BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1654 of 2019
First date of hearing: 06.11.2019
Order reserved on: 15.02.2023
Order pronounced on: 24.03.2023

Mayank Bhatia, S/o Harish Bhatia,
R/o: - H. No. 1/289, Bhatia Niketan,
Patel Nagar, Saharanpur,
UttarPradesh–247001.

Complainant

Versus

1. M/s Bright Buildtech Private Limited.
Regd. Office at: - D-107, Panchsheel Enclave-1,
New Delhi-110017.
2. Golden Touch Investments,
Regd. Office at: - ML-7, Eldeco Mansionz,
Sector-48, Sohna Road, Gurugram-122001, Haryana.
3. M/s Lotus Green Developers Pvt. Ltd.
Regd. Office at: - Lotus Business Park, Level 7,
Tower-B, Plot No. 8, Sector-127, Noida Expressway,
Noida-201304(U.P).
4. Ace Mega Structures Pvt. Ltd.
Regd. Office at: - Plot no. 1B, Greater Noida Expressway,
Sector-126, Noida-201303.
Also At: - D-35, Anand Vihar, Delhi-110095.
5. HDFC Home Loans
Regd. Office at: - 1st Floor, S.C.O, Sector-14,
Gurugram, Haryana-122001.

Respondents

CORAM:
Shri Sanjeev Kumar Arora

Member

APPEARANCE:
Sh. Sangam Singh Kochar (Advocate) Complainant
Sh. Deeptanshu Jain (Advocate) Respondents

ORDER

1. The present complaint dated 25.04.2019 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made thereunder or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S.N.	Particulars	Details
1.	Name of the project	'Woodsview Residencies', sector-89-90, Gurugram
2.	Nature of project	Residential plotted colony
3.	**RERA registered/not registered**	34 of 2020 dated 16.10.2020
4.	**DTPC License no.**	59 of 2013 dated 16.07.2013
5.	Validity status	15.07.2021

6.	Name of licensee	Orris Land & Housing Pvt. Ltd. & 42 Ors.
7.	Licensed area	100.081 Acres
8.	Unit no.	B-49, first floor [As per buyer's agreement on page no. 57 of complaint]
9.	Unit measuring	1090 sq. ft. [As per buyer's agreement on page no. 57 of complaint]
10.	Date of execution of Apartment buyer's agreement	08.02.2016 (as mentioned on page no. 56 of reply)
11.	Possession clause in application form	**5. Possession** **5.1** Subject to Clause 5.2 and subject to buyers making timely payment, **the company shall endeavor to complete the construction of the building block in which the dwelling unit is situated within 36 months with a grace period of 06 months from the date of issuance of allotment letter,** provided that all amounts due and payable by the buyer has been paid to the company in timely manner. The company shall be entitled to reasonable extension of time for the possession of the dwelling unit in

		the event of any default or negligence attributable to the buyer's fulfillment of terms & conditions of this agreement.
12.	Date of allotment	29.10.2015 (as per Annexure- C2 on page no. 32 of complaint)
13.	Due date of possession	29.04.2019 (as per buyer's agreement) (grace period of 6 months is allowed being unqualified)
14.	Basic sale price	Rs.78,48,000/- (page no. 18 of complaint)
15.	Total sale consideration	82,00,457/- (as per payment plan on page no. 34 of complaint)
16.	Total amount paid by the complainant	Rs.18,08,947/- (as per clarification submitted by complainant dated 03.02.2023)
17.	Occupation certificate	Not Received
18.	Offer of possession	Not offered
19.	Surrender by the allottee	05.01.2019 [Page no. 42 of the complaint]

B. Facts of the complaint:

3. The complainant has made the following submissions: -

I. That the complainant along with a real estate broker named Mr. Manish Purwar of Golden Touch Investment (i.e. respondent

no.2) visited the township project "Woodview Residences" to be developed by M/s. Bright Buildtech Private Limited, i.e. respondent no.1 and to be marketed by M/s Lotus Greens Developers Pvt. Ltd. i.e. respondent no.3, situated in the revenue estate of village Hayatpur, Tehsil Gurgaon and Village Badha, Tehsil Manesar, District Gurgaon at Sector 89 & 90 under the master plan of Gurgaon, where he allured the complainant with special characteristics of project and other amenities. The complainant after getting convinced by the respondent no.2, moved an application dated 24-09-2015 to book a residential apartment in the above said project and also got the allotment in the said project vide letter dated 29-10-2015 of an independent floor in the plotted colony having booking id: 210219, ref no.: WR0286, unit no: B-49, first floor, plot area (approx.) 183 sq. yd., super area (approx.)1090 sq. ft.

II. That the complainant and the respondent/builder had entered into buyer's agreement dated 20.01.2016 for the purchase of the said apartment for a total sale consideration of Rs.82,00,457/-. The complainant and the bank were required to pay to the respondent as per the subvention payment plan for the said apartment.

III. That the complainant vide receipt no. 2100000737 and 2100000738, dated 29.10.2015, paid the initial booking amount

of Rs.8,36,401.70/- (which includes Rs. 8,066/- as TDS) to the respondents. Thereafter a tripartite agreement dated 14.03.2016 was executed between the complainant, builder and the Housing Development Finance Corporation Ltd. (HDFC) and wherein former two had jointly approached the HDFC for sanction of a loan of Rs.55,00,000/- against the above said apartment. The complainant had paid Rs.10,000+0.5% towards service tax to HDFC as loan processing fee respectively.

IV. That the HDFC Bank as per the said tripartite agreement, disbursed the loan amount of Rs.8,45,533/- on 22.04.2016 out of total due amount of Rs.55,00,000/- to the respondent/builder. Even at the time of disbursement of the said loan amount, the respondent/builder had not carried out the basic construction work at the site and the HDFC Bank started deducting a pre-EMI interest of around Rs.7000/- every month commencing from 01.05.2016 from the complainant's bank account. The total outstanding amount till date needs to be reimbursed by the respondent/builder to the complainant against the deductions of the said pre-EMIs is approx. Rs.2,18,015/-.

V. That the complainant further visited the project site and found that there is an exorbitant delay in the construction of said apartment and raised his grievance before the respondent no.1 to which made false promises about its early deliverance.

VI. That the complainant visited the site of the said project numerous times, but no satisfactorily explanation has been given about the final delivery of possession due to which the complainant suffered huge mental agony, torture, and harassment on the hands of the respondents.

VII. That the complainant is aggrieved by the respondents on account of non-fulfillment of an obligation under the Act of 2016 and violating the "clause 25" of the agreement dated 24.09.2015 and "Clause 5.1 of buyer's agreement" dated 20.01.2016 for not delivering the possession of the flat in the said project by the due date i.e. on 29.10.2018 (which is 36 months from the allotment dated 29.10.2015) and if the grace period of 6 months is also added in the above 36 months as per the said clause, then the due date goes to 29.04.2019. As per the said clause, the respondent/builder was unable to handover the said unit to the complainant within stipulated time. Therefore, he is claiming the refund of his amount along with the prescribed rate of interest.

VIII. That the complainant served a legal notice on 05.01.2019 to the respondent/builder to cancel the booking of the said apartment and to refund the booking amount along with the interest.

IX. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to

pay interest to the complainant, at the prescribed rate, for every month of delay.

X. That the possession is delayed for many years. Thus, on account of facing serious financial and emotional hardship on account of the delay, the complainant wishes to withdraw from the project and is seeking refund with interest as prescribed under the Act. He has complied with all the terms and conditions of the buyer's agreement, but the respondent/builder has failed to meet up with his part of the contractual obligations and thus liable for refund with interest from date of respective payment till date of realization.

C. Relief sought by the complainant:

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

I. To refund the entire amount of Rs.18,08,947/- (Rupees Eighteen Lakh Eight Thousand Nine Hundred and Forty-Seven only) along with prescribed rate of interest.

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/builder.

6. The respondent contested the complaint by filing reply dated 13.01.2020 on the following grounds:-

(i) That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The buyer's agreement was executed between the complainant and the respondent prior to the enactment of the Act of 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

(ii) That there is no cause of action to file the present complaint.

(iii) That the complainant has no locus standi to file the present complaint.

(iv) That, according to the booking application form and the buyer's agreement, the time period for offering the possession of the unit to the complainant has not yet elapsed and the complaint has been filed pre-maturely by him.

(v)That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. Clause 13.2 of the buyer's agreement.

(vi) That the complainant has concealed true and material facts from this Hon'ble Forum. The true and correct facts are that the complainant had approached the respondent for allotment of dwelling unit in "Woodview Residency" project at Sector 89 & 90. He submitted an application form along-with an amount of Rs.2,00,000/-. It is pertinent to mention here that at the time of

submitting the application, the applicant was provisionally allotted B-49 dwelling unit, FF, at the basic sale price of Rs.78,48,000/- plus EDC, IDC charges plus club members fee plus interest free maintenance security totalling to Rs.82,00,457/- as mentioned in application form duly signed by the complainant. The said allotment was done through golden touch investment and Mr. Piyush Bhatia had given an undertaking for making payment on behalf of the complainant vide undertaking dated 05.10.2015. The complainant was allotted the above said flat vide allotment letter dated 29.10.2015. The complainant had opted for construction linked plan and the detailed payment plan in respect of the dwelling unit was sent to the him along-with allotment letter.

(vii)That as per the agreed payment plan, the complainant was to pay the instalment within the agreed period. The respondent issued a demand note on 18.01.2016 for payment of the next instalment which became due. But the complainant failed to make the payment of said instalment, Even then, the respondent showing his bonafide sent the buyer's agreement of the above said allotted unit to the complainant vide letter dated 10.01.2016, calling upon him to complete the formalities and submit the buyer's agreement duly signed with the respondent. The respondent on non-receipt of amount issued the reminder

to the above said demand note vide letter dated 12.02.2016 again showing its bonafide sent the duly signed agreement along-with letter dated 15.02.2016. The complainant even after repeated demands failed to make the payment and a letter dated 03.03.2016 was sent as a second reminder and the respondent informed the complainant that it has to arrange funds vide letter dated 09.03.2016 for start of construction.

(viii) That the complainant approached the respondent for permission to mortgage the property to avail loan and the same was given vide letter dated 11.03.2016 and a tripartite agreement was entered on 14.03.2016 between the complainant, respondent and HDFC Ltd.

(ix) That the complainant always remained negligent and never fulfilled his part of contract nor paid the instalment as per the agreed payment plan. It is the complainant who is at fault who has not paid the instalments in time because of which the construction of the project was delayed.

(x) That it is submitted that the complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that his calculations have gone wrong on account of severe slump in the real estate market and the complainant now want to somehow get out of the concluded contract made by him on highly flimsy and

baseless grounds. Such malafide tactics of the complainant cannot be allowed to succeed.

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

E. Jurisdiction of the authority

The respondents have raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection 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

8. 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

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11***
> .....
> *(4) The promoter shall-*
>
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
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> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

11. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(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."*

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent.

F.I Objection regarding jurisdiction of authority w.r.t. booking application form executed prior to coming into force of the Act.

14. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of or rights of the parties inter-se in accordance with the booking application form executed between the parties and no agreement for sale as referred to under the

provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the*

Standing Committee and Select Committee, which submitted its detailed reports."

15. Then, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, vide order dated 17.12.2019, the Haryana Real Estate Appellate Tribunal also observed as under-

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

16. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F. II Objection regarding agreement contains an arbitration clause which refers to the dispute resolution system mentioned in agreement.

17. The buyer's agreement entered into between the two sides on 08.02.2016 contains a clause 13.2 relating to dispute resolution between the parties. The clause reads as under: -

> *"All or any disputes arising out or touching upon or in relation to this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties, shall be settled amicably by mutual discussion, failing which the same 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 an appropriate location in Gurgaon by a sole arbitrator mutually appointed by the parties and whose decision shall be final and binding upon the parties. In event of disagreement in the name of the sole Arbitrator, the aggrieved party may approach the Court of competent jurisdiction with regard to the appointment of sole arbitrator."*

18. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute if any with respect to the provisional booked unit by the complainant, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law

for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, Consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Similarly, in ***Aftab Singh and Ors. v. Emaar MGF Land Ltd and Ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builder could not circumscribe the jurisdiction of a consumer forum.

19. While considering the issue of maintainability of a complaint before a consumer forum/commission in the face of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** **decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

> *"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as*

well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above.".

20. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within the right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

F.III Objection regarding the complainant being investor.

21. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that

the complainant is a buyer and paid total price of Rs.63,99,956/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

22. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And Anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant.

G.I To refund the entire amount of Rs.18,08,947/- paid by the complainant with prescribed rate of interest.

23. The complainant was allotted unit no. B-49 on first floor, in the project "Woodview Residencies", Sector 89 & 90, Gururgram, Haryana by the respondent/builder for a total consideration of Rs.82,00,457/-. Though the complainant paid part of the sale consideration against the allotted unit to the tune of Rs.8,36,401/- and an amount of Rs.7,54,531/- was disbursed by the HDFC bank to

the respondent/builder. The above-said unit was booked under subvention scheme and as per terms agreed between the parties, the respondent/builder was under an obligation to make payment of pre-EMI till offer of possession. As per record, bank deducted pre-EMIs amounting to Rs.4,29,445/- from the complainant's account till October 2020, against which the respondent/builder has repaid Rs.2,11,430/- and an amount of Rs. 2,18,015 is left to be repaid to the complainant. The possession of the unit was to be offered within 36 months plus (6) months grace period from the date of the issuance of allotment letter of the unit. Therefore, the due date of possession comes out to be 29.04.2019. It is observed that the complainant requested the respondent even before filing of the complaint for withdrawal from the project. The complainant vide legal notice dated 03.01.2019 dispatched on 05.01.2019, requested the respondent to cancel the booking and refund the amount paid as the construction work of the project was not even started due to shortage of funds.

24. Clause 4.6 of the buyer's agreement talks about the deduction of 10% of the basic sale price of the dwelling unit in case of withdrawal of the allotment. Clause 4.6 of the said buyer's agreement reiterated as under: -

> *"It is agreed between the Parties that, 10% of the Basic Sales Price of the Dwelling Unit shall constitute as the "Earnest Money" which is liable to be withheld/ deducted by the Company in case of default/ breach by the Buyer of any terms and conditions of this Agreement and on cancellation of booking/ allotment for any reason whatsoever. The Buyer agrees and acknowledges that the Earnest Money shall, at all times, be a non-refundable deposit and constitute a genuine pre-estimate of the damage accruing to the Company, in the event of the failure of the Buyer to comply with its obligations for the booking/ allotment/ payment. Pursuant to such cancellation/ withdrawal of the Allotment, the*

Buyer shall have no right, title, lien, claims or demands whatsoever against the Dwelling Unit and/ or the Company and the Company shall have all the rights to deal with the Dwelling Unit in whatever manner as it may deem fit."

25. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

> *"5. AMOUNT OF EARNEST MONEY*
>
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money* ***shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment /plot /building as the case may*** *be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

26. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainant against the allotted unit and are directed to refund the paid-up amount of Rs.18,08,947/- after deducting 10% of the basic sale consideration of Rs.78,48,000/- being earnest money along with an interest @ 10.70% 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 on the refundable amount, from the date of surrender i.e., 05.01.2019 till date of 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

27. 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/builder is directed to refund the paid-up amount of Rs.18,08,947/- after deducting 10% of the basic sale consideration of Rs.78,48,000/- being earnest money along with an interest @ 10.70% p.a. on the refundable amount, from the date of surrender i.e., 05.01.2019 till date of actual refund.

ii. Out of total amount so assessed, the amount paid by the bank /payee be refunded in the account of bank and the balance amount along with interest will be refunded to the complainant.

iii. 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.

28. Complaint stands disposed of.

29. File be consigned to the registry.

(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 24.03.2023