BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : **4070 of 2023**
Date of complaint : **31.08.2023**
Date of order : **24.04.2024**

1. Pragya Pant,
2. Indu Prakash Tiwari,
Both R/o: 38, Qutub View Apartments,
Shaheed Jeet Singh Marg, Hauz Khas,
South Delhi, Delhi-110016. **Complainants**

Versus

M/s Orris Infrastructure Private Limited
Office at: - RZ-D-5, Mahavir Enclave,
South West Delhi, New Delhi-110045. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Rahul Bhardwaj (Advocate) Complainants
Charu Rastogi (Advocate) Respondent

ORDER

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

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name of the project	"Aster Court", Sector 85, Gurgaon
2.	Project area	25.02 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	39 of 2009 dated 24.07.2009, valid upto 23.07.2024
5.	Name of licensee	Be Office Automation Products Pvt Ltd. and 9 Ors.
6.	RERA Registered/ not registered	RC/REP/HARERA/GGM/2018/19 dated 30.10.2018 upto 31.12.2025
7.	Approval of building plans	10.04.2012 (Annexure R1 on page 24 of reply)
8.	Commencement of construction	13.07.2011 (as per Annexure R-12 on page 47 of reply) (inadvertently mentioned as 15.10.2013 on proceedings dated 21.02.2024)
9.	Allotment Letter	13.07.2011 (page 32 of complaint)
10.	Unit no.	602, 6th Floor, Tower-2A (page no. 38 of complaint)
11.	Unit area admeasuring (super area)	1250 sq. ft. (page no. 38 of complaint)
12.	Date of execution of Buyer's Agreement	08.08.2011 (page no. 36 of complaint)
13.	Possession clause	***10.1 Schedule for Possession of the said Apartment*** *The company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building / said Apartment within the period of 36 months plus grace period of 6 months from the date of execution of the Apartment Buyer Agreement by the Company or Sanction of*

		Plans or Commencement of Construction whichever is later, unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1), (11.2), (11.3) and Clause (38) or due to failure of Allottee(s) to pay in time the price of the said Apartment along with all other charges and dues in accordance with the schedule of payments given in Annexure i or as per the demands raised by the Company from time to time or any failure on the part of the Allottee (s) to abide by any terms or conditions of this Apartment Buyer Agreement.
14.	Due date of possession	10.10.2015 (Calculated as 36 months from date of approval of building plans being later + grace period of 6 months) (grace period of 6 months is allowed being unqualified)
15.	Total sale consideration	Rs. 37,98,379/- (As per SOA dated 07.11.2023 on page 42 of reply)
16.	Amount paid by the complainants	Rs. 35,72,621/- (as per SOA dated 07.11.2023 on page 42 of reply)
17.	Occupation certificate /Completion certificate	18.10.2018 (page 31 of complaint)
18.	Offer of Possession	20.10.2018 (page 34 of reply)
19.	Reminders	12.12.2018, 14.03.2019 (page 36-37 of reply)
20.	Final demand notice	16.12.2019 (page 38 of reply)
21.	Pre-cancellation letter	10.07.2023 (page 40 of reply)

B. Facts of the complaint

3. The complainants have made the following submission: -

I. That the complainants were allotted an apartment bearing no. 602, 6th Floor, Tower 2A, 2 BHK, admeasuring 1250 sq.ft in project of respondent named "Aster Court", Sector-85, Gurugram vide allotment letter dated 13.07.2011.

II. That pursuant to executing the allotment letter with the complainants, the respondent executed an apartment buyer agreement dated 08.08.2011 with the complainants for a total sale consideration of Rs. 32,41,250/-.

III. That the respondent has miserably failed to comply with the terms and conditions of the apartment buyer agreement, despite receiving an amount of Rs.35,39,629/- which is more than the promised amount. Further, Annexure I of the apartment buyer's agreement clearly mentions/illustrates that as per the construction linked payment plan, the complainants were only obligated to pay 95% of the total amount agreed between the parties.

IV. That the complainants were constrained to pay the extra amount to the respondent under the apprehension that the complainants may lose their unit which has been purchased by their hard-earned money. The said agreement contained various one-sided and arbitrary clauses due to which the complainants could not negotiate on any of the clauses, since any disagreement or cancellation would have led to forfeiture of the earnest money.

V. That, as per clause 10.1 of the apartment buyer agreement, the possession of the flat/apartment was to be delivered by 08.08.2014, with a maximum grace period, if necessary, of 6 months or 180 days for the respondent(s) to obtain the occupation certificate in respect of this group housing complex and provide the possession to the complainants. However, the respondent has not only failed to hand over the possession

of the flat/apartment along-with all promised appurtenant infrastructure, amenities and services duly developed as promised by the respondent but rather extorted more money than the agreed amount from the complainants even after a huge delay of more than 9 years.

VI. It is submitted that the respondent has till date not provided or given the possession letter till date despite the fact that the respondent has already received the Occupational Certificate from the competent authority in 2018. However, the respondent sent the offer for fit-out possession to the complainants dated 18.04.2018 and demanded more money from the latter. The respondent under the garb of the offer for fit-out possession are demanding charges like electricity installation charges and other miscellaneous charges from the complainants. It is noteworthy to state that the respondent in the offer for fit-out possession letter has demanded an extra Rs.2,98,379/- from the complainants despite the fact the complainants have already paid extra to the respondent as per the terms and conditions of the apartment buyer agreement.

VII. That the complainants continued to follow up with the respondent through various oral meetings and correspondences expressing their dismay and distress on receiving the offer for fit out and not the actual offer of possession despite that fact the respondent has already received the Occupational Certificate from the competent authority as well as extra money from the respondent. The complainants against the demand raised in the offer for fit out possession letter by the respondent made correspondences expressing their dismay and further requested to adjust the same with the significate delay charges in handing the possession of the unit to the complainant.

VIII. That the respondent after receiving more than 100% of the sale consideration and not providing with the actual offer of possession sent

a pre-cancellation letter for the said unit to the complainants, wherein the respondent is demanding an amount of Rs.4,02,402/-and failing which the respondent would be constrained to cancel the unit. It is pertinent to mention that the said cancellation can only be held valid if the allottee has failed to perform his duties as per the terms and conditions of the agreement executed between the parties. Herein, due to the above facts and circumstances narrated, the complainants have committed no breach of any terms and conditions of the apartment buyer agreement rather it is the respondent who has been at default to perform his obligations from the very inception of execution of the agreement. Further, the complainants including the amount paid towards the increase in super area have paid an amount of Rs.35,72,621/- to the respondent against the sale consideration. Therefore, the complainant is requesting this Authority to issue directions to the respondent for withdrawal of such arbitrary letter which is not only invalid but rather mala-fide.

IX. That the complainants are seeking and are entitled for the possession of their apartment along with the delayed possession charges as per the provisions of the RERA Act, 2016

C. Relief sought by the complainants:

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

i. Direct the respondent to pay the interest at the prescribed rate from the due date of possession till the date of actual possession.

ii. Direct the respondent to withdraw the pre-cancellation letter dated 10.07.2023.

iii. Direct the respondent to refund the excess amount of Rs.2,98,379/- illegally charged from the complainants and to abstain the respondent from charging more than what has been agreed as per the terms and conditions of the agreement.

iv. Direct the respondent to pay a sum of Rs.1,00,000/- towards litigation cost.

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 in the present complaint, the complainant was allotted unit no. 602, tower 2A in the project 'Aster Court', located at sector-85, Gurugram, Haryana.

ii. That the builder buyer agreement between the parties took place on 08.08.2011 wherein as per clause 10.1 of the agreement, the respondent was supposed to hand over the possession within a period of 36 months from the date of the signing of agreement or within 36 months plus 6 month's grace period i.e. altogether 42 months from the date of execution of Apartments buyers agreement by the Company or Sanctions of plans or commencement of construction whichever is later.

iii. That further, as per clause 1.4 and 9.2 of the buyer's agreement, it was agreed between the parties that the super area as mentioned in the buyer's agreement is tentative, subject to change at the time of obtaining Occupation Certificate and handing over possession and any major alteration, wherein there is change in the super area of more than 10% shall be based upon prior approval from the allottee and since the unit of the complainants were escalation free, thus increase or decrease in the super area would result into change in the amount of the basic sale consideration and shall be adjusted at the time of offer of possession. Thus, when the area was revised which though was less than 10%, the said fact was duly

communicated to the complainant and the amount charged from the complainants is only as per the terms of the buyer's agreement.

iv. That it is submitted that the unit of the complainant falls into Tower 2A for which the sanction plan was obtained by the respondent on 10.04.2012 as the respondent has obtained some additional land admeasuring 4.05 acres vide license no. 99 of 2011 dated 17.11.2011 from DTCP.

v. That thereafter, several obstructions had taken place which hampered the pace of the construction wherein in the year, 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) were regulated. The Hon'ble Supreme Court directed framing of Modern Mineral Concession Rules. Reference in this regard may be had to the judgment of "Deepak Kumar v. State of Haryana, (2012) 4 SCC 629". The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce in the NCR as well as areas around it. Further, the respondent was faced with certain other force majeure events including but not limited to non-availability of raw material due to various stay orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal thereby stopping/regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. It is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 02.11.2015 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna Riverbed. These orders inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the

Hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh as well. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity as detailed above continued, despite which all efforts were made and materials were procured at 3-4 times the rate and the construction continued without shifting any extra burden to the customer. That the above said restrictions clearly fall within the parameter "reasons beyond the control of the respondent as described under of clause 11.1 of the buyer agreement.

vi. That during that time, a writ petition was filed in the Hon'ble High Court of Punjab and Haryana titled as "Sunil Singh vs. Ministry of Environment & Forests Parayavaran" which was numbered as CWP-20032-2008 wherein the Hon'ble High Court pursuant to order dated 31.07.2012 imposed a blanket ban on the use of ground water in the region of Gurgaon and adjoining areas for the purposes of construction. That on passing of the abovementioned orders by the High Court, the entire construction work in the Gurgaon region came to stand still as the water is one of the essential parts for construction. That in light of the order passed by the Hon'ble High Court, the respondent had to arrange and procure water from alternate sources which were far from the construction site. The arrangement of water from distant places required additional time and money which resulted in the alleged delay and further as per necessary requirements STP was required to be setup for the treatment of the procured water before the usage for construction which further resulted in the alleged delay.

vii. That orders passed by Hon'ble High Court of Punjab and Haryana wherein the Hon'ble Court has restricted use of groundwater in construction activity and directed use of only treated water from available sewerage treatment plants. However, there was lack of number of sewage treatment plants

which led to scarcity of water and further delayed the project. That in addition to this, labour rejected to work using the STP water over their health issues because of the pungent and foul smell coming from the STP water as the water from the S.T.P' s of the State/Corporations had not undergone proper tertiary treatment as per prescribed norms.

viii. That on 19.02.2013, the office of the executive engineer, HUDA Division No. II, Gurgoan vide memo no. 3008-3181, had issued instruction to all developers to lift tertiary treated effluent for construction purpose for Sewerage Treatment plant Behrampur. Due to this instruction, the respondent company faced the problem of water supply for a period of several months as adequate treated water was not available at Behrampur.

ix. That not only this, one of the collaborator/ landowners of land in the project – BE Automation Products (P) Ltd. who was the owner of only 5.8 Acres of land in the entire project indulged in frivolous litigation and put restraints in execution of the project and sale of apartments due to which the construction of the project was delayed. Further, the BE Automation Products Pvt Limited falls under the definition of promoter being one of the landowners and is equally responsible for any delay.

x. That despite all these litigations and obstructions, the unit in question was made ready and available for the complainant and the complainant was offered possession for fit-outs of the unit in question on 18.04.2018.

xi. That the respondent had applied for Occupation Certificate vide application dated 20.11.2014, 15.01.2015 and 15.10.2015 since the construction of the project was done in phase-wise manner and also that the approvals of the revised building plan was obtained at different dates and durations, thus, the respondent obtained the OC for tower 2A on 18.10.2018.

xii. That the complainants were offered the possession of the unit in question immediately after the receipt of the OC vide email dated 18.10.2018 as well

as a letter dated 20.10.2018, whereby the complainants were requested to clear the outstanding amount as raised vide statement of account dated 18.04.2018 along with completion of the possession formalities.

xiii. That the respondent also issued a several letter, mail reminders to the complainants to come forward and take the possession of the unit in question and clear the outstanding dues but the request of the respondent went to deaf ears of the complainants.

xiv. That when the complainants threw all the requests and communications made by the respondent into drain, the respondent was constraint to issue a pre-cancellation letter dated 10.07.2023 whereby the respondent gave a final opportunity to the complainants to make the payment of the outstanding amount and take the possession of the unit in question within a period of 7 days or else the unit of the complainants shall be cancelled.

xv. That the present complaint is barred by limitation against the respondent as the possession was offered to the complainant vide letters dated 20.10.2018 numerous other communications and the complainant has approached this Hon'ble Authority at this belated stage only to reap the benefits without any delay so caused on the part of the respondent in handing over the possession of the unit in question and with an aim to extort monies from the respondent.

xvi. That without prejudice to the above, it is stated that the statement of objects and reasons of the said Act clearly state that the RERA is enacted for effective consumer protection. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of "Consumer" as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. The complainant is an investor and not a consumer.

xvii. That without prejudice to the aforementioned submissions, it is submitted that even otherwise the complainant cannot invoke the jurisdiction of the Hon'ble Authority in respect of the unit allotted to the complainant, especially when there is an arbitration clause provided in the Apartment Buyer Agreement, whereby all or any disputes arising out of or touching upon or in relation to the terms of the said agreement or its termination and respective rights and obligations, is to be settled amicable failing which the same is to be settled through arbitration. Once the parties have agreed to have adjudication carried out by an Alternative Dispute Redressal Forum, invoking the jurisdiction of this Hon'ble Authority, is misconceived, erroneous and misplaced. The Space Buyer Agreement attached by the complainants themselves is containing the Arbitration Clause 49.

xviii. That the complainants have paid a total amount of Rs.33,95,977/- in lieu of the unit in question and an amount of Rs.1,76,644/- is only the interest component which has been paid by the complainants due to their own default of not making timely payments.

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 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent.

F. I Objection regarding complaint being barred by limitation.

12. The counsel for the respondent has raised an objection that the complaint is barred by limitation as the possession was offered to the complainant vide letters dated 20.10.2018 and the complainant has approached this Hon'ble Authority at this belated stage only to reap the benefits without any delay so caused on the part of the respondent in handing over the possession of the unit in question and with an aim to extort monies from the respondent.

13. On consideration of the documents available on record and submissions made by the party, the authority observes that the last cause of action arose on 10.07.2023 when the pre-cancellation letter was issued to the complainants for payment of outstanding dues and the complainants after

receipt of the same has filed the present complaint dated 31.08.2023, challenging the said letter as well as demands contained therein. Keeping in view the aforesaid facts and legal position, the objection with regard to the complaint barred by limitation is hereby rejected.

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

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."*
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> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

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 complainants are well within their 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 Objections regarding force majeure.

19. The respondent-promoter has raised the contention that the construction of the project 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, shortage of labour force in the NCR region, ban on the use of underground water for construction purposes, heavy shortage of supply of construction material 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 10.10.2015. 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.

F. IV Objection regarding the complainant being investor.

20. The respondent has taken a stand that the complainants are investor and not a consumer and therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are buyers and have paid total price of Rs.35,72,621/- to the promoter towards purchase of a 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;"

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

G. Findings regarding relief sought by the complainants.

G. I Direct the respondent to pay the interest at the prescribed rate from the due date of possession till the date of actual possession.

G.II Direct the respondent to withdraw the pre-cancellation letter dated 10.07.2023.

G.III Direct the respondent to refund the excess amount of Rs.2,98,379/- illegally charged from the complainants and to abstain the respondent from charging more than what has been agreed as per the terms and conditions of the agreement.

22. The complainants were allotted a residential apartment bearing no. 602, 6th floor, Tower-2A in the project of the respondent named as 'Aster Court' situated at Sector 85, Gurugram vide apartment buyer agreement dated 08.08.2011. The respondent has contended that OC of the Tower in which the unit of complainants is situated was obtained by it on 18.10.2018 and thereafter, possession of the unit was offered to the complainants vide letter dated 20.10.2018, whereby the complainants were requested to clear the

outstanding amount as per the SOA statement of account dated 18.04.2018 along with completion of the possession formalities. She has further contended that the complainants have paid a total amount of Rs.33,95,977/- in lieu of the unit in question and an amount of Rs.1,76,644/- is only the interest component which has been paid by the complainants due to their own default of not making timely payments. Therefore, the delay possession charges payable if any, should be payable on the amount received in lieu of the unit in question. However, the Authority is of view that as per Section 18(1) of the Act, 2016, the promoter is liable to pay interest on the entire amount paid by the complainant/allottee. Further, the Authority is putting reliance upon the order passed by the Hon'ble Punjab and Haryana High Court in ***RERA Appeal no. 95 of 2021***, titled as ***Emaar India Limited Vs. Kaushal Pal Singh alias Kushpal Singh,*** dated 23.05.2022, wherein, the Hon'ble High Court has categorically laid down that *interest for every month of delay is payable on the entire amount paid by the allottee.* The relevant portion of the order dated 23.05.2022 is reproduced as under for ready reference:

10. ***"On a careful reading of the proviso to Section 18(1) of the 2016 Act, it is evident that an allottee who does not intend to withdraw from the project, is entitled to be paid by the promoter the interest for every month of delay till the delivery of possession at such rate as may be prescribed. It is in the nature of damages or compensation for delay in delivery of the possession of the apartment/unit. Such interest for every month of delay is payable on the entire amount paid by the allottee. The interest has been defined in Section 2(za) of the 2016 Act. Explanation (i) of Section 2(Aa) of the 2016 Act provides that in case of default, the interest is payable by the promoter to the allottee at the rate equal to the rate of interest as shall be prescribed in this behalf. Explanation (ii) Section 2(Za) of the 2016 Act provides that the interest shall be payable to the allottee from the date the promoter received the amount or any part thereof. The proviso to Section 18(1) of the 2016 Act clearly enables the authority to compensate the allottee for the losses suffered on account of delay in***

delivery of possession by the promoter. The interest shall be payable on the complete amount paid by the allottee to the promoter."

23. Therefore, in view of the above, the contention of the respondent stands rejected, and it is liable to pay interest on the entire amount paid by the complainants in terms of Section 18(1) of the Act.

24. That the respondent has submitted that it had issued several letters, mails and reminders to the complainants to come forward and take the possession of the unit in question and clear the outstanding dues, but the request of the respondent went to deaf ears of the complainants and the respondent was constrained to issue a pre-cancellation letter dated 10.07.2023 giving a final opportunity to the complainants to make the payment of the outstanding amount and take the possession of the unit in question within a period of 7 days or else the unit of the complainants shall be cancelled.

25. The complainants have failed to make the requisite payment as per the provision of section 19(6) of the Act and as per section 19(7) of the Act to pay the interest at such rate as may be prescribed for any delay in payments towards any amount or charges to be paid under sub-section (6). Proviso to section 19(6) and 19(7) reads as under:

"Section 19: - Right and duties of allottees. -

.....

*(6) every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13[1], shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, **maintenance charges,** ground rent, and other charges, if any.*

(7) the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

26. The authority observed that the possession of the unit was offered to the complainants on 20.10.2018 and despite repeated reminders they are not coming forward to clear the outstanding dues and to take possession of the unit. Section 19(6) & 19(7) of the Act provides that every allottee shall be

responsible to make necessary payments as per agreement for sale along with prescribed interest on outstanding payments from the allottee and to take physical possession of the apartment as per section 19(10) of the Act. Therefore, in view of the above, the complainants are liable to pay the outstanding dues as per the buyer's agreement as they are willing to take possession of the unit.

27. The complainants intend to continue with the project and are seeking delay possession charges at prescribed rate of interest on amount already paid by them as provided under the proviso to section 18(1) of the Act which 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. -*
> *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."*

28. Clause 10.1 of the apartment buyer's agreement (in short, the agreement) dated 08.08.2011, provides for handing over possession and the same is reproduced below:

> ***10.1 Schedule for Possession of the said Apartment***
> *The company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building / said Apartment within the period of 36 months plus grace period of 6 months from the date of execution of the Apartment Buyer Agreement by the Company or Sanction of Plans or Commencement of Construction whichever is later, unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1), (11.2), (11.3) and Clause (38) or due to failure of Allottee(s) to pay in time the price of the said Apartment along with all other charges and dues in accordance with the schedule of payments given in Annexure I or as per the demands raised by the Company from time to time or any failure on the part of the Allottee (s) to abide by any terms or conditions of this Apartment Buyer Agreement."*

29. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default

under any provisions of this agreement and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession.

30. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 36 months plus grace period of 6 months from the date of execution of the apartment buyer agreement by the company or sanction of plans or commencement of construction whichever is later. Therefore, the due date has been calculated as 36 months from date of approval of building plans i.e., 10.04.2012, being later. Further a grace period of 6 months is allowed to the respondent being unqualified. Thus, the due date of possession come out to be 10.10.2015.

31. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate of interest. However, proviso to section 18 provides 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 possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. 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.

32. 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.

33. 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 24.04.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85% per annum.

34. 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 allottees, 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;"

35. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter

which is the same as is being granted to the complainants in case of delay possession charges.

36. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of apartment buyer's agreement executed between the parties on 08.08.2011, the possession of the booked unit was to be delivered by 10.10.2015. The occupation certificate was granted by the concerned authority on 18.10.2018 and thereafter, the possession of the subject flat was offered to the complainants vide letter dated 20.10.2018. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 08.08.2011 to hand over the possession within the stipulated period.

37. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 18.10.2018. The respondent offered the possession of the unit in question to the complainants only on 20.10.2018, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months time from the date of offer of possession. These 2 months of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession

is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession till the expiry of 2 months from the date of offer of possession (20.10.2018) which comes out to be 20.12.2018.

38. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delayed possession at prescribed rate of interest i.e., 10.85 % p.a. w.e.f. 10.10.2015 till the expiry of 2 months from the date of offer of possession (20.10.2018) which comes out to be 20.12.2018 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.

H. Directions of the authority: -

39. 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 is directed to pay interest to the complainants against the paid-up amount at the prescribed rate i.e., 10.85% per annum for every month of delay from due date of possession i.e., 10.10.2015 till the expiry of 2 months from the date of offer of possession (20.10.2018) i.e., upto 20.12.2018 only.

ii. The respondent is directed to supply a copy of the updated statement of account after adjusting the delayed possession charges within a period of 15 days to the complainants.

iii. The complainants are directed to pay outstanding dues, if any, after adjustment of delay possession charges within a period of 30 days from the date of receipt of updated statement of account.

iv. The respondent is directed to handover possession of the unit/flat in question to the complainants in terms of the apartment buyer's agreement dated 08.08.2011 and the complainant is also obligated to take physical possession of the allotted unit under Section 19(10) of the Act, 2016.

v. The respondent shall not charge anything from the complainants which is not the part of the apartment buyer's agreement. Further, the respondent-promoter is not entitled to charge holding charges from the complainant-allottees at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 on 14.12.2020.

vi. The rate of interest chargeable from the allottees 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 the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

40. Complaint stands disposed of.

41. File be consigned to the registry.

Dated: 24.04.2024

(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram