BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	**3884 of 2021**
Date **of filing :**	**27.09.2021**
Date of **decision :**	**08.12.2023**

1. Sanjay Arya
2. Manjula Arya

Both RR/o: 214, Airlines apartments, Plot no. 5, Sector 23, Dwarka, New Delhi **Complainants**

Versus

Anand Divine Developers Private Limited
Regd. office: 711/92, Deepali Nehru Place, New Delhi - 110019
Also At:- ATS Tower, Plot No 16, Sector 137, Noida - 201305 **Respondent**

CORAM:
Shri Sanjeev Kumar Arora **Member**

APPEARANCE:
Shri. Ishwar Singh Sangwan (Advovate) Complainants
Shri M.K. Dang (Advocate) Respondent

ORDER

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

A. Unit and Project related details:

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

S. N.	Particulars	Details
1.	Name and location of the project	"ATS Triumph", Sector 104, Village-Dhanwapur, Gurugram
2.	Nature of the project	Group housing colony
3.	Project area	14.093 acres
4.	DTCP License	63 of 2011 dated 16.07.2011 valid till 15.07.2019 10 of 2012 dated 03.02.2012 valid till 02.02.2020
	Name of the licensee	M/s Great Value HPL Infratech Private Limited M/s Kaanha Infrastructure private Limited
5.	HRERA registered/ not registered	**Not registered** *Since the project is not registered the registration branch may take the necessary action under the provisions of the Act, 2016
6.	Unit no.	8052 on 05th floor, tower 08 (Block- C) [As on page no. 29 of the complaint]
7.	Unit area admeasuring	3150 sq. ft. [As on page no. 30 of the complaint]
8.	Allotment dated	11.01.2016 [As per page no. 56 of complaint]
9.	Date of builder buyer agreement	11.01.2016 [As per page no. 28 of the complaint]

10.	Possession clause	***18. Time of handing over possession*** *Barring unforeseen circumstances and force majeure events as stipulated hereunder, the possession of the said apartment is proposed to be, offered by the company to the* ***allottee within a period of 36 (Thirty-Six) months with a grace period of 6 (Six) months from the date of agreement*** *of particular tower of building in which the registration for allotment is made, such date shall hereinafter referred to as "stipulated date", subject always to timely payment of all charges including the basic sale price, stamp duty, registration fees and other charges as stipulated herein or as may be demanded by the company from time to time in this regard.*
11.	Due date of possession	**11.07.2019** [Calculated from date of agreement i.e. 11.01.2016 + 6 months grace period]
12.	Total sale consideration	Rs.2,29,19,533/- [As alleged by the complainant on page no. 26 of complaint]
13.	Amount paid by the complainants	Rs.2,29,19,533/- [As alleged by the complainant on page no. 26 of complaint]
14.	Occupation certificate	28.05.2019 [As per annexure R09 on page no. 93 of reply]
15.	Offer of possession	30.05.2019 [As per page no. 57 of the complaint]

B. Facts of the complaint

3. The complainants have made the following submissions: -

a. That the present complaint is being filed by the complainants against the respondent as the respondent have, in a pre-planned manner, cheated and defrauded the complainants of their hard earned money and have rendered deficient services by not providing possession of the residential unit no. 8052 on fifth floor in tower-8 situated at ATS triumph, sector-104, Gurugram along with two car parking purchased by the complainants from the respondent. The complainants bought the said unit in question for their residential purpose.

b. That the fact of the matter is that the complainants were approached by the authorized marketing representatives and business agents of the respondent to purchase a residential unit from the respondents. The representatives of the respondent claimed that the respondents had completed several real estate projects and that they were one of the most respected names in the real estate industry. They further stated that the respondent had all the requisite permissions for this particular residential project, which had been launched under the name and style of ATS Triumph, Sector-104, Gurugram. The representatives assured the complainants that the respondent had already commenced the construction of the above mentioned project and that the complainants could purchase a unit to ensure that the complainants get possession within thirty six months with a grace period of six months as per clause no. 18.

c. That on believing the assurance given by the respondent, the complainant in their meeting with the representatives and authorized agents of the respondent agreed to purchase

over physical possession to them. The complainants were dismayed and shocked to know that respondent got occupancy certificate vide memo no. ZP-760/AD(RA)/2019/12813 dated 28.05.2019, today also the flat is not ready for possession. Obtaining of occupancy certificate is a matter of investigation as flat is not ready on what basis and how respondent manage to get the above said occupancy certificate. It is pertinent to mention here that the complainants availed the loan facility from HDFC at rate of 9.55% interest and the same has been repaid by the complainants which was also a financial burden upon the complainants but despite of that the respondent has not delivered the physical possession of the said unit and miserably failed to get the conveyance deed registered.

f. That it was at this stage that the complainants again contacted the representatives of the respondent to find out status of apartment handing over. The complainants sought information on the tentative timeline for possession by way of a clear and firm assurance by the respondent that they shall complete the project on time. Much to their dismay, the respondent refused to provide any such assurance. This made the complainants realize that the respondent had duped them.

g. That to provide an instance of the ground reality of the status of progress of construction at site, it is brought to the attention of this Hon'ble Authority that the respondent' raised demands were all promptly paid by the complainants as it reflected from the annexed receipts and other documents, which clearly shows that the complainant have been making timely payments in good faith all along.

residential unit no. 8052 on fifth floor in tower-8 situated at ATS Triumph, Sector-104, Gurugram, super built up area 3150 Sq.Ft.(292.64 Sq.Mtr.) @ ₹ 6490.476/- per sq.ft., total cost of the Apartment is ₹ 2,04,45,000/-.

d. That on 26.11.2015, the complainants booked the above said apartment vide application no. 344 by paying initial amount of ₹ 95,831/- + ₹4,169/- (₹ 1,00,000/- vide cheque no. 465849 and as per demands of the respondent, the complainant further paid an amount of ₹1,14,86,438/- on dated 01.02.2016 by way of demand draft no. 483208 drawn on HDFC Bank Limited and further paid an amount of ₹30,06,239/- vide cheque no. 322631 dated 05.01.2016 and also paid an amount of ₹ 20,73,803/- on dated 22.11.2016 vide cheque no. 131831 to the respondent on account of the above said apartment.

e. That the complainants gradually came to realize that the promises of timely possession of the above apartment were nothing but false assurances and misrepresentations on the parts of the respondent. There has been a situation where the respondent have failed to deliver possession of the constructed apartment as per the schedule that had been promised by the respondent i.e. 36+6 months as mentioned in para no. 18 of apartment buyers agreement. However, the structure is complete, whereas internal fitting including electricity fitting are not complete and there is no water supply, so the flat is incomplete. The letter of offer of possession has been issued by the respondent vide ref. No. ATS Triumph/343/19-20 dated 30.05.2019 to the complainants with sole intention to extract or grab the more money from the complainants without handing

h. That it is abundantly clear by the act and conduct of the opposite

i. parties that they have not only defrauded the complainants, but also have violated the terms of the builders buyer agreement by not offering possession within 42 months (36+6). It is apparent that the respondent has provided deficient services, is guilty of unfair trade practices, and has planned to fleece the complainants of their hard-earned money in a well directed and pre- planned manner. Even today, the unit of the complainant has not completed and maximum works are still pending. Due to this, on the one hand, the complainants are deprived of moving into their own apartment in the pre-agreed timeframe and, on the other hand, they are suffering additional loss because of blocked capital of a very heavy amount and also caused huge loss by paying rent as the complainants are residing on rented accommodation.

j. That the actions of the respondent are violative of the principles of natural justice and the services rendered are deficient, malafide, unfair, unjust and illegal as have been shown in the preceding paragraphs. The said practices are against the tenants of ethical business and are liable to be severely deprecated by this Hon'ble Authority.

k. That the respondent has caused monetary losses to the complainants and has denied them the right to enjoy the property for which they have already paid amount. Even more damaging, they have caused immense mental agony, confusion, insecurity and pain to the complainants. That the complainants have also further incurred costs towards the

legal/documentation and other expenses due to no fault of their own.

l. That the complainants have until date deposited ₹2,04,45,000/- in furtherance of the buyer's agreement with the respondent as per their demands raised. However, the respondent has failed to deliver/offer possession of their allotted apartment unit to the complainants within the stipulated time. The respondent is also liable to pay ₹ 5/- per sq. ft. on super area as penalty for delayed possession to the complainants as terms and conditions of the clause no. 19 of buyer's agreement dated 11.01.2016.

m. That the respondent had already entire sale consideration amounting to ₹ 2,04,45,000/- which is more than the actual sale price of the apartment and despite received the said amount, the respondent has knowingly, intentionally and deliberately not delivering the possession of the said unit and also not executing the conveyance deed of the said unit. Moreover, the respondent has illegally charged maintenance amounting as fully detailed and described in final statement of account of respondent.

n. That the act and conduct of the respondent amounts to grave deficiency in service and unfair trade practice of the highest degree. The respondent has caused great mental agony and physical harassment to the complainants. The complainants have paid such a huge amount after collecting their life's savings with hope to move into their own apartment in the NCR region.

C. **Relief sought by the complainants:**

4. The complainants have sought following relief:

a. To direct the respondent to deliver the possession of the duly completed residential apartment with penalty for delaying the possession at the prevailing rate by the authority.

b. To direct the respondent to pay the interest on the principal amount @ 18% per annum from the date of payment till realization.

c. To direct the respondent to execute the conveyance deed of the above said residential apartment.

d. To direct the respondent to charge the maintenance from the date of possession and not as per their desire.

e. Cost of litigation of ₹2,00,000/-.

D. Reply filed by the respondent:

5. The respondent has contested the complaint on the following grounds:

a. 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 39 of the buyer's agreement, which is reproduced for the ready reference of this hon'ble authority-

> *"All or any dispute arising out of or touching upon or in relation to the terms of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 as amended up to date. A sole arbitrator who shall be nominated by the Board of Directors of the company shall hold the arbitration proceedings at the office of the Company at Noida. The allottee hereby confirms that he shall have no objection to this appointment, more particularly on the ground that the Sole Arbitrator being appointed by the Board of Directors of the company likely to be biased in favour of the company. The*

Courts at Noida, Uttar Pradesh shall to the specific exclusion of all other courts alone have the exclusive jurisdiction in all matters arising out of/touching and/or concerning this Agreement regardless of the place of execution or subject matter of this Agreement. Both the parties in equal proportion shall pay the fees of the Arbitrator."

b. That the complainant, after checking the veracity of the project namely, 'ATS Triumph', sector 104, Gurugram had applied for allotment of a residential unit and agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint. It is submitted that based on the application of the complainants, unit no. 8052, Tower no.8 was allotted to the complainant.

c. That it was agreed that as per clause 4 of the buyer's agreement, the sale consideration of ₹ 2,04,45,000/- was exclusive of other costs, charges including but not limited to maintenance, stamp duty and registration charges, service tax, proportionate taxes and proportionate charges for provision of any other items/facilities.

d. That the possession of the unit was supposed to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement. It is submitted that clause 18 of the buyer's agreement clearly states that "Barring unforeseen circumstances and force majeure events as stipulated hereunder, the possession of the said apartment is proposed to be offered by the company to the allottee within a period of 36 months with a grace period of 6 (six) months from the date of actual start of the construction of a particular tower building in which the registration for allotment is made, such date shall hereinafter referred to as 'stipulated date', subject

always to timely payment of all amounts including the basic sale price, EDC/IDC, IFMS, stamp duty, registration fees and other charges as stipulated herein or as may be demanded by the company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/ engineer-in-charge of the complex and the said certification shall be final and binding on the allottee."

e. That it is pertinent to mention herein that the implementation of the said project was hampered due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of the respondent and which have affected the materially affected the construction and progress of the project. Some of the force majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under:

I) Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to demonetization: [Only happened second time in 71 years of independence hence beyond control and could not be foreseen]. The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f. 9-10 November 2016 the day when the Central Government issued notification with regard to demonetization. During this period, the contractor

could not make payment to the labour in cash and as majority of casual labour force engaged in construction activities in India do not have bank accounts and are paid in cash on a daily basis. During demonetization the cash withdrawal limit for companies was capped at ₹ 24,000/- per week initially whereas cash payments to labour on a site of the magnitude of the project in question are ₹ 3-4 lakhs per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence the implementation of the project in question got delayed due on account of issues faced by contractor due to the said notification of Central Government.

f. Further there are studies of reserve bank of India and independent studies undertaken by scholars of different institutes/universities and also newspaper reports of reuters of the relevant period of 2016-17 on the said issue of impact of demonetization on real estate industry and construction labour.

g. The Reserve Bank of India has published reports on impact of demonetization. In the report- macroeconomic impact of demonetization, it has been observed and mentioned by Reserve Bank of India at page no. 10 and 42 of the said report that the construction industry was in negative during Q3 and Q4 of 2016-17 and started showing improvement only in April 2017.

h. Furthermore, there have been several studies on the said subject matter and all the studies record the conclusion that during the period of demonetization the migrant labour went to their native places due to shortage of cash payments and construction and real estate industry suffered a lot and the pace of

construction came to halt/ or became very slow due to non-availability of labour. Some newspaper/print media reports by Reuters etc. also reported the negative impact of demonetization on real estate and construction sector.

i. That in view of the above studies and reports, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should deemed to be extended for 6 months on account of the above.

(II) Non-Payment of instalments by allottees: Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.

(III) Inclement weather conditions viz. Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavorable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions.

j. That the respondent after completing the construction applied for the grant of the occupation certificate on 03.10.2016. The respondent has even offered the possession of the unit to the complainants vide letter dated 30.05.2019 after obtaining the occupation certificate on 28.05.2019.

k. However, on account of the ban on construction activities by the Hon'ble Supreme Court and several authorities, the respondent

has not been able to complete the apartment. Moreover, the outbreak of the deadly Covid-19 virus has resulted in significant delay in completion of the construction of the projects in India and the real estate industry in NCR region has suffered tremendously. The outbreak resulted in not only disruption of the supply chain of the necessary materials but also in shortage of the labour at the construction sites as several labourers have migrated to their respective hometowns. The Covid-19 outbreak which has been classified as 'pandemic' is an Act of God and the same is thus beyond the reasonable apprehension of the respondent. It is submitted that the same falls under the ambit of the definition of 'force majeure' as defined in clause 22 of the buyer's agreement and the respondent cannot be held accountable for the same. This time period is covered by the above mentioned force majeure events is required to be added to the time frame mentioned above. The respondent cannot be held responsible for the circumstances which were beyond its control.

I. The complainants are real estate investors who have invested their money in the project of the respondent with an intention to make profit in a short span of time. However, their calculations have gone wrong on account of slump in the real estate market and they are now deliberately trying to unnecessarily harass, pressurize and blackmail the respondent to submit to their unreasonable demands instead of abiding by contractual obligations of making timely payment towards the due amount.

6. 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 complainants.

E. Jurisdiction of the authority

7. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

E. I Territorial jurisdiction

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

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

> *"Section 11(4)(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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;*
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottee and the real estate agents under this Act and the rules and regulations made thereunder."*

10. So, in view of the provisions of the Act of 2016 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.

F. Findings on the objections raised by the respondent.

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

11. The agreement to sell entered into between the two side on 11.01.2016 contains a clause 39 relating to dispute resolution between the parties. The clause reads as under:

> *"All or any dispute arising out of or touching upon or in relation to the terms of this agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 as amended up to date. A sole arbitrator who shall be nominated by the board of directors of the company shall hold the arbitration proceedings at the office of the company at Noida. The allottee hereby confirms that he shall have no objection to this appointment, more particularly on the ground that the sole arbitrator being appointed by the board of directors of the company likely to be biased in favour of the company. The courts at Noida, Uttar Pradesh shall to the specific exclusion of all other courts alone have the exclusive jurisdiction in all matters arising out of/touching and/or concerning this agreement regardless of the place of execution or subject matter of this agreement. Both the parties in equal proportion shall pay the fees of the arbitrator."*

12. 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.

13. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
> *79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration*

Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

14. 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 judgment 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, 1995 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."

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

F.II. Objections regarding the complainant being investor.

16. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of ₹ 2,29,19,533/-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;"*

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

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

18. An objection is raised by 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 and 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."*

19. 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"

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

G. Findings regarding relief sought by the complainants.

F.I Direct the respondent to deliver the possession of duly completed residential apartment with penalty for delaying the possession of the subject unit at the prescribed by the authority.

21. The respondent has offered the possession of the unit on 30.05.2019 after receiving the occupation certificate dated 28.05.2019 from the competent authority.

Validity of offer of possession

22. At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession liability of

promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and allottee remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

i. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate from the department concerned certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads and street lighting.

ii. **The subject unit should be in habitable condition-** The test of habitability is that the allottee should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water and sewer connections etc from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of the

subject unit with such minor defects under protest. This authority will award suitable relief for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit will not be considered a legally valid offer of possession.

iii. **Possession should not be accompanied by unreasonable additional demands**- In several cases additional demands are made and sent along with the offer of possession. Such additional demands could be unreasonable which puts heavy burden upon the allottees. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed an invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottees should accept possession under protest

23. The complainant stated that till date they have not taken the possession of the unit since the unit is not in a habitable condition and the photographs are also attached in the complaint. So, it can be concluded from the photographs that the unit is incomplete and is not in a habitable condition at the moment also to corroborate the same the respondent also stated during the hearing dated 08.12.2023 that they need minimum 3 weeks time to handover the possession of the unit to the complainant. There are so many deficiencies in respect of electric fitting, bathroom fitting, cup-board modular kitchen, flooring

etc. are not up to the mark finished. Therefore, the unit was not habitable at the time of offer of possession and offer of possession of an uninhabitable unit will not be considered a legally valid offer of possession. Therefore, applying above principle on facts of this case, the respondent is directed to complete the unit in all respects within 2 months from the date of this order and make it ready for habitation. The respondent now has to make a fresh offer of possession accompanied with fresh statement of accounts deleting all demands which are not as per buyer's agreement and including therein interest payable to the complainants for delay caused in offering possession as the offer of possession dated 30.05.2019 is quashed hereby and at the same time the complainants are directed to take possession of the said unit after a valid offer of possession within 60 days from the date of this order.

F.II. Direct the respondent to pay the interest on the principle amount @18% p.a. from due date of possession till realization.

24. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

> ***Section 18: - Return of amount and compensation***
> *If the promoter fails to complete or is unable to give possession of an apartment, plot or building, -*
> .....
>
> *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.*

25. As per clause 18 of the buyer's agreement dated 11.01.2016, the possession of the subject unit was to be handed over by 11.07.2019. Clause 18 of the buyer's agreement provides for handover of possession and is reproduced below:

18. Time of handing over possession

"Barring unforeseen circumstances and force majeure events as stipulated hereunder, the possession of the said apartment is proposed to be offered by the company to the ***allottee within a period of*** *36 (Thirty-Six) months* ***with a grace period of*** *6* ***(Six) months from the date of agreement*** *of particular tower of building in which the registration for allotment is made, such date shall hereinafter referred to as "stipulated date", subject always to timely payment of all charges including the basic sale price, stamp duty, registration fees and other charges as stipulated herein or as may be demanded by the company from time to time in this regard."*

26. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters 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 clause in the flat buyer agreement by the promoters are 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 mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

27. **Admissibility of grace period**: The promoter has proposed to hand over the possession of the apartment within 36 months from the date

of agreement i.e., 11.01.2016 with a grace period of 6 months. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period of 6 months in the possession clause. Accordingly, the authority literally interpreting the same allows this grace period of 6 months to the promoter at this stage. Accordingly, the due date of possession comes out to be 11.07.2019.

28. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges as one of the reliefs. However, proviso to section 18 provides 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 possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."*

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

30. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as

on date i.e., 08.12.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.

31. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

32. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges

33. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 18 of the agreement executed between the parties on 11.01.2016, the possession of the subject apartment was to be delivered within 36 months from the date of execution of agreement i.e., till 11.01.2019. As far as grace period of 6 months is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over

possession is 11.07.2019. The respondent has offered the possession of the subject apartment on 30.05.2019 however, this offer is not a valid offer of possession for the reasons quoted above. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 11.07.2019 till actual handing over of possession at prescribed rate i.e., 10.75% p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

F.III. Direct the respondent to execute the conveyance deed of the above said residential apartment.

34. As per Section 17 (1) of Act of 2016, the respondent is under obligation to get the conveyance deed executed. In the present case the possession of the allotted unit has yet not handed over to the complainants. The respondent is directed to handover the possession of the subject apartment complete in all aspects and thereafter, execute a conveyance deed in favour of the complainants.

F.IV. Direct the respondent to charge the maintenance from the date of possession and not as per their desire

35. The authority has decided this in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that since maintenance charges are applicable from the time a flat is occupied, its basic motive is to fund operations related to upkeep, maintenance, and upgrade of areas which are not directly under any individual's ownership. RERA's provisions enjoin upon the developer to see that residents don't pay ad hoc charges.

Also, there should be a declaration from the developer in the documents that they are acting in own self-interest and that they are not receiving any remuneration or kick-back commission.

F.V. Direct the respondent to pay cost of litigation of Rs.2,00,000/-.

36. The complainants are claiming compensation in the above-mentioned reliefs. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before the Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority

37. Hence, the authority hereby passes this order and issue 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):

a. The respondent is directed to pay interest to the complainants against the paid-up amount at the prescribed rate i.e., 10.75% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 11.07.2019 till actual handing over of possession. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

b. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the

allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

c. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period within 30 days from the date of this order and the respondent shall handover the possession in next 60 days to the complainants/allottees.

d. The respondent is directed to execute the conveyance deed of the allotted unit executed in the favour of complainants within 90 days in term of section 17(1) of the Act of 2016 on payment of stamp duty and registration charges as applicable.

e. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

38. Complaint stands disposed of.

39. File be consigned to registry.

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

Dated: 08.12.2023