

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

Complaint no. : 4540 of 2022
Date of order : 29.05.2024

Raman Bhatia
R/o: B-438, New Friends Colony,
New Delhi.

Complainant

Versus

M/s BPTP Limited
Office at: - M-11, Middle Circle, Connaught Circus,
New-Delhi-110001.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Dolma Kashiva (Advocate)
Harshit Batra (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	"Terra", Sector- 102, Gurugram
2.	Nature of project	Group Housing Towers
3.	RERA registered/not registered	Registered 299 of 2017 dated 13.10.2017
4.	DTPC License no.	83 of 2008 dated 05.04.2008 94 of 2011 dated 24.10.2011
	Validity status	04.04.2025 23.10.2019
	Name of licensee	SUPER BELTS PVT. LTD and 3 others COUNTRYWIDE PROMOTERS PVT LTD and 6 others
	Licensed area	23.18 acres 19.74
5	Unit no.	T-21-903, 9 th floor
6	Unit measuring	1998 sq. ft
7.	Date of execution of Flat buyer's agreement	03.01.2013
8.	Possession clause	5. Possession 5.1 The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser(s) within



	Commitment	Period.	<i>The Seller/Confirming Party shall be additionally entitled to a Grace Period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said Unit.</i>
			1.6 "Commitment Period" shall mean, subject to, Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC). Stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyer's Agreement, whichever is later.
9.	Due date of possession	03.01.2017 (Calculated from the date of buyer's agreement)	
10.	Total sale consideration	Rs. 1,32,06,331 /- [As per page no. 60 of complaint]	
11.	Total amount paid by the complainant	Rs.99,46,672 /- (As per SOA page 76 of the complaint)	
12	Termination letter 1 st	03.12.2021	

13.	Occupation certificate dated	24.08.2022
14	Offer of possession	20.12.2021
15	Termination letter	08.02.2022
16	Legal notice sent by the complainant to the respondent on	01.04.2022 [As on page no. 98 of the complaint]

B. Facts of the complaint

3. The complainant has made the following submission: -

1. That the respondent issued an advertisement announcing a group housing project called 'Terra' situated at Sector 37D, Gurgaon and invited applications from prospective buyers for the purchase of flats in the said project.
2. That being caught in the web of false promises, the complainant entered into a Flat Buyer's Agreement dated 03.01.2013 with the respondent for purchasing the residential flat/ unit bearing no. T21-903, Floor No., in T21 Towers, for a total consideration of Rs.99,46,671.20 and was allotted the abovementioned flat measuring super built up area 1998 sq.ft. vide allotment letter dated 07.12.2012.
3. That the total sale consideration for the flat was inclusive of the basic sale price of Rs.1,04,89,500/- preferential location charges of Rs.1,048,950.00/-, DC of Rs.9,23,076/-, power backup charges of Rs.1,00,000/-, club membership charges of Rs.2,00,000/- per unit along with IFMS of Rs.99,900/- Fire Fighting, Electricity Connection and Power Back-up Installation Charges of Rs.1,99,800/-. It is pertinent to mention

here that the complainant had obtained a loan from HDFC Bank and opted for subvention scheme whereby the instalments towards the loan payment was to be paid by the respondent since the entire loan amount had been disbursed to the respondent directly, however the respondent has failed to remit the instalments and thus, the complainant was compelled to remit the said instalments for repayment of the said loan.

4. That as per clause 5 read with clause 1.6 of the agreement, the due date of handing over possession was within 42 months from the date of the sanction of the building plan or execution of the agreement, whichever is later. Additionally, a grace period of 180 days was also provided to handover the possession of the unit.
5. It is to further mention here that the complainant made several requests and sent various reminders to the respondent to give possession of the unit and intimated the respondent about the gross delay caused by the respondent in handing over the possession but no action was taken from the respondent side on this behalf.
6. That in order to cover-up the delayed actions, the respondent wrongfully issued a Termination/Cancellation intimation dated 03.12.2021 to the complainant which was not accepted by the complainant, subsequently the respondent issued a notice offering possession on 20.12.2021, which clearly demonstrates the mala fide intent and attempts to mislead the complainant.
7. That the complainant paid a total of Rs.99,46,671.20/- towards the entire sale consideration, however, there has been no delivery of possession. It is pertinent to note that the payments demanded dated 19.02.2013 for Rs.9,24,539/-, 19.02.2013 for Rs.32,42,168 and 03.05.2014 for Rs.26,73,533/- have been paid to the respondent directly from the bank for which the interest is been paid by the complainant only.

Date of Payment	Receipt No.	Amount
27.08.2012	2012/140002395 9	Rs.6,00,0000/-
27.10.2012	2012/140002949 4	Rs.18,09,057.02/-
15.02.2013	2012/140004024 7	Rs. 6,97,374/-
19.02.2013		Rs.9,24,539/-
19.02.2013		Rs.32,42,168/-
03.10.2015		Rs.26,73,533/-
Total Amount		Rs.99,46,671.20/-

8. That on visiting the site, the complainant realized that the construction on the site was not as per the construction plan and brought this to the knowledge of the respondent repeatedly through personal visits, letters, and mails but the respondent company as usual assured that the delivery of the flat would be given as per the dates specified in the Agreement.
9. That the respondent company in an attempt to dupe and defraud the complainant of its legitimate rights continued to lure the complainant to believe that the flat booked by him will be delivered and initiated a round of negotiations with the complainant in order to amicably resolve the issue and chose to offer discount on the price being demanded by them.
10. That the complainant being aggrieved by the non-offering of possession and delay of more than 6 years in the project, served a legal notice dated 01.04.2022 exercising his right to withdraw from the project in terms of Section 18(1)(a) and 19(4) due to the inordinate delay caused by the respondent and refunding the entire amount of Rs.99,46,671.20 that had

been remitted by the complainant and HDFC Bank within 15 days from the date of the notice, with interest as applicable.

11. It is pertinent to state that neither any response to the said notice was given by the respondent nor the amount was refunded. After losing all the hopes the complainant approached the Authority for redressal of his grievance.

C. Relief sought by the complainant:

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

i. Direct the respondent to refund the paid-up amount of Rs.99,46,671/- along with interest.

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

D. Reply by the respondent.

6. The respondent has contested the complaint on the following grounds: -

I. That On 12.08.2012, the complainant applied for the allotment of a flat in the project "Terra" and opted for the construction linked payment plan. The respondent vide its allotment letter dated 07.12.2012 allotted unit no.T21-903 (tentatively admeasuring 1998 sq. ft.) to the complainant and the Flat Buyer's Agreement was executed between the parties on 03.01.2013. The possession of the flat was to be handed over within 42 months from the date of sanction of building plans or execution of the agreement, whichever is later and further a grace period of 180 days was agreed therein subject to force majeure circumstances and timely payment of instalments. The respondent raised demands as per the agreed payment schedule, however the complainant defaulted in the payment of instalments. The reminder notices dated 19.12.2012,

22.02.2013, 05.08.2015, 04.09.2015, 05.10.2015, 09.11.2015,
09.12.2015, 21.01.2016, 20.02.2016, 17.05.2016, 22.06.2016,
22.07.2016, 06.03.2017, 11.04.2017, 22.06.2017, 27.12.2017,
07.03.2018, 09.04.2018, 10.07.2018 and last and final opportunity
notices dated 05.01.2017 and 22.08.2018 were served upon the
complainant for clearance of outstanding dues..

- II. It is submitted that the respondent had diligently applied for Registration of the Project in question i.e. "Terra" located at Sector-37D, Gurugram including Towers-T-20 to T-25 & EWS before the Authority and accordingly, registration certificate no. 299 of 2017 dated 13.10.2017 was issued by the Authority wherein the registration for the said project is valid. Thereafter, to make sure that the project is not delayed any further, the respondent has arranged funds and completed the construction of the project and completed the same. The respondent duly applied for grant of Occupancy Certificate before the concerned department and the same was granted in principal on 09.12.2021 and despite serving the complainant with termination letters dated 10.12.2019 and 03.12.2021, as a goodwill gesture the respondent offered the possession of the unit to the complainant vide offer of possession letter dated 20.12.2021. The complainant continued to be in breach of the terms of the agreement and deliberately failed to clear the outstanding dues and to take the possession of the unit. Therefore, the respondent was left with no other option but to terminate the unit of the complainant vide termination letter dated 08.02.2022.
- III. That the complainant approached the respondent through a broker, namely "Mall View" after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same. It is further submitted that complainant is an investor and has booked

the unit in question to yield gainful returns by selling the same in the open market.

- IV. That the complainant falsely stated that the timely payments were made by the complainant as and when demanded, however the complainant made several defaults in making timely payments as a result thereof, respondent had to issue reminder letters for payment of the outstanding amounts.
- V. It is pertinent to point out that till date, the complainant made inordinate delay in making timely payments of instalments and the delay is continuing since the complainant has not cleared the dues. Hence, the projected timelines for possession got diluted due to the defaults committed by various allottees including the complainant in making timely payments.
- VI. In terms of the Rules, the Government prescribed the agreement for sale and specified the same in Annexure A of the Rule 8(1) of the Rules. Rule 8(2) provides that any documents such as allotment letter or any other document executed post registration of the project with the RERA between the promoter and the allottee, which are contrary to the form of the agreement for sale, Act or Rules, the contents of the form of the agreement for sale, Act or Rules shall prevail.
- VII. The parties had agreed under the Flat Buyer's Agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Clause-17 of the FBA is reproduced below for ready reference-

"17. Dispute Resolution: All or any disputes arising out of or touching upon or in relation to the terms or formation of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments, modifications or re-enactment thereof for the time being in force. A Sole Arbitrator, who shall be nominated by the Seller/Confirming Party's Managing Director, shall hold the arbitration proceedings at Gurgaon. The Purchaser(s) hereby confirms

that he shall have no objection to such appointment and the Purchaser(s) confirms that the Purchaser(s) shall have no doubts as to the independence or impartiality of the said Arbitrator and shall not challenge the same. The arbitration proceedings shall be held in English language and decision of the Arbitrator including but not limited to costs of the proceedings/award shall be final and binding on the parties."

VIII. In this regard, it is submitted that the complainant has indulged in a selective reading of the clauses of the agreement. It is submitted that possession was to be handed over within 42 months from the date of sanction of building plans or execution of agreement, whichever is later, along with 180 days of grace period subject to force majeure circumstances and circumstances beyond control of the respondent(s). The projected timelines for possession are based on the cash flow. It was not in the contemplation of the respondent that the allottees would hugely default in making payments and hence, cause cash flow crunch in the project.

IX. That with a view to wriggle out of the agreed upon terms between the parties, the complainant is seeking refund with interest. In this context, it is submitted that prior to entering into the transaction, the complainant had at the stage of booking itself agreed as follows-

"H.1. The Applicant(s) has fully understood and agrees that in case the Applicant(s) cancels, withdraws, assigns or surrenders his allotment, for any reason whatsoever at any point of time, then the company at its sole discretion, shall be within its right to cancel/terminate the booking/allotment/application/agreement and shall forfeit Earnest Money and Non- Refundable Amounts paid by the Applicant(s). The Applicant(s) shall approach the Company for the refund, if any, and the Company shall refund the balance amount (i.e. the refundable amount left, after deducting the earnest money and non-refundable amounts and any other amounts due and payable by the Applicant(s), if any, to the Applicant(s) without any interest and compensation within (120) One Hundred Twenty Days from the date of full realization of the sale price after the sale of the Unit by the Company to any third party".

The said understanding was reaffirmed vide clause 7.3 of the agreement which reads as under-

"7.3. The Purchaser(s) has fully understood and agrees that in case the Purchaser(s) cancels, withdraws or surrenders his allotment, for any reason whatsoever at any point

of time, then the Seller/Confirming Party at its sole discretion may cancel/terminate the this Agreement and shall forfeit Earnest Money and Non-Refundable Amount, paid by the Purchaser(s). The Purchaser(s) shall approach the Seller/Confirming Party for the refund, if any, and the Seller/Confirming Party shall refund the balance amount i.e. the refundable amount left, after deducting the Earnest Money and Non-Refundable amounts and any other amounts due and payable by the Purchaser(s) to the Purchaser(s) without any interest and compensation within (120) One Hundred Twenty Days from the date of sale of the Unit by the Seller/Confirming Party to any third Party".

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 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

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;

Section 34-Functions of the Authority:

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

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

12. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly 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.
13. 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."

14. Further, 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."

15. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer 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 and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F. II Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

16. 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.
17. 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.

18. 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."

19. 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 Hon'ble Supreme Court shall be binding on all courts within the territory of India and accordingly, the Authority is bound by the aforesaid view. The relevant para of the judgement 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."

20. 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 the complainant being investor.

21. 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 entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled

principle of interpretation that preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it 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 suites buyer's agreement, it is revealed that the complainant is a buyer and paid total price of Rs.99,46,672 /- to the promoter towards purchase of a 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,"

22. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is allottee as the subject unit was allotted to him 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 an investor is not entitled to protection of this Act also stands rejected.

G. Findings regarding relief sought by the complainant

G.1 Direct the respondent to refund the paid-up amount along with interest.

23. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with interest 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)

24. Clause 5.1 read with clause 1. of the flat buyer's agreement (in short, the agreement) dated 03.01.2013, provides for handing over possession and the same is reproduced below:

"5.1

The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser(s) within the Commitment Period. The Seller/Confirming Party shall be additionally entitled to a Grace Period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said Unit."

"1.6 "Commitment Period" shall mean, subject to, Force Majeure circumstances, intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by the Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted. Development Charges(DC), Stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(S) ***within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyer's Agreement, whichever is later."***

25. The respondent promoter has proposed to handover the possession of the subject flat within a period of 42 months from the date of approval of building plans or execution of agreement whichever is later, plus 180 days grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter.
26. The date of execution of the apartment ought to be taken as the date for determining the due date of possession of the unit in question along with a grace period of 180 days. Therefore, the due date of possession comes out to be 03.01.2017.
27. The complainant was allotted an apartment bearing no.T21-903, Floor-9th, Tower-T21 admeasuring 1726.91 sq. ft. in the project of the respondent named "Terra" situated at Sector 37D, Gurugram vide apartment buyer's agreement dated 03.01.2013 for a sale consideration of Rs.1,82,18,257/- against which the complainant has paid an amount of Rs.99,46,672/- in all. The respondent has submitted that the complainant has failed to make payment of the outstanding dues as per the demand letter issued by the respondent and in lieu of it several reminders were sent by the respondent to the complainant and finally the unit was cancelled via termination letter dated 08.02.2022. The complainant has sent a legal notice to the respondent stating he wants to withdraw from the project and seeking refund of the amount paid by him.
28. After, considering the documents available on record as well as submissions made by the parties, the authority is of view that request was made by the complainant for refund vide legal notice dated 01.04.2022 after cancellation of the allotment. Therefore, now the question before the Authority is whether the cancellation made by the respondent vide letter dated 08.02.2022 is valid or not.

29. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainant has paid an amount of Rs.99,46,671 /- against the total sale consideration of Rs.1,82,18,257/- and no payment was made by the complainant after October, 2015. The respondent/builder has sent several reminders, before issuing the termination letter asking the allottee to make payment of the amount due, but the same having no positive results and ultimately leading to cancellation of unit vide letter dated 08.02.2022. Further, section 19(6) of the Act of 2016 casts an obligation on the allottees to make necessary payments in a timely manner. Hence, cancellation of the unit in view of the terms and conditions of the payment plan annexed with the buyer's agreement dated 03.01.2013 is held to be valid. But while cancelling the unit, it was an obligation of the respondent to return the paid-up amount after deducting the amount of earnest money. The respondent has submitted that refund is clearly defined in the booking application form and agreement as 15% of the sale consideration of the unit. This is a contractual term agreed between the parties out of their own free will before coming into force of the Act, 2016.
30. Further, the deductions made from the paid-up amount by the respondent are not as per the law of the land laid down by the Hon'ble apex court of the land in cases of *Maula Bux VS. Union of India, (1970) 1 SCR 928* and *Sirdar K.B. Ram Chandra Raj Urs. 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 framed 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."

31. Therefore, in view of the above, the contention of the respondent w.r.t forfeiture of 15% of the sale consideration/cost of the property to be considered/treated as earnest money stands rejected.
32. Keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.99,46,671/- after deducting 10% of the sale consideration of Rs.1,82,18,257/- being earnest money along with an interest @10.85% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of cancellation i.e., 08.02.2022 till

actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority: -

33. 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 refund the paid-up amount of Rs.99,46,672/- after deducting 10% of the sale consideration of Rs.1,82,18,25/- being earnest money along with an interest @10.85% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of cancellation i.e., 08.02.2022 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.

34. Complaint stands disposed of.

35. File be consigned to the registry.

Dated: 29.05.2024


(Ashok Sangwan)
Member

Haryana Real Estate
Regulatory Authority,
Gurugram