BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: 7108 of 2022
Order reserved on: 30.11.2023
Order pronounced on: 18.01.2024

Mrs. Sneh Lata Batra
R/o: - House No. R-597, New Rajinder Nagar (1st floor)
New Delhi- 110060 **Complainant**

Versus

M/s Anant Raj Limited
Regd. office: Plot no. CP-01, Sector-8, IMT Manesar, Gurugram, Haryana-122051
Corporate Office: A.R.A., Center E-2, Jhandewalan Extension, New Delhi- 110055 **Respondent**

CORAM:
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Khush Kamra (Advovate) **Complainant**
Shri Rahul Bhardwaj (Advocate) **Respondent**

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 allottee 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. No.	Particulars	Details	
1.	Name of the project	"Anant Raj Estate", Sector-63A, Gurgaon	
2.	Nature of project	Residential plotted colony	
3.	**RERA registered/not registered**	Registered vide registration no. 142 of 2017 dated 28.08.2017	
	Validity status	27.08.2022	
4.	**DTPC License no.**	119 of 2011 dated 28.12.2011	71 of 2014 dated 29.07.2014
	Validity status	27.12.2019	28.07.2024
	Licensed area	100.262 acres	7.8625 acres
	Name of licensee	M/s Rose Realty Pvt. Ltd. & others	M/s Glaze Properties Ltd & others
5.	Application letter dated	22.03.2012 [As per page no. 36 of complaint]	
6.	Provisional allotment letter	20.05.2012 [As per page no. 36 of complaint]	
7.	Final allotment letter	12.02.2013 [As per page no. 40 of complaint]	
8.	Independent floor no.	22-SF, pocket -E [As per page no. 40 of complaint]	
9.	Unit area admeasuring	1810 sq. ft. (super area) [As per page no. 40 of complaint]	
10.	Date of floor buyer agreement	11.07.2014 [As per page no. 46 of complaint]	
11.	Sale consideration	Rs.1,32,50,746/- [As per payment plan on page no. 42 of complaint]	
12.	Amount paid by the complainants	Rs.54,23,670/- [As statement of account dated 26.02.2021 on page no. 85 of complaint]	

13.	Possession clause	***Clause 4.2*** *The Developer shell endeavour to handover the possession of the floor unit within* ***36 months from the date of execution of the floor buyer's agreement with the grace period of 6 months ("tentative handover date").*** *Notwithstanding the same the developer shell at all the times we entitled to an extension of time from the tentative handover date, if the completion of the colony or the part /portion of the colony where the said floor unit is situated is delayed on account of any force major event.*
14.	Due date of possession	**11.01.2018** (Calculated from date of agreement i.e., 11.07.2014) ***(Grace period of 6 months is allowed being unconditional)***
16.	Occupation certificate	11.01.2019 [As per page no. 80 of reply] (inadvertently mentioned as 15.02.2020 in the proceeding dated 30.11.2023)
17.	Offer of possession	26.02.2021 [As per page no. 81 of complaint]

B. Facts of the complaint

3. The complainant has made the following submissions: -

I. That the present complaint pertains to a situation whereby the complainant had booked a residential Independent floor unit bearing no. 22-SF, on the second floor, having super area of 1810 sq. ft. in the project namely "Anant Raj Estate" situated at Sector- 63-A, Gurgaon, and Haryana being developed by M/s Anant Raj Limited.

II. That the complainant was in need of a flat in a wholesome locality to fulfill the residential requirements of her family. While the complainant was looking for a flat to buy, the respondent approached her and made

elaborate representations and promises about the project, including the quality, standard, and exquisite facilities that would be provided. Further, respondent assured the complainant that the project would timely be constructed and thereafter possession of the unit shall be timely delivered. The respondent held several meetings with the complainant at their registered office, during which the entire layout, design, and amenities of the project were explained to her. The complainant, on being assured by the respondent's representations and promises, booked the said unit in the project of the respondent.

III. That based on the various representations made by the respondent, the complainant paid an amount of Rs.10,00,000/- towards booking a unit in the project on 22.03.2012. In furtherance of the same, the complainant submitted a booking application form to the respondent on 22.03.2012 for booking a unit admeasuring 1810 sq. ft., in the project being developed by the respondent.

IV. That upon filling the application form, the respondent issued provisional allotment letter after a delay of two months i.e., on 20.05.2012 from the date of booking whereby the said unit was allotted to the complainant. It must be noted that the total sale consideration for unit is Rs.1,29,27,590/-. Thereafter, the respondent subsequently issued a final allotment letter after a delay of one year on 12.02.2013.

V. That subsequent to the issuance of the final allotment letter, the respondent had, without even executing buyer's agreement, started to unlawfully demand huge amounts of money with respect to the unit. The complainant had to run from pillar to get the respondent to execute buyer's agreement with respect to the unit but no avail. The complainant

on realizing that she had already paid a substantial amount of money with respect to the unit and the fact that she was at submissive position, met the unlawful payment demand of the respondent. It is hereby crucial to state that the complainant even prior to the execution of the builder buyer's agreement on 30.06.2012 made another payment of Rs.44,23,670/- with respect to the unit.

VI. That the respondent after a delay of more than 2 years from the booking of the unit and after collection of a substantial amount the respondent executed the floor buyer agreement dated 11.07.2014 in the favor of the complainant. She was shocked to find that the agreement was filled with various arbitrary and one-sided terms and conditions. For instance, as per clause 2.5 of the agreement, on delay in payments towards the unit, the complainant was liable to pay compoundable interest @18% per annum to the respondent. However, the complainant could not negotiate any of the one-sided and arbitrary terms and conditions as any disagreement thereof would have led to cancellation of the unit and forfeiture of the non-refundable amount paid by her along with earnest money i.e., Rs.10,00,000/-.

VII. That as per clause 4.2, the possession of the unit was promised to be offered within 36 months from the date of execution of this floor buyer agreement with a grace period of 6 months for making an offer of possession of the unit. Thus, the possession of the unit was promised to be offered to the complainant latest by January 2018.

VIII. That the complainant had been patiently waiting for the respondent to complete the project and thereby deliver the possession of the unit from the date of booking. However, to the utter shock and dismay of the

complainant, the respondent despite committing a delay of more than 2 years in executing the agreements, had unilaterally granted itself another 24 months to deliver the unit from the date of agreement. Further, the respondent even gave itself an extension of 6 months in case it fails to deliver the unit within 36 months. That unilaterally granting itself the said period of possession along with an extension of 6 months is a clear indication of the fact that the respondent has been indulging in unfair trade practices.

IX. That the complainant complied with each payment demand as was raised by the respondent. The complainant sought regular updates from the respondent through several emails, meetings, and telephonic conversations, with respect to the progress of construction work of the project and were assured that the same was progressing as per schedule and that possession of the unit would be offered within the time promised as per the agreement i.e., by January 2018. The respondent had collected an amount of Rs.54,23,670/- against consideration of the unit from the complainant. However, the respondent failed to offer possession of the unit to the complainant within the time period stipulated in the agreement and even till date. The complainant relentlessly chased the respondent seeking a tentative date by when possession of the unit would be offered but the same was of no avail. The respondent failure to offer possession of the unit despite a delay of more than 4 years from the date of booking clearly demonstrates a deficiency in their services.

X. That the respondent received the occupation certificate from the competent authorities vide letter dated 11.01.2019 and thereafter the respondent vide its letter dated 26.02.2021, offered the possession of the

said allotted unit to the complainant and raised a demand for the alleged balance dues including GST. The respondent even after receiving the occupation certificate back in 2019 did not offer the possession of the unit till 2021.

XI. That the complainant did not take the possession of the said unit when handled over by the respondent as the unit was not complete in all aspects as mentioned in the agreement and as per the agreement executed between the parties the total consideration of the unit was Rs.1,24,95,000/- whereas the final amount raised by the respondent in the intimation of possession letter was Rs.1,40,52,983/-.

XII. That the complainant has been severely traumatized by the gross deficiency in services of the respondent and unethical trade practice of the respondent as the respondent offered the possession the unit which was not complete in all aspects and was not in a habitable condition, thereafter the respondent unlawfully demanded huge amounts of money with respect to the unit but has even failed to adequately compensate for the inordinate delay caused in offering possession of the unit. Therefore, the complainant has approached this Authority for redressal of her grievances and concerns.

XIII. That the complainant had booked the unit in the project of the respondent in the year 2012 and since then the complainant has eagerly awaited possession of the unit. Therefore, despite the inordinate delay that has been caused by the respondent, the complainant seek possession of the unit complete in all respects along with appropriate compensation for the period of delay caused by the respondent.

C. Relief sought by the complainant:

4. The complainant has sought following relief:

   I. Direct the respondent to handover the physical possession of the allotted unit complete in all respects.

   II. Direct the respondent to pay interest @10% per annum on the amount deposited by the complainant with the respondent with effect the date from the date of booking of the unit, till the date if actual possession is handed over by the respondent.

   III. Direct the respondent to pay a sum of Rs.2,00,000/- to the complainant towards cost of litigation.

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 has contested the complaint on the following grounds:-

   I. The complainant has sought relief under section 18 of the Act 2016, but the said section is not applicable in the facts of the present case and as such the complaint deserves to be dismissed. It is submitted that the operation of section 18 is not retrospective in nature and the same cannot be applied to the transactions as they were entered prior to the Act of 2016 came into force. The parties while entering into the said transactions could not have possibly taken into account the provisions of the Act and as such cannot be burdened with the obligations created therein. In the present case also, the floor buyer agreement was executed much prior to the date when the Act of 2016 came into force and as such

section 18 of the Act cannot be made applicable to the present case. Any other interpretation of the Act of 2016 will not only be against the settled principles of law as to retrospective operation of laws but will also lead to an anomalous situation and would render the very purpose of the Act nugatory. The complaint as such cannot be adjudicated under the provisions of Act of 2016.

II. That the present complaint, so preferred under the Act 2016, is not maintainable as the complainant has failed to disclose any maintainable as the complainant neither have any cause of action nor any *locus standi* to file or maintain the present complaint against the respondent, especially when he has breached the terms and conditions of the agreement and contract by defaulting in making timely payments and in the guise of the present complaint the complainant is seeking to amend/modify/re-write the terms and conditions of the agreement /understanding between the parties in order to cause wrongful gain to themselves and wrongful loss to the respondent which is evident from the averments as well as the prayers sought in the complaint.

III. That the complainant had approached the respondent and expressed an interest in booking an residential independent floor in project developed by the respondent known as "***Anant Raj Estate***" situated in Sector 63A, Gurugram. Prior to making booking the complainant conducted extensive and independent enquiries with regard to the project and it was only after the complainant was fully satisfied about all aspects of the project, that the complainant took an independent and informed decision, uninfluenced in any manner by the respondent, to book the unit.

IV. That the complainant, in pursuance of the aforesaid application form, was allotted an independent floor unit bearing no. 22 on second floor, in pocket E admeasuring 1810 sq. ft. in the "Estate Floor" at "Anant Raj Estate" by paying an initial token amount of Rs.10,00,000/-. She consciously opted for installment wise payment plan for remittance of the sale consideration for the unit in question and further represented to the respondent that he shall remit every installment on time as per the payment schedule. The respondent had no reason to suspect the *bona fide* of the complainant and proceeded to allot the unit in question in their favor.

V. That subsequent to the execution of the application form and the provisional allotment letter, the respondent issued a final allotment letter dated 12.02.2013, confirming the allotment of the above mentioned independent residential floor in favour of the complainant-allottee for a total sale consideration of Rs.1,33,05,902/- including all the miscellaneous charges paid to the respective competitive authorities. That at the time of the final allotment letter, the complainant as per payment plan made an amount of Rs.44,23,670/-.

VI. That the final allotment letter being the preliminary draft containing the basic and primary understanding between the parties on 12.02.2013. However, the complainant kept, on delaying the singing of the floor buyer's agreement on one or the other pretext of their constant travels for work and kept promising/assuring the respondent to visit their office to execute the floor buyer's agreement.

VII. That upon the grant of occupation certificate on 11.01.2019 from the competent authority i.e., Director General, Town and Country planning

Haryana, the respondent had sent the complainant email dated 03.10.2019, informing about receipt of occupation certificate for the said unit and amount payable upon registration of same, subsequently the complainant visited the site and upon satisfying himself about the completion of floor unit, agreed to remit the dues payable, but due to his frequent travel issues, she did not make the payment and also did not pursue to take possession. That the respondent neither raised reminders during the COVID period i.e., in year 2020 nor charge interest for said delayed period by the complainant and send a reminder intimation of possession dated 26.02.2021, intimating the complainant to obtain the possession of their allotted independent residential floor, subject to clearing the outstanding dues.

VIII. That the complainant till the issuance of the first demand letter paid only Rs.54,23,670/-. The respondent started the raising demands letter from the complainant only after receiving the occupation certificate from the competent authority. The complainant is very well aware of the continues delay and were reminded on continuous basis through the demands letters. It is also significant to note that the complainant under two different mails both dated 23.06.2021 requested for waiver of penalties considering the COVID circumstances and agreed to make balance payment before leaving the country on 02.07.2021 and admitted the delay on his part. The respondent as per the terms and conditions of the floor buyer agreement sent numerous demand letter from 31.08.2021, 02.09.2021, 11.11.2021, 20.12.2021, 28.02.2022, 05.05.2022 and 28.07.2022 to clear all the outstanding dues for the said apartment.

IX. That after obtaining no response from the complainant, the respondent sent a final notice letter dated 26.10.2022 requesting the complainant to clear the balance payment, failing which the independent residential floor of the complainant would be automatically cancelled as per the terms and conditions of the floor buyer agreement. Vide the final notice dated 26.10.2022, she was categorically apprised that the company has complete right to terminate the agreement and cancel the residential independent floor in case of any delayed payment by the allottee and reserves the right to forfeit the earnest money, interest and statutory taxes paid for the residential independent floor. Furthermore, the respondent clarified vide the final demand letter, that the same letter shall be treated as the cancellation letter provided if the complainant fails to clear the outstanding dues within a period of one month, to which the complainant paid no heed. Therefore, it would not out of place to state that subsequent to the serving of the final demand letter, she never paid and cleared the outstanding amount towards the said independent floor thereby constraining the respondent to cancel the said unit.

X. That the complainant paid no heed to the requests of the respondent. What is important to observe herein, by perusal of above-mentioned documents as well as numerous demand notices raised by the respondent, that the complainant was never serious to take the possession of the said floor unit in question. It would not be out of place to state that complainant is a habitual and wilful defaulter, who deliberately abstained itself from paying the instalments on time. Moreover, the complainant in the series of their own e-mails can be seen admitting the fact that there has been a delay in clear the payment from

her side citing COVID issues, which itself is a clear evidence that at this stage the complainant is only trying to take a shed under the garb of the Act, 2016 by submitting wrong, false and frivolous submissions before this Authority.

XI. That, after continuous and wilful defaults on behalf of the complainant, the independent residential floor of the complainant was automatically cancelled dated 26.11.2022 as the respondent was left with no other option. At the time of cancellation of the said unit, the complainant was bound to pay the charges amounting to Rs.1,11,17,376/- (including the interest charges as well as the charges towards the stamp duty). The respondent cancelled the subject unit in consonance with the terms of the floor buyer agreement executed with the complainant and did not breach any of the terms and conditions of the same despite the fact that the respondent faced huge harassment from the complainant on account of non-payment of dues towards the said unit. Further, the cancellation of the said unit has been done as per section 11(5) of the Act, 2016.

XII. That the complainant is an investor and booked multiple units with the respondent to yield gainful returns by selling the same in the open market, however, due to the ongoing slump in the real estate market, the complainant has filed the present purported complaint to enjoy wrongful gain from the agreement. She do not come under the ambit and scope of the definition an allottee under section 2(d) of the Act, as the complainant is an investor and booked the units in order to enjoy the good returns from the project. She has invested in the independent residential floor in question for commercial gains, i.e. to earn income by way of rent and/or re-sale of the property at an appreciated value and to earn premium

thereon. Since the investment has been made for the aforesaid purpose, it is for commercial purpose and as such the complainant is not a consumer/end users. The complaint is liable to be dismissed on this ground alone.

XIII. Further delay in raising construction, if any, is on account of failure of complainant to timely make the payment of the instalments due as per the agreed payment plan and on account of reasons which are covered under clause 4.2 of the floor buyer agreement as force majeure and the parties had clearly agreed that in that case the respondent shall not be held responsible or liable for not performing its obligations or undertaking mentioned in the agreement if such performance is prevented, delayed or hindered by the reasons explained.

XIV. That the possession of the unit as per the co-joint reading of clause 4.1 and 4.2 of the floor buyer agreement was to be handed over within 36 months (plus the grace period of 180 days i.e., 6 months) which comes to 11.01.2018, the occupation certificate of the unit was granted by the competent authority on dated 11.01.2019. The complainant is trying to confuse this Authority with their false, frivolous and moonshine contentions. That the said date of deemed possession was a tentative date which was expressed in the agreement and accordingly, any fluctuation in delivery of the possession was ought to be accepted by her.

XV. That it was not only on account of following reasons which led to the push in the proposed possession of the project but because of other several factors also as stated below for delay in the project:

- Time and again various orders passed by the NGT staying the construction.

- The sudden surge requirement of labour and then sudden removal has created a vacuum for labour in the NCR region. That the projects of not only the respondent but also of all the other developers have been suffering due to such shortage of labour and has resulted in delays in the project is beyond the control of any of the developers.
- Moreover, due to active implementation of social schemes like National Rural Employment Guarantee and Jawaharlal Nehru National Urban Renewal Mission, there was also more employment available for labours at their hometown even though the NCR region was itself facing a huge demand for labour to complete the projects.
- Even today in current scenario where innumerable projects are under construction all the developers in the NCR region are suffering from the after-effects of labour shortage on which the whole construction industry so largely depends and on which the respondent has no control whatsoever.
- Shortage of bricks in region has been continuing ever since and the respondent had to wait many months after placing order with concerned manufacturer who in fact also could not deliver on time resulting in a huge delay in project.
- In addition, the current government declared demonetization on 08.11.2016 which severely impacted the operations and project execution on the site as the labours in absence of having bank accounts were only being paid via cash by the sub-contractors of the company and on the declaration of the demonetization, there was a huge chaos which ensued and resulted in the labours not accepting demonetized currency after demonetization.
- In July 2017, the Government of India further introduced a new regime of taxation by the name of Goods and Service Tax which further created chaos and confusion owning to lack of clarity in its implementation. Ever since July 2017 since all the materials required for the project of the company were to be taxed under the new regime it was an uphill task of the vendors of building material along with all other necessary materials required for construction of the project wherein the auditors and CA's across the country were advising everyone to wait for clarities to be issued on various unclear subjects of this new regime of taxation which further resulted in delays of procurement of materials required for the completion of the project.
- That there was a delay in the project on account of violations of the terms of the agreement by several allottee and because of the recession in the market most the allottee have defaulted in making

timely payments and this accounted to shortage of money for the project which in turn also delayed the project.

- Then the developers were struck hard by the two consecutive waves of the covid-19, because of which the construction work completely came to halt. Furthermore, there was shortage of labour as well as the capital flow in the market due to the sudden lockdown imposed by the government.
- Lately, the work has been severely impacted by the ongoing famers protest in the NCR as the farmers protest has caused huge blockade on the highway due to which ingress and egress of the commercial vehicles carrying the raw materials has been extremely difficult, thereby bringing the situation not in the control of the developers and thus, constitutes a part of the force majeure.

XVI. Further, the prayer as sought for by the complainant is directly contrary to the binding inter-se agreement. In relation to this prayer, the same is fully envisaged and dealt with by way of detailed terms and conditions in the inter-se agreement itself. She is in default of their duty under section 19(6) of the Act and thus the respondent is also entitled to the prescribed interest under section 19(7) of the Act of 2016.

XVII. That upon completion of the development, construction and other related works, the buyer will be entitled to take possession of the said independent residential floor only after all the amounts payable towards total sale price and other charges and dues or amounts payable under the agreement are paid and the conveyance deed in respect of the said independent residential floor is executed and duly registered on the terms and conditions of this agreement except those omitted by the promoter as unnecessary and the terms and conditions, if any, imposed by the authorities in this behalf with the Registrar/Sub-Registrar concerned.

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

E. Written submission made by the complainant as well as respondent.

8. The complainant and respondent have filed the written submissions on 15.12.2023 and 29.12.2023 respectively which are taken on record. The additional facts apart from the complaint or reply have been stated by the parties in written submissions are mentioned below.

E.I Written submission of the complainant

9. The complainant has filed the written submission on 15.12.2023, and made the following submissions.

- That the respondent offered the possession of the allotted unit to the complainant vide letter of offer of possession dated 26.02.2021 i.e., after a delay of 4 years from the promised date of offer of possession as stipulated in the agreement. It is noteworthy to mention here that more than 10 years have transpired since the agreed-upon possession date in the agreement, and yet, the respondent has not made any remittance whatsoever towards the compensation for the delay to which the complainant was legally entitled. The complainant vide several emails had informed the respondent that the demand raised is not acceptable since it is not backed by any delay penalty.
- That as per the payment schedule attached with the buyer's agreement the consideration agreed between the parties was Rs.1,33,54,629/-. However, vide the email dated 03.10.2019, intimation of the demand request raised by the respondent after getting the occupation certificate, the consideration was revised to Rs.1,40,52,983/-.

E.II Written submission of the respondent

10. The respondent has filed the written submission on 07.12.2023, and made the following submissions: -

- That the respondent had received occupation certificate of the said unit dated 11.01.2019 and in furtherance of which, the respondent intimated

the complainant via email dated 03.10.2019 informing the complainant about receipt of occupation certificate of the said unit along with the offer of possession, as the complainant is an NRI and a resident of Singapore. Also, it is pertinent to mention that respondent never sent any reminders during the COVID period i.e. year 2020 nor charged interest for the said delayed period from the complainant and sent a reminder intimation of possession (IOP) dated 26.02.2021, intimating the complainant to obtain the possession of their allotted independent residential floor subject to clearing outstanding dues.

- The complainant duly acknowledged & received the e-mails dated 03.10.2019 & 06.10.2019 and agreed to pay the remaining amount of the unit as per the terms and conditions of the builder buyer agreement with the condition of waiving of the interest on the delayed payment by herself.
- The complainant in a subsequent email dated 06.10.2019, accepted the waiver provided and also seeked advise if Singapore Dollar would be acceptable or not. The respondent replied to this email in affirmative on 11.10.2019. But post this communication there was neither any payment received by the respondent nor any query from complainant side.
- During Covid-19 period, the respondent had never sent any demand letters to the complainant since respondent is a customer-centric entity. However, after first wave of Covid-19 was over, the respondent again provided a fresh possession letter in 2021 to the complainant waiving the interest on the delayed payment by the complainant.
- The respondent had sent numerous demand letters to the complainant dated 31.08.2021, 02.09.2021, 11.11.2021, 20.12.2021, 28.02.2022, 05.05.2022 and 28.07.2022 in addition to emails dated 03.10.2019, 11.10.2019, 23.06.2021, 02.09.2021, 15.11.2021, 21.12.2021 19.05.2022 and 28.07.2022 demanding outstanding dues. Therefore, the respondent before the cancellation of the unit demanded Rs.97,48,507/- as the total amount accrued for delay in payment by her of more than 6 years.
- That vide email dated 06.10.2019, the complainant informed the respondent about his inability to make payment in INR (Indian Rupee) and requested if complainant can be allowed to make the payment in Singapore Dollar. The respondent, despite being aware of the fact that accepting payment in different currency would very well bring extra workload for them, accepted to complainant's request.
- Despite acceding to various requests of the complainant, the respondent did not receive any payment from the complainant. Therefore, respondent was constrained to send a final notice letter dated 26.10.2022, requesting complainant to clear the balance payment, failing which the independent

residential floor of complainant would automatically be cancelled as per the terms and conditions of the floor buyer's agreement. Final notice dated 26.10.2022, the complainant was categorically apprised that the company has complete right to terminate the agreement and cancel the residential independent floor in case of any delayed payment by the allottee and that the same letter shall be treated as the cancellation letter provided if the complainant fails to clear the outstanding dues within a period of one month but complainant paid no heed to any of this.

F. Jurisdiction of the authority

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

F. I Territorial jurisdiction

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.

F.II Subject matter jurisdiction

12. 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.*

13. 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.

G. Findings on the objections raised by the respondent:

G.I Objection regarding maintainability of complaint on account of complainant being investor.

14. The respondent took a stand that the complainant is investor and not consumers and therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. However, 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 allotment letter, it is revealed that the complainant is buyer's, and he has paid total price of Rs.54,23,670/- to the promoter towards purchase of unit 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;"*

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant 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". Thus, the contention of promoter that the allottee being investor are not entitled to protection of this Act also stands rejected.

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

15. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be out rightly dismissed as the buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

16. The authority is of the view 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. The Act nowhere provides, nor can be so construed, that all previous agreements would 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 would be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017*** which provides as under:

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

17. 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."*

18. 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.III Objections regarding force majeure.

19. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, dispute with contractor, non-payment of instalment by allottees, GST, demonetization, shortage of labour, and COVID- 19. The plea of the respondent regarding various orders of the NGT and demonetisation and all the pleas advanced in this regard are devoid of merit. 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. Further, also there may be cases where allottee has not paid instalments regularly but all the allottee cannot be expected to suffer because of few allottee. 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. IV. Objection regarding delay in completion of construction of project due to outbreak of Covid-19.

20. The Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020*** dated 29.05.2020 has observed as under:

69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

21. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 11.01.2018. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period cannot be excluded while calculating the delay in handing over possession.

H. Findings regarding relief sought by the complainant.

H.I Direct the respondent to handover the physical possession of the allotted unit complete in all respects.

H.II Direct the respondent to pay interest @10% per annum on the amount deposited by the complainant with the respondent with effect the date from the date of booking of the unit, till the date if actual possession is handed over by the respondent.

22. The complainant was allotted a unit bearing no. 22-SF, vide provisional allotment letter dated 20.05.2012, under possession linked payment plan. Thereafter, an agreement to sell was executed between the parties on 11.07.2014, vide which a unit bearing no. 22-SF, in pocket- E admeasuring 1810 sq. ft. was allotted to her. She has paid an amount of Rs.54,23,670/- against the basic sale consideration of Rs.1,32,50,746/-. As per clause 4.2 of the agreement, the respondent was required to hand over possession of the unit within a period of 36 months from the date of execution of the floor

buyer's agreement with a grace period of 6 months. Therefore, the due date of possession comes out to be 11.01.2018.

23. That the respondent has obtained the occupation certificate in respect of the allotted unit of the complainant on 15.02.2020 and thereafter, has offered the possession on 26.02.2021. Thereafter, the respondent has issued various reminder cum demand letters to the complainant and requested to pay the outstanding dues but the complainant has failed to pay the same. Due to non-payment of the outstanding dues, the respondent has cancelled the unit vide letter dated 26.10.2022 vide which the respondent threatened the complainant to forfeit the entire amount paid by her.

24. The respondent submitted that the complainant is a defaulter and has failed to make payment as per the agreed payment plan. Various reminders and final opportunities were given to the complainant and thereafter the unit was cancelled vide letter dated 26.10.2022. Accordingly, the complainants failed to abide by the terms of the agreement to sell executed inter-se parties by defaulting in making payments in a time bound manner as per payment schedule.

Now, the question before the authority is whether this cancellation is valid or not?

25. The authority has gone through the payment plan, which was duly signed by both the parties, which is reproduced for ready reference: -

S. No.	Payment Due	Charge	%	Amount	Service Tax	Total Amount Floor Unit
1.	At the time of booking	Basic	8.19%	974,896.00	25,104.00	1,000,000.00
2.	Within 60 days from date of allotment	Basic EDC & IDC PLC	31.81% 43.31% 50.00%	3,785,104.00 187,335.00 297,500.00	116,960.00 0.00 9,193.00	4,396,092.00
3.	On offer of possession	Basic PLC EDC & IDC	60.00% 50.00% 56.69%	7,140,000.00 297,500.00 245,255.00	264,751.00 11,031.00 0.00	7,958,537.00

TOTAL COST	13,354,629.00

26. It is matter of record that the complainant booked the aforesaid unit under the above mentioned payment plan and paid an amount of Rs.54,23,670/- towards total consideration of Rs.1,32,50,746/- which constitutes 40.93% of the total sale consideration and she has paid the last payment only on 30.06.2012. The respondent has obtained the occupation certificate in respect of the allotted unit of the complainant on 15.02.2020 and thereafter, the possession of the same was offered on 26.02.2021.

27. It is pertinent to mention here that as per section 19(6) & 19(7) of Act of 2016, the allottee is under obligation to make payments towards consideration of allotted unit as per agreement to sale dated 11.07.2014. The respondent after giving reminders dated 31.08.2021, 02.09.2021, 11.11.2021, 20.12.2021, 28.02.2022, and 28.07.2022 in addition to email dated 03.10.2019, 11.10.2019, 23.06.2021, 02.09.2021, 15.11.2021, 21.12.2021, 19.05.2022 and 28.07.2022 for making payment for outstanding dues as per payment plan, has cancelled the subject unit. Despite issuance of aforesaid numerous reminders, the complainant has failed to take possession and clearing the outstanding dues. The respondent has given sufficient opportunity to the complainant before proceeding with termination of allotted unit. Thereafter, the respondent issued final notice dated 26.10.2022, and the relevant proportion of the said notice is reproduce as under:-

> *In view of the facts and circumstances narrated above the Company is hereby constrained to serve you with the notice of termination n of the Agreement. Kindly note that in case of your failure to make the payment of the total outstanding amounting to Rs.97,48,507/- (Rupees Ninety- Seven Lakhs Forty-Eight Thousand Five Hundred Seven Lakhs Sixty Thousand Eight Hundred Sixty-Nine Only) (GST on Interest will be the Floor Buyer's Agreement dated. 11.07.2014* ***shall stand terminated/cancelled***

absolved, discharged and released of all liabilities/obligations etc. under the said Agreement and shall also have the right to deal with the said Floor in any manner in its sole discretion as it may deem Nil."

28. As per clause 5.3 of the floor buyer's agreement, the respondent/promoter has a right to cancel the unit in case the allottee has breached the agreement to sell executed between both the parties. Clause 5.3 of the agreement to sell is reproduced as under for a ready reference:

> *5.3 In the event Buyer fails to take over physical possession of the Floor Unit within the time period of 45 days (forty five) specified in Clause 5.1 herein, the same shall be an Event of* ***Default under this Floor Buyer Agreement, and without prejudice to the right of Developer to terminate this Floor Buyer Agreement*** *under Clause 8 or any other right/remedy available to it under law, the Buyer shall be liable to pay to the Developer holding charges at the rate of Rs.25/- (Rupees Twenty Five only) per month per square feet of Super Built up area of the Floor Unit ("Holding Charges") as the 5.3 cost of necessary upkeep and maintenance of the Floor Unit for the period of such delay. However, for the entire period of such delay the Floor Unit shall be at the sole risk, responsibility and cost of the Buyer in relation to its deterioration in the physical condition."*

29. That the above mentioned clause provides that the promoter has right to terminate the allotment in respect of the unit upon default under the said agreement. Further, the respondent company has already obtained the occupation certificate for the project of the allotted unit on 15.02.2020 and offered the possession on 26.02.2021. Despite the issuance of offer of possession after obtaining OC, the complainant has failed to take possession of the subject unit and clear the outstanding dues.

30. During proceeding on 30.11.2023, the counsel for the respondent has brought to the notice of the Authority that vide email dated 06.10.2019, send by the complainant to the respondent "*that the Singapore Dollar is also acceptable, and the respondent has replied on the said email on 11.10.2019, and mentioned that you can approach in your local bank in Singapore, and share bank details with SWIFT CODE/IFSC CODE etc. certainly your local bank*

will be able to process the payment in our account." Further, vide email dated 23.06.2021, the complainant has requested to the respondent /promoter for waiving off the interest of delay payment and the said request was considered by the respondent and the complainant was directed to clear all the outstanding dues on or before 29.06.2021. Thereafter, the respondent/promoter issued demands letter and further, issued final note cum termination letter to the complainant. The respondent cancelled the unit of the complainant after giving adequate demands notices. Thus, the cancellation in respect of the subject unit is valid and the relief sought by the complainant is hereby declined as the complainant-allottee has violated the provision of section 19(6) & (7) of Act of 2016 by defaulting in making payments as per the agreed payment plan. In view of the aforesaid circumstances, only refund can be granted to the complainant after certain deductions as prescribed under law.

31. Now, another question arises before the authority that whether the authority can direct the respondent to refund the balance amount as per the provisions laid down under the Act of 2016, when the complainant has not sought the relief of the refund of the entire paid up amount while filing of the instant complaint or during proceeding. It is pertinent to note here that there is nothing on record to show that the balance amount after deduction as per relevant clause of agreement has been refunded back to the complainant. The authority observed that rule 28(2) of the rules provides that the authority shall follow summary procedure for the purpose of deciding any complaint. However, while exercising discretion judiciously for the advancement of the cause of justice for the reasons to be recorded, the authority can always work out its own modality depending upon

peculiar facts of each case without causing prejudice to the rights of the parties to meet the ends of justice and not to give the handle to either of the parties to protract litigation. The authority will not go into these technicalities as the authority follows the summary procedure and principal of natural justice as provided under section 38 of the Act of 2016, therefore the rules of evidence are not followed in letter and spirit. Further, it would be appropriate to consider the objects and reasons of the Act which have been enumerated in the preamble of the Act and the same is reproduced as under: -

> *"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."*

32. From the above, the intention of the legislature is quite clear that the Act of 2016 has been enacted to protect the interests of the consumer in real estate sector and to provide a mechanism for a speedy dispute redressal system. It is also pertinent to note that the present Act is in addition to another law in force and not in derogation. In view of the same, the authority has power to issue direction as per documents and submissions made by both the parties.

33. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Ors. VS. Sarah C. Urs., (2015) 4 SCC 136,*** and wherein it was held that forfeiture of the amount in case of breach of

contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 ***Ramesh Malhotra VS. Emaar MGF Land Limited*** *(decided on 29.06.2020) and* ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** *(decided on 12.04.2022)* ***and followed in CC/2766/2017 in case titled as Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022,*** held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed providing as under-

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

34. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but

that was not done. So, the respondent/builder is directed to refund the amount received from the complainants after deducting 10% of the sale consideration and return the reaming amount along with interest at the rate of 10.85% (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 termination/cancellation 26.10.2022 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H.III Direct the respondent to pay a sum of Rs.2,00,000/- to the complainant towards cost of litigation.

35. The complainant is seeking relief w.r.t. compensation in the above-mentioned reliefs. ***Hon'ble Supreme Court of India in case titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (2021-2022(1) RCR(C) 357),*** has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

I. Directions of the Authority

36. 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):

I. The respondent is directed to refund the paid-up amount of Rs.54,23,670/- after deducting 10% of the sale consideration of Rs.1,32,50,746/- being earnest money along with interest at the rate of 10.85% (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 termination/cancellation 26.10.2022 till its realization.

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.

37. Complaint stands disposed of.

38. File be consigned to registry.

Dated: 18.01.2024

(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram