viability, numerous high-class amenities etc. He was lured into by the respondent representatives and decided to apply for allotment in the said project. The respondent/promoter promised various facilities and lured the complainant with various features. The project was one of the most amphibious project and promised world class facilities and connectivity with all the major surrounding areas. The promises made by the respondent had a huge impact on the mind of the complainant and he decided to go forward with the project and hence decided to make an application for the booking in the



project of the respondent for the unit. The prime features as projected by the respondent company was as below: -

- Located near to Palam Vihar, Dwarka, proposed new Diplomatic Enclave and Metro Line.
- Short drive to the Indira Gandhi International Airport.
- Connectivity with the North Periphery Road.
- Swimming pool
- Gymnasium
- Crèche facilities

III. The complainant is allottee of unit no. IF1103, Independent floor 11, admeasuring approximately 2101 sq. ft. in Raheja Shilas, situated in Sector 109, Gurugram for total sale consideration of Rs.99,92,679/-.

IV. That the respondent had made tall claims with respect to the shortest delivery time of 24 months which was one of the major reasons of the complainant investing in the project and had made sure that no default in delivery of the payment was made on the part of the complainant as he had saved his entire life so as to enable himself to own a house. Most of the payments were made on time and in case of default of payment, the complainant was liable to pay interest at the rate of 18% per annum to the respondent from the due date of payment of instalment to be compounded on a monthly basis. The complainant, nevertheless, duly made the payments to the respondent as and when demanded.



- V. That the entire purpose of charging such huge rate of interest by the real estate companies is firstly to deter the allottees from defaulting on payments and secondly, to assure that the construction is not halted for default by any of the allottee/purchaser. Despite receiving huge sums of money, the respondent has not assured the timely construction of the project and has delayed the project by several years.
- VI. That as per article 4 clause 4.2 of the seller-buyer agreement, the respondent was to hand over the possession to the complainant within 24 months excluding 6 months of compensation free grace period. In case the respondent is not able to hand over the possession, then it undertook to pay compensation at the rate of Rs 7/- per sq. ft. of the super built up area per month.
- VII. That despite the payment of Rs.71,41,930/- paid by him, including the basic sale price and other charges, the respondent has failed to deliver the possession of the flat to the complainant.
- VIII. That the complainant had met the representatives of the respondent and had verbally requested it to deliver the possession of the apartment several times, but it has failed to adhere to the request of the complainant even after 6 years has elapsed from the date of signing of the seller-buyer agreement. On the other hand, the respondent always had an excuse ready and requested some more time in the completion of the project on one pretext or the other. He is aggrieved since there was already so much delay in



handing over the possession but since he had already paid the major of the amount, the complainant reluctantly agreed to give the respondent some more time to finish the project. The respondent was already in receipt of 70% of the total sale consideration but had not completed the construction. Further, the respondent was also guilty of not issuing the construction updates to inform the complainant of the stage of the construction.

- IX. The complainant has already invested huge sums of money in the project of the respondent but till date has neither handed over the possession nor has been offered a refund. Hence, being aggrieved, the complainant has approached this authority for the relief. It is only just and fair that authority may be pleased to hold that the respondent was liable to deliver the possession of the flat by July 2013.
- X. That having lost all hope, the complainant requested the respondent to refund the money with the same rate of interest at which it had been charging him for delay in payment i.e., 18% per annum interest compounded monthly. The complainant on various occasions had met the representatives of the respondent and had verbally requested to initiate refund of the paid amount along with interest.

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

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



- i. Direct the respondent to refund the money paid by the complainant till date i.e., Rs.71,41,930/- along with interest @18% compounded monthly from the date of payment till realization of the amount.
  - ii. Direct the respondent to pay a lump sum compensation of Rs.10,00,000/- as compensation for mental agony and harassment caused to the complainant.
  - iii. Direct the respondent to pay a sum of Rs 50,000/- as litigation expenses to the complainants.
5. On the date of hearing, the authority explained to the respondent /promoter on the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

**D. Reply by the respondent**

6. The respondent contested the complaint on the following grounds.
- I. That the present complaint is based on vague, misconceived notions and baseless assumptions of the complainant and 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 floor no. IF11-03, in Raheja Shilas, Sector 109, Gurugram vide application form dated 08.03.2011. the respondent vide letter dated 04.07.2011 issued allotment letter to the complainant. The booking of the said allotted floor 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. Although the provisions of the Act 2016 are not applicable to the facts of the present case in hand yet without prejudice and in order to avoid complications later on, the respondent has registered the project with the authority. The said project is registered with RERA vide registration no. 90 of 2017 dated 28.08.2017. The authority had issued the said certificate which is valid for a period of five years commencing from 28.08.2017 the date of revised EC.
- IV. That the request for grant of occupation certificate for the unit allotted to the complainant in the project was made before the publication of Haryana Real Estate (Regulation and Development)



Rules, 2017, After completion of construction of Atharva Towers and Shilas Towers, the Company applied for Occupation Certificate. The Department of Town and Country Planning, Haryana granted two occupation Certificates consisting of all high rise Atharva Towers and Shilas Towers vide its letters bearing Memo No. ZP-331/SD(BS)/2014/10384 dated 20.05.2014 and Memo No. ZP-331/SD(BS)/2014/26665 dated 19.11.2014 respectively with respect to all high-rise apartments and EWS flats.

- V. That the project "Raheja Atharva" is a residential group colony situated at Sector - 109, Gurugram consists of three components namely (a) Raheja - Atharva towers consists of 8 high rise towers from A to H, (Atharva Towers), (b) Raheja - Shilas Towers consists of three high rise towers named as T1, T2 and T3 (Shilas towers), (c) Raheja Shilas - independent floors (IF) which consists of low-rise floors apartment.
- VI. That the complainant after checking the veracity of the project namely, 'Raheja Shilas Low Rise" had applied for allotment of floor no. IF11-03 vide the booking application form. The complainant agreed to be bound by the terms and conditions of the booking application form. He was aware of the facts as same were also stated in clause 3 of the booking application form dated 08.03.2011 and 4.3 of the agreement to sell dated 04.07.2011.
- VII. That the construction of the tower in which unit is allotted to the complainant is located already complete and the respondent shall



hand over the possession of the same after getting the occupation certificate which it has already applied for which the concerned department subject to the complainant making the payment of the due installments amount as per the terms of the application and agreement to sell.

- VIII. That the construction activity of the Raheja Shilas- independent floors (IF) which consists of low-rise floor apartment is already completed and only after completion of construction of the Raheja Shilas- Independent floor (IF), the respondent applied grant of occupation certificate to the department of Town and Country planning, Haryana on 05.06.2018 and the same is still pending with the department. The unit are ready for delivery as is evident from the report of DTCP dated 31.07.2018. It is further submitted that the physical possession may only be offered to the complainant after obtaining occupation certificate from the concerned department.
- IX. That this authority does not have the jurisdiction to decide on the interest as claimed by the complainant. It is submitted that in accordance with section 71 of RERA, 2016 read with Rules 21(4) and 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, the authority shall appoint an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard. It is submitted that even otherwise, it is the adjudicating officer as



defined in section 2(a) of RERA, 2016 who has the power and the authority to decide the claims of the complainant.

- X. 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 59 of the booking application form and clause 14.2 of the buyer's agreement.
- XI. That the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the complaint. The 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', and 'Raheja Vedanta' and in most of these projects 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 respondent launched the project Raheja Atharva- in the year 2010. The project Raheja Atharva residential group colony situated at sector - 109, Gurugram consists of three components namely (a) Raheja - Atharva towers consists of 8 high rise towers from A to H, (Atharva towers), (b) Raheja - Shilas towers consists of three high rise towers named as T1,T2 and T3(Shilas towers), (c) Raheja Shilas - independent floors (IF) which consists of low-rise floors apartment.
- That the complainant is 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 the calculations have gone wrong on account of severe slump in the real estate market and the complainant 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 period of 24 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.
- Despite the respondent fulfilling all its obligations as per the provisions laid down by law, the government agencies have failed miserably to provide essential basic infrastructure facilities such as roads, sewerage line, water and electricity supply in the sector where the said project. The development



of roads, sewerage, laying down of water and electricity supply lines has to be undertaken by the concerned governmental authorities and is not within the power and control of the respondent. The respondent cannot be held liable on account of non-performance by the concerned governmental authorities. The respondent company has even paid all the requisite amounts including the external development charges (EDC) to the concerned authorities.

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 complainants.

**E. Jurisdiction of the authority**

8. The respondent has contended in its reply that the complaint on ground of jurisdiction be rejected. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E. I Territorial jurisdiction**

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district.





Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

## **E. II Subject-matter jurisdiction**

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

### **Section 11**

.....

(4) The promoter shall-

*(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

### **Section 34-Functions of the Authority:**

*34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** and reiterated in case of ***M/s Sana Realtors Private***



**Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022** wherein it has been laid down as under:

*"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

**F. Findings on the objections raised by the respondent**

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

14. An objection has been 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)*** decided on 0612.2017 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."*



15. 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.*"

16. 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.

**F. II Objection regarding complainants are breach of agreement for non-invocation of arbitration.**

17. The respondent had raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains a provision regarding initiation of arbitration proceedings in



case of breach of agreement. The clause 59 of the booking application form and clause 14.2 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".*

18. 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.

19. 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 Appellant 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."*

20. 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."*

21. 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 his 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.

**F.III. Objection regarding entitlement of DPC on ground of complainants being investor**

22. The respondent has taken a stand that the complainant is an investor and not consumer. He has 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 consumer of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, 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 a buyer and has paid a total price of Rs.82,32,635/- 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;"

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

**G. Findings on the relief sought by the complainants.**

- G.I. Direct the respondent to refund the money paid by the complainant till date i.e., Rs.71,41,930/- along with interest @18% compounded monthly from the date of payment till realization of the amount.
24. The complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with



interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

***"Section 18: - Return of amount and compensation***

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

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*

*he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:*

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

*(Emphasis supplied)*

25. The clause 4.2 of the agreement to sell dated 16.06.2012 provides for handing over of possession and is reproduced below:

**4.2 Possession Time and Compensation**

*That the Seller shall sincerely endeavor to give possession of the Unit to the purchaser within twenty-four (24) months from the date of the execution of the Agreement to sell and after providing of necessary infrastructure specially road sewer & water in the sector by the Government, but subject to force majeure conditions or any Government/Regulatory authority's action, inaction or omission and reasons beyond the control of the Seller. However, the seller shall be entitled for compensation free grace period of six (6) months in case the construction is not completed within the time period mentioned above. The seller on obtaining certificate for occupation and use by the Competent Authorities shall hand over the Unit to the Purchaser for this occupation and use and subject to the Purchaser having complied with all the terms and conditions of this application form & Agreement To sell. In the event of his failure to take over and/or occupy and use the unit provisionally and/or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be liable to compensation @ Rs.7/- per sq. ft. of the super area per month as holding charges for the entire period of such delay....."*



26. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in making payment as per the plan may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such a clause in the agreement to sell by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such a mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
27. **Due date of handing over possession and admissibility of grace period:** As per clause 4.2 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 24 months plus 6 months of grace period, in case the construction is not complete within the time frame specified. It is a matter of fact that the respondent has not completed the project in which the allotted unit



is situated and has not obtained the occupation certificate by July 2013. However, the fact cannot be ignored that there were circumstances beyond the control of the respondent which led to delay in completion of the project. Accordingly, in the present case, the grace period of 6 months is allowed.

28. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund of the amount paid by him at 18% rate of interest. However, the allottee intends to withdraw from the project and is seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

29. 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.
30. 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., 16.02.2023 is **8.70%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%**.

31. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule **28(1)**, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 4.2 of the agreement to sell dated form executed between the parties on 04.07.2011, the possession of the subject unit was to be delivered within a period of 24 months from the date of execution of buyer's agreement which comes out to be 04.07.2013. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over of possession is 04.01.2014.
32. Keeping in view the fact that the allottee/complainant wishes to withdraw from the project and is demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the plot in accordance with the terms of agreement for sale or duly completed by the date specified therein, the matter is covered under section 18(1) of the Act of 2016.
33. The due date of possession as per agreement for sale as mentioned in the table above is **04.01.2014** and there is **delay 6 years 1 month and 10 days** on the date of filing of the complaint.
34. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/



promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

*".... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."*

35. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others (supra)** it was observed as under:

*25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."*



36. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
37. 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 refund of the entire amount paid by him at the prescribed rate of interest i.e., @ 10.70% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.
- G. II Direct the respondent to pay a lump sum compensation of Rs.10,00,000/- as compensate for mental agony and harassment caused to the complainant.**
- G.III Direct the respondent to pay a sum of Rs.50,000/- as litigation expenses to the complainants.**

38. The complainant is also seeking relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of compensation.

**G. Directions of the authority**


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

- i. The respondent/promoter is directed to refund the amount i.e., Rs.82,32,635/- received by it from the complainant along with interest at the rate of 10.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.





- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
- iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainant. Even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee/complainant.
40. Complaint stands disposed of.
41. File be consigned to registry.

  
**(Sanjeev Kumar Arora)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.02.2023

  
**(Ashok Sangwan)**  
Member