BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 168/ 2021 /3114/2019
Ordre reserved on: 14.12.2022
Order pronounced on: 28.02.2023

1. Mr. Hiran Kumar Sood
2. Mrs. Kavita Sood
Both RR/o: - 72 Mandakini Enclave, Alaknanda, New Delhi- 110019 **Complainants**

Versus

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

CORAM:
Shri Ashok Sangwan **Member**
Shri Sanjeev Kumar Arora **Member**

APPEARANCE:
Sh. Amish Tandon (Advocate) Complainants
Sh. Garvit Gupta (Advocate) Respondent

ORDER

1. This complain has been filed by the complainant/allottees 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 provisions of the Act or the Rules and regulations made thereunder or to the allottees 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 complainants, 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 Aranya City", Sector 11&14, Gurugram,
2.	Total project area	107.85 acres
3.	Registered project area	52.37125 acres
4.	Nature of the project	Residential plotted colony
5.	DTCP license no. and validity status	25 of 2012 dated 29.03.2012 valid up to 28.03.2018
6.	Name of licensee	Ajit Kumar and Others
7.	RERA Registered/ not registered	Registered vide no. 93 of 2017 dated 28.08.2017
8.	RERA registration valid up to	27.08.2022
9.	Plot no.	F-56 (Page no. 68 of the complaint)

10.	Unit area admeasuring	239.200 sq. Yds. (Page no. 68 of the complaint)
11.	Date of execution of agreement to sell	21.11.2012 (Page no. 65 of the complaint)
12.	Allotment letter	21.11.2012 (Page no. 62 of the complaint)
13.	Possession clause	**4.2 Possession Time and Compensation** *That the Seller shall sincerely endeavor to give possession of the Plot to the purchaser within thirty-six (36) 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 development is not completed within the time period mentioned above."* *[emphasis supplied]* (Page no. 73 of the complaint)

14.	Grace period	**Allowed** 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 36 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 November 2015. As per agreement to sell, the construction of the project is to be completed by November 2017 which is not completed till date. **Accordingly, in the present case the grace period of 6 months is allowed.**
15.	Due date of possession	21.05.2016 (Note: - 36 months from date of agreement i.e., 21.11.2012 + 6 months grace period)
16	Basic sale consideration as per BBA at page 83 of complaint	Rs.78,76,666/-
17	Total sale consideration	Rs.81,13,312/- (As per applicant ledger dated 30.03.2017 page no. 94 of complaint)

18	Amount paid by the complainants	Rs.81,13,312/- (As per applicant ledger dated 30.03.2017 page no. 94 of complaint)
19	Completion certificate	11.11.2016 [Page 15 of the reply]
20	Offer of possession	17.11.2016 [Page no. 96 of the complaint]
21.	Legal notice send by the complainants	16.05.2019 [Page no. 131 of the complaint]
22.	Delay in handing over the possession till date of filing of complaint i.e., 26.07.2019	3 years 2 months and 5 days

B. Facts of the complaint

3. The complainants have made the following submissions: -

I. That complainants were lured by the tall claims of the representatives of the company and its attractive brochure which along with the plot promised, *inter alia,* the following facilities: -

- Hospital and shopping mall
- School
- Swimming Pool
- Club
- Library
- Gym

Influenced by the above attractions, the complainants went ahead and executed an "application for allotment". In accordance & pursuant to execution of the above mentioned "application for allotment", the complainants deposited the initial demanded sum to the company on 26.07.2012 vide Cheque No. 098769 and 098770. They have paid all sums demanded by the company with respect to the plot from time to time without any delay.

II. Thereafter, an allotment letter dated 21.11.2012 was issued to complainants by the respondent company. Simultaneously, an agreement to sell dated 21.11.2012 qua the plot was also executed between the parties. Various details regarding the plot (including but not limited to area, consideration, payment plan etc.) were also contained in the said buyer's agreement.

III. That in the month of November 2016, after a delay of over more than six months from the date of promised possession, complainants received a communication from the respondent wherein it purported to offer possession of the plot. They made the due payments as mandated in the possession letter. However, subsequently, on 19.01.2017, the respondent provided an indemnity bond format to which complainants had serious objections qua some clauses as they attempted to substantially alter the conditions in the buyer's agreement. The whole process

of accepting complainant's contentions was resolved on 06.06.2018.

IV. That on 18.06.2018, an indemnity bond was finally executed between the parties with respect to the purchase of the plot. The said indemnity bond was stated by the respondent to be a precursor to the possession and execution of a conveyance deed qua the plot. However, post the execution of the indemnity bond, the respondent went completely silent on the transaction. No conveyance deed was ever executed or offered to be executed by the respondent for the plot. Till date, they have paid a sum of Rs.81,19,790/- to the respondent company in connection with the transaction in question.

V. That it is critical to state that although offer of possession was made by respondent company in the month of November 2016, however till date the plot is not ready in the manner and form promised by it. The respondent, in order to put a stop on delay in possession, had purportedly offered possession to them. Further, the entire episode of indemnity bond had been cleverly engineered by the respondent so as to buy more time. Such unfair trade practice(s) by the company is clearly illegal and has been deployed only to evade delivery of 'effective' possession and make payments for delay in possession. Such conduct on the part of the respondent

has gravely prejudiced the complainants in as much as it has resulted in undue hardship and loss to them.

VI. Further, the complainants visited the site on 04.03. 2019 and found the township in disarray and brought this to the notice of the office bearers of respondent company vide an email dated 12.04.2019 and to which there was no response.

VII. Finally, the complainants decided to seek refund of the monies paid by them to the respondent company with respect to the plot. Consequently, they were compelled to issue a legal notice/demand notice to the respondent dated 16.05.2019, inter alia, seeking a refund of the amount deposited by them along with interest. However, the said legal notice elicited no response from the respondent.

VIII. That the respondent has till date did not fulfil its promise with regard to provision of modern amenities and infrastructure and the said township is still not in a habitable state. The respondent has induced the complainants to invest in the project by making false and misleading statements promising them world class amenities and luxuries. Even after a lapse of 7 years for applying for the said plot, the respondent failed to live up to its promises. It has wilfully defaulted and acted in lackadaisical manner, causing great loss to complainants both financially and mentally.

C. Relief sought by the complainants:

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

   i. To refund a sum of Rs.81,19,790/- paid by the complainants to the respondent company in connection with the property along with interest @18% per annum till date compounded at Rs.44,00,926/-.

   ii. Pendente lite and future interest @ 18% per annum till the date of actual recovery.

   iii. Direct the respondent to pay litigation cost of Rs.2,00,000/- to the complainants.

5. On the date of hearing, the authority explained to the respondent /promoter about 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 complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The agreement to sell was executed between the parties to the complaint prior to the enactment of the Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively. The provisions of the Act, 2016 are not applicable to the facts of the present case in hand.

II. That the part completion certificate was granted on 11.11.2016 for the unit allotted to the complainants in the project which was prior to the publication of the Rules, 2017. Thus, the present dispute is not triable before this authority.

III. That as per the provisions of the Act, 2016, the authority can regulate projects only with respect to the registered projects and hence, the present complaint is not maintainable as it is neither a registered project nor is liable to be registered as the part completion certificate dated 11.11.2016 has already been received by the respondent company with respect to the area in which the said unit of the complainants lies.

IV. That 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 13.2 of the buyer's agreement.

V. That the complainants have not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by him maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows.

- That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving

persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as 'Raheja Atlantis', 'Raheja Atharva', 'Raheja Shilas' and 'Raheja Vedanta' and in most of these projects large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.

- That the complainant, after checking the veracity of the project namely, 'Raheja's Aranya City', Sector 11 and 14, Sohna, Gurugram had applied for allotment of a plot bearing no. H-091 vide its booking application form. The complainants agreed to be bound by the terms and conditions of the booking application form. The complainants were aware from the very inception that the plans as approved by the concerned authorities are tentative in nature and that the respondent might have to effect suitable and necessary alterations in the layout plans as and when required.
- That the complainants are real estate investors and not a "customer" who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that her calculations have gone wrong on account of severe slump in the real estate market and 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 based on the application for booking, the respondent vide its allotment offer letter dated 21.11.2012 allotted to the complainants plot no. F56 admeasuring 239.20 sq. yard. It is submitted that the complainants signed and executed the agreement to sell on 21.11.2012 and the complainants agreed to be bound by the terms contained therein.
- That 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 is being developed. 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. However, yet, necessary infrastructure facilities like 60-meter sector roads including 24-meter-wide road connectivity, water and sewage which were

supposed to be developed by HUDA parallelly have not been developed.

- That the respondent would hand over the possession of the apartment as soon as the construction work is complete subject to availability of basic external infrastructure such as water, sewer, electricity etc. as per terms of the application and agreement to sell and the grant of the occupational certificate by the authorities. Due to the above-mentioned conditions beyond the reasonable control of the respondent, the unit allotted to the complainant has not been offered and the respondent cannot be held liable for the same. The respondent is also suffering unnecessarily and badly without any fault on its part. Due to these reasons, the respondent has to face cost overruns without its fault. Under these circumstances the passing any adverse order against the respondent at this stage would amount to complete travesty of justice.

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

E. Jurisdiction of the authority

8. 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. The objection raised 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 flat 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 06.12.2017 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 agreement contains an arbitration clause which refers to the dispute resolution system mentioned in agreement.

17. The agreement to sell entered into between the two sides on 21.11.2012 contains a clause 13.2 relating to dispute resolution between the parties. The clause reads as under: -

> *"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 respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute if any with respect to the provisional booked unit by the complainant, the same shall be

adjudicated through arbitration mechanism. 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. Similarly, 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 complainant and builder could not circumscribe the jurisdiction of a consumer forum.

19. While considering the issue of maintainability of a complaint before a consumer forum/commission in the face 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 para 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."*

20. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within the 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. Objections regarding the complainants being investors.

21. The respondent has taken a stand that the complainants are the investors and not consumers. Therefore, they have not entitled to the protection of the Act and are not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority 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 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 apartment buyer's agreement, it is revealed that the complainants are buyers and paid total price of Rs.81,13,312/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the

definition of term allottee under the Act, the same is reproduced below for ready reference:

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

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainants are allottees 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 allottees being investors are not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant.

G. I To refund a sum of Rs.81,19,790/- paid by the complainants to the respondent company in connection with the property along with interest @18% per annum till date compounded at Rs.44,00,926/-.

G. II Pendente lite and future interest @ 18% per annum till the date of actual recovery.

22. The complainants were allotted plot no. F-56, admeasuring 239.200 sq. Yds, in the project "Raheja Aranya City" by the respondent/builder for a total consideration of Rs.81,13,312/- to be paid as per the payment plan. A buyer's agreement was executed on 21.11.2012. The possession of the unit was to be offered within 36 months ***plus/minus Six (6) months grace period from the date of the execution of the Agreement***. Therefore, the due date of possession comes out to be 21.05.2016. The complainants paid a sum of Rs.81,13,312/- which is more than the basic sale price. The respondent has offered the possession on 17.11.2016 after the receipt of the part completion certificate of the competent authority. The complainants visited the site on 04.03.2019 and found the township in disarray and brought this to the notice of the office bearers of the respondent company vide an email dated 12.04.2019 and to which there was no response till date. Thereafter, they were compelled to issue a legal notice/ demand notice to the respondent company dated 16.05.2019, inter alia, seeking a refund of the amount deposited by them along with interest. However, the said legal notice elicited no response from the respondent. Thus, on the basis of above-mentioned evidence it is contended that the allottees are entitled to refund of the paid-up amount besides interest

23. But the plea of respondent on the basis of pleadings as well as documents etc. i.e., the allotted unit was offered to the complainants on 17.11.2016 after obtaining the part completion certificate from the competent authority. But the allottees failed to take its possession after clearing the dues despite communication in this regard with them. Secondly, though they raised curtained issues w.r.t. infrastructure but that was for the different statutory authorities to raised and the respondent can't be held liable for the same.

24. Some of the admitted facts of the case are that on the basis of letter of allotment dated the complainants were allotted a plot admeasuring 239.200 sq. yards. In the project namely "Raheja Aranya City" Sector-11&14, Sohna District Gurugram at the sale price of RS.81,13,312/- and that amount was paid by them, after a buyer's agreement in this regard was executed between the parties on 21.11.2012. the possession of the allotted unit was to be offered to the complainants within a period of 36 months from the date of agreement with a grace period of 6 months i.e., by 21.05.2016. It is also a fact that after getting part completion certificate 11.11.2016 of the project, the respondent offered possession of the allotted units to the complainants on 17.11.2016. but the same was not taken due to one reason or the other leading to exchange of communication between the parties and ultimately sending a legal notice dated 16.05.2019, withdrawing from the project and seeking refund of the paid-up amount. Though the complainants raised some

issues w.r.t. to their inability to take possession of the allotted unit, but the respondent offered possession of the same on the basis of a valid and legal document issue d by the competent authority. If they had any grievance after taking possession of the subject unit, then they were free to approach the competent authorities for seeking the desired relief. However, no one can be compelled to take possession of a unit against their wishes and are entitled to withdraw from the project but as per the provisions of the Act of 2016. Even the Hon'ble Apex court while dealing with such type in cases of ***Maula Bux Vs Union of India (1970)1SCR298 & Dardar KB Ramchandra Raj Urs Vs Sarah C Urs (2015)4SCC136. and*** followed by ***NCDRC, New Delhi in consumer case no. 2766 of 2017 titled as Jayant Singal & anr. vs M/s M3M India Limited*** decided on 26.07.2022. took a view that on cancellation of allotment/agreement, deductions beyond 10% of the basic sale consideration are not permissible and are reasonable one. Even the Government of Haryana also framed regulations in this regard known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, providing as under-

> ***"5. AMOUNT OF EARNEST MONEY***
>
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that*

the forfeiture amount of the earnest money ***shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment /plot /building as the case may*** *be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

25. It is evident from the above mentions facts that the complainants had paid a sum of Rs.81,13,312/- against basic sale consideration of Rs.78,76,666/-of the unit allotted to them on 21.11.2012. There is nothing on the record to show that the respondent acted on the representation dated 16.05.2019, sent by the complainants withdrawing from the project and seeking refund of the paid-up amount. Though the amount paid by the complainants against the allotted unit is more than the basic sale consideration, but the respondent was bound to act and respond to the pleas of surrender/cancellation and refund.

26. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainants against the allotted unit and is directed to cancel the same by forfeiting the earnest money which shall not exceed the 10% of the basic sale consideration of the said unit as per payment schedule and shall return the balance amount along with interest at the rate of 10.70% (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 surrender/ withdrawing i.e., 16.05.2019 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 litigation cost of Rs.2,00,000/- to the complainants.

27. The complainants are seeking above mentioned 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 complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses.

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 paid-up amount of Rs.81,13,312/- to the complainants after retaining 10% of the basic sale consideration of Rs.78,76,666/- and that amount should have been paid on the date of surrender i.e., 16.05.2019. Accordingly, the interest at the prescribed rate i.e., 10.70% is allowed on the balance amount if any, from the date of surrender till date of its actual refund.

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

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 28.02.2023