BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: **2685 of 2021**
Date of complaint: **22.07.2021**
Date of order: **05.05.2023**

1. Mrs. Juhi Basoya
2. Mr. Ashok Basoya

Both RR/o: - House no. 138, Espace Nirvana Country, Sector- 50, Gurugram **Complainants**

Versus

M/s Tata Housing Development Company Limited.
Regd. office: Ground Floor -3, Naurang House, 21, KG Marg, New Delhi- 110001 **Respondent**

CORAM:
Shri Sanjeev Kumar Arora **Member**

APPEARANCE:
Sh. Vishesh Garg (Advocate) Complainants
Sh. Arun Yadav (Advocate) Respondent

ORDER

1. This complaint 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 there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project details

2. The particulars of unit, 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	Tata Primanti, Sector- 72, Gurugram
2.	Nature of the project	Residential group housing colony
3.	RERA registered/not registered	Registered vide no. 98 of 2017 dated 28.08.2017
4.	RERA registration valid up to	30.06.2020
5.	Unit no.	EF27-C, 2 and 3rd floor, Tower- C (Page no. 197 of the complaint)
6.	Unit area admeasuring	6105 sq. ft.
7.	Date of allotment	24.10.2016 (Page no. 66 of the reply)
8.	Date of execution of agreement to sell	02.11.2016 (Page no. 194 of the complaint)
9.	Date of booking	N. A
10.	Possession clause	**4.2 Possession, Time, and Compensation**

		(a) THDCL shall endeavor to give possession of the said premises to the purchaser(s) on or before **December 2018** and after providing necessary infrastructure in the sector by the Government but subject to force majeure circumstances and reasons beyond the control of THDCL.
11.	Due date of possession	31.12.2018 (As mentioned in the buyer's agreement)
12.	Offer of possession	14.02.2020 (Page no. 262 of the complaint)
13.	Legal notice send by the allottee	05.08.2020 (Page no. 331 of the complaint)
14.	Total sale consideration	Rs.5,50,36,575/- (Page no. 199 of the complaint)
15.	Amount paid by the complainant	Rs.2,58,79,577/- (As alleged by the complainant at page no. 35 of the complaint)
16.	Occupation certificate /Completion certificate	17.01.2020

B. Fact of the complaint

3. The complainants have made the following submissions: -

I. That the complainants are permanent residents of Delhi and want to shift to Gurgaon by purchasing their villa/apartment and thus after seeing the advertisement of the respondent for the apartments in its

project 'Tata Primanti' they got their booking in respect of an apartment in the month of May 2011 and paid Rs.30 lacs as an advance booking amount and on their application, the respondent allotted a residential executive floor no. C on the second and third floor in the tower No. EF 9 in the said project at sector 72, village Fazilpur Jharsa, Tehsil & Distt. Gurgaon and an allotment letter were issued by it on 23.5.2011 in respect of premises no. EF 9 measuring 4500 sq. ft. and subsequently payments were also made by them to it as per its demands and a buyer agreement was executed between the parties by which the possession of the said premises was to be delivered to them 21.03.2014. But as the said project was delayed on its part or for the reasons best known to it and thus on the asking of the complainants, the respondent told that the possession will be delivered by the first quarter of 2016.

II. That due to this assurance and in anticipation, the complainants moved/shifted to Gurgaon in May 2013 along with their family in a rented premises at H. No. 357, Espace, Nirvana Country, Sector 50, Gurugram @ Rs.80,000/- per month.

III. That the possession of the said apartment was offered by the respondent in March 2016 but when they visited the site and were shocked to see the same and came to the conclusion that it was not even near to completion and quality of the work didn't match the expectations of the complainants and the commitments made by the

respondent. As a result, the complainants insisted on cancelling the booking, but then they were insisted by the respondent to shift to the project that was being constructed in phase – 2 of "Tata Primanti" and were assured by the respondent that this project in phase – 2 is better than the previous project of phase – 1 and the same would be completed in the stipulated period and agreeing upon its assurances, the complainants agreed to shift to this project of phase – 2. The complainants therefore entered into a new builder buyer agreement with the respondent, according to which, the possession was to be delivered in December 2018. The complainants continued to stay on rent as they wanted to shift in their own house.

IV. That the complainants shifted to Gurgaon from Delhi since May 2013 to Gurgaon for a monthly rent of Rs.80,000/- and subsequently shifted to H. No. 210, Espace, Nirvana Country, Sector 50, Gurgaon since 2015 and now residing at H. No. 138, Espace, Nirvana Country, Sector 50, Gurgaon on a monthly rent of Rs.68,000/- since January 2019 and thus they have incurred amount of more than Rs.67 lacs on account of monthly rent on these three premises since May 2013 till date.

V. That as per the builder buyer's agreement dated 02.11.2016 executed between the parties, the respondent in respect of the executive floor no. EF 27/C admeasuring 6105 sq. ft. situated on 2nd and 3rd floor of the building no. EF 27. That agreement was executed in accordance

with the application form dated 09.04.2016 which was inclusive of 3 parking bays and the basic consideration amount as per agreement was Rs.5,50,36,575/- and it went to Rs.5,76,31,200/- after all the charges.

VI. That the booking date was considered to be 21.10.2016 and the application money was the total amount paid for the previous apartment that was EF 9 and the total amount paid by that day was Rs.2,58,79,577/-.

VII. That as per clause 4.2 of the agreement, the possession of the apartment was to be delivered by it to them upto December 2018 which was not done. But on 14.02. 2020, an offer of possession for the apartment was finally made by the respondent which was already delayed by 13 months. The respondent demanded full and final payment from the complainants and offered delay compensation as per its calculations which were wrong and illegal and also in the said demand, EDC and GST changes were mentioned. The due date for the payments was 14.03.2020. The balance amount was to be financed by the bank, therefore, upon the demand of balance payment by it, they approached the bank for release of the payment. When the bankers visited the site, they decided that a lot of work was pending and consequently the bank didn't release the payment. Henceforth, they decided to visit the site and were astonished and disappointed to see the site as too much work was pending and it was not at all at

the stage where possession could be given, let alone inhabitation. The complainants decided to have a meeting, and in that meeting they were given assurance that the work will be completed on urgent basis, but even after two more meetings, the work seemed to be pending.

VIII. That the complainant no. 1 Juhi Basoya sent a mail to the respondent on 11.03.2020. Ms. Shalini Dudeja, its authorized signatory, replied that the bankers will have to coordinate with Mr. Vikas. Thereafter another mail was received by the complainants from Ms. Shalini Dudeja on 12.06.2020 informing that the inspection of the apartment was scheduled for 15.06.2020. The complainant no. 2, Mr. Ashok Basoya, replied and requested the meeting to be scheduled for 16.06.2020 as he was not available for the said date. Since there was no reply from its side, Ashok Basoya again sent a mail on 16.06.2020 to request the postponement of the meeting to 18.06.2020, which was accepted by Ms. Shalini Dudeja on the same day and the meeting was then scheduled for 18.06.2020.

IX. That on 18.06.2020, they visited the site, but nobody represented the respondent on that day and the complainant left and he was disappointed after looking at the condition of the site. He mailed in disappointment, on the same date, to Ms. Shalini Dudeja that even after fixing the appointment through mail and filling of the required form, and after the confirmation on the mail, no one was present on

the site to meet them, and the condition of the site was awful. The pictures of the site were attached with the said mail. On 25.06.2020, they received a mail from Ms. Shalini Dudeja, in which all the pending work was mentioned, and it was written in the mail that the work will be finalized on urgent basis and the handover of the apartment will be made in 15 – 17 days and demanded the balance payment again.

X. That on 01.07.2020, they again sent a mail informing that the bankers didn't agree to the respondent terms and conditions have again refused to release the payment. They asked for another meeting and mentioned that higher authorities should be present at the site so that a final decision could be made. A reply was received on the same day informing that meeting was scheduled for 06.07.2020 with Mr. Bibhash Chakravarty at the respondent regional office at Gurugram.

XI. That on 03.07.2020, the complainants mailed that they weren't available on 06.07.2020 so the meeting should be postponed to 07.07.2020. But a reply was received informing that the concerned person will not be available on that day and agreeing to this, complainants replied on 04.07.2020 and asked for the meeting to be scheduled on 08.07.2020. This continued and the last visit made by them to the site was on 26.07.2020 whereupon after seeing the actual positions and he took various photographs of the spot including the premises in question which clearly show that the major work regarding completion of the washrooms, glass in the railings, main

doors leading to balconies, tile works, stone works, wooden as well as kitchen cabinets and many more work were still left to be done and in no way the premises in question could be habitable for the complainants along with their other family members. Even otherwise, the whole of the colony is still unoccupied and looks like a dessert. Even there was no gatemen or security personnel in the vicinity and when they tried to contact the respondent officials about the actual position and work of the premises in question, but none has attended them and thus they have opted to withdraw with the present booking and to ask for the refund of their amount which they have already paid to the respondent.

XII. That all of a sudden the notice under reply sent by the respondent to the complainants dated 27.07.2020 received on 29.07.2020 whereby they were asked to clear the outstanding amount within 15 days and the said notice/letter has been described as last & final reminder for the payment and the same has been issued in reference with the earlier demand letter on 14.02.2020 and subsequent reminders 22.5.2020 & 29.6.2020 which were already duly replied by them showing the feasibility of the premises in question.

XIII. Thereafter a notice dated 31.8.2020 has been served upon them by the respondent through its counsel on false, frivolous and baseless assertions by which they were asked to pay Rs.3,34,57,779/- more to the respondent in respect of the premises in question in spite of the

fact that Rs.2,58,79,577/- have already been paid by them and the financial institution has denied to finance the project in question due to its non-completion of the project detailed above and also on account of its prevailing market price which is much less than the booking cost. Even otherwise, they have made 50% amount of the cost of the premises in question to the respondent since its inception i.e., 2011 onwards and the same was to handover to them in the year 2016 and subsequently in December 2018 when the apartment buyer's agreement dated 02.11.2016 was executed between the parties but the respondent has failed to complete the project in question and to deliver its possession and it is a settled law that non-delivery of possession of the premises in question, the complainants can't be made to wait for unreasonably long time and thus it is a fit case for the refund.

C. Relief sought by the complainants:

4. The complainants sought following relief(s):

I. Direct the respondent to refund an amount of Rs.2,58,79,577/- along with interest @ 18% p.a. w.e.f. May 2011 till date along with Rs.67,00,000/- along with interest @ 18% p.a. from the respondent to the complainants after the cancellation of the unit in question along with compensation.

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 has filed an application for rejection of complaint on the ground of jurisdiction along with reply. The respondent has contested the complaint on the following grounds.

   i. The complaint filed by the complainants is not maintainable and the Haryana Real Estate Regulatory Authority, Gurugram, Haryana has no jurisdiction whatsoever to entertain the present complaint. According to the respondent, the jurisdiction to entertain the complaints pertaining to refund, possession, compensation, and interest i.e., prescribed under sections 12, 14, 18 and section 19 of the Act lies with the adjudicating officer under sections 31 and 71 read with rule 29 of the rules.

   ii. In the present case, the complaint pertains to the alleged delay in delivery of possession for which the complainants have filed the present complaint and is seeking the relief of possession, interest and compensation u/s 18 of the said Act. Therefore, even though the project of the respondent i.e., "Primanti Phase- 2" Sector-72, Gurgaon is covered under the definition of "ongoing projects" and registered with this authority, the complaint, if any, is still required to be filed before the adjudicating officer under rule 29 of the said rules and not

before this authority under rule 28 as this authority has no jurisdiction whatsoever to entertain such complaint and such complaint is liable to be rejected.

iii. That, without prejudice to the above, in terms of the said rules, they have filed the amended complaint under the amended rule – 29 (but not in the Amended 'form CAO') and are seeking the relief of refund, interest and compensation under section 18 of the Act of 2016. The present complaint is not in the amended 'Form CRA', therefore the present complaint is required to be rejected on this ground alone.

iv. That statement of objects and reasons as well as the preamble of the said Act clearly state that the RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of "Consumer" as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. The complainants are investors and not consumers and nowhere in the present complaint have the complainants pleaded as to how the complainants are consumers as defined in the Consumer Protection Act, 1986 qua the respondent no. 1. The complainants, who are already the owner of House no. B-702, Gayatri Apartments, Plot no. 27, Sector-10, Dwarka, New Delhi- 110075 (address mentioned in the apartment buyer agreement) and 225, are investors, who never had any intention

to buy the apartment for their own personal use and have now filed the present complaint on false and frivolous grounds.

v. That the complainants are defaulters, having deliberately failed to make the payments of installments within the time prescribed, as detailed in the statement of account attached with the notice of possession dated 14.02.2020, and subsequent reminders dated 22.05.2020, 29.06.2020, 27.07.2020, legal notice dated 31.08.2020 and reply dated 25.01.2021, to the complainant's legal notice which resulted in outstanding dues of Rs.3,23,15,747/- (after adjustment of (a) Rs.16,07,261/- towards delay possession charges @ 10.20%, for a delay period of approximately 223 days; (b) EDC/IDC adjustment of Rs.5,73,870/- ; and (c) GST set off of Rs.2,56,410/-) as reflected in the statement of account sent with the notice of possession and also delay possession charges/interest as reflected in the current statement of account dated 10.08.2021. in addition to the above, they were liable to pay the stamp duty, registration, and other ancillary charges, as reflected in the statement of account sent with the notice for possession.

vi. That from the date of booking till the date of offer of possession i.e., 14.02.2020, they have never ever raised any issue whatsoever and have now concocted a false story and raised false and frivolous issues and have filed the present complaint on false, frivolous and concocted grounds. This conduct of the complainants clearly indicates that the

complainants are mere speculators having invested with a view to earn quick profit and due to slowdown in the market conditions, they have filed the present complaint on false, frivolous and concocted grounds.

vii. Despite several adversities and hurdles, the respondent has continued with the construction of the project even though as per the registration certificate, the due date of completion was 30.06.2020, however, the occupation certificate of the unit in question has already been obtained on 17.01.2020, and the possession has already been offered vide notice of possession dated 14.02.2020. However, the complainants were only short term and speculative investors and therefore, they were not interested in taking over the possession of the said apartment. It is apparent that the complainants had the motive and intention to make quick profit from sale of the said apartment through the process of allotment. Having failed to resell the said apartment due to general recession and because of slump in the real estate market, the complainants have developed an intention to raise false and frivolous issues to engage the respondents in unnecessary, protracted and frivolous litigation. The alleged grievance of the complainants has the origin and motive in sluggish real estate market.

viii. That this authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement signed by the complainants

/allotment offered to him. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of said Act or said Rules, has been executed between the complainants and the respondent. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the apartment buyer agreement dated 02.11.2016, executed much prior to coming into force of said Act or said rules. The adjudication of the complaint for interest and compensation, as provided under sections 12, 14, 18 and 19 of said Act, has to be in reference to the agreement for sale executed in terms of said Act and said Rules and no other agreement. This submission of the respondent *inter alia,* finds support from reading of the provisions of the said Act and the said Rules. Thus, in view of the submissions made above, no relief can be granted to the complainants.

ix. That section 19(3) of the Act provides that the allottee shall be entitled to claim the possession of the apartment, plot or building, as the case may be, as per the declaration given by the promoter under section 4(2)(l)(C). The entitlement to claim the possession or refund would only arise once the possession has not been handed over as per the declaration given by the promoter under section 4(2)(l)(C). In the present case, the respondent had made a declaration in terms of section 4(2)(l)(C) that it would complete the project by 30.06.2020, however, the occupation certificate for the unit in question has already

been obtained on 17.01.2020 and the possession has already been offered vide notice of possession dated 14.02.2020. Thus, no cause of action can be said to have arisen to the complainants in any event to claim possession or refund, along with interest and compensation, as sought to be claimed by them.

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 those undisputed documents as well as written submissions made by the parties.

E. Jurisdiction of the authority

8. The respondent has filed an application that the authority has no jurisdiction to entertain the present complaint. The application of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as 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, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District.

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

E. II Subject matter jurisdiction

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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 complainants 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. 2020-2021 (1) RCR (C), 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 handing over possession as per declaration given under section 4(2)(l)(C) of RERA Act.

14. The counsel for the respondent has stated that the entitlement to claim possession or refund would arise once the possession has not been handed over as per declaration given by the promoter under section 4(2)(l)(C). Therefore, the next question of determination is whether the

respondent is entitled to avail the time given to it by the authority at the time of registering the project under section 3 & 4 of the Act.

15. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

16. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

> *Section 4: - Application for registration of real estate projects*
>
> *(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —.....*
>
> *(l): -a declaration, supported by an affidavit, which shall be signed by the promoter, or any person authorised by the promoter, stating: — .....*
>
> *(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."*

17. The time period for handing over the possession is committed by the builder as per the relevant clause of apartment buyer agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the

promoter to hand over the possession by the due date as per the apartment buyer agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors***. and has observed 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..."*

F. II Objections regarding the complainant being investor.

18. The respondent has taken a stand that the complainants are the investors and not consumers, therefore they are 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 the 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 complainants is buyer, and they have paid total amount of **Rs.2,58,79,577/-**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;"*

19. 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 complainants, it is crystal clear that the complainants is allottee(s) 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 is not entitled to protection of this Act also stands rejected.

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

20. 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."*

21. 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</u>*

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."

22. 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.

G. Findings on the relief sought by the complainants

G. I Direct the respondent to refund an amount of Rs.2,58,79,577/- along with interest @ 18% p.a. w.e.f. May 2011 till date along with Rs.67,00,000/- along with interest @ 18% p.a. from the respondent to the complainants after the cancellation of the unit in question along with compensation.

23. The complainants were allotted a unit bearing no. EF-9, 2 and 3rd floor, Tower- C, in the project of the respondent detailed above on 23.05.2011 for a total sale consideration of Rs.3,51,00,000/-. The builder buyer's agreement was executed in this regard on 30.01.2011. Thereafter, the respondent approaches the complainants who insisted them to shift in the

other project of the respondent that was being constructed in phase – 2 of "Tata Primanti" and further, assured that this project in phase – 2 is better than the previous project in phase – 1 and the same would be completed in the stipulated period. The complainants agreed to shift to this project of phase – 2. Thereafter, they entered into a new builder buyer agreement with the respondent, according to which, the possession was to be delivered by December 2018. As per the builder buyer's agreement dated 02.11.2016 executed between the parties, the respondent allotted executive floor bearing no. EF 27/C admeasuring 6105 sq. ft. situated on 2nd and 3rd floor of building no. EF 27. That agreement was executed in accordance with the application form dated 09.04.2016 which was inclusive of 3 parking bays for basic consideration of Rs.5,50,36,575/- as per agreement and it went to Rs.5,76,31,200/- after all the charges. Thereafter, occupation certificate of the unit was obtained on 17.01.2020, and the possession was offered vide notice of possession dated 14.02.2020 along with demand seeking outstanding dues. However, the complainants have approached the authority on 22.07.2021 i.e., after offer of possession (14.02.2020) and the occupation certificate was obtained from the competent authority (17.01.2020), seeking refund of the paid-up amount against the allotted unit.

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

therein. The due date of possession as per buyer's agreement was 02.11.2016 and the allottees in this case have filed this complaint on 22.07.2021 after possession of the unit was offered to them after obtaining occupation certificate by the promoter. The OC was received on 17.01.2020 whereas the offer of possession was made on 14.02.2020. The complainants vide legal notice dated 05.08.2020 requested the respondent that they wish to withdraw from the project and made a request for refund of the paid-up amount on its failure to give possession of the allotted unit in accordance with the terms of buyer's agreement. On failure of respondent to refund the same, they have filed this complaint seeking refund.

25. The right under section 18(1)/19(4) accrues to the allottees on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottees have not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to them, it impliedly means that the allottees tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the

handing over of possession and allottees interest for the money they have paid to the promoter is protected accordingly and the same was upheld by in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022; that: -

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

26. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. But

the complainant/allottees failed to exercise the right although it is unqualified one. The complainants have to demand and make their intention clear that they wish to withdraw from the project. Rather, tacitly wished to continue with the project and thus made themselves entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottees invest in the project for obtaining the allotted unit and on delay in completion of the project and when the unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

27. This view is supported by the judgement of Hon'ble Supreme Court of India in case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Civil appeal no. 5785 of 2019)*** wherein the Hon'ble Apex court took a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate and also in consonance with the judgement of Hon'ble Supreme Court of India in case of ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors (Supra).***

28. The above said unit was allotted to complainants on 24.10.2016. There is a delay in handing over the possession as due date of possession was 31.12.2018 whereas, the offer of possession was made on 14.02.2020 and thus, becomes a case to grant delay possession charges. The authority observes that interest of every month of delay at the prescribed rate of interest be granted to the complainant/allottees in case the delay in handing over of physical possession of the allotted unit. But now, the peculiar situation is that the complainants want to surrender the unit and want refund. Keeping in view of the aforesaid circumstances that the respondent-builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, and judgment of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.202,*** it is concluded that if the complainant/allottees still want to withdraw from the project, the paid-up amount shall be refunded after deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018.

29. The Hon'ble Apex court of the land in cases of ***Maula Bux Vs. Union of India (1973) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136***, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as ***Jayant Singhal and Anr. Vs. M/s M3M India Ltd.*** decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of

contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted 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. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides 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.*

30. Further, clause 3(VI) of the buyer's agreement, talks about cancellation /withdraw by allottee. The relevant part of the clause is reproduced as under: -

3.6 Failure/Delay in Payment

*The Purchaser(s) agrees that out of the amount(s) paid/payable by him/her/**them towards the Sale Consideration, 15% of the Sales Price shall form as Earnest Money to ensure fulfilment by the Purchaser(s) of the terms and conditions, as contained** herein. Time is the essence of the terms and conditions mentioned herein and with respect to the Purchaser(s) obligations to pay the Sale Consideration as provided in the Payment Plan along with other payments such as, applicable stamp duty, registration fee and other charges on or before the due date or as and when demanded by THOCL, as the case may be and also to perform or observe all the other obligations of the Purchaser(s) under this Agreement. The Purchaser(s) hereby also covenant's to observe and perform all the terms and conditions of the booking, and/or allotment and/or this Agreement and/or Conveyance Deed, to keep THDCL and its agents and representatives, estates and effects indemnified and harmless against the said payments and observance and performance of the said terms and conditions and also against any loss or damages that THDCL may suffer as a result of non- payment, non-observance, or non-performance of the terms and conditions mentioned herein and/or the Conveyance Deed (when executed) by the Purchaser(s)..*

31. It is evident from the above mentions facts that the complainants paid a sum of Rs.2,58,79,577/- against basic sale consideration of Rs.5,50,36,575/-of the unit allotted. There is nothing on the record to show that the respondent acted on the representations of the complainant. Though the amount paid by the complainants against the allotted unit is about 47% of the basic sale consideration but the respondent/promoter was bound to act and respond to the pleas for surrender/withdrawal and refund of the paid-up amount.

32. 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 refund the same in view of the agreement to sell for allotment 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 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/filing of complaint i.e., 09.01.2020 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

- **Compensation and cost of litigation**

The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.*** (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled to claim compensation 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 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.

H. Directions of the authority

33. 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.2,58,79,577/- after deducting 10% as earnest money of the basic sale consideration of Rs.5,50,36,575/- with interest at the prescribed rate i.e., 10.70% on the balance amount, from the date of surrender/legal notice i.e., 05.08.2020 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.

34. Complaint stands disposed of.

35. File be consigned to registry.

Dated: 05.05.2023

(Sanjeev Kumar Arora)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram