

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no.	3421 of 2021
Date of filing complaint	25.08.2021
Reserved on:-	19.04.2023
Date of Pronouncement:-	17.05.2023

Kusum Dunglay R/o: F-10/8, Ground Floor, Vasant Vihar, New Delhi-110057	Complainant
Versus	
M/s Ninaniya Estates Ltd. R/o: 160, Karni Vihar, Ajmer Road, Near Rawat Mahila College, Jaipur, Rajasthan-302021	Respondent
CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Shri Siddharth Arora Advocate	Complainant
None	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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 allottees 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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name and location of the project	"Prism Portico", Sector 89, Gurugram
2.	Project area	5.05 acres
3.	DTCP License no.	179 of 2008 dated 11.10.2008 and valid upto 10.10.2018
4.	Name of licensee	Ninaniya Estate Ltd.
5.	RERA Registered/ not registered	Unregistered
6.	Unit no.	401, 4 th Floor (Annexure C2 at page 32 of complaint)
7.	Unit area admeasuring (super area)	1400 sq. ft. (Annexure C2 at page 32 of the complaint)
8.	Allotment Letter	N/A
9.	Date of buyer's agreement	01.10.2018
10.	MoU	01.10.2018
11.	Date of commencement of construction	01.04.2015 (As per email received from respondent on 21.01.2022)
12.	Possession Clause	5.1 That the Company shall complete the construction of the said Unit



		within 36 months from the date of execution of this agreement and/or from the start of construction whichever is later and Offer of possession will be sent to the Allottee subject to the condition that all the amounts due and payable by the Allottee by the stipulated date as stated in Annexure II attached with this agreement including sale price, maintenance charges, security deposit, stamp duty and other charges etc. have been paid to the Company. The Company on completion of the construction shall apply for completion certificate and upon grant of same shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues.
13.	Due date of possession	01.10.2021 (Calculated from date of agreement) Grace period is not allowed
14.	Total sale consideration	Rs. 56,00,000/- (Annexure C2 at page 33 of complaint)
15.	Amount paid by the complainant	Rs. 50,00,000/- (Annexure C1 at page 29 of complaint)
16.	Occupation certificate	Not offered
17.	Offer of possession	Not offered

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18.	Assured return clause	Clause 2 of MoU: The developer shall give an assured return @ Rs. 75,000/- per month w.e.f. 01.11.2018, on in arrears till the date of possession of the said unit is handed over to the buyer
19.	Amount received by complainant as an assured return	Rs. 12,00,000/- (As pleaded by respondent in his reply on page 21) The complainant has also agreed that she has received assured return as per MoU till March 2020.

B. Facts of the complaint:

3. That the respondent company approached and represented to the complainant that they are engaged in the business of construction and allured the complainant to invest in their project assuring her allotment of independent floors/flats/units/suites/office space(s) and five star hotels proposed to be constructed by the respondent company and assured return on the amounts paid by the complainant towards the consideration of the said unit. The respondent company further represented to the complainant that the deposits made by her would be used as an advance for the purposes of construction and development of the project undertaken by it.
4. That as a bonafide customer, the complainant believing and acting upon assertions and assurances made by the respondent company, on 26.09.2018 applied for an allotment of office space admeasuring 1400 square feet approximately @ basic sale price of Rs. 4000/- per square feet i.e. for a total sale consideration of INR 56,00,000/- in the project

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- namely prism portico office space situated at sector-89, Gurgaon-Pataudi Road, Haryana (hereinafter referred to as "the project").
5. That the complainant along with the said allotment paid an amount of Rs. 50,00,000/- on account of sale consideration duly acknowledged by the respondent company vide their receipt/letter dated 26.09.2018. Thereafter, the complainant and the respondent company, on 01.10.2018, entered into the buyer's agreement (hereinafter referred to as the buyer agreement") governing the inter-se rights and obligations with regard to the said unit. That in terms of the said buyer agreement, the respondent company allotted an office space i.e., unit no. 401, 4th floor in the project namely PRISM PORTICO admeasuring 1400 square feet approximately @ basic sale price of Rs. 4,000/- per square feet i.e., for a total sale consideration of Rs. 56,00,000/- (Hereinafter referred to as "the unit").
 6. That as mentioned hereinabove and in terms of the buyer agreement, the complainant paid an amount of Rs. 50,00,000/- constituting 89.28% of the total sale consideration duly acknowledged by the respondent company vide their receipt dated 26.09.2018. It is further submitted that the remaining 10.72% of the sale consideration i.e. Rs. 6,00,000/- was payable by the complainant at the time of handing over the possession of the said unit by the respondent company.
 7. It is further submitted that as per the provisions stipulated in the buyer's agreement and more specifically clause 5.1, the respondent company was bound to deliver the physical possession of the unit in question to the complainant within 36 months with an extended period of 6 months from the date of execution of the buyer's agreement.

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8. That it is imperative to state here that the complainant and the respondent company in addition to the buyer's agreement also entered into a memorandum of understanding dated 01.10.2018 (hereinafter referred to as the "memorandum of understanding") confirming the rights and obligations of the parties in terms of the buyer's agreement. That in terms in terms of the memorandum of understanding, the respondent company once again acknowledged the amount of Rs. 50,00,000/- duly paid by the complainant on account of the sale consideration.
9. It is pertinent to mention here that as per the provisions stipulated in the memorandum of understanding and more specifically clause 4, the respondent company agreed to give an assured return on the amount of Rs. 50,00,000/- paid by the complainant in terms of the buyer agreement @ 1.5% per month amounting to INR 75,000/- w.e.f. November 2018 till the date of actual possession of the unit is handed over to the complainant or for a period of 12 months, whichever is later. That it is imperative to state here that the respondent company in terms of the memorandum of understanding and specifically clause nos. 7 & 8 further assured and confirmed the complainant monthly return @ Rs. 75,000/- till the possession of a fully furnished unit under reference is handed over to her and further in the event of delay in payment of the aforesaid payment, the respondent company shall be liable to pay a penal interest of 1.5% per month over and above the amount of assured return.
10. Since the time of commencement of the booking, due to the slow progress of the construction of the project, the complainant was apprehensive about completion and consequent handing over of the

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unit by the respondent company. as such, the complainant, time and again, approached the respondent company for enquiring about the status of the project and completion of the unit. Despite various efforts, requests and visits by the complainant, the respondent company always misled the complainant and gave false and misleading assurances and failed to give the true and correct picture of the progress and completion of the project and handing over of the unit in question.

11. That as such the respondent company had been paying to the complainant the sum of Rs. 75,000/- as envisaged and agreed upon in terms of the memorandum of understanding till March 2020. However, post March 2020, the respondent company failed to pay the assured return of Rs. 75,000/- in complete contravention of the terms of the memorandum of Understanding. That the respondent company deliberately violated their obligations under the buyer agreement and the memorandum of understanding as mentioned hereinabove but also failed to update the complainant about any progress of the construction of the unit in question at the actual site. That the respondent company have till date did not exercise their right to buy back the unit in terms of the memorandum of understanding and more specifically clause 5 and the buyer agreement and more specifically clause 3.5. in addition, thereto, the respondent company have also failed to pay the assured return amounting to INR 75,000/- per month to the complainant in terms of the memorandum of understanding since April 2020.

12. That post March 2020 on various occasions, the complainant approached the respondent company to clear their balance on account of assured return in terms of the memorandum of understanding. However, the respondent company expressed their inability to hand over the

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possession of the Unit in question and agreed to refund the amount of INR 50,00,000/- duly paid by the Complainant on account of the sale consideration. It was further agreed that the amount of assured return payable by the Respondent Company would be calculated as on the date of repayment and shall be paid to the Complainant, subsequently.

13. That as such the respondent company issued cheque for an amount of INR 50,00,000/- in favour of the complainant vide cheque No. 119301 dated 31.03.2021 drawn of Bank of India, MGF Plaza Branch, Gurgaon, Haryana. Further, the respondent company assured the complainant that the said cheque will be honoured on its presentation with her banker. That, the Complainant believing the said assurance given by the Respondent Company presented the aforesaid cheque dated 31.03.2021 for INR 50,00,000/- which was returned by its Banker, vide Return Memo dated 02.04.2021, for the reason: "Funds Insufficient", to her utter shock. That as such, post the dishonour of cheque, the Complainant informed the Respondent Company through its Director about the same, upon which the Respondent Company cited paucity of funds on account of Covid-19 situation prevailing Nationwide and requested the Complainant to bank the cheque after a period of 2 months and not to initiate any legal proceedings against the Respondent Company on account of the said cheque.

14. That though it was not obligatory upon the complainant to accede to the request made by the respondent company, however as a goodwill gesture, the complainant once again after a period of two months presented the aforesaid cheque of INR 50,00,000/- being cheque No. 119301 dated 31.03.2021 drawn of Bank of India, MGF Plaza Branch, Gurgaon, Haryana, which was once again returned by its banker HDFC,

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D-1, Shopping Centre No. 2 Branch, Vasant Vihar, New Delhi vide Return Memo dated 11.06.2021, for the reason: "Account Blocked". The said conduct of the respondent clearly shows the fraudulent intention of not clearing its debt. Since the respondent company had failed to fulfill its contractual obligations stipulated in the buyer agreement and the memorandum of understanding and further failed to honor their debt due as narrated hereinabove, the complainant through her advocate, issued a demand notice dated 26.06.2021, calling upon the respondent, *inter alia*, to refund the entire amount paid by the complainant, along with interest thereupon.

15. That despite service of the aforesaid legal notice, the respondent company chose not to reply to the same nor have till date refunded the amount of Rs. 50,00,000/- (rupees fifty lakhs only) duly paid by the complainant herein. It was thus respectfully submitted that in blatant and absolute contradiction to the promises and assurances made by the respondent company since the inception of the association with the complainant and until as late as 11.06.2021, when the cheque issued by the respondent company for the amount of INR 50,00,000/- (Rupees Fifty Lakhs Only) the amount paid by the complainant on account of the sale consideration has been dishonoured. This clearly depicts the *mala fide* and fraudulent intent of the respondent company towards their allottees such as the complainant herein. That thus from the above narrated facts, the complainant now has come to the conclusion that the respondent and its office bearers are adamant to adopt all sorts of abominable means and methods of malpractices at the cost of complainant's interest. There is deception of the complainant through unfair trades practices adopted by the respondent company. The

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promises made by the respondent company are materially misleading, false and deceptive representation. The claims made by the respondent company and their representatives were found false and misleading one, with the purpose to tempt the buyers to invest their hard earned money for the purchase of floors/units/flats and in this way, the complainant is victim of unfair trade practices adopted by the respondent company. The complainant is victim of unscrupulous exploitation at the hands of the respondent company.

16. The complainant has been compelled to file the present complaint on account of the failure of the respondent to fulfil its duties and obligations under the act and rules, including but not limited to its failure to refund the monies paid by the complainant on account of the sale consideration. It is respectfully submitted that the respondent company is, as such, liable to compensate the complainant for the litigation costs incurred in institution and prosecution of the present complaint, which are quantified at Rs. 1,00,000/-.

C. Relief sought by the complainant:

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

- i. Direct the respondent to refund an amount of Rs. 50,00,000/- along with interest at the prescribed rate.
- ii. Direct the respondent to pay interest @ 1.5% per month w.e.f. from April, 2020 till its realization on the amount of Rs. 50,00,000/- duly paid by the complainant, over and above the monthly assured return payable as agreed upon in the MoU.
- iii. Direct the respondent to pay compensation and litigation cost.

(Handwritten mark)

D. Reply by respondent:

18. The respondents by way of written reply made following submissions:

- i. That at the very outset it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before the real estate regulatory authority as the reliefs being claimed by the complainant cannot be said to fall within the realm of jurisdiction of this forum.
- ii. That the complainant, only after carefully strategizing and manipulating the clauses of the buyer's agreement and stating false statements, has filed the present complaint. It is humbly submitted that no cause of action arose against the respondent company, which could have resulted in filing of the present complaint. That the complaint is frivolous, ill motivated and with malicious intent and is not maintainable. It is further submitted that the complainant has very strategically and deceitfully filed the present complaint. There is a complete lack of evidence to prove any of the false allegations as raised by the complainant and the present complaint germs out of bitterness and greed of the complainant. Thus, on this ground alone the complaint is liable to be dismissed and the complainant should be penalised in order to establish precedent to avoid any malicious litigation in the future of similar nature.
- iii. At the very onset it is pertinent to mention that the complainant came to the officials of the respondent for booking a unit in one the most coveted projects of the respondent company. That the

complainant submitted the application form and paid the booking amount accordingly. that at the time of signing the application form, the respondent officials clarified and explained in detail all the terms and conditions of the application form. A copy of the application form was provided to the complainant and after fully understanding and agreeing to the terms & conditions of the application form, she made the booking. The complainant is shooting arrow in the dark with the hope and aspiration of making easy money while misusing the jurisdiction of this hon'ble court however the respondent is hopeful and confident that once the present reply will be considered by this hon'ble court, the present complaint will be dismissed by this court with costs to set out an example that frivolous complaints will not be encouraged by this hon'ble court.

- iv. That it is further submitted that on one hand the complainant is relying on particular clauses of the agreement and on the other hand the complainant is submitting that the terms of agreement are illegal and amount to unfair trade practices. it is pertinent to mention herein that the complainant cannot be allowed to refer to the agreement as per her own convenience nor should be complainant be allowed to rely upon certain terms and clauses of the agreement and deny the other terms and clauses of the agreement which they themselves, with free will, have signed. The indecisive and preferential reading of the agreement and the complainant actual intention of procuring the suit property as an investment is writ large from the bare perusal of the complaint. the present complaint is just a tactic to earn easy money.



- V. That the complainant has come before the hon'ble court with unclean hands. that the complaint has been filed by the complainant just to harass the respondent and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant requires detailed deliberation by leading the evidence and cross-examination, thus only the civil court has jurisdiction to deal with the cases required detailed evidence for proper and fair adjudication. Moreover the complainant has already received a sum of Rs 14,79,000/- (rupees fourteen lakhs seventy nine thousand only) towards the payment of assured return in respect of the unit in question. Thus the complainant is not entitled for the relief which he is seeking by the way of the present complaint as he is already seeking the claim of assured return in respect of the unit in question and the present petition is not maintainable under the provisions of the real estate (regulation and development) act, 2016 (*hereinafter referred as Rera.*).
- vi. That it is pertinent to mention that the present complaint is not maintainable before the hon'ble court as it is crystal clear from reading the complaint that the complainant is not an 'allottee', but is an 'investor', who is only seeking assured return from the respondent, by way of present petition, which is not maintainable under the provisions of the real estate (regulation and development) act, 2016 (*hereinafter referred as rera*). complainant herself has admitted the fact that she has invested in the project of the respondent.

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- vii. That presently, the hon'ble court is not the right forum for the relief sought by the complainant. as there is no question of refund to be given in view of the catena of judgements passed by the hon'ble real estate regulatory authority, Gurugram as the complainant is already claiming the assured return in respect of the unit in question that the complainant is attempting to seek an advantage of the slowdown in the real estate sector and trying to seek undue advantage by concealing the true facts. It is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent.
- viii. That the present complaint is an arm-twisting method employed by the complainant to fulfil the illegitimate, illegal and baseless claims so as to get benefit from the respondent. Thus, the present complaint is without any basis and no cause of action has arisen till date in favour of the complainant and against the respondent and hence the complaint deserves to be dismissed. That it further submitted that if there is any alteration in the timeline of the completion of the project, it was beyond the control of the Respondent owing to the following reasons:
- Policies regarding availability of FAR based on various factors/ grounds and conditions including TOD and TDR.
 - Revised taxation policies including GST, Brokerage Policies.
 - Environmental restrictions such as use of untreated water and frequent stoppage of construction due to pollution control measure on environment etc.
 - Increase in the cost of construction material.

- Two stage process of environmental clearance which takes 2 to 3 years.
- Labour strikes and shortage of construction workers, construction material and even the contractor hired for the construction works was not performing as per the scope of the project work and the Respondent had to send constant reminders to the contractor regarding slow pace of work and workforce deployed, which was resulting in timeline alterations for the timely completion of project.
- Statutory construction ban across the NCR region during the winter season, resulting in slow down of the project.
- Many investors in the project had defaulted in timely payment of instalments due to which it became difficult for the Respondent to adhere to the timelines for the completion of the project.
- The connecting roads to the project were not timely acquired by the Government authorities, thus the construction equipment, raw material and labour ingress became a difficult task. The same was a major component which lead to the changed timelines in the completion of the project since the construction and development works became slow and delayed.
- Demonetisation also resulted in delaying the timely completion of project. Moreover in the matter of Anup Kumar Rath Versus M/s Sheth Infraworld private Limited, it has been observed by MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL " that due to demonetization from 8.11.2016, the contractor or subcontractor could not pay the daily wages of the workers

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which affected the strength of workers and their efficiency of the work. It is quite natural and acceptable that the workers earning daily wages are required to be paid their wages in cash on every day or at least on week basis. So, the effect of demonetization was unexpected and it was beyond the control of the Promoter to face such situation. The submission of Learned Allottee that the demonetization has no relevancy to hand over possession of flat cannot be accepted. So, the reasonable period of 3 months may be considered for delayed possession due to the demonetization."

- Outbreak of the novel-corona virus is also the major factor which leads to the alteration in the timeline for the completion of project.
- ix. That since the hurdles faced by the respondent company were beyond the control of the respondent, no fault can be found qua the respondent. It is further submitted that, it was never the intention of the respondent company to not complete the project on time, rather the alteration in the timeline was beyond the control as indicated in previous paragraph. That it is extremely important to bring to the notice of this hon'ble court that the alteration in the timeline for the development of project in question was due to external, unseen and unavoidable reasons and there was no delay on part of the respondent company.
- x. That there was an instant decline in the real estate market within the one year of the launch of the project in question. It is important to mention here that while executing the construction of such a large-scale project a continuous and persistent flow of fund is the

essence of smooth operations. However, this situation prevailed and continued for a longer period. Moreover, in the year 2018, Non-Banking Financial Company Crisis also led to drying up the source of funding for the sector. Its further lead to alteration in the timeline of the completion of the project.

19. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and written submissions made by the parties and who reiterated their earlier version as set up in the pleadings.

E. Jurisdiction of the authority:

20. The plea of the respondent regarding lack of jurisdiction of Authority is 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

21. 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

22. 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)(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.

23. 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.

24. 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."

25. 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.1. Objection regarding complainants being investor:

26. The respondent submitted that the complainant is investor and not consumer/allottee, thus, the complainant is not entitled to the protection of the Act and thus, the present complaint is not maintainable.

27. The authority observes that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims and 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 under section 31 of the Act,



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 buyer's agreement, it is revealed that the complainant is an allottee/buyer and he has paid total price of Rs. 50,00,000/- to the promoter towards purchase of the said unit 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;"

28. In view of above-mentioned definition of "allottee" as well as all the terms and condition of the buyer's agreement executed between respondent and complainant, it is crystal clear that the complainant is allottee 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 complainant-allottee being investors is not entitled to protection of this Act stands rejected.

F.II Objections regarding force majeure:

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29. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as ban on construction, demonetisation, COVID-19, GST law. The plea of the respondent regarding various orders of ban on construction and demonetisation but all the pleas advanced in this regard are devoid of merit. The orders NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Further, the plea of COVID-19 also stands rejected. Moreover, time taken in governmental clearances cannot be attributed as reason for delay in project. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Entitlement of the complainant for refund:

G.I Direct the respondent to refund an amount of Rs. 50,00,000/- along with interest at the prescribed rate.

G.II Direct the respondent to pay interest @ 1.5% per month w.e.f. from April, 2020 till its realization on the amount of Rs. 50,00,000/- duly paid by the complainant, over and above the monthly assured return payable as agreed upon in the MoU.

30. Both the issues being interconnected are being taken up together. A project by the name of Prism Portico situated in Sector 89, Gurugram was

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being developed by the respondent builder. The complainant coming to know about it applied for allotment of a unit and was allotted provisionally a unit bearing no. 401 at 4th floor measuring 1400 sq. ft. for a total sale consideration of Rs. 56,00,000/-. A buyer agreement in this regard was executed between the parties on 01.10.2018 and the possession of the allotted unit was to be offered 36 months from the date of execution of this agreement and/or from the start of construction whichever is later which comes out to be 01.10.2021. The complainant paid a sum of Rs. 50,00,000/-. A memorandum of understanding with regard to allotted unit was also executed between the parties and whereby the promoter agreed to pay the complainant a sum of Rs. 75,000/- per month as assured return w.e.f. 01.11.2018 and also gave her 12 postdated cheques towards assured returns of that amount starting from the month of November. It was also agreed that if the promoter offers possession of the allotted unit to the complainant before the period of 12 months, then the later would return postdated cheques and otherwise, the allottee would continue to receive the amount of assured returns of the above mentioned amounts till the fully furnished unit is handed over to her.

31. In pursuant to abovementioned buyer's agreement and MoU, the promoter continued to make payment of the assured return and paid that amount upto March 2020 and after that failed to pay the same. After that, neither the promoter exercised its right to buy back the allotted unit nor offered its possession leading to filing of the complaint seeking refund of the paid-up amount, the arrears of assured return, interest and compensation.

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32. The case of respondent, on the other hand, is that the complainant is its allottee and was allotted the unit in the project detailed earlier for a sum of Rs. 56,00,000/- The execution of buyer's agreement and MoU dated 01.10.2018 were not disputed. It was pleaded that the respondent has already paid a sum of Rs. 12,00,000/- to the allottee as assured return. Moreover, occupation certificate of the project has yet not been received and the complaint filed seeking refund, arrears of assured return along with interest and compensation is not maintainable and is liable to be dismissed. It was also pleaded that the Authority has no jurisdiction to entertain the complaint and the complainant is an investor.
33. Admittedly, the complainant is an allottee of the respondent in its project detailed above for a sum of Rs. 56,00,000/-. A buyer's agreement in this regard followed by MoU dated 01.10.2018 was executed between the parties setting out the terms, conditions of allotment, payment plan, dimensions of the unit and due date of offer of possession after completion of the construction of the project and payment of assured returns etc. It is not disputed that at the time of execution of buyer's agreement, the complainant paid a sum of Rs. 50,00,000/- to the promoter as agreed upon and the remaining amount of Rs. 6,00,000/- was to be paid at the time of offer of possession of the unit. The promoter agreed to pay to the complainant a sum of Rs. 75,000/- per month w.e.f. from November 2018 for a period of 12 months as assured returns and that amount was admittedly paid upto March, 2020. The due date for completion of the project and offer of possession of the allotted unit was agreed upon as 36 months from the date of buyer's agreement or date of start of construction, whichever is later i.e., 01.10.2021. Thus, in such a situation when the due date for completion of the project and offer of

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possession of the allotted unit has already expired on 01.10.2021, the complainant is entitled to seek refund of the paid-up amount besides interest.

34. On bare perusal of the documents available on record the authority observes that the respondent expressed its inability to handed over the possession of the unit in question and agreed to return the amount of Rs.50,00,000/- duly paid by the complainant on account of the sale consideration. That the respondent had issued a cheque bearing no. 119301 dated 31.03.2021 drawn on Bank of India, MGF Plaza Branch, Gurugram (Haryana) for an amount of Rs.50,00,000/- to the complainant. The cheque was dishonoured, and the criminal proceeding was initiated under the Negotiable Instrument Act and the same was pending before the Patiala Court New Delhi. This conduct of the respondent clearly shows the fraudulent intention of not clearing the money of the complainant. Since the respondent had failed to fulfill its contractual obligations stipulated in the buyer's agreement, memorandum of understanding and failed to return the paid-up amount of the complainant. Thereafter, complainant, issued a demand notice dated 26.06.2021, and seeking refund of the entire amount paid by the complainant along with interest.
35. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and 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 unit 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.



36. 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.....”

37. 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

38. 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

obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016.

- i. The respondent- promoter is directed to refund the entire amount of Rs. 50,00,000/- paid by the complainant 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 each payment till the date of actual realization. The amount paid on account of assured return may be deducted/adjusted from the refundable amount.
- 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.

42. Complaint stands disposed off.

43. File be consigned to the registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 17.05.2023