BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1232 of 2021
Order reserved on: 27.10.2022
Date of pronouncement of order: 12.01.2023

1. Sh. Krishan Kumar Radhu
2. Anuradha Batla

Address: D 828, New Friends Colony, New Delhi 110 025

Complainants

Versus

Emaar MGF Land Ltd.
Registered address: 306-308, Square One, C-2, District Centre, Saket, New Delhi, Delhi 110017
Also, at: ECE, House, 28 Kasturba Gandhi Nagar, New Delhi – 110001

Respondent

CORAM:
Shri Vijay Kumar Goyal — **Member**
Shri Sanjeev Kumar Arora — **Member**

APPEARANCE:
Shri Alok Kumar with Shri Amit Kumar — Advocate for the complainants
Shri J.K.Dang — Advocate for the respondent

ORDER

1. The present complaint dated 16.03.2021 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.

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.	Name of the project	Gurgaon Greens, Sector-102, Gurugram.
2.	Total area of the project	13.531 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no.	75 of 2012 dated 31.07.2012
	Validity of license	30.07.2020
	Licensee	Kamdhenu Projects Pvt. Ltd. & Anr.
5	HRERA registered/ not registered	**Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.**
	HRERA registration valid up to	**31.12.2018**
	HRERA extension of registration vide	**01 of 2019 dated 02.08.2019**
	Extension valid up to	**31.12.2019**
6.	Occupation certificate granted on	05.12.2018 [annexure R17, page 135 of reply]
7.	Provisional allotment letter	29.01.2013 [annexure R4, page 34 of reply]
8.	Unit no.	GGN-15-0301, 3rd floor, tower no. 15 [annexure R5, page 47 of reply]
9.	Area of the unit	1650 sq. ft. (super area)

10.	Date of execution of buyer's agreement	10.05.2013 (annexure R5, page 44 of reply)
11.	Possession clause	***14. POSSESSION*** ***(a) Time of handing over the possession*** *Subject to terms of this clause and barring force majeure conditions, subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within* ***36 (Thirty Six) months from the date of start of construction,*** *subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a* ***grace period of 5 (five) months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project.*** (Emphasis supplied)
12.	Date of start of construction as per statement of account dated 13.04.2021 at page 99 of reply	14.06.2013
13.	Due date of possession	14.06.2016 [Note: Grace period is not included]
14.	Consideration as per payment plan annexed with the buyer's agreement at page 75 of reply	Rs.1,23,90,790/-
15.	Total consideration as per statement of account dated 13.04.2021 at page 99 of reply	Rs.1,27,75,359/-
16.	Total amount paid by the complainant as per the statement	Rs.1,27,41,722/-

	of account 13.04.2021 at page 99 of reply	
17.	Offer of possession	**12.12.2018** [annexure R8, page 102 of reply]
18.	Legal notice sent to the respondent by the complainants on	16.04.2019 [Page at 110-119]
19.	Delay compensation already paid by the respondent in terms of the buyer's agreement as per statement of account dated 13.04.2021 at page 100 of reply	Rs.3,08,799/-
20.	Delay in handing over possession w.e.f. due date of handing over possession i.e., 14.06.2016 till date of offer of possession plus 2 months i.e., 12.02.2019	2 years 7 months 29 days

B. Facts of the complaint

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

   i. The complainants applied for a residential unit in the project. That the Emaar allotted to the complainant's unit no. GGN-15-0301 in the project vide provisional allotment letter dated 29.01.2013. Thereafter, parties executed an agreement to sell, titled as the apartment buyers agreement dated 10.05.2013 (ABA thereafter). The total sale consideration for the said unit is Rs. 1,19,82,550/-. That the complainants have paid to Emaar a sum of Rs.1,22,99,375/- till 10.01.2019 as evidenced by the statement of account dated 10.01.2019 issued by Emaar.

II. That clause 14(a) of ABA provides that Emaar was to handover possession of the unit within a period of 36(Thirty-Six) months from the date of start of construction. The agreement provided an additional grace period of 5(five) months for applying and obtaining the completion certificate / occupation certificate in respect of the unit and/or the project after the period of 36 months.

III. The agreement to sell provided that this period was (i) "barring force majeure conditions and (ii) subject to the allottee having complied with all the terms and conditions of this agreement..."

The complainants' states that the promoter has not informed them at any time of any force majeure conditions. The complainants further state that they have punctually complied with all terms and conditions of the agreement to sell.

IV. That the Emaar's statement of account as on 10.01.2019 the start of PCC foundation was on 14.06.2013. Thus, this is the date of start of construction. The 36 months period for completion of construction expired on 13.06.2016. The five months grace period for obtaining occupation certificate etc. expired on 13.11.2016. The Emaar did not complete the construction in time and did not offer possession of the allotted Unit to the complainants within the appointed time.

V. That the complainants at last, received your letter of offer of possession dated 12.12.2018 on 18.12.2018. The complainants visited respondent's office and were informed that they were required to pay a further sum of Rs. 4,80,022/- for taking possession of their unit. Complainants deposited this amount with respondent by cheque no. 800514 dated 16.01.2019 drawn on Canara Bank in favor of the respondent. Thus, complainants have performed their obligations under the contract. Complainants requested the respondent on 26.01.2019 by a registered

communication that "before proceeding further we may be allowed to have a joint inspection of the unit with you. This will ensure that everything is in order and if some deficiencies still exist, they can be removed at your end." Complainants visited respondent's office and requested respondent's officers to have an inspection of the allotted unit to ensure that the construction is complete and there are no deficiencies in it.

VI. Therefore, the complainants through their counsel served a notice dated 16.04.2019 upon the Emaar. The complainants conveyed in Para 12 of the notice:

> *"12.* Our Clients do hereby terminate the contract between the parties in view of the inordinate delay in the offer of possession of the apartments to our Clients as also the subsequent reluctance in even giving an inspection of the allotted apartment to them." The Complainants inter alia demanded in the notice, "the refund of all amounts paid by them to you with interest @ 10.7% per annum from the date of each payment till the date on which the amount is refunded with interest..."

VII. That the respondent/promoter thereafter sent a possession offer by its letter dated 11.09.2019 received by the complainants on 13.09.2019. It is dishonestly stated that "The company through "intimation of possession" demand, requested you to take possession...". The complainants specifically state that they have not received any possession letter before the letter dated 04.07.2019. The complainants are advised that they are now not bound to take possession and have a continued legal right to seek the refund of the amounts paid along with interest and compensation. There is a failure to handover possession of the allotted flat to the complainants within the time agreed in the apartment buyer's agreement.

VIII. That the section 11(4)(a) of The Real Estate (Regulation and Development) Act, 2016 (RERA hereafter) requires that the promoter shall "be responsible for all obligations, responsibilities and functions of this Act or the Rules and Regulations made there under of allottees *as per the agreement to sell...*" Under the agreement to sell, it was an obligation of the promoter to complete the construction, obtain occupation certificate and offer possession of the apartment to the buyer within the time agreed between the parties and recorded in clause 14(a) of the ABA between the parties. The promoters have failed to perform its obligations under the agreement to sell.

IX. As per clause 16(a) of the ABA reads:

> *"(a) In case the company is not able to handover the possession of the Unit within the period as stipulated hereinabove or any extended period (provided however contingencies stated in clause 14 and 31 have not occurred), the Allottee shall be entitled to payment of compensation @ Rs. 7.50/- per sq. ft. per month of the Super Area of the Unit for the period of delay beyond 36+5 months or such extended periods as permitted under this agreement."*

Even this compensation was subject to severe limitations contained in clauses 16 (b), (c) and (d).

X. That the clause 12 of the agreement provided that time is of the essence of the agreement. However, it applies only against the allottees and does not similarly bind the promoter. Clause 13 dealing with 'delay in payments' and clause 17 dealing with 'failure to take possession' provide that in case of delay or default by the allottee, he shall be liable to pay interest @ 24% per annum. On the

other hand, the exit clause provided in clause 26 of the allotment letter reads:

> *"26. In the event, the allottee chooses to cancel the booking/ allotment and/or the agreement or is in breach of any terms & conditions including but not limited to, send the duly signed copy of the agreement within 30 days from the date of dispatch by the company, the company shall be released and discharged of all liabilities and obligations under this allotment letter and/or agreement. Pursuant to any of the conditions aforesaid, the allottee understands that the company at any stage shall have the right to resell the unit to any third party or deal with the same in any other manner as the company may deem fit. On happening of such event, the company will refund to the allottee the amount paid by the allottee, without any interest after deducting the earnest money along-with non-refundable amounts due and payable by the allottee. The allottee agrees that in case of such cancellation, refund shall be made only after realization of such refundable amount on further sale/resale of the unit to any third party."*

XI. That the agreement is one-sided. The terms thereof are substantially unfair, and they are harsh, oppressive and unconscionable against the complainants. A perusal of the apartment buyer's agreement reveals stark incongruities between the options available to the respective parties. The allotment Letter is a 13 pages document, printed in single space, in 10 point font size. Similarly, the apartment buyer's agreement is a 50-page document, in a printed form, in single space and the complainants were made to sign on the dotted lines in these *standard formats* as also to accept the set of rules printed therein as part of the contract; in spite of they being unfair, unreasonable and unconscionable. The said clauses cannot be enforced upon the complainants. In fact, the contractual terms of the said agreement are *ex-facie* one sided, unfair and

unreasonable. The incorporation of such one-sided clauses in the agreement constitutes an unfair trade practice. Emaar cannot seek to bind complainants with such a contract.

XII. That the complainants vide legal notice dated 16.04.2016, in view of the inordinate delay in the offer of possession of the apartments to them terminated and withdrew from the contract between the parties. Further, complainants demanded the refund of all amounts paid by them to Emaar with interest from the date of each payment till the date on which the amount is refunded within 15 days from the receipt of the notice.

XIII. This legal notice was sent to the respondent at its email ID bharat.garg@emaar-india.com registered by it with the registrar of companies. The notices were delivered, and the following note was received by email of the respondent: "Thank you for writing in to Emaar. This is an automated response to acknowledge the receipt of your e-mail. We assure you of a response through one of our executives within 02 working days of receipt of your mail.

"It would help expedite a response, if you could mention your unit number in the subject line of your email..." The notices were also sent by speed post. The track report of the notices informs that 'Item delivered'.

XIV. That respondent did not reply or comply with the legal notice sent by complainants. Therefore, Emaar is liable to refund a sum of Rs. 1,27,79,397/- along with interest till the date of the complaint. The complainants are entitled to claim interest @ 10.7% per annum as per rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017. Such interest as on 27.02.2021 i.e. the date of the complaint came to Rs. 83,22,408.49/-. The complainants are also entitled to the pendente lite and future

interest at the same rate from the date of the complaint till the respondent pays the entire due amounts to the complainants.

XV. The cause of action for filing the complaint arose in favour of the complainants and against the respondent in January 2013 when the complainants applied for allotment of a residential unit in the project being developed by Emaar. It further arose on 29.01.2013 when the respondent issued allotment letter for unit No. GGN-15-0301 in favour of the complainants. It again arose on 10.05.2013 when an apartment buyer's agreement was executed between the parties. It again arose on all such occasions when the complainants made the payments to Emaar, and they issued acknowledgment-cum-receipt to complainants. It further arose on 13.11.2016 when the agreed period for delivery of possession expired. It again arose on 16.04.2019 when the complainants terminated the contract between the parties and demanded the refund of entire amount with interest. The cause of action continues.

XVI. The project 'Gurgaon Greens' in Sector 102, Village Dhankot, Gurugram is situated in Planning area of Gurugram, therefore, the Adjudicating Officer has complete territorial jurisdiction vide notification No. 1/92/2017-ITCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint as the nature of the real estate project is commercial in nature so the Adjudicating Officer has the subject matter jurisdiction along with territorial jurisdiction. The cause of action partially arose at Gurugram.

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 amounting to Rs.1,22,99,375/- along with interest as per section 19(4) read with rule 15 of the rules.

D. Reply filed by the respondent

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

I. That the present complaint is not maintainable in law or on facts. It is submitted that the present complaint is not maintainable before this authority under the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "the Act" for short) and the Haryana Real Estate (Regulation and Development) Rules, 2017, (hereinafter referred to as "the Rules"). The present complaint is liable to be dismissed on this ground alone. Even otherwise, the complaint is not maintainable in law and merits dismissal.

II. That the complainants have got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 10.05.2013, as shall be evident from the submissions made in the following paras of the present reply. The respondent craves leave of this authority to refer to and rely upon the terms and conditions set out in the buyer's agreement, in detail at the time of the hearing of the present complaint, so as to bring

out the mutual obligations and the responsibilities of the respondent as well as the complainants thereunder.

III. That the present complaint raises several such issues which cannot be decided in summary proceedings. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint can only be adjudicated by the Civil Court. The present complaint deserves to be dismissed on this ground alone. That the complainants are estopped by their own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint.

IV. That as per the averments in the complaint, the due date for offer of possession was November 2016. Therefore, without prejudice to the contentions of the respondent that there has been no delay or default on the part of the respondent and without admitting in any manner any truth in the allegations made by the complainants, it is submitted that the cause of action, if any, for filing of the present complaint arose prior to the date of coming into force of the present act. Hence, the complaint is barred by limitation and liable to be dismissed on this ground also.

V. That the complainants are not "allottees" but are actually investors who have purchased the unit in question as a speculative investment. It is pertinent to mention that the complainant has two more units in the same project having unit no. GGN-11-0101 & GGN-14-0201 for which two separate complaints have been filed before this authority. That the complainants are wilful and persistent defaulters who have failed to make payment of the sale

consideration as per the payment plan opted by them. The complainants have concealed the real and true facts which are as under. Furthermore, the respondent has already credited an amount of Rs. 3,08,799/- to the account of the complainants. The complainants have also made certain payments on account of delayed payment charges. Without prejudice to the rights of the respondent, delayed interest if any has to calculated only on the amounts deposited by the allottees/complainants and not on any amount credited by the respondent, or any payment made by the allottees/complainants towards delayed payment charges (DPC) or any taxes/statutory payments etc.

VI. That right from the very beginning, the complainants had delayed in making timely payment of the instalments as per the payment plan voluntarily chosen by them. HVAT payment request letter dated 17.04.2017. The statement of account dated 13.04.2021 reflecting the payments made by the complainants as well as the delayed payment interest levied on the complainants by the respondent has been appended as **annexure R7**.

VII. That it is pertinent to mention herein that as per the terms and conditions of the buyer's agreement, the complainants were under a contractual obligation to make timely payment of all amounts payable under the buyer's agreement, on or before the due dates of payment failing which the respondent is entitled to levy delayed payment charges in accordance with clause 1.2(c) read with clauses 12 and 13 of the buyer's agreement. That in the meanwhile, the respondent registered the project under the provisions of the act. the project had been initially registered till 31.12.2018. The

registration certificate dated 05.12.2017. Thereafter, the respondent applied for extension of REREA registration. That the consequently, extension of RERA registration certificate dated 02.08.2019 had been issued by this authority to the respondent till 31.12.2019.

VIII. That upon receipt of the occupation certificate, the respondent offered possession of the unit in question to the complainants vide letter dated 12.12.2018, which is **annexure R8**. The complainants were called upon to remit balance amount as per the statement attached with offer of possession and also to complete the necessary formalities and documentation so as to enable the respondent to hand over possession of the unit to the complainants. It is pertinent to mention herein that compensation amounting to **Rs. 3,08,799/-** was also credited to the complainants although in accordance with clause 16(c) of the buyer's agreement, the complainants, being in default of the buyer's agreement were not entitled to any compensation from the respondent. However, instead of clearing their outstanding dues and taking possession of the unit, the complainants addressed frivolous correspondence to the respondent. Till date, the complainants have not come forward to take possession of the said unit. It was not out of place to mention that the possession of the said unit had been offered to the complainants by the respondent way back vide letter of offer of possession dated 12.12.2018. That upon dispatch of letter of offer of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement stand fully satisfied. Thus, the complainants are estopped from filing the

present complaint. The complaint is not maintainable after issuance of the letter of offer of possession by the respondent.

IX. That it is most respectfully submitted that the contractual relationship between the complainants and the respondent is governed by the terms and conditions of the buyer's agreement dated 10.05.2013. Clause 12 of the buyer's agreement provides that time shall be the essence of the contract in respect of the allottee's obligation to perform/observe all obligations of the allottee including timely payment of the sale consideration as well as other amounts payable by the allottee under the agreement. Clause 13 of the buyer's agreement, *inter alia*, provides for levy of interest on delayed payments by the allottee.

X. That clause 14 of the buyer's agreement provides that subject to force majeure conditions and delay caused on account of reasons beyond the control of the respondent, and subject to the allottee not being in default of any of the terms and conditions of the same, the respondent expects to deliver possession of the unit within a period of 36 months from the date of start of construction plus five months grace period. in the case of delay by the allottee in making payment or delay on account of reasons beyond the control of the respondent, the time for delivery of possession stands extended automatically. In the present case, the complainants are defaulters who has failed to make timely payment of sale consideration as per the payment plan and is thus in breach of the buyer's agreement. The time period for delivery of possession automatically stands extended in the case of the Complainants. On account of delay and defaults by the complainants, the due date for delivery of

possession stands extended in accordance with clause 14(b)(iv) of the buyer's agreement, till payment of all outstanding amounts to the satisfaction of the respondent.

XI. That in so far as payment of compensation/interest to the complainants are concerned, it is submitted that the complainants, being in default, is not entitled to any compensation in terms of clause 16(c) of the buyer's agreement. Furthermore, in terms of clause 16(d) of the buyer's agreement, no compensation is payable due to delay or non-receipt of the occupation certificate, completion certificate and/or any other permission/sanction from the competent authority.

XII. That as has been submitted in the preceding paras of the present reply, the respondent had completed construction of the unit/tower by April, 2018 and had applied for issuance of the occupation certificate on 13.04.2018. The occupation certificate was issued by the competent authority on 05.12.2018. It is respectfully submitted that after submission of the application for issuance of the occupation certificate, the respondent cannot be held liable in any manner for the time taken by the competent authority to process the application and issue the occupation certificate. Thus, the said period taken by the competent authority in issuing the occupation certificate as well as time taken by government/statutory authorities in according to approvals, permissions etc., necessarily have to be excluded while computing the time period for delivery of possession.

XIII. That it is submitted that several allottees, including the complainants have defaulted in timely remittance of payment of

installments which was an essential, crucial and an indispensable requirement for conceptualization and development of the said project. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. Therefore, there is no default or lapse on part of the respondent and there in no equity in favour of the complainants. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

XIV. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainants and without prejudice to the contentions of the respondent, it is respectfully submitted that the provisions of the act are not retrospective in nature. The provisions of the act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the act. The provisions of the act relied upon by the complainants for seeking refund or interest cannot be called in to aid in derogation and in negation of the provisions of the buyer's agreement. The complainants cannot claim any relief which is not contemplated under the provisions of the buyer's agreement. Assuming, without

in manner admitting any delay on the part of the respondent in delivering possession, it is submitted that the interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond or contrary to the agreed terms and conditions between the parties.

XV. That it is evident from the entire sequence of events, that no illegality or lapse can be attributed to the respondent. Thus, the allegations levelled by the complainants qua the respondent are totally baseless and do not merit any consideration by this authority. The complaint filed by the complainants is nothing but an abuse of the process of law. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

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. 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

10. 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."

11. 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

12. 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.

13. 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. 1,27,41,722/- 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;"*

14. 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.

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

15. The respondent contended that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the 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 respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.

16. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on*

that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

17. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

18. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer 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 buyer's 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 the Act and are not unreasonable or exorbitant in nature.

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

G. I Direct the respondent to refund the entire amount paid by the complainant to the respondent amounting to Rs.1,22,99,375/- along with interest as per section 19(4) read with rule 15 of the rules.

19. 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."*

20. As per clause 14 of the flat buyer agreement dated 10.05.2013 provides for handing over of possession and is reproduced below:

> **14. POSSESION**
>
> ***(a) Time of handing over the Possession***

Subject to terms of this clause and barring force majeure conditions, subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within ***36 (Thirty Six) months from the date of start of construction,*** *subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a* ***grace period of 5 (five) months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project.***

21. At the outset, it is relevant to comment on the present possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. 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 fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement 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 mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

22. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (Thirty Six) months from the date of start of construction, and further provided in agreement that promoter shall be entitled to a grace period of 5 months for applying and obtaining the completion certificate/occupation certificate in respect of the unit and/or the project. The date of execution of buyer's agreement is 10.05.2013. The period of 36 months expired on 14.06.2016 as a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the grace period prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 5 months cannot be allowed to the promoter at this stage.

23. The section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein.

24. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession the allottee wishes to withdraw from the project and demand return of the amount received

by the promoter in respect of the unit with interest at the prescribed rate. The allottee in this case has filed this application/complaint on 16.03.2021 after possession of the unit was offered to them after obtaining occupation certificate by the promoter. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made to them and demand for due payment was raised then only filed a complaint before the authority. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after obtaining occupation certificate. Section 18(1) gives two options to the allottee if the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

(i) Allottee wishes to withdraw from the project; or

(ii) Allottee does not intend to withdraw from the project

25. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the allottee has tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession

of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money he has paid to the promoter are protected accordingly. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and*** **Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022.** it was observed

> *25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the aportment, 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.*

26. 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."

27. 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. 16.04.2019 till the date of its actual realization.

H. Directions of the authority

28. 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 balance amount of the unit by deducting the earnest money which shall not exceed the 10% of the basic sale consideration and shall return the balance amount to the complainants within a period of 90 days from the date of this order. The refund should have been made on the date of request of withdraw/surrender i.e 16.04.2019, accordingly interest at the prescribed rate i.e. 10.60% is allowed on the balance amount from the date of request of withdraw/surrender till the date of its actual realization.

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.

29. Complaint stands disposed of.

30. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.01.2023