BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : **6805 of 2022**
Date of decision : **15.05.2024**

Geetanjali Jangra
R/o: - NW-58, Vishnu Garden Extension,
Tilak Nagar, New Delhi. **Complainant**

Versus

M/s. Neo Developers Private Limited
Regd. office: - 32-B, Pusa Road,
New Delhi-110005. **Respondent**

CORAM:
Shri Ashok Sangwan Member

APPEARANCE:
Sh. Alok Bhachawat (Advocate) Complainant
Sh. Venkat Rao (Advocate) Respondent

ORDER

1. This 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 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 complainant, 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 of the project	"Neo-Square", Sector-109, Gurugram.
2.	Project area	8.237 acres
3.	Nature of the project	Commercial
4.	DTCP license no.	102/2008 Dated 15.05.2008
5.	RERA Registered/ not registered	Lapsed project validity upto-23.08.2021.
6.	Unit no.	Priority no.-52, Floor-3rd (As on page no. 41 of complaint
7.	Unit Area	600 sq.ft. [Super-Area] (As on page no. 41 of complaint)
8.	Date of execution of buyer's agreement	04.08.2015 (As on page no. 36 of complaint)
9.	M.O.U	04.08.2015 (As on page no. 65 of complaint)

10.	Assured return clause	**Clause 4** That against the total basic consideration of Rs.47,80,800/- (Rupees Forty Seven Lakhs Eighty Thousand Eight Hundred Only) determined as per Clause 3 Above, the Allotttee has , paid unto Company upon and/or prior to the execution of this MOU, an amount of Rs.49,81,594/-, the company hereby admits and acknowledges. The company shall pay a **monthly assured return of Rs.54,000/-** on the total amount received **w.e.f 04.08.2017** after deduction of Tax at Source and service tax. The monthly assured return shall be paid to the Allottee(s) from **04.08.2017 onwards till the commencement of first lease.** [Emphasis supplied] (As on page no. 68 of complaint)
11.	Possession Clause	**Clause 3 of the MOU** The Company shall complete the construction of the said Building/Complex, within which the said space is located within **36 months from the date of execution of this agreement or from the start of construction,** whichever is later and apply for grant of completion/Occupancy certificate. [Emphasis supplied] As on page no. 67 of complaint)
12.	Due date of possession	04.08.2018 [Calculated 36 months from the date of execution of the agreement]

13.	Basic sale consideration	Rs. 47,00,800/- (As on page no. 67 of complaint)
14.	Amount paid by the complainant	Rs.55,19,254/- (As on page no. 33 of reply)
15.	Occupation certificate /Completion certificate	Not obtained
16.	Offer of possession	Not offered

[**Note**: In the proceedings dated 10.04.2024, the amount paid by the complainant was inadvertently mentioned as Rs.49,81,594/- instead of Rs.55,19,254/-]

B. Facts of the complaint

3. The complainant has made the following submissions: -

I. That the present complaint has been filed by the complainant Mrs. Geetanjali Jangra through her attorney holder Mr. Manoj Kumar Jangra, against the promoter M/s Neo Developers Pvt. Ltd.

II. In the year 2014-15, the respondent launched a commercial project "Neo Square" in Sector-109, Dwarka Expressway, Gurugram. Allured by the assured return and timely completion of the project, the complainant decided to book a space in the food court area having a super-area of approximately 600 sq.ft. against the total sale consideration of Rs.47,80,800/-.

III. After booking the said space, the complainant paid an amount of Rs.46,81,594/- towards the advance/part consideration for the shop before the execution of the buyer's agreement and the Memorandum of understanding. The parties executed the Buyer's

Agreement along with the Memorandum of Understanding on 04.08.2015. As per the said MOU, the respondent was to complete the construction of the building/complex within 36 months from the date of execution of the agreement or from the start of construction, whichever is later.

IV. Further, in terms of the agreement and the MOU the complainant purchased the said space on the "Assured Return Plan" whereby the respondent assured to pay a monthly assured return of Rs.54,000/- per month w.e.f 04.08.2015 until the commencement of the first lease of the said retail space.

V. That on 16.12.2015 the complainant received a payment request towards EDC & IDC from the respondent for an amount of Rs.2,84,400/- which the complainant paid on 01.07.2016. The respondent again sent a demand letter on 30.03.2017 for an amount of Rs.2,53,260/- citing the VAT amount due against the retail space. The complainant paid the said demand on 13.05.2017.

VI. That on 27.10.2017 & 10.05.2018, the complainant received the post dated cheques of assured return alongwith the covering letter for the period of August 2017 to March 2018 and April 2018 to March 2019 amounting to Rs.3,83,940/- and Rs.5,83,200/- respectively.

VII. The complainant submits that after making the full payment in 2015 and the expiry of due date for completion of construction the complainant continuously requested for updates since the year 2018. However, no proper response was received from the respondent. The respondent stopped paying the assured return

from April 2019. On one hand, the respondent failed to complete the construction and lease out the said space and on the other hand, failed to pay the assured return. The complainant submits that till date the construction is not complete in as much as the completion certificate/occupation certificate has not been obtained, therefore, the question of leasing out the space does not arise.

VIII. That on 30.09.2021, the respondent for the first time sent a letter (wrongly mentioning it as "Reminder-3") demanding the outstanding payments towards VAT against the said project for an amount of Rs.4,11,547/-. The complainant responded to the said letter via e-mail dated 19.10.2021 stating that she has already paid VAT during May,2017 and there is no basis for demanding the said VAT.

IX. That there was no response from the respondent till 07.12.2021 when the complainant received an alleged "Reminder letter for signing the Lease Assignment Form" for the first time. The respondent without paying any heed to the request of the complainant to pay assured return and/or adjust the outstanding amount towards VAT if any, sent a reminder for clearing the alleged outstanding dues towards VAT on 29.06.2022 within 15 days from the date of notice failing which the respondent threatened to cancel the said space.

X. That the respondent stopped paying the assured returns since, April 2019. Till date, the complainant has paid a sum of Rs.55,19,254/- . The respondent has failed to fulfill its obligation under the MOU and

BBA of paying the assured returns since April 2019, and completing the construction of the project by the due date i.e., 03.08.2018.

C. Relief sought by the complainant:

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

   I. Direct the respondent to pay the arrears of assured return @Rs.54,000/- per month from April 2019 to September 2022 amounting to Rs. 22,68,000/-.

   II. Direct the respondent to refund the entire amount paid by the complainant i.e., Rs.55,19,254/- alongwith interest @18% per annum, from the date of respective payments till the date of fi.ing of the present complaint.

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. That at the outset, the complainant has erred gravely in filing the present complaint and misconstrued the Provisions of the Real Estate (Regulation & Development) Act, 2016 . It is imperative to bring to the attention of the Authority that the RERA Act was passed with the sole intention of regularization of real estate projects, and the dispute resolution between builders and buyers and the reliefs sought by the complainant cannot be construed to fall within the

ambit of the Act. That the complainant herein, has failed to provide the correct/complete facts that she is an investor and not allottee.

II. That the complainant with the intent to invest as an investor, approached the respondent and inquired about the project i.e., "NEO SQUARE", situated at Sector-109, Gurugram, Haryana. After being fully satisfied with the project and the approvals thereof, the complainant applied by submitting a booking application form dated 03.08.2018, whereby seeking allotment of unit no. 4 admeasuring 586 sq. ft super area on the ground floor, having a basic sale price of Rs.60,81,508/-. The complainant considering the future speculative gains, also opted for the Investment Return Plan being floated by the respondent.

III. That since the complainant had opted for the Investment Return Plan, a Memorandum of Understanding dated 06.10.2018 was executed between the parties, which was a completely separate understanding between the parties in regards to the payment of assured returns in lieu of investment made by the complainant and leasing of the unit/space thereof. It is pertinent to mention herein that as per the mutually agreed terms between the complainant and the respondent, the returns were to be paid from 06.10.2020.

IV. That the MOU executed between the parties was in the form of an "Investment Agreement.". Therefore, the allotment of the said unit contained a "Lease Clause" which empowers the respondent to put the unit along with the other commercial space units on lease and does not have possession clauses, for handing over the physical

possession. Hence, the embargo of the Real Estate Regulatory Authority, in totality, does not exist.

V. It is also pertinent to mention that the complainant voluntarily also executed the Buyer's Agreement dated 06.10.2018 for the retail shop after having full knowledge and being well satisfied and conversant with the terms and conditions of the Buyer Agreement.

VI. It is submitted that the as per clause 12 of the 'MOU', the respondent was obligated to complete the construction of the said complex within 48 months from the date of execution of the MOU or from the date of start of construction, whichever is later and apply for grant of completion/occupancy certificate. For the convenience of the Authority, clause 12 of MOU is reproduced hereunder for ready reference:

> *"12. That the company shall complete the construction of the said Building/Complex, within which the said space is located within 48 months from the date of execution of this Agreement or from the start of construction, whichever is later and apply for grant of completion/Occupancy Certificate. The Company on grant of Occupancy. Completion Certificate, shall issue final letters to the Allottee(s) who shall within 30(thirty) days, thereof remit all dues"*

VII. That as per clause 5.2 of the agreement the date of completion of construction was the date when the application for grant of completion/occupancy certificate will be made. Clause 5.2 is produced for ready reference:

> *"5.2. That the construction completion date shall be deemed to be the date when the application for grant of completion/occupancy certificate is made".*

VIII. It is not out of the place to mention that the respondent is entitled for the grace period of 6 months on account of the delay caused due

to various bans/constructions restrictions and worldwide spread of covid-19, which the Authority and other courts had considered as a *force majeure* circumstance and have allowed grace period of 6 months to the promoters at large on account of delay so caused as the same was beyond the control of the respondent.

IX. It is also submitted that while computing the date of offer of possession the grace period of 6 months as agreed by the complainant may also be considered and allowed in view of the judgement of the Hon'ble Supreme Court in '*M/S Supertech Ltd. vs. Rajni Goyal, Civil Appeal No. 6649-50 of 2018*', wherein keeping in view the bans imposed by NGT and other government authorities etc., the promoter was allowed for the grace period enshrined under the agreement.

X. Accordingly, the due date of delivery of possession in the present case is 48 months + 6 months (grace period) to be calculated from 06.10.2018 and the due date for possession in the instant case comes out to be 06.04.2023.

XI. It is humbly submitted that the instant complaint has been filed by the complainant on 24.12.2022 (date as per Performa B) which is much before the due date of handing over possession. It is pertinent to mention that the said complaint is pre-mature since the same is filed, seeking refund, before the due date of possession. In view of the same, it can be concluded that the complainant is seeking withdrawal from the project, before due date at his own will and volition.

XII. It is pertinent to apprise the Authority that in case of withdrawal from the project by the complainant at his own volition, the respondent is obligated and under liberty to terminate the MOU and refund all monies paid by the complainant after deduction of 10% (Earnest Money) of total basic sale price, brokerage paid, and the monies already paid to the complainant in form of Assured Return.

XIII. It is pertinent to note that the complainant vide instant complaint has sought the relief of refund of the amount paid against the unit and further sought withdrawal from the project before the due date of possession i.e., 06.04.2023. Accordingly, the respondent is liable to forfeit 10% on account of being earnest money of the basic sale consideration, brokerage paid along with the amount of assured return already paid to the complainant.

XIV. It is most humbly submitted that as per the mutually agreed terms between the complainant and the respondent, the payment of assured returns was to commence only from 06.10.2020. However, the Banning of Unregulated Deposits Schemes Act, 2019 came into force in 2019 and therefore the respondent was constrained to cease all payment pertaining to Assured Return to all its allottees who had opted for the same from 2019.

XV. It is submitted that assured return is not a matter contemplated under any provision of RERA 2016 and thus the assumption of jurisdiction by the authority is wholly illegal and unsustainable in the eyes of law. In this regard the provisions of Section 11 highlight the scope of the functions of the promoter, as envisaged under the

Act. The same also, so do not impose any obligations in relation to returns of investment.

XVI. It is submitted that the above rule clearly indicated the extent to which the rights of the allottees are protected, is the matters contained in the agreement, form of which is provided under the rules. It is submitted that even this agreement does not contain any condition governing assured returns. Thus, any order of payment of assured return would go beyond the statute and assumed jurisdiction in a wholly illegal manner.

XVII. It is pertinent to mention that the respondent from time-to-time issued demand request/reminders to the complainant to clear the outstanding dues against the booked unit. However, the complainant delayed the same for one or the other reasons. It is to be noted that the complainant miserably failed to comply the payment plan and further on each and every occasion failed to remit the outstanding dues on time as and when demanded by the respondent. The complainant had paid Rs.88,58,949.24/- against the total due Amount of Rs. 90,90,580.24/- It is to be noted that there lies an outstanding due of Rs. 1,43,626/- .

XVIII. It is to be noted that against the unit booked by the complainant, the respondent till date has remitted Rs.2,44,362/- on account of assured return to the complainant.

XIX. That, the respondent was constrained to send the final notice dated 05.11.2020 wherein the complainant was afforded a last opportunity to clear the dues by 15.11.2020 failing which the unit allotted would be treated as cancelled from 16.11.2020 and the

complainant would be left with no lien, right, title, interest or claim of whatsoever nature in the unit.

XX. It is humbly submitted that the respondent is raising the EDC/IDC demands as per government regulations. That the rate at which the respondent is charging the EDC/IDC amount is as per the assessments of the competent authority. Accordingly, the EDC/IDC amounts have been demanded from the complainant, as the same has been assessed and demanded by the competent authority. That the demand of EDC/IDC is done as per Clause 11 of the Buyer's Agreement. The aforesaid mentioned clause clearly states that the allottee is liable to pay interest on all delayed payment of taxes, charges etc. The said clause is reiterated below for ready reference:

> *"That the Allotee agrees to pay all taxes, charges, levies, cesses, applicable as on dated under any name or category/heading and/ or levied in future on the land and/or the said complex and/or the said space at all times, these would be including but not limited to GS, Development charges, Stamp Duties, Registration Charges, Electrical Energy Charges, EDC Cess, IDC Cess, BOCW Cess, Registration Fee, Administrative Charges, Property Tax, Fire Fighting Tax and the like. These shall be paid on demand and in case of delay, these shall be payable with interest by the Allottee".*

XXI. It is submitted that as per the agreement so signed and acknowledged, the completion of the said unit was subject to the midway hindrances which were beyond the control of the respondent. And, in case the construction of the said commercial unit was delayed due to such 'Force Majeure' conditions the Respondent was entitled for extension of time period for completion. It is to be noted that the development and implementation of the project have been hindered on account of

several orders/directions passed by various authorities/forums/courts as has been delineated here in below:

	Date of Order	Directions	Period Of Restriction	Days affected	Comments
	19th July 2016	National Green Tribunal in O.A. No. 479/2016 had directed that no stone crushers be permitted to operate unless they operate consent from the State Pollution Control Board, no objection from the concerned authorities and have the Environment Clearance from the competent Authority.	Till date the order in force and no relaxation has been given to this effect.	**30 days**	The directions of NGT were a big blow to the real estate sector as the construction activity majorly requires gravel produced from the stone crushers. The reduced supply of gravels directly affected the supply and price of ready mix concrete required for construction activities.
3.	**8th Nov, 2016**	National Green Tribunal had directed all brick kilns operating in NCR, Delhi would be prohibited from	8th Nov, 2016 to 15th Nov, 2016	**7 days**	The bar imposed by Tribunal was absolute. The order

		working for a period of 2016 one week from the date of passing of the order. It had also been directed that no construction activity would be permitted for a period of one week from the date of order.			had completely stopped construction activity.
4.	**7th Nov, 2017**	Environment Pollution (Prevention and Control Authority) had directed to the closure of all brick kilns, stones crushers, hot mix plants, etc. with effect from 7th Nov 2017 till further notice.	**Till date the order has not been vacated**	**90 days**	The bar for the closure of stone crushers simply put an end to the constructio n activity as in the absence of crushed stones and bricks carrying on of constructio n were simply not feasible. The respondent eventually ended up locating alternative s with the intent of expeditious ly concluding constructio n activities but the previous period of

					90 days was consumed in doing so. The said period ought to be excluded while computing the alleged delay attributed to the Respondent by the Complainant. It is pertinent to mention that the aforesaid bar stands in force regarding brick kilns till date is evident from orders dated 21st Dec, 19 and 30th Jan, 20.
5.	9th Nov 2017 and 17th Nov, 2017	National Green Tribunal has passed the said order dated 9th Nov, 2017 completely prohibiting the carrying on of construction by any person, private, or government authority in		**9 days**	On account of passing of the aforesaid order, no construction activity could have been legally carried out by the Respondent. Accordingly,

			NCR till the next date of hearing. (17th of Nov, 2017). By virtue of the said order, NGT had only permitted the competition of interior finishing/interior work of projects. The order dated 9th Nov, 17 was vacated vide order dated 17th Nov, 17.			construction activity has been completely stopped during this period.
6.	29th October 2018		Haryana State Pollution Control Board, Panchkula has passed the order dated 29th October 2018 in furtherance of directions of Environmental Pollution (Prevention and Control) Authority dated 27th Oct 2018. By virtue of order dated 29th of October 2018 all the construction activities including the excavation, civil construction were directed to remain close	**1st Nov to 10th Nov, 2018**	**10 days**	On account of the passing of the aforesaid order, no construction activity could have been legally carried out by the Respondent. Accordingly, construction activity has been completely stopped during this period.

		in Delhi and other NCR Districts from 1st Nov to 10th Nov 2018.			
7.	24th July, 2019	NGT in O.A. no. 667/2019 & 679/2019 had again directed the immediate closure of all illegal stone crushers in Mahendergarh Haryana who have not complied with the siting criteria, ambient, air quality, carrying capacity, and assessment of health impact. The tribunal further directed initiation of action by way of prosecution and recovery of compensation relatable to the cost of restoration.		**30 days**	The directions of the NGT were again a setback for stone crushers operators who have finally succeeded to obtain necessary permissions from the competent authority after the order passed by NGT on July 2017. Resultantly, coercive action was taken by the authorities against the stone crusher operators which again was a hit to the real estate sector as the supply of gravel reduced manifolds and there

					was a sharp increase in prices which consequentl y affected the pace of construction .
8.	11th October 2019	Commissioner, Municipal Corporation, Gurugram has passed an order dated 11th of Oct 2019 whereby the construction activity has been prohibited from 11th Oct 2019 to 31st Dec 2019. It was specifically mentioned in the aforesaid order that construction activity would be completely stopped during this period.	**11th Oct 2019 to 31st Dec 2019**	**81 days**	On account of the passing of the aforesaid order, no construction activity could have been legally carried out by the Respondent. Accordingly, construction activity has been completely stopped during this period.
9.	04.11.201 9	The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ petition bearing no. 13029/1985 titled as "*MC Mehta vs. Union of India*" completely banned all construction activities in Delhi-NCR which restriction was partly modified vide order	**04.11.2019 - 14.02.2020**	**102 days**	These bans forced the migrant labourers to return to their native towns/state s/villages creating an acute shortage of labourers in the NCR

		dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020.			Region. Due to the said shortage the Construction activity could not resume at full throttle even after the lifting of ban by the Hon'ble Apex Court.
10.	3rd week of Feb 2020	Covid-19 pandemic	**Feb 2020 to till date**	**To date (3 months Nationwide lockdown)**	Since the 3rd week of February 2020, the Respondent has also suffered devastatingly because of the outbreak, spread, and resurgence of COVID-19 in the year 2020. The concerned statutory authorities had earlier imposed a blanket ban on construction activities in Gurugram. Subsequently, the said embargo had been lifted to a limited

					extent. However, during the interregnum, large-scale migration of labor occurred and the availability of raw materials started becoming a major cause of concern.
11.	Covid in 2021	That period from 12.04.2021 to 24.07.2021, each and every activity including the construction activity was banned in the State	12.04.2021 - 24.07.2021	**103 days**	Considering the wide spread of Covid-19, firstly night curfew was imposed followed by weekend curfew and then complete curfew.
			Total days	**582**	

XXII. That from the facts indicated above and documents appended, it is comprehensively established that a period of 582 days was consumed on account of circumstances beyond the power and control of the respondent, owing to the orders of the the statutory authorities. All the circumstances stated hereinabove come within the meaning of ***force majeure***, as stated above. Thus, the respondent has been prevented by circumstances beyond its power and control from undertaking the implementation of the project during the time period indicated above and therefore the same is

not to be taken into reckoning while computing the period of 48 months as has been provided in the agreement. That the present complaint is an utter abuse of the process of law, and hence deserves to be dismissed.

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

E. Jurisdiction of the authority

The application 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 allottees 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;*

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.

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. (Supra) and*** *reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022***wherein it has been laid down as under:

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest*

thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

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

F. Findings on the objections raised by the respondent.

F.I. Objection regarding complainant being an investor not an allottee.

13. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, she is 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 consumer of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or

violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is buyer and has paid total price of **Rs.55,19,254/-** 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;"*

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

F.II. Objection regarding the project being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

15. The respondent/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/restrictions of the NGT as well as competent authorities, High Court and Supreme Court orders etc. 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 14.082018. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the reliefs sought by the complainant

G.I Direct the respondent to pay the arrears of assured return @Rs.54,000/- per month from April 2019 to September 2022 amounting to Rs. 22,68,000/-.

G.II Direct the respondent to refund the entire amount paid by the complainant i.e., Rs.55,19,254/- alongwith interest @18% per annum, from the date of respective payments till the date of fi.ing of the present complaint.

16. In the present the complainant intends to withdraw from the project as the project got delayed by more than 4 years and occupation certificate w.r.t the project has not been received till date. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit for which they have paid a considerable

amount towards the sale consideration and as observed by ***Hon'ble Supreme Court of India in lreo Grace Realtech pvt. Ltd. Vs. Abhishek Khanna & Ors, civil appeal no. 5785 of 2019, decided on11.01.2021.:***

> *" .... The occupation certificate is not available even as on dote, which clearly amounts to deficiency of service. The allottee cannot be made to wait indefinitely for possession ofthe apartments alloxed to them, nor can they be bound to take the apartments in Phase 1. of the project....."*

17. Further in the judgement of the Hon'ble Supreme court of India in the cases of **Newtech Promoters and Developers private Limited vs state of U.P. and Ors. (Supra)** reiterated in case of **M/s Sana Realtors private Limited & other Vs Union of lndia & others SLP (Civil) No. 13005 of 2020** decided on 12.05.2022 it was observed:

> *"25' The unqualified right of the allottee to seek refund referred lJnder Section lA0)fu) and Section 19(4) of the Act is not dependent on ony contingencies or stipulations thereof. It appears that the legislature hos consciously provided this right of refund on demond as an unconditionol absolute right to the allottee, if the promoter fails to give possession of the opartmen, plot or building within the time stipulated under the tbrms 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 n withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed. "*

18. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or

unable to give possession of the unit in accordance with the terms of buyer's agreement/MOU or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project without prejudice to any other remedy available, to return the amount received by the respondent in respect of the unit with interest at such rate as may be prescribed.

19. **Admissibility of refund along with prescribed rate of interest:** In the present complaint, the complainant intends to withdraw from the project and is seeking refund of the paid-up amount as provided under the section 18(1) of the Act. Sec. 18(1) proviso reads as under:

*"**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 of 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)

20. The complainant is seeking refund of the amount paid by her with interest at the prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 75. Prescribed rate of interest : *[proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]*

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

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

22. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 15.05.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

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

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. -For the purpose of this clause-

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

24. The authority after considering the facts stated by the parties and the documents placed on record is of the view that the complainant is well within her right for seeking refund under section 18(1)[a] of the Act, 2016.

25. The complainant was allotted a unit bearing priority no. 52 on third floor, in the project "Neo-Square" Sector- 109, Gurugram developed by the respondent/builder for a total consideration of Rs.47,00,800/. The buyer's agreement and the Memorandum Of Understanding was executed between the parties on 04.08.2015. The possession of the allotted unit under the Act and Rules 2(1)(F) of the rules 2017, is the essence of the agreement. As per clause 3 of the MOU, the respondent was to complete the construction of the said complex within 36 onths from the date of execution of the buyer's agreement or from the date of start of construction whichever is later. Clause 3 of the MOU has been reproduced below:

" The company shall complete the construction of the said Building/Complex, within which the said space is located within 36 months from the date of

execution of this agreement or from the start of construction, whichever is later and apply for grant of completion/Occupancy certificate. "

[Emphasis supplied]

26. The memorandum of understanding was executed on 04.08.2015, so if we calculate 36 months from 04.08.2015 it expires on 04.08.2018. Therefore, the due date of possession comes out to be 04.08.2018.

27. As per clause 4 of the MOU dated 04.08.2015, the respondent/promoter promised the complainant that it will pay the complainant a monthly assured return of Rs.54,000/- w.e.f 04.08.2017 till the commencement of first lease. The complainant has submitted that the respondent has paid monthly assured return till March, 2019 and the assured returns are pending from April, 2019. The respondent has submitted in its reply that there has been no default on the part of the respondent as it has duly paid assured returns to the complainant till the enactment of the BUDS Act after which it became illegal due to the legal position over unregulated deposits post the enactment of the BUDS Act.

28. It is pleaded that the respondent has not complied with the terms and conditions of the MOU. Though for some time, the amount of assured return was paid but later on, the respondent refused to pay the same by taking a plea of the **Banning of Unregulated Deposits Schemes Act, 2019** (herein after referred to as the Act of 2019), citing earlier decision of the authority **Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd.,** complaint no 141 of 2018) whereby relief of

assured return was declined by the authority. The authority has rejected the aforesaid objections raised by the respondent in CR/8001/2022 titled as **Gaurav Kaushik and anr. Vs. Vatika Ltd.** wherein the authority while reiterating the principle of prospective ruling, has held that the authority can take different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. Further, it was held that when payment of assured returns is part and parcel of builder buyer's agreement then the promoter is liable to pay that amount as agreed upon and the BUDS Act, 2019 does not create a bar for payment of assured returns even after coming into operation as the payments made in this regard are protected as per section 2(4)(l)(iii) of the Act of 2019. Thus, the plea advanced by the respondent is not sustainable in view of the aforesaid reasoning and case cited above.

29. The money was taken by the builder as deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. So, on his failure to fulfil that commitment, the allottee has a right to approach the authority for redressal of his grievances by way of filing a complaint. In the present complaint, the assured return was payable as per clause 4 of MOU, the

assured return agreed to be paid was Rs.54,000/- per month w.e.f. 04.08.2017 till the first lease is executed. But as the complainant intends to withdraw from the project and is seeking refund alongwith the prescribed rate of interest and assured returns, she is not entitled to the benefits of assured return.

30. The purpose of assured return is to compensate the allottee for the amount paid by the allottee in upfront and which is continued to be used by the promoter for the period specified in the agreement/MOU. In the present matter, the complainant is entitled to refund of the total paid-up amount from the date of deposit alongwith interest at the prescribed rate i.e. MCLR + 2%. In view of the above, the payment of assured return as well as the prescribed interest on the amount paid up would result in double benefit to the complainant and would not balance the equities between the parties. In view of the above, the complainant is entitled to refund of the total paid up amount alongwith interest at the prescribed rate of interest after deducting the amount paid on the account of assured return by the respondent.

31. The authority hereby directs the respondent to refund the amount received by it i.e., Rs.55,19,254/- with interest at the rate of 10.85% of 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, after

deducting the amount paid on account of assured return by the respondent, within the timelines provided in rule 16 of the Rules ibid.

H. Directions of the authority

32. 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 is directed to refund the entire paid-up amount of Rs.55,19,254/- received by it from the complainant 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 date of refund of the deposited amount, after deducting the amount paid by the respondent on account of assured return.

    ii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.

33. Complaint stands disposed of.

34. File be consigned to registry.

(Ashok Sangwan)
Member

Dated: 15.05.2024

Haryana Real Estate Regulatory Authority, Gurugram