(corrected vide order dated 18-05-2022)

HARERA
GURUGRAM

Complaint No. 1646 of 2021

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1646 of 2021
First date of hearing: 22.04.2021
Date of decision : 12.07.2022

1. Meeta Vij
2. Shuchita Vij
   Both RR/o: - A-1/20, 3rd floor, Safdarjung Enclave, New Delhi- 110029 **Complainants**

Versus

1. M/s Raheja Developers Limited.
   Regd. office: W4D, 204/5, Keshav Kunj, Western Avenue, Sainik Farma, New Delhi- 110062
2. ICICI Bank Limited
   Regd. Office at: - Landmark, Race Curse Circle, Vadodara 390007, Green Park New Delhi
   Also, At: - ICICI Bank Tower, Bandra- Kurla Complex, Mumbai- 400051 **Respondents**

CORAM:
Dr. K.K Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Sh. Geetansh Nagpal Advocate for the complainants
Sh. Udayan Yadav
Sh. Yash Sharma A.R of the respondent no. 1
Sh. Dharmender Sehrawat Advocate for the respondent no. 2

ORDER

1. The present complaint dated 26.03.2021 has been filed by the complainants/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 provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

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.	Date of approval of building plans (revised)	24.04.2017 [As per information obtained by the planning branch]

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7.	Date of environment clearances (revised)	31.07.2017 [As per information obtained by the planning branch]
8.	RERA Registered/ not registered	Registered vide no. 32 of 2017 dated 04.08.2017
9.	RERA registration valid up to	31.07.2022 5 Years from the date of revised Environment Clearance
10.	Unit no.	C-105, 10th floor, Tower/block- C (Page no. 32 of the complaint)
11.	Unit area admeasuring	2813.310 sq. ft. (Page no. 32 of the complaint)
12.	Allotment letter	Not annexed
13.	Date of execution of agreement to sell	12.09.2014 (Page no. 28 of the complaint)
14.	Date of execution of memorandum of understanding	16.09.2014 (Page no. 28 of the complaint)
15.	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***

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		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. 42 of the complaint)
16.	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

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		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 September 2018. As per agreement to sell, the construction of the project is to be completed by September 2018 which is not completed till date. **Accordingly, in the present case the grace period of 6 months is allowed.**
17.	Due date of possession	12.03.2019 (Note: - 48 months from the date of agreement to sell i.e., 12.09.2014 plus six months grace period)
18.	Basic sale consideration as per article 3.1 of the agreement for sale dated 12.09.204 page 32 of the complaint.	Rs.2,21,54,816/-
19.	Total sale consideration as per applicant ledger dated 28.12.2018 page no. 20 of the complaint	Rs.2,53,13,946/-
20.	Amount paid by the complainant	~~Rs.2,35,54,591/-~~ 2,39,69,174/- [As per applicant ledger dated 28.12.2018 page no. 20 of the complaint]
21.	Payment plan	Flexi Payment plan

		[As per applicant ledger dated 28.12.2018 page no. 20 of the complaint]
22.	Occupation certificate /Completion certificate	Not received
23.	Offer of possession	Not offered
24.	Delay in handing over the possession till date of filing complaint i.e., 26.03.2021	2 years and 14 days

B. Fact of the complaint

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

I. That the respondent/promoter advertised itself as a very ethical business group that lives and grows on its commitments in delivering housing and other projects as per promised quality standards and agreed timelines. The respondent while launching and advertising any new housing project always commit and promise to the targeted consumer that their dream home would be completed and delivered to them within the time agreed initially in the agreement.

II. That the respondent no. 2 i.e., "ICICI Bank" through its home search team is arrayed as respondent no. 2 and dealing in offering inventories of flats/units to prospective home buyers including in

NCR. The company also facilitates loans for the identified units to home buyers. ICICI.

III. That the respondent/promoter is very well aware of the fact that in today's scenario looking at the status of the construction of housing projects in India, especially in NCR, the key factor to sell any dwelling unit is the delivery of completed house within the agreed timeline and that is the prime factor which a consumer would see while purchasing his/her dream home. Respondent, therefore used this tool, which is directly connected to emotions of consumers, in its marketing plan and always represented and warranted to the consumers that their dream home would be delivered within the agreed timelines having engaged Arba Tec of Burj Khalifa fame, of Dubai and thus consumer is receiving better and reliable commitments.

IV. The complainants have submitted that relying upon the promoter, explained by respondent no. 2 also, they applied in housing project "Raheja Revanta" and were allotted apartment no. C-105, 10th floor, Tower- C, in Surya Tower having a carpet area of approximately 2813.31sq. ft. with an exclusive right to use, located in Village- Shikolpur, Sector-78, Tehsil & District Gurugram, together with the proportionate undivided, unidentified, impartible interest in the land underneath the said housing complex , with the right to use the common areas and facilities in the said housing complex vide apartment buyers' agreement dated

14.09.2014. It is further submitted that the sale price of the apartment was of Rs.2,50,19,423/- including taxes, payable by the apartment allotee/complainant. The complainants made a payment of Rs.2,39,69,174/- as per the ledger account issued by the builder dated 27.10.2020. and paid 95% costs by July,2016 and the same was being enjoyed by the builder under a highly self favourably loaded construction linked plan. It is vital to state that the construction linked plan was mischievously designed by the builder when the realty of the construction is way apart from completion in the next 2 years also.

V. That as per the apartment buyer's agreement clause 4.2, the respondent no. 1 had promised the complainants to handover the physical possession of the dwelling apartment/unit by with 48 months from the date of builder buyer agreement. The same expired in August 2018. It is further submitted that the respondent has apparently made the complainants part away with hard-earned money along with burdening them with a defunct loan account on the basis of false promises and admittedly, the respondent has already received over 95% of the amount as per the construction linked payment schedule. On the contrary, the respondent no. 1 has failed on all its commitments and promises affirmed on various agreements.

VI. That the respondent entered into a memorandum of understanding dated 16.09.2020 "MoU" with the complainants

facilitating an arrangement of Pre-EMI scheme wherein the buyers were not required to pay any EMI/interest till the date of possession. However, the builder has admittedly defaulted in the same and ICICI Bank has been intimidating, freezing accounts of the complainants, leading to loss in CIBIL score, destroying the financial score for further financial and other activities and has been finishing the complainants.

VII. Further, as per clause 8 of the MoU, the buyer was at the liberty of terminating the builder buyer agreement at the end of 3 years and was subject to an assured premium of Rs.1400/- pr. sq. ft along with the refund of the entire amounts which has been invested in the said unit. The peculiarity of the present case comes from the terms & conditions of the MoU.

VIII. At this juncture, it is imperative to highlight that the builder has approached the complainant, at numerous occasions, to settle the issue of buy-back to renegotiate the buyback offer but which was a mischievous attempt by it again which makes it amply that the builder has consciously entered into the buy-back scheme with the complainants and the same cannot be denied or disputes in the present day.

IX. The complainants have submitted that as per clause 6 of the MoU, the builder admits to the special scheme and arrangement of specific loan for them which brings out the nexus between the respondents. Accordingly, the builder was required to pay Pre-EMI

interest upto 36 months from date of execution of the builder buyer agreement and thereafter, the respondent no. 1 was to continue the payment of Pre-EMI as per the terms and agreement of buy-back MoU, which were not paid. The loan account statement clearly sets out the defaults on part of the builder in adhering to the agreement.

X. The respondent has been cheated and played fraud upon the complainants by inducing them in booking the apartment in the so-called project Raheja Revanta at Village-Shilokpur, Sector- 78, Gurugram and inducing them to secure a loan from ICICI bank which is at their cost. It can be observed that the builder has cautiously induced the complainants for a loan and there directed that money to his own account, enjoyed the entire amount at a low cost in connivance with respondent no. 2 and refused to provide the unit or the buy-back scheme which was mutually agreed.

XI. That the complainants several times requested the respondents telephonically as well as personal visits at the office for the regularization of the ICICI loan account on account of default in pre-EMI and met with the officials of respondents in this regard and completed all the requisite formalities as required by the respondents but despite that the officials of respondent company did not give any satisfactory reply to the complainants and the lingered the on one pretext or the other.

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XII. The complainants have further submitted that the compelling actions of the builder has coerced them to seek refund of the payment made towards the purchase of the unit along with financial loan from ICICI bank and all applicable charges, costs, and interest.

XIII. That the builder by providing bad planning false and fabricated advertisement, thereby, concealing true and material facts about the status of project and mandatory regulatory compliances, wrongfully induced the complainants to deposit their hard-earned money in their so-called upcoming project, with sole dishonest intention to cheat them and cause wrongful loss to them and in this process the respondents gained wrongfully, which is purely a criminal act. That the respondent has also played a fraud upon ICICI bank which was facilitating the loan amount in favour of the buyer and taking untimely payments without reaching the right stage of progress concealing lot in the milestone of construction.

C. Relief sought by the complainants:

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

i. To direct the builder to comply with the provisions of the builder buyer agreement and the MoU.

ii. To direct the builder to pay the premium of Rs.1400/- sq. ft. to the complainant along with interests, costs, in view of the provisions of the MoU and the agreement to sell.

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iii. To direct the builder to clear all dues as per the agreements including any interest accrued due to default on part of the builder.

iv. To direct the builder to provide refund of the entire amount i.e., Rs.2,39,69,174/- received over the period of time as part of the consideration towards the flat along with applicable compound interest rates in accordance with the agreement to sell.

v. To hold the builder and respondent no. 2 guilty of non-compliance of builder buyer agreement, MoU, and the subvention scheme.

5. On the date of hearing, the authority explained to the respondent/promoter on the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

6. Though, respondent no. 2, put in appearance through its counsel but did not file any written reply despite ample opportunity given in this regard.

D. Reply by the respondent no. 1

7. The respondent no. 1 contested the complaint on the following grounds: -

i. That the complainants booked a flat no. C- 105, admeasuring 2813.31 sq. ft. in 'Raheja Revanta', Sector 78, Gurugram, Haryana vide application form dated 03.09.2014. The respondent vide letter dated 12.09.2014 issued provisional allotment letter to the

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complainant. Further, the provisions of the Act of 2016 are not applicable to the present and the submissions based on the said provisions are made only with the intention to mislead this authority. Nevertheless, it is clarified to avoid complications at the later stage of the case that the complainants booked unit C-105, in tower C in "Raheja Revanta" on 03.09.14. It is submitted that the agreement to sell was executed prior to Act of 2016, and hence, the parties are bound by the terms of the agreement. The said project is registered under the provision of this Act vide registration no. 32 of 2017 dated 04.08.2017.

ii. That the respondent/promoter vide letter dated 12.09.2014 issued a provisional allotment letter to the complainants. The agreement to sell with respect to the said allotted floor was done prior to the enactment of the Act, 2016 and the provisions laid down in the said act cannot be applied retrospectively.

iii. That the construction of the tower in which the unit allotted to the complainants is located is 80% complete and the respondent shall hand over the possession of the same to them after its completion subject to their making the payment of the due installments amount and on availability of infrastructure facilities such as sector road and laying providing basic external infrastructure such as water, sewer, electricity etc. as per terms of the application and agreement to sell.

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iv. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 14.2 of the buyer's agreement.

v. That the complainants have not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The complaints have been filed 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

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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 complainants 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 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 are 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.
- That despite the respondent fulfilling all its obligations as per the provisions laid down by law, the government agencies have

failed miserably to provide essential basic infrastructure facilities such as roads, sewerage line, water, and electricity supply in the sector where the said project is being developed. The development of roads, sewerage, laying down of water and electricity supply lines has to be undertaken by the concerned governmental authorities and is not within the power and control of the respondent. The respondent cannot be held liable on account of non-performance by the concerned governmental authorities. The respondent company has even paid all the requisite amounts including the External Development Charges (EDC) to the concerned authorities. However, yet, necessary infrastructure facilities like 60-meter sector roads including 24-meter-wide road connectivity, water and sewage which were supposed to be developed by HUDA parallelly have not been developed. The picture/google images of the project site when the project was launched along with the latest pictures of the project site and the area surrounding it shows no development of sector roads on sector 78, Gurugram. 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,

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sewerage, water, and electricity. the copy of the said RTI application dated 22.05.2018. 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

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Manesar Line from overhead to underground 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's 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.

- The respondent has done its level best to ensure that the complex is constructed in the best interest and safety of the prospective buyers. It is pertinent to mention that during such time when all such procedure and process were taking place, concurrently some amendments took place in Haryana Fire Safety Act, 2009 due to which it was further technically advised and mandated to have additional service floors/fire refuge area in the high-rise tower as additional safety norms, to which the respondent complied in letter and spirit. After

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revision of zoning plan, the respondent applied for revision of building plan incorporating all the advised changes and left-over area due to overhead HT wires which was to be built and shown as to be shower and presented in first /original building and marketing plan. The application for revision of building plans was made vide application dated 14.01.2016 to DTCP, Haryana as per initiated committed project layout and design only. Pursuant to such application the DTCP, Haryana was pleased to revise the building plan in conformity with revised Zoning Plan.

- 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 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.

8. 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

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

E.I Territorial jurisdiction

10. 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

11. 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.

12. 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.

13. 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."

14. 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 no. 1

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

15. 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 will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

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.II 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 12.09.2014 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 complainants are well within their 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 builder to comply to the provisions of the builder buyer agreement and the MOU.

G. II Hold the builder and the respondent no. 2 i.e., financial institution guilty of non-compliance of the builder buyer agreement and MOU and the subvention scheme.

23. A buyer's agreement is a vital document that defines rights and obligation of the parties. Thus, it is of utmost important that the agreement must be drafted fairly. Whereas only specific provisions are to be declared void on account of being arbitrary, unjust, or unfair. In present case, the complainants have not mentioned any one-sided clause particularly in the complaint that to be declared unfair and unilateral.

G.III Direct the builder to pay the premium of Rs.1400/- sq. ft. to the complainant along with interest, costs, in view of the provisions of MOU and the agreement to sell, in toto;

G.IV. Direct the builder to clear all dues as per the agreements including interest accrued due to default on part of the builder.

G.V. Direct the builder to provide refund of the entire amount i.e., Rs.2,39,69,174/-, received over the period of time as part of the consideration towards the flat along with applicable compound interest rates in accordance with the agreement to sell

24. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

> *"**Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-*
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
> ***he shall be liable on demand to the allottees**, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, **to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed** in this behalf including compensation in the manner as provided under this Act:*
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*
> *(Emphasis supplied)*

25. As per clause 4.2 of the agreement to sell dated 12.09.2014 provides for handing over of possession and is reproduced below:

> **4.2 Possession Time and Compensation**
> *That the Seller shall sincerely endeavor to give possession of the Unit to the purchaser **within** 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....."*

26. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in making payment as per the plan may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its

meaning. The incorporation of such a clause in the agreement to sell by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such a mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

27. **Due date of handing over possession and admissibility of grace period:** As per clause 4.2 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 48 months plus 6 months of grace period, in case the construction is not complete within the time frame specified. It is a matter of fact that the respondent has not completed the project in which the allotted unit is situated and has not obtained the occupation certificate by September 2018. However, the fact cannot be ignored that there were circumstances beyond the control of the respondent which led to delay incompletion of the project. Accordingly, in the present case the grace period of 6 months is allowed.

28. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the prescribed rate interest. However, the allottees intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

29. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

30. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 12.07.2022 is **7.70%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **9.70%.**

31. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule **28(1),** the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 4.2 of the agreement to sell dated form executed between the parties on 12.09.2014, the possession of the subject unit was to be delivered within a period of 48 months from the date of execution of buyer's agreement which comes out to be 12.09.2018. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over of possession is 12.03.2019.

32. Keeping in view the fact that the allottee/complainants wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the plot in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.

33. The due date of possession as per agreement for sale as mentioned in the table above is **12.03.2019** and there is delay of 2 years and 14 days on the date of filing of the complaint.

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

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

35. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs**

State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022. it was observed

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

36. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

37. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent

is established. As such, the complainants are entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @ 9.70% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the authority

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

i. The respondent/promoter is directed to refund the amount received by it from the complainants along with interest at the rate of 9.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.

ii. The respondent/promoter is further directed that the outstanding loan paid by the bank be refunded to the financial institution.

iii. The balance amount with the respondent/promoter after paying the financial institution be refunded to the complainants along with interest at the prescribed rates.

iv. 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.

39. Complaint stands disposed of.

40. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.07.2022