

**BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY,
GURUGRAM**Ordre reserved on: 12.04.2023
Order pronounced on: 12.07.2023

NAME OF THE BUILDER		RAHEJA DEVELOPERS LIMITED.	
PROJECT NAME		"RAHEJA'S MAHESHWARA"	
S. No.	Case No.	Case title	APPEARANCE
1.	CR/2169/2022	Rabia Chander and Samit Sharma Vs. Raheja Developers Limited	Shri Pankaj Chandola Advocate and Shri Garvit Gupta Advocate
2.	CR/2364/2022	Nidhi Sharma and Amit Sharma Vs. Raheja Developers Limited	Shri Pankaj Chandola Advocate and Shri Garvit Gupta Advocate
3.	CR/4899/2022	Mrs. Santosh Kumar and Mr. Mahesh Kumar Vs. Raheja Developers Limited	Shri Jagdeep Kumar Advocate and Shri Garvit Gupta Advocate

CORAM:

Shri Ashok Sangwan

Member**ORDER**

1. This order shall dispose of all three complaints titled as above filed before the authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.

2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, "**Raheja Maheshwara**" (residential group housing colony) being developed by the same respondent/promoter i.e., M/s Raheja Developers Limited. The terms and conditions of the agreement to sell and allotment letter against the allotment of units in the upcoming project of the respondent/builder and fulcrum of the issues involved in both the cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of refund the entire amount along with interest and the compensation.
3. The details of the complaints, reply to status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project Name and Location	"Raheja's Maheshwara", Sector 11 & 14, Sohna Master Plan Gurugram, Haryana
<p>Possession Clause: -</p> <p><i>"21. The company shall endeavour to complete the construction of the said apartment within Forty-Eight (48) months plus/minus Twelve (12) months grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later but subject to force majeure, political disturbances, circumstances cash flow mismatch and reason beyond the control of the company. However, in case the company completes the construction prior to the said period of 48 months plus 12 months grace period the allottee shall not raise any objections in taking the possession after payment of Gross Consideration and other charges stipulated hereunder. The company on obtaining certificate of occupation and use for the building in which said apartment is situated, by the competent authorities shall hand over the said apartment to the allottee for his occupation and use and subject to the allottee having complied with all the terms and condition of the agreement to sell....."</i></p>	



Sr. No	Complaint No., Case Title, and Date of filing of complaint	Reply status	Unit No.	Date of execution of agreement to sell	Due date of possession	Total Consideration /Total Amount paid by the complainants in Rs.
1.	CR/2169/2022 Rabia Chander and Samit Sharma Vs. Raheja Developers Limited. Date of Filing of complaint 31.05.2022	Reply received on 12.04.2023	C-601, 6 th floor, Tower/ block- C admeasuring 1098.50 sq. ft. [Page no. 39 of complaint]	30.07.2016 [Page no. 38 of complaint]	30.07.2021 (Note: - 48 months from date of agreement i.e., 30.07.2016 + 12 months grace period)	TSC: - 42,90,796/- AP: - 16,43,041/- (As per customer ledger dated 07.04.2023 page no. 17 of reply)
2.	CR/2364/2022 Nidhi Sharma and Amit Sharma Vs. Raheja Developers Limited Date of Filing of complaint 31.05.2022	Reply received on 12.04.2023	C-602, 6 th floor, Tower/ block- C admeasuring 1098.50 sq. ft. [Page no. 42 of complaint]	01.08.2016 [Page no. 41 of complaint]	01.08.2021 (Note: - 36 months from date of agreement i.e., 01.08.2016 + 12 months grace period)	TSC: - 42,90,796/- AP: - 16,43,041/- (As per customer ledger dated 07.04.2023 page no. 16 of reply)



3.	CR/4899/2 022 Mrs. Santosh Kumar and Mr. Mahesh Kumar Vs. Raheja Developers Limited. Date of Filing of complaint 22.07.2022	Reply received on 12.04.2023	C-303, 3 rd floor, Tower/ block- C admeasuring 1198.11 sq. ft. [Page no. 26 of complaint]	21.09.2016 [Page no. 25 of complaint]	21.09.2021 (Note: - 48 months from date of agreement i.e., 21.09.2016 + 12 months grace period)	TSC: - 46,56,428/- AP: - 24,60,064/- (As per customer ledger dated 23.06.2022 page no. 62 of complaint)
The complainants in the above complaints have sought the following reliefs: 1. Refund of total amount paid by the complainants to the respondent company along with interest at the prescribed rate. 2. Direct the respondent to pay litigation cost.						
Note: In the table referred above, certain abbreviations have been used. They are elaborated as follows: Abbreviation Full form TSC Total Sale consideration AP Amount paid by the allottee(s)						

4. The aforesaid complaints were filed against the promoter on account of violation of the agreement to sell and allotment letter against the allotment of units in the upcoming project of the respondent/builder and for not handing over the possession by the due date, seeking award of refund the entire paid-up amount along with interest and compensation.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.

6. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case **CR/2169/2022, titled as Rabia Chander and Samit Sharma Vs. Raheja Developers Limited** are being taken into consideration for determining the rights of the allottee(s) qua refund the entire paid-up amount along with interest and others.

A. Project and unit related details

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

CR/2169/2022, titled as Rabia Chander and Samit Sharma Vs. Raheja Developers Limited.

S. N.	Particulars	Details
1.	Name of the project	"Raheja's Maheshwara", Sector 11 & 14, Sohna Master Plan Gurugram, Haryana
2.	Project area	9.23 acres
3.	Registered area	3.752 acres
4.	Nature of the project	Group housing complex
5.	DTCP license no. and validity status	25 of 2012 dated 29.03.2012 valid up to 28.03.2018
6.	Name of licensee	Ajit Kumar and 21 others
7.	RERA Registered/ not registered	Registered vide no. 20 of 2017 dated 06.07.2017

8.	RERA registration valid up to	5 Years from the date of revised Environment Clearance
9.	Unit no.	C-601, 6 th floor, Tower/block- C (Page no. 39 of the complaint)
10.	Unit area admeasuring	1098.50 sq. ft. (Page no. 39 of the complaint)
11.	Allotment letter	N. A
12.	Date of execution of agreement to sell	30.07.2016 (Page no. 38 of the complaint)
13.	Possession clause	<i>21. The company shall endeavour to complete the construction of the said apartment within Forty-Eight (48) months plus/minus Twelve (12) months grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later but subject to force majeure, political disturbances, circumstances cash flow mismatch and reason beyond the control of the company. However, in case the company completes the construction prior to the said period of 48 months plus 12 months grace period the allottee shall not raised any objections in taking the possession after payment of Gross Consideration and other</i>

		<p><i>charges stipulated hereunder. The company on obtaining certificate of occupation and use for the building in which said apartment is situated, by the competent authorities shall hand over the said apartment to the allottee for his occupation and use and subject to the allottee having complied with all the terms and condition of the agreement to sell....."</i></p> <p>(Page no. 49 of the complaint).</p>
14.	Grace period	<p>As per clause 21 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 48 months plus/minus 12 months <i>grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later.</i> Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 12 months to the promoter at this stage.</p>
15.	Due date of possession	30.07.2021

		(Note: - 48 months from date of agreement i.e., 30.07.2016 + 12 months grace period)
16.	Total sale consideration	Rs.42,90,796/- (As per applicant ledger dated 07.04.2023 at page no. 17 of the reply)
17.	Amount paid by the complainant	Rs.16,43,041/- (As per applicant ledger dated 07.04.2023 at page no. 17 of the reply)
18.	Payment Plan	Installment link payment plan (As per payment plan page no. 60 of the complaint)
19.	Occupation certificate /Completion certificate	Not yet obtained
20.	Offer of possession	Not offered
21.	Delay in handing over the possession till date of filing complaint i.e., 31.05.2022	10 months and 1 day

B. Facts of the complaint

8. The complainants have made the following submissions in the complaint: -
- a. That in the year 2016, the real estate project namely "Raheja's Maheshwara" situated at sector 11 & 14, Sohna, Gurugram, Haryana came to knowledge of the complainants, through the authorized marketing representatives of the respondent. The marketing

representative approached them, for and on behalf of the respondent, making tall claims with respect to the project and of the longstanding credentials of the respondent in the real estate sector. It was represented that the project is one of the finest and that the said unit is free from all kinds of encumbrances.

- b. That relying on such false and misleading representations, assurances, brochures, and meetings, they agreed to purchase one unit bearing no. C-601 in tower-C admeasuring super area 1099 sq. ft. ft for a total sale consideration of Rs.40,93,997/- and accordingly paid an amount of Rs.3,98,410/- and Rs.1,37,200/- through cheque bearing no. 043449 dated 07.05.2016 and 043452 dated 23.06.2016, respectively as the booking amount. The respondent acknowledged the payment vide receipts dated 20.05.2016.
- c. That the complainants opted for an Installment linked payment plan and the respective instalment was to be raised only upon achieving the proposed milestone. The respondent at times has failed to achieve the milestone for the project in question and despite after knowing the same has raised the demands without achieved the proposed milestones. That since starting they have paid the entire instalment as and when demanded by it still the respondent has failed to complete the project as per agreed development schedule. Thereafter, the respondent issued a letter dated 21.06.2016, wherein they were informed that the allotment of unit no. C-601, tower C has been approved and allotted to them.
- d. That on 30.07.2016, an agreement to sell was executed for the aforesaid unit between the parties. Whereby the parties entered into an understanding regarding the allotted unit bearing no. C-601, the said

agreement spelled out the terms and conditions regarding the said allotment, the payment schedule and the due date of delivery.

- e. That as per the clause 21 of the agreement, the respondent was under the obligation to handover the possession of the unit within 48 months along with grace period of 12 months from the date of execution of the said agreement. That there has been no event of unforeseen circumstances or force majeure which may have delayed delivery of possession. Therefore, the date of handing over of the possession was 30.7.2020. However, no possession was delivered on the agreed date as mentioned in the agreement and now the project has been abandoned by it. It is pertinent to note that it is almost 68 months from the date of execution of the agreement but till date construction is nowhere near completion. That till date only the excavation of the said project has been done, in all likelihood the said project has been abandoned, and the respondent has no intentions of completing the same. That in such a scenario continuing in the said project is only causing more mental agony and financial distress to them as they are in complete trust deficit regarding the commitments and hollow promises of the respondent.
- f. That the agreement is completely unfair, one sided and an unreasonable one. They were forced to sign the agreement as they were left with no choice but to sign the agreement as they had already invested a major portion of money in the said project and the respondent was in a dominant position. Therefore, to safeguard their hard-earned money the complainant had no choice but sign on the dotted line.
- g. That on the one hand, as per clause 16 of the agreement entitled the respondent to charge 12% of interest in case of delay in making

payments by the complainants whereas on the other hand, Clause 21 of the agreement provides that the respondent shall pay to Allottee compensatory lease rental per month (or part thereof) at the rate determined by an international IPC. The respondent being in dominant position has compelled the complainants to execute the agreement having arbitrary clauses. The clauses of the agreement are arbitrary and one sided, thus, on the same parity, complainants shall be entitled for interest @12% p.a. on the payment received by it with regard to the unit, the possession of which has not been handed over.

h. That on 08.11.2017, the respondent on false pretext raised a demand of Rs.6,22,911/- which was supposed to be raised upon completion of foundation of the project. However, the foundation work was not even started by it at the site of the project. That the said demand was completely false and misleading to extract the hard-earned money of the allottees. That aggrieved by the demand raised by it without achieving the particular stage of construction (i.e., on completion of foundation), they vide email dated 12.11.2017 raised their concern over the demand being raised by the respondent on false and misleading statements and requested the respondent to withdraw the same as no development activities are ongoing since long at the site of the project.

That in response, the respondent on 13.11.2017 specifically accepted and admitted that the said demand was raised without achieving the particular milestone. The respondent further provided unsatisfactory response by making excuse of ban on construction activities by NGT. However, the respondent was supposed to complete the foundation work prior to the date of ban imposed by the NGT. They

again on 15.11.2017, requested the respondent to withdraw the said demand and raise the same upon completion of foundation. However, no satisfactory response was ever received from the respondent.

- i. That on visiting the site of the project they found that the project has not been developed as per the development plan and it is way behind the agreed development schedule. They also visited the office of the respondent and raised their concern over the non-development of the project as per the terms of the agreement. However, all the concern of the complainants fell in deaf ears of the respondent. The respondent with *malafide* intention has raised all the demands without achieving the particular stage of construction which is violation of the terms of the agreement; however, the respondent did not care about the same. The tactic of the respondent was to dupe and retain the complainant in the project is crystal clear by their act of raising of demands without developing the particular stage of the project as per the terms of the agreement which is in violation of the terms and conditions of the agreement as well as schedule of payment. The present case is a clear exploitation of innocence and beliefs of the complainants and an act of the respondent to retain the complainants hard-earned money in illegal manner.
- j. That they were regularly approaching the respondent and was also paying visits to the office for asking about the status of the project and date for handing over of possession, but no heed was paid to the concerns raised by them. Despite the repeated requests made by them, it failed to redress the grievances of the complainants and continued to raise reminders without completing the requisite development work of

the project. As on date, no one at the office of the respondent was addressing the concerns of the complainants and the project has been completely abandoned and the respondent has siphoned off the money paid by the complainants for its own purposes.

- k. That while booking the said unit and thereafter on each receipt of the huge instalments from the complainants, the respondent had been assuring and promising the complainants the actual possession of the unit with all amenities/facilities as promised. However, it is pertinent to note that the said project is nothing as promised and has been abandoned. The respondent has utterly failed to fulfil his obligations to deliver the possession in time or refund the money along with the interest and has caused mental agony, harassment, and huge losses to the complainants, hence the present complaint.

C. Relief sought by the complainants: -

9. The complainants have sought following relief(s)
- Direct the respondent to refund of total amount paid by the complainant to the respondent along with interest at the prescribed rate.
 - Direct the respondent to pay litigation cost.

D. Reply by the respondent

10. The respondent has filed a reply dated 12.04.2023 and contested the complaint on the following grounds: -
- That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The agreement to sell was executed between the parties prior to the enactment of the Act, 2016 and the provisions laid down in the said Act cannot be enforced retrospectively. Although

the provisions of the Act, 2016 are not applicable to the facts of the present case in hand yet without prejudice and in order to avoid complications later on, the respondent has registered the project with the authority under the provisions of the Act of 2016, vide registration no. 20 of 2017 dated 06.07.2017.

- II. 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 59 of the buyer's agreement.
- III. 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 present complaint has been filed by him 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 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', 'Raheja Shilas' 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 complainants, after checking the veracity of the project namely, 'Raheja's Maheshwara', Gurugram had applied for allotment of a unit vide booking application form. On the basis of the representations of the complainant, the respondent allotted unit bearing no. C-601 to the complainants. The complainants agreed to be bound by the terms and conditions of the booking application form. The complainants were aware from the very inception and had acknowledged in clause 2 of application form that the plans as approved by the concerned authorities are tentative in nature and that the respondent might have to effect suitable and necessary alterations in the layout plans as and when required.
- That the complainants are real estate investors and not "customers" who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that their calculations have gone wrong on account of severe slump in the real estate market and is now raising untenable and illegal pleas on highly flimsy and baseless grounds. Such malafide tactics of the complainants cannot be allowed to succeed.

- That the possession of the unit is supposed to be offered to the complainant in accordance with the agreed terms and conditions of the buyer's agreement.
- The use of expression 'endeavour to give the possession' in clause 21 of the buyer's agreement clearly shows that the company has merely held out a hope that it would try to give the possession of the complainant within a specified time. However, no unequivocal promise was made to the prospective buyer's that possession of the unit would be delivered at the end of a particular period.
- That in view of clause 25 of the agreement, the delay in the completion of the project was not attributable towards the respondent as while the initial foundation work was bring laid down, it was put on hold under the instructions of the National Green Tribunal due to SMOG. It is submitted that the delay was timely conveyed to the complainant. It is submitted that the said project would be completed by the year 2023.
- That during entire 2020 and 2021 and till date due to covid pandemic the entire sector was impacted and as such the period of over 2 years should in any case not to be counted while computing any alleged delay. The pandemic period clearly comes within the ambit of "force majeure."



- That the respondent would hand over the possession of the apartment as soon as the construction work is complete subject to availability of basic external infrastructure such as water, sewer, electricity etc. as per terms of the application and agreement to sell and the grant of the occupational certificate by the authorities. Due to the above-mentioned conditions beyond the reasonable control of the respondent, the unit allotted to the complainant has not been offered and the respondent cannot be held liable for the same. The respondent is also suffering unnecessarily and badly without any fault on its part. Due to these reasons, the respondent has to face cost overruns without its fault. Under these circumstances the passing any adverse order against the respondent at this stage would amount to complete travesty of justice.
- That every complaint has to be decided according to law, but there is a benchmark (the law), which a authority applies to the facts in order to discern (and adjudicate) what was the obligation, and if there is any deficiency in intent, effort or delivery as claimed but then facts have to reach the record completely and accurately. That variation in the economic situation and the upturns and the downturns or unfulfilled expectations of a few cannot form the basis or an excuse to feign deficiency in service delivery.

➤ That the three factors: (1) delay in acquisition of land for development of roads and infrastructure (2) delay by government in construction of the Dwarka Expressway and allied roads; and (3) oversupply of the commercial units/shops in the NCR region, operated to not yield the price rise as was expected by a few. This cannot be a ground for complaint for refund as the application form itself has abundantly cautioned about the possible delay that might happened due to non-performance by Government agencies.

11. 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

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

E.I Territorial jurisdiction

13. 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

14. 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.

15. 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.
16. 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."

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

F. Findings on the objections raised by the respondent

F.I. Objections regarding the complainant being investor.

18. The respondent has taken a stand that the complainants are investors and not a consumer. Therefore, they are not entitled to the protection of the Act and is 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 consumer 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 the consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time 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 they are buyers and paid total price of Rs.16,43,041/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

19. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainants are 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 allottee being an investor is not entitled to protection of this Act also stands rejected.

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

20. Another objection raised the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements

made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

21. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and 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."

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

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

23. The agreement to sell entered into between the parties on 30.07.2016 contains a clause 59 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".

24. 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.

25. 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 Appellate 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."

26. 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.”

27. 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 rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings on the relief sought by the complainant.

G.I. Direct the respondent to refund of total amount paid by the complainant to the respondent along with interest at the prescribed rate.

28. 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)

29. As per clause 21 of the agreement to sell dated 30.07.2016 provides for handing over of possession and is reproduced below:

21. The company shall endeavour to complete the construction of the said apartment within **Forty-Eight (48) months plus/minus Twelve (12) months grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later** but subject to force majeure, political disturbances, circumstances cash flow mismatch and reason beyond the control of the company. However, in case the company completes the construction prior to the said period of **48 months plus 12 months grace period the allottee shall not raised any objections in taking the possession** after payment of Gross Consideration and other charges stipulated hereunder. The company on obtaining certificate of occupation and use for the building in which said apartment is situated, by the competent authorities shall hand over the

said apartment to the allottee for his occupation and use and subject to the allottee having complied with all the terms and condition of the agreement to sell....."

30. 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.

31. **Due date of handing over possession and admissibility of grace period:** As per clause 21 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 48 months plus/minus 12 months *grace period of the date of execution*

of the agreement or environment clearance and forest clearance, whichever is later. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 12 months to the promoter at this stage.

32. **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.*

33. 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.

34. 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., 12.07.2023 is **8.70%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%**.
35. 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 21 of the agreement to sell dated form executed between the parties on 30.07.2016, 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 30.07.2020. 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 30.07.2021.
36. 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 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.
37. The due date of possession as per agreement for sale as mentioned in the table above is **30.07.2021** and there is delay of **10 months and 1 day** on

the date of filing of the complaint. The authority has further, observes that even after a passage of more than 1.11 years till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to it and for which they have paid a considerable amount of money towards the sale consideration. It is also pertinent to mention that complainant has paid almost 38% of total consideration till 2017. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottees intend to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.

38. Moreover, 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 allottees 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....."

39. 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."

40. 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 it in respect of the unit with interest at such rate as may be prescribed.

41. 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 them at the prescribed rate of interest i.e., @ 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 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*.

G. II Direct the respondent to pay litigation cost.

42. The complainants are seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. 2021-2022(1) RCR (C), 357* held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating

officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.

F. Directions of the authority

43. 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 each of the complainant(s) along with interest at the rate of 10.70% 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. 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.
- iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee/complainant.

(Handwritten signature)

44. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
45. Complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter.
46. File be consigned to registry.

Dated: 12.07.2023



(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram

HARERA
GURUGRAM