BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2383 of 2023**
Date of complaint	:	**08.06.2023**
Date of order	:	**13.03.2024**

1. Anil Malhotra,
2. Indu Malhotra,
Both R/o: - Flat no. 702, Tower-A-2,
Parasvnath Exotica, Golf Course Extension Road,
Gurugram-122002. **Complainants**

Versus

IREO Private Limited.
Regd. Office at: C-4, 1st floor, Malviya Nagar,
South Delhi, Delhi-110017. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Deepak Kumar Khushalani (Advocate) Complainants
M.K Dang (Advocate) Respondent

ORDER

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

Rules and regulations made thereunder or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name and location of the project	"The Corridors" at sector 67A, Gurgaon, Haryana
2.	Nature of the project	Group Housing Colony
3.	Project area	37.5125 acres
4.	DTCP license no.	05 of 2013 dated 21.02.2013 valid upto 20.02.2021
5.	Name of licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
6.	RERA Registered/ not registered	**Registered** Registered in 3 phases Vide 378 of 2017 dated 07.12.2017(Phase 1) Vide 377 of 2017 dated 07.12.2017 (Phase 2) Vide 379 of 2017 dated 07.12.2017 (Phase 3)
	Validity Status	30.06.2020 (for phase 1 and 2) 31.12.2023 (for phase 3)
7.	Apartment no.	602, 6th floor, Tower-A1 (As per BBA on page no. 29 of complaint)
8.	Unit area admeasuring	1867.01 sq.ft [Super-Area] (As on page no. 29 of complaint)
9.	Date of approval of building plan	23.07.2013 (as per project details)
10.	Date of environment clearance	12.12.2013 (as per project details)
11.	Date of builder buyer agreement	24.09.2014 (As on page no. 26 of complaint)

12.	Date of fire scheme approval	27.11.2014 (as per project details)
13.	Possession clause	**13.3 Possession and Holding Charges** Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, registration chares, stamp duty and other charges and also subject to the allottee having complied with all the formalities or documentation as prescribed by the company, the company proposes to offer **the possession of the said apartment to the allottee within a period of 42 months from the date of approval of building plans and/or fulfillment of the preconditions imposed thereunder (Commitment Period).** The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the Company. **(Emphasis supplied)**

14.	Due date of possession	23.01.2017 (calculated from the date of approval of building plans) Note: Grace Period is not allowed.
15.	Total sale consideration	Rs.1,99,20,649.34/- (As per payment plan on page no. 62 of complaint)
16.	Amount paid by the complainants	Rs.61,22,733/- (As per SOA dated 04.03.2022 on page 111 of reply)
17.	Occupation certificate	27.01.2022 (As on page no.107 of reply)
18.	Offer of possession	16.02.2022 (as on page 110 of reply)

B. Facts of the complaint:

3. The complainants have made the following submissions: -

I. That the Hon'ble Supreme Court of India vide its judgment dated 11.01.2021 passed in Civil Appeal No. 5785/2019 has held that whose units falls in Tower A-1 of the project in question are entitled for complete refund on account of delay. Hence, the complainants are entitled for refund with interest on account of delay as their unit falls in Tower A-1. Further, the committed period in terms of clause 13.3 of apartment buyer's agreement expired on 23.01.2017, as held by this Authority in its judgment passed in numerous cases pertaining to the same project.

II. That the respondent is developing and constructing a group housing colony named "The Corridors" located at Golf Course Extension Road, Sector-67-A, Gurgaon. Accordingly, the complainant booked a 3 BHK unit/flat in the aforesaid project on 22.3.2013 and upon execution of apartment buyer's agreement, it was assured by the

promoter/respondent that the unit shall be delivered within 42 months from the day of grant of building plan approval which were approved on dated 23.07.2013. Hence, the committed date of delivery of unit ended on 23.1.2017.

III. The respondent of its own vide e-mail dated 28.04.2016 promised to hand over the possession of the unit by the end of year 2017. Thereafter, it was again confronted by the respondent saying vide its separate reply dated 15.03.2017 that the possession of the unit shall be given by last quarter of the year 2017. The admittance of the respondent leaves no room to confront that the project is delayed and complainants were justified for non-remitting the 4th payment demand, which was raised only on 10.01.2017 i.e. nearly on the expiry of committed date.

IV. That the complainants thereafter vide multiple letters/mails including letter dated 25.06.2017 sent to the respondent i.e. after "expiry of committed date & grace period" directing respondent to return the money with interest owing to delay. However, the respondent never paid any heed to the said request of complainants.

V. That the complainants thereafter till April 2023 were requesting the promoter/respondent to return their paid-up amount as the complainants are now not obligated to take the possession of the unit vide their notice of possession letter dated 16.02.2023 but, promoter had never adhered to the demand of complainants regarding return of their amount with interest has now lead to filing of present complaint.

VI. That the complainants also come across about the following facts in regard to incompetency of respondent in dealing with the present project who is not authorized to deal, sell, allot or take money from the complainant/buyers because of the fact: -

a. That the respondent was/is neither the owner for carrying out the residential project nor was competent to collect the money and to book/sell the flats thereof.

b. That the initial/earnest money was taken before grant of building plan approval (which is not permissible as per the conditions stipulated in Housing License or as per Haryana Development & Regulation of Urban Areas Act, 1975). Further, it is also relevant to mention here that respondent at the time of signing the initial booking application form not disclosed to the complainants that the licence for the present project had been granted to other companies.

c. That under section 2 (d) of Haryana Development & Regulation of Urban Areas, Act, 1975 defines term colonizer to mean an individual company or association, body of individuals, whether incorporated or not, owing land for converting it into a colony and to whom a license has been granted under the said Act. However, in the present case, the respondent is neither the owner of any part of land comprised of project "The Corridors", nor any license has been granted by the D.T.C.P, Chandigarh in favour of respondent. Therefore, respondent meets none of the essential conditions of the expression "Colonizer" as prescribed under section 2 (d) of the Haryana Act, 1975. Further, in terms of Policy Memo No.PF-51A/2015/2708 dated 18.2.2015, the D.T.C.P, Chandigarh has laid down policy parameters for allowing change in beneficial interest, *viz.* change in developer; assignment of joint development rights and/or marketing rights etc. in a license granted under Haryana Act, 1975. Whereas, no such permission had been granted to the respondent by the

office of D.T.C.P, Chandigarh, Thus, from the above stated position it is clear that the respondent has no legal authority to deal with the said license No. 5/2013 and/or to book, allot, sell, transfer any flats/units made thereat with any third party and the entire transaction made by the respondent in league with its alleged subsidiary/licensing companies is totally illegal and unlawful based on misrepresentations and false statements which amount to deficiency in service and unfair trade practice.

VII. That this Authority also while taking serious note of the fact that respondent is violating the provisions had issued show-cause notice vide notice no. HARERA/RC 377-379/NOTICE/2019/21 dated 22.2.2019 which clearly says that *"the respondent has falsely misrepresented before H-RERA that the collaboration agreement between land owing companies/respondent and the licensee companies is registered in order to obtain the registration from H-RERA. Whereas under re-examination it had been found that contravention to rule 14 (ii) of the Haryana Real Estate (Regulation and Development) Rules, 2017 had been done so, as to obtain registration of project before interim RERA, Panchkula without approval of change of developer under the policy from D.T.C.P., Haryana.*

VIII. That the respondent at the time of booking advertised the project with a 90 meter motorable access road approaching to the project, but, the respondent since inception and on every account had concealed the fact that the land upon which the 90 meter road was to be developed, which in fact is under litigation filed by the landowners before Hon'ble High Court of Punjab & Haryana in Civil Writ Petition No. 25807/2014 and 8983/2014, wherein stay order had already been passed; furtherance to that no fresh acquisition notification or proceedings

had been initiated by HUDA/Government, as per the information gathered from the office of Land Acquisition Officer, Haryana under RTI vide reply dated 04.01.2017.

IX. That the respondent being a developer in terms of Section 4 (2) (l) (E) of Act 2016, was supposed to take all pending approvals on time, from the competent authorities; but in present scenario neither any permission for change in beneficial interest/change in developer had ever been applied by the licensee companies before competent authority i.e. DTCP, Chandigarh nor had ever been any approval been granted in favour of the respondent to deal with the project in any manner rather being a stranger to the project.

X. That all the actions of respondent are not in consonance with the laws, especially the development regulation laws prevalent in the State of Haryana, including the fact that no valid supporting documents had ever been submitted by licensee companies showing any relation of the respondent except their redundant inter-se agreements executed amongst them, which are invalid, inoperative and not considered by the office of DTCP, Chandigarh.

C. Relief sought by the complainants:

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

I. To refund the entire paid-up amount along with prescribed rate of interest.

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

D. Reply by the respondent.

6. The respondent vide reply dated 18.12.2023 contested the complaint on the following grounds: -

i. 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.

ii. That the complainant was allotted a unit bearing no. CD-A1-06-602, having a tentative super area of 1867.01 sq. ft. vide allotment offer letter dated 07.08.2013 for a sale consideration of Rs.1,99,20,649.34/-. Thereafter, an apartment buyer's agreement was executed between the parties on 24.09.2014.

iii. That the possession of the unit was to be offered to the complainant in accordance with clause 13.3 of the buyer's agreement. Further, clause 13.5 of the agreement also provided for an extended delay period of 12 months from the date of end of the grace period.

iv. That from the aforesaid terms of the booking application form and the apartment buyer's agreement, it is evident that the time was to be computed from the date of receipt of all the requisite approvals. Even otherwise construction cannot be raised in the absence of necessary approvals. It is pertinent to mention here that it has been specified in sub clause (iv) of clause 17 of the building plan dated 23.7.2013 that the clearance issued by the Ministry of Forest and Environment, Government of India had to be obtained before starting of the construction of the project. that the environment clearance for the construction of the project was granted on 12.12.2013. Furthermore, in clause 39 of part A of the environment clearance dated 12.12.2013, it was stated that fire safety plan was to be duly

approved by the fire department before the start of any construction work at the spot. As per clause 35 of the environment clearance certificate dated 12.12.2013, the project was to obtain permission of Mines & Geology Department for excavation of soil before the start of construction. The requisite permission from the Department of Mines & Geology Department has been obtained on 04.03.2014. Furthermore, it was stated in clause 39 of part A of the environment clearance that fire safety plan was the necessity before the start of any construction work at the site. The last of the statutory approvals, i.e., the fire scheme approval was granted by the concerned authorities on 27.11.2014 and the time period for offering the possession according to the agreed terms of the agreement would be expired only on 27.11.2019. The respondent has already completed the construction of the tower in which the unit allotted to the complainant is located and has also obtained occupation certificate from the competent authorities on 27.01.2022. Thereafter, possession of the unit was offered to the complainant on 16.02.2022.

v. That the implementation of the project was affected on account of certain conditions and events which were beyond the control of the respondent and are as under:

- Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to Demonetization: The respondents 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. from 8th 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, 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.

- Orders Passed by National Green Tribunal: In last four successive years i.e., 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. Also, the Hon'ble NGT has passed orders with regard to phasing out the 10-year-old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. Thus, there was a delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November- December 2016 and November-December 2017.
- The construction work remained very badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondents and the said period is also required to be added for calculating the delivery date of possession.
- 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.

- Inclement Weather Conditions viz. Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavourable 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.
- That, furthermore, outbreak of Covid-19 and its various subsequent waves adversely affected the functioning of various Govt. as well as private offices and has caused delay in grant of occupation certificate of phase-II of the project in which unit of the complainant is situated. This Hon'ble Authority has also taken the suo moto cognizance of the covid-19 pandemic and has declared 6 months period starting from 25.03.2020 as force majeure period. The Hon'ble Apex Court and Hon'ble Punjab and Haryana High Court have also taken suo moto cognizance of the situation due to various waves of Covid-19 and have granted relief in terms of extension of limitation w.e.f. 15.03.2020 to 28.02.2022. Accordingly, this period w.e.f. 15.03.2020 to 28.02.2022 should be counted under force majeure since respondent after completion of the construction of the project has applied for grant of occupation certificate on 10.09.2019 and any delay in grant of occupation certificate either due to various false and frivolous complaints filed by various defaulting allottees or due to non-functioning of the offices of the competent authority due to Covid-19 pandemic cannot be attributed to the respondent.

vi. That the complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that his calculation has gone wrong on account of severe slump in the real estate market and the complainant now wants to get out of the concluded contract on highly flimsy and baseless grounds. Such malafide tactics of the complainant cannot be allowed to succeed.

E. Jurisdiction of the authority

7. The respondent has raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

E.II Subject matter jurisdiction

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

> ***Section 11*****.....***(4) The promoter shall-***
> ***(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made***

thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

11. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(C), 357 and*** *reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** and wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating

officer under Section 71 and that would be against the mandate of the Act 2016."

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the 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 Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

13. The respondent submitted 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 and the same is reproduced below for the ready reference:

> ***"35. Dispute Resolution by Arbitration***
> *"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".*

14. 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.

15. 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 complainant and builder 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."

16. 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 para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

17. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that the complainants

are well within 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. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.

F.II Objection regarding the complainant being investor.

18. The respondent has taken a stand that the complainants are investor and not a consumer and 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 consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims and 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 buyer's agreement, it is revealed that the complainants are buyers and have paid total price of Rs.61,22,733/- to the promoter towards purchase of an unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

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

F.III Objections regarding the circumstances being 'force majeure'

20. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainants is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, dispute with contractor, non-payment of instalment by allottees and demonetization, spread of Covid-19 across worldwide. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 23.01.2017. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. The plea of the respondent regarding various orders of the NGT and demonetisation and all the pleas advanced

in this regard are devoid of merits. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainants.

G.I To refund the entire paid-up amount alongwith prescribed rate of interest.

21. The complainants intend to withdraw from the project and are seeking refund 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)*

22. Clause 13 of the buyer's agreement provides the time period of handing over possession and the same is reproduced below:

13.3

"Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said Apartment to the Allottee within a period of 42 months from the date of approval of the Building Plans and/or fulfilment of the preconditions imposed there under ("Commitment Period"). The Allottee further agrees and understands that the Company shall additionally be entitled to a period of 180 days ("Grace Period"), after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company."

23. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them

the benefit of doubt because of the total absence of clarity over the matter.

24. The authority has gone through the possession clause of the agreement. 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 the complainants not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. 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 allottees that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter 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 apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession.

25. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 180 days grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter.

26. The respondent/promoter submitted that the due date of possession should be calculated from the date of fire scheme approval which was obtained on 27.11.2014, as it is the last of the statutory approvals which forms a part of the preconditions. The authority is of the view that the

respondent has not kept the reasonable balance between his own rights and the rights of the complainant/allottee. The respondent has acted in a pre-determined and preordained manner.

27. On a bare reading of the clause 13.3 of the agreement, it becomes apparently clear that the possession in the present case is linked to the "fulfilment of the preconditions" which is so vague and ambiguous in itself. Nowhere in the agreement it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due date of possession is subjected to in the said possession clause. If the said possession clause is read in entirety the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the "fulfilment of the preconditions" has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject apartment. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and totally against the interests of the allottees must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of possession of the unit in question to the complainant.

28. By virtue of apartment buyer's agreement executed between the parties on 24.09.2014, the possession of the booked unit was to be delivered

within 42 months from the date of approval of building plan (23.07.2013) which comes out to be 23.01.2017 along with grace period of 180 days which is not allowed in the present case.

29. On 23.07.2013, the building plans of the project were sanctioned by the Directorate of Town and Country Planning, Haryana. Clause 3 of the sanctioned plan stipulated that an NOC/clearance from the fire authority shall be submitted within 90 days from the date of issuance of the sanctioned building plans. Also, under section 15(2) and (3) of the Haryana Fire Service Act, 2009, it is the duty of the authority to grant a provisional NOC within a period of 60 days from the date submission of the application. The delay/failure of the authority to grant a provisional NOC cannot be attributed to the developers. But here the sanction building plans stipulated that the NOC for fire safety (provisional) was required to be obtained within a period of 90 days from the date of approval of the building plans, which expired on 23.10.2013. It is pertinent to mention here that the developers applied for the provisional fire approval on 24.10.2013 (as contented by the respondents herein in the matter of Civil Appeal no. 5785 of 2019 titled as ***'IREO Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.)*** after the expiry of the mandatory 90 days period got over. The application filed was deficient and casual and did not provide the requisite documents. The respondents submitted the corrected sets of drawings as per the NBC-2005 fire scheme only on 13.10.2014, which reflected the laxity of the developers in obtaining the fire NOC. The approval of the fire safety scheme took more than 16 months from the date of the building plan approval i.e., from 23.07.2013 to 27.11.2014. The builders failed to give any explanation for the inordinate delay in obtaining the fire NOC.

30. In view of the above, the authority taken a view that the complainant/allottee should not bear the burden of mistakes/laxity or the irresponsible behaviour of the developers/respondents and seeing the fact that the developers/respondents did not even apply for the fire NOC within the mentioned time frame of 90 days. It is a well settled law that no one can take benefit out of his own wrong. In light of the above-mentioned facts the respondent/promoter should not be allowed to take benefit out of his own mistake just because of a clause mentioned i.e., fulfilment of the preconditions even when they did not even apply for the same in the mentioned time frame. In view of the above-mentioned reasoning the authority has started to calculate the due date of possession from the date of approval of building plans.

31. **Admissibility of grace period:** The respondent promoter had proposed to hand over the possession of the apartment within 42 months from the date of sanction of building plan and/or fulfilment of the preconditions imposed thereunder which comes out to be 23.01.2017. The respondent promoter has sought further extension for a period of 180 days after the expiry of 42 months for unforeseen delays in respect of the said project. The respondent raised the contention that the construction of the project was delayed due to *force majeure* conditions including demonetization and the order dated 07.04.2015 passed by the Hon'ble NGT including others.

32. **Demonetization:** Demonetization could not have hampered the construction activities of the respondent's project that could lead to the delay of more than 2 years. Thus, the contentions raised by the respondents in this regard are rejected.

33. **Order dated 07.04.2015 passed by the Hon'ble NGT:** The order dated 07.04.2015 relied upon by the respondent promoters' states that

"In these circumstances we hereby direct state of U.P., Noida and Greater NOIDA Authority, HUDA, State of Haryana and NCT, Delhi to immediately direct stoppage of construction activities of all the buildings shown in the report as well as at other sites wherever, construction is being carried on in violation to the direction of NGT as well as the MoEF guideline of 2010."

34. A bare perusal of the above makes it apparent that the above-said order was for the construction activities which were in violation of the NGT direction and MOEF guideline of 2010, thereby, making it evident that if the construction of the respondents project was stopped, then it was due to the fault of the respondent itself and cannot be allowed to take advantage of its own wrongs/faults/deficiencies. Also, the allottee should not be allowed to suffer due to the fault of the respondent/promoter. Therefore, in the present case, the respondent/promoter has not assigned such compelling reasons as to why and how it shall be entitled for further extension of time 180 days in delivering the possession of the unit. Accordingly, this grace period of 180 days cannot be allowed to the promoters at this stage.

35. The complainants have submitted that due to inordinate delay on part of the respondent, they had surrendered the unit in question vide letter dated 25.06.2017 and made a request for refund of the paid-up amount alongwith interest to the respondent-promoter, but the respondent never paid any heed to the said request of the complainants, leading to filing of the present complaint.

36. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of apartment buyer's agreement executed between the parties on 24.09.2014, the possession of the booked unit was to be delivered within 42 months from the date of approval of building plan (23.07.2013) which

comes out to be 23.01.2017. The grace period of 180 days is not allowed in the present complaint for the reasons mentioned above. Therefore, the due date of handing over possession comes out to be 23.01.2017. Occupation certificate was granted by the concerned authority on 27.01.2022 and thereafter, the possession of the subject flat was offered to the complainants on 16.02.2022. However, it is pertinent to note that the complainants had already requested refund of the monies paid by them vide letter dated 25.06.2017 which is prior to the receipt of occupation certificate but after the due date agreed between the parties in the BBA. Copy of the same has been placed on record. In view of the above-mentioned facts, the allottees intended to withdraw from the project and are well within their right to do the same in view of section 18(1) of the Act, 2016.

37. Moreover, 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. observed as under: -

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

38. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and

regulations made thereunder or to the allottees 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 allottees, as they wish 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.

39. 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., @10.85% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the authority

39. 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 entire paid-up amount of Rs.61,22,733/- received by it from the complainants along with interest at the rate of 10.85% 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 realization of the 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 complainant and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainant.

40. Complaint stands disposed of.

41. File be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 13.03.2024