BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**4034 of 2021**
Complaint filed on	:	**11.10.2021**
Date of decision	:	**30.05.2023**

Mrs. Roopali Mehra
W/o Mr. Manish Mehra
R/o: 1201, Tower-19, The Close South, Nirvana Country,
Sector-50, Gurugram Haryana - 122018 **Complainant**

Versus

M/s Raheja Developers Limited.
Regd. Office at: W4D, 204/5, Keshav Kunj, Western Avenue, Carippa Marg, Sainik Farms, New Delhi- 110062
Also, at: - Raheja Mall, 3rd Floor, Sector- 47, Sohna Road, Gurugram - 122001 **Respondent**

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

APPEARANCE:
Sh. Ishaan Dang (Advocate) Complainant
Sh. Garvit Gupta (Advocate) Respondent

ORDER

1. The present complaint 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 to the allottees as per the agreement for sale executed *inter se* them.

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 Revanta", Sector 78, Gurugram, Haryana
2.	Project area	18.7213 acres
3.	Nature of the project	Residential group housing colony
4.	DTCP license no. and validity status	49 of 2011 dated 01.06.2011 valid up to 31.05.2021
5.	Name of licensee	Sh. Ram Chander, Ram Sawroop and 4 Others
6.	RERA Registered/ not registered	Registered vide no. 32 of 2017 dated 04.08.2017
7.	RERA registration valid up to	5 Years from the date of revised Environment Clearance
8.	Unit no.	C-184, 18th floor, Tower/block- C (Page no. 29 of the complaint)
9.	Unit area admeasuring	1621.390 sq. ft. (Page no. 29 of the complaint)

10.	Date of execution of agreement to sell	24.05.2012 (Page no. 25 of the complaint)
11.	Date of allotment letter	24.05.2012 (Page no. 19 of the complaint)
12.	Date of execution of tripartite agreement	01.06.2012 (Page no. 72 of the complaint)
13.	Possession clause	**4.2 Possession Time and Compensation** *That the Seller shall sincerely endeavor to give possession of the Unit to the purchaser* ***within*** *thirty-six (36) months in respect of 'TAPAS' Independent Floors* ***and forty eight (48) months in respect of 'SURYA TOWER' 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.........." (Page no. 39 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 48 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 May 2016. As per agreement to sell,

		the construction of the project is to be completed by May 2016 which is not completed till date. **Accordingly, in the present case the grace period of 6 months is allowed.**
15.	Due date of possession	24.11.2016 (Note: - 48 months from date of agreement i.e., 24.05.2012 + 6 months grace period)
16.	Basic sale consideration as per BBA at page 60 of complaint	Rs.1,13,47,974/-
17.	Amount paid by the complainant as pleaded in the complaint at page no. 6 of complaint	Rs.98,53,569/-
18.	Occupation certificate /Completion certificate	Not received
19.	Offer of possession	Not offered
20.	Demand/reminders letter issued by the respondent company	28.06.2016, 20.07.2016, 31.08.2016, 19.09.2016 (Page no. 134 to 137 of the complaint)
21.	Termination/cancellation notice	21.10.2016 (Page no. 138 of the complaint)

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint: -

I. That the officials of the respondent approached the complainant in the year 2012 in their endeavour to convince her to purchase a residential apartment in the group housing colony known as "Raheja's Revanta" located in Sector 78, Gurugram, (Haryana). The officials of the respondent represented to her that construction of the said project would be definitely completed within a period of 48 months. They further assured the complainant that the apartments in the said project would be of the highest quality containing world-class facilities and state-of-the-art services.

II. That convinced by the representations and assurances by the officials of the respondent, she had booked a residential apartment in the said project and filled an application form. The complainant had also made payment of the booking amount of Rs.9,85,910/- to the respondent, which had been duly acknowledged by the respondent.

III. That vide allotment letter dated 24.05.2012, the complainant was allotted an apartment bearing no. C-184 located on the 18th floor in Tower C in the said project admeasuring 1621.39 square feet (super area) along with two car parking spaces. She had opted for a construction linked payment plan.

IV. That agreement to sell/buyer's agreement dated 24.05.2012 prepared by the respondent was executed between the parties. The total basic sale price of the said unit was settled at Rs.96,11,600/-. The terms and conditions incorporated in the aforesaid agreement to sell were tilted heavily in favour of the respondent and completely

one-sided. The respondent was in a dominant position and was not amenable to reason. Moreover, the respondent was not even prepared to listen to her or to sit across the table to discuss the contractual covenants contained in the agreement to sell. The complainant had no option at the relevant point in time but to execute the aforesaid agreement.

V. That as per clause 4.2 of the aforesaid agreement to sell, the possession of the said unit was required to be offered to the complainant within a period of 48 months from the date of execution of agreement to sell (timeline pertaining to "Surya Tower" to be considered). It would not be out of place to mention that the respondent had represented the complainant at the time of booking that the possession of the said unit would be handed over to her definitely by May 2016.

VI. That the complainant had availed a housing loan amounting to Rs.90,00,000/- from LIC Housing Finance Limited (LICHFL) for purchase of the said unit. The tripartite agreement dated 01.06.2012, was executed between the complainant, the respondent and LIC Housing Finance Limited along with the documentation kit containing the promissory note, agreement to mortgage, affidavit cum undertaking, loan agreement and power of attorney.

VII. That in May 2015, the complainant transferred the balance unpaid amount of the aforesaid housing loan to ICICI Bank. The in-principal sanction letter dated 31.05.2015, was issued by ICICI Bank to the

complainant. A total amount of Rs.74,36,295/- was sanctioned to be disbursed to the complainant by ICICI Bank.

VIII. That the complainant had made payment of instalments on time as per the payment plan and without any delay and had made a total payment of Rs.98,53,569/- to the respondent till 2016. The same had also been duly acknowledged by the respondent.

IX. That the complainant since May 2016 had regularly contacting the officials of the respondent to enquire about the handing over of possession of the said unit to her. However, the officials of the respondent never provided any direct answer to the queries posed by the complainant and were not forthcoming about details pertaining to the tentative timeline of completion of the project, status of construction at the site, whether occupation certificate had been applied for etc. Furthermore, she also visited the corporate office of the respondent located at Saket, Delhi but the officials of the respondent shut down the aforesaid office in order to completely cut off public dealing and avoid meeting the aggrieved allottees. The complainant had also been issuing emails/letters to the respondent and kept enquiring about the handing over of possession of the said unit to her. However, no conclusive reply was ever provided by the respondent to her.

X. That, the complainant sent emails to the respondent enquiring about the status of the said unit. However, she was shocked receive an email dated 16.06.2021 from the respondent wherein it had been stated

that the allotment of the complainant with respect to the said unit had been cancelled by it vide cancellation letter dated 21.10.2016. The aforesaid cancellation was unilateral on part of the respondent. Moreover, the respondent had also forfeited a large sum from the total amount paid by the complainant to it on the pretext of the same being covered under the definition of earnest money. Thereafter, she contacted the officials of the respondent telephonically who disclosed to her that termination letter dated 21.10.216, had been issued to the complainant. However, the complainant had never received any communication from the respondent, let alone the above-mentioned termination letter and duly conveyed the same to the officials of the respondent.

XI. That the complainant then enquired about the reason for the termination of her allotment. The officials of the respondent merely stated that the complainant had not made payment of certain instalments despite being issued reminder letters by the respondent. The complainant reiterated that she had never received any letter from the respondent. The complainant requested the officials of the respondent to provide her the copies of the letters allegedly issued by them to her. But the officials of the respondent did not accede to the just and valid requests of the complainant initially. However, when the complainant refused to take no for an answer and continued to stand her ground, the officials of the respondent finally provided her with copies of the reminder letters and determination

letter allegedly issued by the respondent to her. The payment reminder letters dated 28.06.2016, 20.07.2016, 31.08.2016 and 19.09.2016 have been appended with the complaint.

XII. That after going through the letters purportedly issued by the respondent to the complainant, it was discovered by her that the respondent for reasons best known to it kept issuing the aforesaid letters to the official address of the erstwhile employer of the complainant, i.e., Jindal Steel & Power Limited even after she had resigned from the aforesaid organization. It would not be out of place to mention that the complainant had provided her residential address to the respondent and the same had been duly mentioned in the application form, allotment letter and agreement to sell as well. The address provided in the aforesaid document at the relevant point in time was a rented apartment which was on company lease from Jindal Steel & Power Limited.

XIII. That it is reiterated that the complainant had resigned from Jindal Steel & Power Limited on 31.03.2016. However, reminder letters dated 28.06.2016, 20.07.2016, 31.08.2016 and 19.09.2016 issued by the respondent had been dispatched by the respondent only at the following address: - Jindal Steel & Power Limited, Flat No.2, Sector 32, Gurgaon-122001. Even the office address of the aforesaid organization had been wrongly mentioned by the respondent. The correct address of the corporate office of Jindal Steel & Power Limited

at the relevant point in time was Jindal Centre, Plot No.2, Sector 32, Gurgaon-122001.

XIV. That she was shocked to know about the unilateral termination of her allotment by the respondent. The complainant, even before the issuance of the termination letter dated 21.10.2016 had made payment of almost 97% of the total sale consideration amount mentioned in the payment plan to the respondent. The unilateral termination of the allotment of the complainant with respect to the said unit by the respondent is absolutely void, illegal, non-est and nullity in the eyes of law.

XV. That the complainant had requested the officials of the respondent to reinstate her allotment with respect to the said unit. She had also conveyed to the officials of the respondent that she had availed a housing loan just to ensure that payments were made in a timely manner to the respondent. It had also been communicated to the officials of the respondent that it was not easy for the complainant to make payment of the equated monthly installments (EMIs) to the bank and the same was proving to be extremely difficult for her.

XVI. That the officials of the respondent refused to reinstate the allotment of the complainant pertaining to the said unit as the same had already been sold to another allottee. However, the officials of the respondent conveyed to the complainant that they would be willing to offer an entirely different unit to the complainant only after execution of an indemnity cum undertaking by her to the effect that she would not

seek any compensation or refund with respect to the said unit and the new apartment in question. The complainant had outright refused to agree to such a preposterous proposition and give in to the unscrupulous and illegal demands of the respondent. It is submitted that the officials of the respondent since the very beginning had dealt with the complainant in a high-handed manner and had taken advantage of its dominant position.

XVII. That the respondent has indulged in unfair trade practices. It is submitted that the respondent with the aim of selling the said unit to a third party at a much higher price had decided to unilaterally and illegally terminate the allotment of the complainant and forfeit a large portion of the consideration amount paid by her to the respondent. The respondent had terminated the allotment of the complainant even after timely payment of the installments by her. The respondent has wrongfully gained at the expense of the complainant.

XVIII. That the complainant had always been ready and willing to perform her part of the contract. She always had available with her the requisite funds to pay towards the balance sale consideration of the said unit. In fact, a housing loan had specially been availed by the complainant for making payment of the sale consideration amount towards the said unit. Therefore, it is evident from the entire sequence of events that no illegality or lapse can be attributed to her.

C. Relief sought by the complainant:

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

I. Direct the respondent to refund the entire amount paid by the complainant to the respondent towards the said unit along with interest @ 9.30% per annum from the date of each payment till the date of filing of this complaint.

D. Reply by the respondent

5. 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 prior to the enactment of the Act, 2016 and the provisions laid down in the said Act cannot be enforced 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 under the provisions of the Act of 2016, vide registration no. 32 of 2017 dated 04.08.2017.

   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 records 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 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 14.2 of the buyer's agreement.

iv. That the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present 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/builder 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 project is one of the most Iconic Skyscraper in the making, a passionately designed and executed project having many firsts and is the tallest building in Haryana with highest infinity pool and club in India. The scale of the project required

a very in-depth scientific study and analysis, be it earthquake, fire, wind tunneling facade solutions, landscape management, traffic management, environment sustainability, services optimization for customer comfort and public heath as well, luxury and iconic elements that together make it a dream project for customers and the developer alike. The world's best consultants and contractors were brought together such as Thorton Tamasetti (USA) who are credited with dispensing world's best structure such as Petronas Towers (Malaysia), Taipei 101(Taiwan), Kingdom Tower Jeddah (world' tallest under construction building in Saudi Arabia and Arabtec makers of Burj Khalifa, Dubai (presently tallest in the world), Emirates palace Abu Dhabi etc.

- That compatible quality infrastructure (external) was required to be able to sustain internal infrastructure and facilities for such an iconic project requiring facilities and service for over 4000 residents and 1200 Cars which cannot be offered for possession without integration of external infrastructure for basic human life be it availability and continuity of services in terms of clean water, continued fail safe quality electricity, fire safety, movement of fire tenders, lifts, waste and sewerage processing and disposal, traffic management etc. Keeping every aspect in mind this iconic complex was conceived as a mixture of tallest high-rise towers & low-rise apartment blocks with a

bonafide hope and belief that having realized all the statutory changes and license, the government will construct and complete its part of roads and basic infrastructure facilities on time. Every customer including the complainant was well aware and was made well cautious that the respondent cannot develop external infrastructure as land acquisition for roads, sewerage, water, and electricity supply is beyond the control of them. Therefore, as an abundant precaution, the respondent company while hedging the delay risk on price offered made an honest disclosure in the application form itself in clause no. 5 of the terms and conditions.

- That the complainant is a real estate investor, and she has booked the unit in question with a view to earn quick profit in a short period. However, it appears that its calculations have gone wrong on account of severe slump in the real estate market, and she was 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 24.05.2012 allotted to the complainant unit no. C-184, tower-C, admeasuring 1621.39 sq. ft. She signed and executed the agreement to sell on 24.05.2012 and agreed to be bound by the terms contained therein.

- 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. It 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. There is no infrastructure activities/development in the surrounding area of the project-in-question. Not even a single sector road or services have been put in place by HUDA/GMDA/HSVP till date.
- That the respondent had also filed RTI application for seeking information about the status of basic services such as road, sewerage, water, and electricity. Thereafter, the respondent received reply from HSVP wherein it is clearly stated that no

external infrastructure facilities have been laid down by the concerned governmental agencies. The respondent can't be blamed in any manner on account of inaction of government authorities.

- That furthermore two High Tension (HT) cables lines were passing through the project site which were clearly shown and visible in the zoning plan dated 06.06.2011. The respondent was required to get these HT lines removed and relocate such HT Lines for the blocks/floors falling under such HT Lines. The respondent proposed the plan of shifting the overhead HT wires to underground and submitted building plan to DTCP, Haryana for approval, which was approved by the DTCP, Haryana. It is pertinent to mention that such HT Lines have been put underground in the revised Zoning Plan. The fact that two 66 KV HT lines were passing over the project land was intimated to all the allottees as well as the complainant. The Respondent had requested to M/s KEI Industries Ltd for shifting of the 66 KV S/C Gurgaon to Manesar Line from overhead to underground Revanta Project Gurgaon vide letter dated 01.10.2013. The HVPNL took more than one year in giving the approvals and commissioning of shifting of both the 66KV HT Lines. It was certified by HVPNL Manesar that the work of construction for laying of 66 KV S/C & D/C 1200 Sq. mm. XLPE Cable (Aluminium) of 66 KV S/C Gurgaon - Manesar

line and 66 KV D/C Badshahpur – Manesar line has been converted into 66 KV underground power cable in the land of the respondent/promoter project which was executed successfully by M/s KEI Industries Ltd has been completed successfully and 66 KV D/C Badshahpur – Manesar Line was commissioned on 29.03.2015.

- That respondent got the overhead wires shifted underground at its own cost and only after adopting all necessary processes and procedures and handed over the same to the HVPNL and the same was brought to the notice of District Town Planner vide letter dated 28.10.2014 requesting to apprise DGTCP, Haryana for the same. That as multiple government and regulatory agencies and their clearances were in involved/required and frequent shut down of HT supplies was involved, it took considerable time/efforts, investment and resources which falls within the ambit of the force majeure condition. The respondent has done its level best to ensure that the complex is constructed in the best interest and safety of the prospective buyer's.
- That GMDA, office of Engineer-VI, Gurugram vide letter dated 03.12.2019 has intimated to the respondent company that the land of sector dividing road 77/78 has not been acquired and sewer line has not been laid. The respondent/promoter wrote on several occasions to the Gurugram Metropolitan

development Authority (GMDA) to expedite the provisioning of the infrastructure facilities at the said project site so that possession can be handed over to the allottees. However, the authorities have paid no heed to or request till date.

- That the construction of the tower in which the unit allotted to the complainant is located is 80% complete and the photographs showing the current status of the construction of the tower in which the unit allotted to the complaint is located. It is submitted that due to the above-mentioned conditions which were beyond the reasonable control of the respondent, the construction of the project in question has not been complete 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.
- That the respondent raised payment demands from the complainants in accordance with the mutually agreed terms and conditions of allotment as well as of the payment plan and the complainants made the payment of the earnest money and part-amount of the total sale consideration and is bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, stamp duty, service tax as well as other charges payable at the applicable

stage. However, the complainant defaulted in adhering to her contractual obligations.

- Despite being aware that timely payment of the installment amount was the essence of the allotment, she remit the due amount despite reminders dated 28.06.2019, 31.08.2016, 20.07.2016, 19.09.2016, and the respondent was constrained to terminate the allotment as per the allotment/cancellation letter dated 21.10.2016.

6. 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

7. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

8. 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

9. 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.*

10. 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.

11. 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."

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case 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. Objections regarding the complainant being investor.

13. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, she is 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 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 consumer of the real estate sector. It is settled principle of interpretation that preamble

is an introduction of a statute and states main aims & 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 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 complainant is a buyer and she has paid total price of **Rs.98,53,569/-** 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;"*

14. 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 allottee(s) as the subject unit was allotted to her 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 investor is not entitled to protection of this Act also 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. Another 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."*

16. 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 <u>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</u>. 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."*

17. 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.III Objection regarding agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement

18. The agreement to sell entered into between the two side on 24.05.2012 contains a clause 14.2 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".*

19. 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 same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

20. 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."

21. 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."

22. 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 her 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.

G. Findings on the relief sought by the complainant.

G.I. Direct the respondent to refund the amount of Rs.98,53,569/- paid by the complainants to the respondent towards the said unit along with prescribed rate of interest per annum from the date of each payment till the date of filing of this complaint.

23. The complainant was allotted unit no. C-184, 18th floor, in tower/block-C, in the project "Raheja Revanta" by the respondent/builder for a total consideration of Rs.1,13,47,974/-. A buyer's agreement was executed on 24.05.2012. The possession of the unit was to be offered within 48 months from the date of the execution of the Agreement to sell plus 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. Therefore, the due date of possession comes out to be 24.11.2016 along with grace period of 6 months.

24. The respondent-builder cancelled the unit of the complainant vide letter dated 21.10.2016 after issuance of demand letters and reminders dated 28.06.2016, 20.07.2016, 31.08.2016, 19.09.2016, respectively on account of non-payment of consideration by the allottee. The complainant resigned from Jindal Steel & Power Limited on 31.03.2016. However, reminder letters dated 28.06.2016, 20.07.2016, 31.08.2016

and 19.09.2016 issued by the respondent were dispatched by the respondent at the address of Jindal Steel & Power Limited, Flat No.2, Sector 32, Gurgaon-122001. Even the office address of the aforesaid organization had been wrongly mentioned by the respondent. The correct address of the corporate office of Jindal Steel & Power Limited at the relevant point in time was Jindal Centre, Plot No.2, Sector 32, Gurgaon-122001.

25. The complainant took a plea that her address was changed and as a result of which, she didn't receive any demand letter/reminders in this regard and hence, the same should not be considered. The Authority observes that plea of complainant is not maintainable as any such request w.r.t. change of address was not made by the complainant to the respondent. Further, the payment plan was already known to the complainant which means, it was the obligation on her part also to take follow up of the same. Further, after 2016, it was in 2021 only when she approached the respondent/builder.

26. Accordingly, the complainant failed to abide by the terms of the agreement executed inter-se parties by defaulting in making payments in a time bound manner as per payment schedule. The respondent after giving reminders dated 28.06.2016, 20.07.2016, 31.08.2016, 19.09.2016 cancelled the unit of the complainant vide letter dated 21.10.2016. The respondent has given sufficient opportunities to the complainant before proceeding with termination of allotted unit. As per clauses 3.6 and 3.7 of the agreement to sell, the respondent /promoter

has a right to cancel the unit in case the allottee breached the agreement to sell executed between both the parties. Clauses 3.6 and 3.7 of the agreement to sell is reproduced as under for a ready reference:

> ***3.6 Earnest Money 3.6***
> *That the Purchaser agrees that out of the amount(s) paid by him towards the sale price, the **Seller shall treat 10% of the Sale Price as Earnest Money to ensure fulfilment by the Purchaser of the terms and conditions as contained herein**. Timely payment is the essence of the terms and conditions, of this Agreement to Sell and the Purchaser is under an obligation to pay the sale price as provided in the payment plan along with the other payments such as PLC, EDC, IDC, parking charges, club membership charges,, applicable stamp duty, registration fee, maintenance security etc, and other charges on or before the due date or as and when demanded by the Seller, as the case may be and also to perform and observe all other obligations of the Purchaser under this Agreement.*
>
> ***3.7 Failure/Delay in Payment***
> *If there is delay or default in making payment of the installments by the Purchaser, then the Purchaser shall pay to the Seller interest which shall be charged @ 18% per annum from the due date of payment of installment on monthly compounded basis. However, if the payment is not received within 90 days from the due date or in the event of non-fulfilment/breach of any of the terms and conditions of this allotment, Agreement to sell or Conveyance Deed by the Purchaser, including withdrawal of the application and/or also in the event of failure by the Purchaser to sign and return to the Seller Agreement to sell on Seller's standard format within thirty (30) days from the date of its dispatch by the Seller, the booking will be cancelled at the discretion of the Seller and earnest money paid to the Seller by the Purchaser along with interest on delayed payments and brokerage paid, if any shall stand forfeited and the Purchaser shall be left with no right, title, interest, lien or claim of whatsoever nature on the said apartment. The balance amount after above deductions shall be refundable to the Purchaser without any interest, after the said unit is allotted to some other Purchaser. The dispatch of said cheque by registered post/speed-post to the last available address with the Seller as filled up in the application form (as applicable) shall be full and final discharge of all the obligations on the part of the Seller or its employees and the Applicant (s)/intending allottee (s) will not raise any objection or claim on the Seller after this. The Seller may at its sole discretion condone the breach by the Purchaser and may revoke cancellation of the allotment provided the unit has not been re-allotted to some other person and the Purchaser agrees to pay the upto-date interest and the unearned profits (difference between his booking price and prevailing sales price) in proportion to total amount outstanding on the date of restoration and subject to such additional conditions/undertaking as may be decided by the Seller. Further if any*

Purchaser at any stage wants to withdraw his application for booking for any reason whatsoever, it shall be deemed as cancellation by the Purchaser and in that eventuality, Seller shall be entitled to forfeit earnest money paid by the Purchaser. The balance amount (after deducting the earnest money, outstanding interest for delayed payments, brokerage/ commissions etc. if any) shall be refundable to the Purchaser without any interest, after the said unit is allotted to some other intending Purchaser.

27. The respondent/promoter issued demands letter and further, issued termination/cancellation letter to the complainant. The respondent cancelled the unit of the complainant after giving adequate demands notices. Thus, the cancellation of unit is valid.

28. Now, the second issue for consideration arises as to whether after cancellation, the balance amount after deduction of earnest money of the basic sale consideration of the unit has been sent to the claimant or not. Though vide letter dated 21.10.2016, the details of amount to be returned after deductions have been given but it is pleaded by the allottee that she has not received any amount after cancellation of the unit. Even otherwise, a perusal of calculations given in letter dated 21.10.2016 shows that besides the amount deducted on account of brokerage, delayed interest, and forfeitable one, more than 15% of the paid-up amount has been deducted which is nothing but in the nature of penalty as per section 74 of the Contract Act, 1872. The issue with regard to deduction of earnest money on cancellation of a contract arose before the Hon'ble Apex court in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136,*** *and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if*

forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 ***Ramesh Malhotra VS. Emaar MGF Land Limited*** (decided on 29.06.2020) *and* ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** (decided on 12.04.2022) ***and followed in CC/2766/2017 in case titled as Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022,*** *held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money".* Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed 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."*

29. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, the respondent/builder can't retain

more than 10% of basic sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainant after deducting 10% of the basis sale consideration and return the reaming 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 termination/cancellation 21.10.2016 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the authority

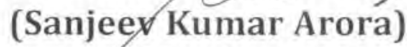
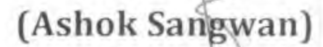
30. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

    i. The respondent is directed to refund the paid-up amount of Rs.98,53,569/- after deducting 10% as earnest money of the basic sale consideration of Rs.1,13,47,974/- with the interest at the prescribed rate i.e., 10.70% on the balance amount, from the date of termination/cancellation i.e., 21.10.2016 till date of 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.

31. Complaint stands disposed of.

32. File be consigned to registry.

(Sanjeev Kumar Arora) Member

(Ashok Sangwan) Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 30.05.2023