

**BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY,
GURUGRAM**

Complaint no. : 5281 of 2022
Date of order : 29.05.2024

Rita Pandey
R/o: 221, Deed Plaza Complex,
Opposite Civil Court, Gurugram.

Complainant

Versus

M/s Chirag Buildtech Private Limited
Office at: - Building no.-80, Sector-44,
Gurugram-122003.

Respondent

CORAM:
Shri. Ashok Sangwan

Member

APPEARANCE:
Shri. Sanjeev Sharma (Advocate)
Shri. Garvit Gupta (Advocate)

Complainant
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 under the provision of the Act or the rules and regulations made thereunder or to the allottee 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	"ROF Ananda", Sector 95, Gurugram
2.	Nature of the project	Affordable
3.	RERA Registered/ not registered	184 of 2017 dated 14.09.2017
4.	RERA registration valid up to	13.09.2021
5.	Allotment letter	13.04.2018 (Page 53 of reply)
6.	Unit no.	508, Tower B, 5 th floor (As on page no. 22 of the complaint)
7.	Unit area admeasuring	644 sq. ft (carpet area) 100 sq.ft. (balcony area) (As on page no. 22 of complaint)
8.	Environment clearance	09.10.2017 (As on page no. 29 of reply)
9.	Space Buyer's Agreement	09.02.2018 (As on page no. 19 of complaint)
10.	Possession clause 3.1	3.1.

		<p><i>Unless a longer period is permitted by the DGTCP or in the Policy and subject to the force majeure circumstances as stated in Clause 16 hereof, intervention of statutory authorities, receipt of occupation certificate and timely compliance by the Apartment buyer(s) of all his/her/their obligations, formalities and documentation as prescribed by the Developer from time to time and not being in default under any part of this Agreement, including but not limited to timely payment of installments of the Total Cost and other charges as per the Payment plan, stamp duty and registration charges, the Developer proposes to offer possession of the Said Apartment to the Apartment Buyer(s) within 4 years from the date of approval of building plans or grant of environmental clearance, whichever is later. The aforesaid period of development shall be computed by excluding Sundays, bank Holidays, enforced Govt. holidays and the days of cessation of work at site in compliance of order of any judicial/concerned State Legislative Body.</i></p> <p>[Emphasis supplied] (As on page no. 27 of complaint)</p>
11	Due date of possession	09.04.2022 [Calculated 4 years from the dte of environmental clearance plus 6 months covid grace period]

12.	Total sale consideration	Rs. 26,26,480/- (As on page no. 60 of reply)
13.	Amount paid by the complainants	Rs. 27,00,922/-/- (As on page no. 81 of reply)
14.	Occupation certificate /Completion certificate	22.02.2022
15.	Offer of Possession	23.02.2022 (As on page no. 145 of the complaint)
16.	Demand letter	19.01.2021, 07.07.2021, 16.09.2021,23,02,2022 (As on page no. 140-144 of reply)
17.	Cancellation letter	10.10.2022 (As on page no. 148 of the reply)

B. Facts of the complaint

3. The complainant has made the following submission: -

- I. That the complainant is an allottee within the meaning of Act, 2016. The respondent company i.e., Chirag Buildtech Private Limited is a private limited company incorporated under the Companies Act, 1956 and is *inter alia* engaged in the business of providing real estate services.
- II. That the complainant purchased an affordable housing apartment developed by M/s Chirag Buildtec (Pvt) Ltd. called ROF and the allotment of the unit was made on 14.12.2017.
- III. That payment of more than 25% of the total sale consideration has been collected payment on 14.12.2017 before executing the agreement of sale.

IV. The allottee has already paid Rs.27,00,922/- to the promoter therefore the demand for an additional Rs.2,53,766/- is absolutely unjustified and illegal. That by commencement date the project should have been completed by now, in 4 years time i.e December 2021 and possession should have been handed over to the allottee where as the promoter is still demanding illegal payment of meter charges and interest upto 23.02.2022. Hence, the present complaint.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
- i. Direct the respondent to handover physical possession of the unit along with delayed possession charges.
 - ii. Direct the respondent to pay cost of litigation to the tune of Rs. 1, 50,000/-
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: -
1. That the authority has no jurisdiction to adjudicate upon the present complaint. The complaint is not maintainable for the reason that the agreement contains a dispute resolution clause which refers to the mechanism to be adopted by the parties in the event of any dispute i.e. Clause 38 of the Buyer's Agreement is reproduced for the ready reference-

"All or any disputes arising out or touching upon in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled through the adjudicating officer appointed under the Act.

- II. That the complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short span of time. That the respondent is the sole, absolute and lawful owner of the land parcel situated in the revenue estate of Village Dhorka, Sector 95, Gurugram, Haryana. The respondent had obtained the approval/sanction to develop a project known as 'ROF Ananda'.
- III. That the respondent had obtained the approval on the building plans from DTCP on 07.12.2016 and the environmental clearance on 09.10.2017 from the State Environment Assessment Authority, Haryana.
- IV. That on the basis of the application, an agreement for sale was executed between the parties on 09.02.2018. That since, the complainant was short on funds, approached the respondent and requested to issue a Permission to Mortgage to ICICI Bank in order to enable the bank to financially assist them in making payments towards the total sale consideration of the unit. The respondent issued its permission to mortgage the unit in the favour of the ICICI Bank.
- V. That the respondent raised payment demands from the complainant. Vide demand letter dated 19.01.2021 the respondent demanded Rs. 4,21,133/- from the complainant. However, the complainant defaulted in making timely payment and only part-payment was made by the complainant and the remaining amount was adjusted in the next instalment demand.
- VI. That vide payment demand letter dated 12.05.2022, the respondent had sent demand letter for the net outstanding amount of Rs.2,68,574/-. However, the complainant failed to remit the due amount. The respondent completed the construction of the tower in which the subject unit was located and offered possession to the complainant vide offer of possession dated 23.02.2022. The complainant was required as per the said offer of possession to make complete payment towards the due amount as well as

to complete the documentation formalities. That the respondent demanded Rs. 2,68,574/- from the complainant as per the demand letter dated 12.05.2022.

- VII. The complainant was aware that as per Clause 1.3 of the Application Form and Clauses 1.4 and 2.2 and 5.1 of the Agreement, timely payment of the due amount was the essence of the allotment. It was understood vide Clauses 11.7 of the Application Form and 1.13 of the Agreement and as per Clause 5(iii)(i) of the Affordable Scheme Policy, 2013, that if the allottee fails to make the payment towards the demanded amount, then the respondent would be entitled to terminate the allotment by issuing the cancellation letter.
- VIII. On account of defaults committed by the complainant, the respondent was left with no other choice but to terminate the allotment of the complainant by issuing the cancellation letter dated 10.10.2022. The complainant is left with no right, title or lien in the unit after the said cancellation. The said cancellation has been done by the respondent strictly as per the Agreement and the said policy and the same is valid in the eyes of law.
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 submission made by the parties.

E. Jurisdiction of the authority

8. The respondent has raised a preliminary objection/submission that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of the complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial

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as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

9. 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

10. 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 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;

11. 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.

F. Findings on the objections raised by the respondent.

F. I Objection regarding the complainant being an investor.

12. The respondent has taken a stand that the complainant is an investor and not consumer, 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. The

respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the agreement to sell dated 09.02.2018, it is revealed that the complainant is a buyer, and he has paid total price of Rs.27,00,922/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

13. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the agreement to sell executed between promoter and complainant, it is crystal clear that the complainant is an allottee as the subject unit was 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 29.07.2019 in appeal no. 000600000010557

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 protection of this Act also stands rejected.

F. II Objection regarding non-invocation of arbitration clause referring to the dispute resolution mentioned in the agreement.

14. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.
15. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

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

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

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

17. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article

141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

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

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

F. III Objection regarding force majeure conditions.

19. 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 Covid-19. The Authority vide notification no. 9/3-2020 dated 26.05.2020 have provided an extension of 6 months for projects having completion date on or after

25.05.2020, on account of force majeure conditions due to the outbreak of Covid-19 pandemic.

G. Findings regarding relief sought by the complainant

G. I Direct the respondent to handover physical possession of the unit along with delayed possession charges.

20. In the present complaint, the complainant intends to continue with the project and is seeking possession of the unit and delayed possession charges as per section 18(1) of the Act and the same is reproduced below for ready reference:

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building,-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

21. The complainant was allotted an apartment bearing no. B-508 on 5th Floor, Tower-B admeasuring 644.12 sq. ft. in the project of the respondent named "Rof Ananda" situated at Sector 95, Gurugram vide apartment buyer's agreement dated 18.12.2018 for a sale consideration of Rs.26,26,480/- against which the complainant has paid an amount of Rs.27,00,922/- in all.
22. Clause 3.1 of the builder buyer's agreement (in short, the agreement) dated 09.02.2018, provides for handing over possession and the same is reproduced below:

7.1

*Unless a longer period is permitted by the DGTCP or in the Policy and subject to the force majeure circumstances as stated in Clause 16 hereof, intervention of statutory authorities, receipt of occupation certificate and timely compliance by the Apartment buyer(s) of all his/her/their obligations, formalities and documentation as prescribed by the Developer from time to time and not being in default under any part of this Agreement, including but not limited to timely payment of installments of the Total Cost and other charges as per the Payment plan, stamp duty and registration charges, the Developer proposes to offer possession of the Said Apartment to the Apartment Buyer(s) **within 4 years from the date of approval of building plans or grant of environmental clearance, whichever is later**. The aforesaid period of development shall be computed by excluding Sundays, bank Holidays, enforced Govt. holidays and the days of cessation of work at site in compliance of order of any judicial/concerned State Legislative Body.*

23. The promoter/respondent was obligated to deliver possession of the specified apartment within a timeframe of four years from either the date of approval of building plans or the date of receiving environmental clearance, whichever occurs later. Consequently, building plans were approved on 07.12.2016, while environmental clearance for the project was obtained on 09.10.2017. As the latter date falls later, the four-year period will be calculated from 09.10.2017, culminating on 09.10.2021. The Authority vide notification no. 9/3-2020 dated 26.05.2020 have provided an extension of 6 months for projects having completion date on or after 25.05.2020, on account of force majeure conditions due to the outbreak of Covid-19 pandemic. Therefore, the due date of possession comes out to be 09.04.2022
24. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that by virtue of Clause 3.1 of the agreement executed between the parties on 18.12.2018, the

possession of the subject unit was to be delivered within 4 years from the date of approval of the building plans or grant of environmental clearance, whichever is later. The date of grant of environmental clearance falls later thus 4 years will be taken into account from the date of obtaining the environmental clearance i.e., 09.10.2021. As per the notification of the Authority in view of covid-19 an extension of 6 months is granted and thus 09.10.2021 plus 6 months comes out to be 09.04.2022. The due date of handing over possession of the unit was 09.04.2022. The respondent/promoter has obtained the occupation certificate from the concerned authorities on 22.02.2022 and offered possession to the complainant on 23.02.2022. Therefore, there is no reason why this benefit cannot be allowed to the complainant/allottee who is duly affected during above such adverse eventualities and hence a relief of 6 months will be given equally to both the complainant/allottee and the respondent and no interest shall be chargeable on either party, during the COVID period i.e., from 01.03.2020 to 01.09.2020.

25. The respondent had raised a demand on 12.05.2022 to the complainant for the payment of outstanding dues. Pursuant to the demand letter, the respondent issued a cancellation letter dated 10.10.2022, thereby cancelling the unit of the complainant/allottee. However, the authority is of the view that the cancellation is not in accordance with the Affordable Housing Policy of 2013. Also, during proceedings dated 10.04.2024 the respondent stated that the respondent is willing and ready to hand over possession of the apartment to the complainant subject to clearance of

outstanding dues. Thus, the cancellation is set-aside and the complainant/allottee is directed to pay the outstanding dues, if any.

26. Thus, the authority is of the view that there has been no delay on the part of the respondent in completing the project. The respondent has completed and offered the possession of the unit to the complainant as the agreement, within the agreed timelines. Hence, the relief of the complainant regarding delayed possession charges does not hold any substance and is hereby declined.

G.II. Direct the respondent to cost of litigation of an amount of Rs.1,50,000/-

27. The complainant is seeking relief w.r.t compensation in the above mentioned relief. Hon'ble Supreme Court of India in case titled as *M/s Newtech Promoters and Developers pvt. Ltd. v/s State of U.P & Ors. (2021-2022(1) RCR© 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 and legal expenses.

H. Directions of the authority: -

28. 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 functions entrusted to the authority under sec 34(f) of the Act: -

- i. The respondent/promoter is directed to provide a copy of updated statement of accounts to the complainants/allottees within a period of 15 days from the date of this order.
 - ii. The complainant/allottee is directed to pay the outstanding dues, if any within a period of 30 days from the date of receipt of updated statement of accounts.
 - iii. The respondent is directed to handover the possession of the unit on payment of the outstanding dues , if any to the complainant/allottee.
 - iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay to the allottee, in case of default i.e., the delayed possession charges as per section 2(za)of the Act.
 - v. The respondent shall not charge anything from the complainant which is not the part of the apartment buyer's agreement
 - vi. The benefit of six months grace period on account of Covid-19 shall be applicable to both the parties in the manner detailed herein above and no interest to be charged for the period of 01.03.2020 to 01.09.2020 from the complainants or to be paid by the respondent on account of delay for the above said covid period.
29. Complaint stands disposed of.
30. File be consigned to the registry.

Dated: 29.05.2024



(Ashok Sangwan)
Member

Haryana Real Estate
Regulatory Authority,
Gurugram