BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. **5486 of 2023**
Date of decision **24.10.2024**

Meenakshi Chauhan
R/o: - D-12/6 2nd Floor, Ardee City,
Sector-52, Gurugram, Haryana. **Complainant**

Versus

M/s Chirag Builders Pvt. Ltd.
Corporate Office at: Building No-80, Floor-1st,
Sector-44, Gurugram, Haryana. **Respondent**

CORAM:
Shri Vijay Kumar Goyal Member

APPEARANCE:
Sh. Toshif Ahmed (Advocate) Complainant
Sh. Garvit Gupta (Advocate) Respondent

ORDER

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

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period,

if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name and location of the project	"ROF Ananda", Sector-95, Gurgaon
2.	Nature of the project	Affordable Housing Project
3.	Project area	16.82 acres
4.	DTCP license no.	17 of 2016 dated 25.10.2016
5.	RERA Registered/ not registered	187 of 2017 dated 14.09.2017
6.	Unit No.	E-902, 9th Floor, Tower-E (Page no. 57 of complaint)
7.	Area of unit	645.29 sq ft
8.	Date of allotment	04.10.2018 (Page no. 25 of complaint)
9.	Date of builder buyer agreement	15.10.2021 (Page 51 of complaint)
10.	Possession clause	**7.1 . Possession of the said Flat** *..... the Promoter shall offer the possession of flat to the allottee with a period of **4 years from the date of approval of building plans or grant of environment clearance, whichever is later.*** *(Emphasis supplied)* (Page no 63 of complaint)
11.	Environment Clearance dated	09.10.2017 (Page no. 11 of reply)
12.	Due date of possession	09.04.2022 (Calculated from 4 years from the receipt of EC+ a grace period of 6 months is being allowed unconditionally)

13.	Total sale consideration	Rs. 26,24,260/- (Page no. 57 of complaint)
14.	Total amount paid by the complainant	Rs. 28,17,519/- (As per page 26 of complaint)
15.	Occupation certificate	20.02.2022
16.	Offer of Possession	23.02.2023 (Page no. 94 of reply)
17.	Pre-Termination dated	20.12.2023 (Page no. 97 of reply)
18.	Termination letter dated	09.02.2024 (Page 6 of application dated 24.04.2024)

B. Facts of the complaint

3. The complainant has made the following submissions: -

I. That the complainant applied for allotment of a residential flat no. E-902 in Block/Tower-E, on 9th Floor, having carpet area of 645.29 sq. ft. and balcony area of 86.20 sq. ft. along with a two-wheeler open parking space in project namely "ROF ANANDA" situated at Sector-95, Gurgaon, Haryana, being developed by the respondent.

II. That the respondent and the complainant entered into a registered agreement for sale dated 15.10.2021. As per the agreement, the respondent had to deliver the apartment within 4 years from the date of environmental clearance i.e. 4 years from 09.10.2017. The due date of possession was 09.04.2022. That respondent failed to deliver the possession till date.

III. That the complainant continued to make the payments as per the payment plan. However, the complainant made the entire payment of Rs.

28,17,519/- and nothing is due on the part of the complainant.

IV. That the complainant has been requesting the respondent to hand over the flat in question to the complainant. The complainant, even after paying heavy sums of money, received nothing in return but only loss of the time and money invested by him as the respondent were never able to satisfactorily respond to any of the queries of the complainant. The respondent was never definite about the delivery of the possession.

V. That the complainant received a demand letter dated 08.08.2023 from the respondent for the alleged dues of Rs. 2,92,202.29/-. That in terms of the demand letter respondent have admittedly received an amount of Rs. 28,17,519.00. That the demand was based on the premise that the date of allotment was 23.08.2018. That the allotment was made to the complainants by the respondent on 04.10.2018 and not 23.08.2018 as mentioned in the demand letter dated 08.08.2023. The complainant replied to the demand letter vide their reply dated 21.08.2023 for the alleged dues of Rs. 2,92,202.29/- to the respondent. The complainant in their reply requested the respondent to reconcile the records by changing the date of the allotment from 23.08.2018 to 04.10.2018 and also requested to inform, if any payment is required to be made by the complainant.

VI. That the respondent is guilty of deficiency in service within the purview of provisions of the Real Estate (Regulation and Development) Act, 2016 (Central Act 16 of 2016) and the provisions of Haryana Real Estate (Regulation and Development) Rules, 2017. The complainant has suffered on account of deficiency in service by the respondent & is fully liable to cure the deficiency as per the provisions of the Real Estate (Regulation and Development) Act, 2016 (Central Act 16 of 2016) and the provisions of Haryana Real Estate (Regulation and Development) Rules, 2017.

C. Relief sought by the complainants:

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

   I. Direct the respondent to offer the possession of the said unit after and pay delayed possession charges.

   II. Direct the respondent to not charge holding charges and maintenance from the complainant till the actual handover of possession of the unit.

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

D. Reply by the respondent.

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

   I. That at the very outset, it is most respectfully submitted that the complaint is not maintainable for the reason that the agreement contains a dispute resolution clause which refers to the mechanism to be adopted by the parties in the event of any dispute i.e. Clause 38 of the Buyer's Agreement, which is reproduced for the ready reference: -

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

   II. That the respondent is the sole, absolute and lawful owner of the land parcel situated in the revenue estate of Village Dhorka, Sector 95, Tehsil and District Gurugram, Haryana. The respondent had obtained the approval/sanction to develop a project known as 'ROF Ananda' from the Director Town and Country Planning, Haryana, Chandigarh vide approval bearing license no. 17 of 2016 dated 25.10.2016 under the Haryana Development and Regulation of Urban Areas Act, 1975 and the Haryana Development and Regulation of Urban Areas Rules, 1976 read with the

Affordable Group Housing Policy, 2013 issued by the Government of Haryana vide the Town and Country Planning Department notification dated 19.08.2013 as amended from time to time.

III. That the respondent had obtained the approval on the building plans from DTCP dated 07.12.2016 and the environment clearance dated 09.10.2017 from the State Environment Assessment Authority, Haryana for the project.

IV. That after checking the veracity of the project, the complainant applied for allotment of an apartment. The complainant was aware that all the payment demands towards the total sale consideration were to be demanded by the respondent strictly as per the said policy and only after being completely satisfied about the same, had made the booking with the respondent.

V. That the payment plan of the unit applied for was strictly as per the notified Affordable Housing Policy, 2013. The relevant clause i.e. 5(iii)(b) of the said policy is reproduced hereunder: -

> *"b. ...Any persons interested to apply for allotment of flat in response to such advertisement by the colonizer may apply on the prescribed application form* ***along with 5% amount of the total cost of the flat.*** *All such applicants shall be eligible for an interest at the rate of 10% per annum on the booking amount received by the developer for a period beyond 90 days from the close of booking till the date of allotment of flat or refund of booking amount as the case may be. The application will be required to deposit* ***additional 20% amount of the total cost of the flat at the time of allotment of the flat.*** *The balance* ***75% amount will be recovered in six equated six-monthly instalments*** *spread over three-year period..."*

VI. That the complainants at the time of Booking had made the payment towards 5% amount of the total cost of the unit as per the Affordable Scheme Policy, 2013. The complainants intimated to the respondent that they were suffering from financial constraints and that they would

accordingly approach a financial institution for loan. Accordingly, the complainants approached a financial institution named Housing Development Finance Corporation Limited (herein after referred as HDFC), to avail loan facility and to make payments against the said unit.

VII. On the basis of the application, an agreement in respect of unit E-902 on 9th Floor in Tower -E having a carpet area of 645.29 sq. ft. and balcony area of 86.20 sq. ft. was sent by the respondent to the complainants. The complainants signed the agreement only after being fully aware of all the limitations and obligations and after being completely satisfied with the terms and conditions of the said agreement. Thus, the agreement for sale was signed between the complainants and the respondent on 29.09.2018. Moreover, the complainants had also perused and signed Annexure B of the agreement for sale which contained the payment plan which specifically stated the stage of payments.

VIII. The complainants had already got a loan sanctioned, they approached the respondent and requested it to executed a Tripartite agreement with HDFC. On the basis of the request of complainants, the respondent executed a Tripartite agreement dated 13.11.2018 in order to enable it to financially assist the complainants in making payment towards the total sale consideration of the unit. The respondent reminded the complainants about Clause 2.5 of the Agreement for Sale wherein the complainants had acknowledged and admitted that regardless of availing of the loan facility, it would be the obligation and responsibility of the complainants to make the payment in order to ensure compliance of the terms and conditions of the Agreement for Sale. Clause 2.5 of the Agreement for Sale are reproduced hereunder: -

"The Allottee understands and agrees that although the allottee may obtain finance from any financial institution/bank/entity or

any other lawful source for the purchase of the Said Flat as may be permissible under Applicable Law .....
In case of default in repayment of dues of the Bank/financial institution/agency by the Allottee, the Allottee authorizes the Promoter to cancel the allotment of the Said Flat and repay the amount received till that date after deduction of the Earnest money...."

IX. The complainants were aware that as per clause 2.1 and clause 5 of the agreement for sale, timely payment of the instalment amount was the essence of the allotment. It was understood vide the said clauses of the agreement for sale and as per clause 5(iii)(b) of the Affordable Scheme Policy, 2013, that if the allottees fail to remit the payment demanded by the respondent on time, then they would be bound to make payment towards interest @15% per annum. Despite being aware of the terms and conditions, the complainants failed to remit the payments on time for the reasons best known to them and have now concealed the said facts from this Hon'ble Authority.

X. That vide demand letter dated 21.01.2019, the respondent demanded the net payable amount of Rs. 3,54,277/-. The due date for payment was 23.02.2019. However, the complainants failed to remit the payment on time and the respondent was constrained to send again raise the said demand vide demand letter dated 11.04.2019 for Rs 4,18,744/- (inclusive of interest). However, the complainants failed to remit the said amount. The respondent thereafter, vide reminder letter dated 08.06.2019 again requested the complainants to remit the said dues of Rs 4,27,188/-. The complainants failed to remit the said payments without any justification or reasoning. The respondent thereafter on account of continuous defaults in making the payments by the complainants issued another reminder letter dated 13.10.2021 for Rs 1,29,505/-.

XI. That as per Clause 7.1 of the agreement, the respondent was to handover

physical possession of the unit to the complainant within a period of 4 years from the date of approval of the environment clearance. However, as per the said clause, the due date to handover the possession of the unit was subject to force majeure conditions and timely payment of instalment by the allottee. It was further agreed vide Clause 7.3 of the agreement that if the implementation of the project was affected on account of force majeure conditions, then the respondent would be entitled to an extension of time. Clauses 7.1 and 7.3 of the Agreement are reproduced hereunder: -

> *"7.1. Within 3 months from the date of issuance of Occupancy Certificate, the Promoter shall offer for possession of the said flat to the Allottee. Subject to Force Majeure Circumstances, receipt of Occupancy Certificate and Allotee having timely complied with all its obligations, formalities or documentation, as prescribed by the Promoter in terms of this Agreement and not being in default under any part hereof including but not limited to the timely payment....the Promoter shall offer possession of the said flat to the allottee within a period of 4 years from the date of approval of building plans or grant of environment clearance."*
>
> *"7.3...If the Completion of the project is delayed due to any of the above conditions, then the Allotee agrees that the promoter shall be entitled to extension of time for delivery of possession of the said Flat."*

XII. That on account of outbreak of Covid-19 pandemic, the implementation of the entire project was affected. The due date of possession as per the terms of the agreement without taking into consideration the force majeure conditions would have been 09.10.2021. The fact that outbreak of covid pandemic event was a force majeure condition and was beyond the reasonable control of the developers including the respondent was acknowledged by the Authority wherein the completion date, revised completion date and extended completion date was automatically extended by 6 months. Thereafter on account of second wave of COVID-19 pandemic Haryana Real Estate Regulatory Authority, Panchkula by way of resolution in its meeting held on 2nd of August 2021 ordered for extension of 3 months from 1st April 2021 to 30th of June 2021.It was observed that

the second wave of COVID-19 pandemic has adversely hit all sections of the society and it being a case of natural calamity, the authority pursuant to section 37 of the RERA Act, 2016 had decided to grant the said extensions. It was further directed that no fee/ penalty shall be paid/payable by the developer on account of delay as the same was beyond its reasonable control and apprehension. Thus, as per the terms of the agreement, the due date to handover the possession of the unit in question was 09.04.2022.

XIII. That despite such event, the respondent completed the construction of the tower in which the unit allotted to the complainant is located and offered the possession of the unit vide letter dated 23.02.2023.

XIV. That the respondent vide final opportunity letter dated 20.12.2023 intimated the complainants that an amount of Rs 3,00,444/- is due and the respondent vide the said letter requested the complainants to clear out the said dues within 15 days from the issuance of the said letter. It is pertinent to mention here that the complainants despite several calls, reminder letters and various other means of communication had failed to remit the said due amounts. Further on non-payment of outstanding amount, the unit was terminated vide letter dated 09.02.2024.

XV. That moreover, even as per Section 19(6) of the Real Estate (Regulation and Development) Act, 2016, it is the obligation of the complainants to make necessary payments in the manner and within the time as specified in the agreement for sale.

XVI. It is thus, a classic case of an allottees claiming premium of his own defaults, laches and wrongs and the respondent cannot be made to suffer on account of the same. The complainants are real estate investors who had made the booking with the complainants in order to make profit in a short span of time. However, on account of slump in the real estate market,

their calculations went wrong and they were not possessed with sufficient funds to honour their commitments. On account of delay and default on the part of complainants, it is the respondent who has been made to suffer. The complainants and such like investors cannot be allowed to play with the future and interest of other genuine allottees who have invested their life-savings with the respondent.

XVII. 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

7. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter 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 the complainants being investors.

11. The respondent has taken a stand that the complainant is an investor and not consumer. Therefore, she is not entitled to the protection of the Act and also not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & 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 the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement,

it is revealed that the complainant is a buyer and paid total price of Rs.28,17,519/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through 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;"*

12. 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 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 investors are not entitled to protection of this Act also stands rejected.

F. II Objection regarding force majeure conditions

13. The respondent-promoter has raised the contention that the construction of the tower in which the complainant's unit is situated has been delayed due to force majeure circumstances arising from the Covid-19 pandemic. The Authority, through notification no. 9/3-2020 dated 26.05.2020, had already provided a six-month extension for projects with completion dates on or after 25.05.2020, due to the force majeure conditions caused by the

Covid-19 pandemic. Since this extension has already been accounted for, any further delay beyond the specified period is unjustified. Therefore, the respondent-promoter cannot rely on the force majeure clause for any delays beyond the extension period granted by the Authority.

G. Findings on the relief sought by the complainants

G.I. Direct the respondent to offer the possession of the said unit and pay delayed possession charges.

14. The complainant was allotted a residential unit no.-E-902 on 9th floor in Tower-E admeasuring a carpet area of 645.29 sq.ft and balcony area of 86.20 sq.ft with a two wheeler open parking space in the project. Thereafter, the respondent and the complainant entered into a agreement for sale on 15.10.2021 and as per clause 7.1 of the said agreement the respondent undertook to deliver the possession of the unit to the complainant within 4 years from the date of approval of building plans or grant of occupation certificate, whichever is later. The date of approvals of building plans from the concerned authorities was granted on 07.12.2016 and the environmental clearance was obtained on 09.10.2017. The environmental clearance was obtained later on and thus, the 4 years of due date of possession would be calculated from the date of obtaining the environmental clearance i.e., 09.10.2017. So, the due date of handing over possession of the unit comes to be 09.10.2021. The respondent has stated in it reply that the construction of the project was affected due to the outbreak of the Covid-19 pandemic and the fact that the outbreak of covid-19 was a force majeure condition and was beyond the reasonable control of the respondent. The Authority vide notification no. 9/3-2020 dated 26.05.2020 have provided an extension of 6 months for projects having completion date on or after 25.05.2020, on account of force majeure conditions due to the outbreak of Covid-19 pandemic. Thus, after adding the

6 months of extension on account of covid-9, the due date of possession comes out to be 09.10.2021 + 6 months i.e., 09.04.2022.

15. The occupation certificate in respect to the concerned project has been granted by the concerned government authority on 22.02.2022 (as stated in the offer of possession sent by the respondent to the complainant on 23.02.2022 on page no. 94 of the reply) and the respondent has offered possession of the unit to the complainant on 23.02.2022. The due date of possession was 09.04.2022 and the respondent has obtained occupation certificate on 22.02.2022. Thus, there is no delay on part of the respondent to complete the project within the agreed timelines.

16. The Authority as per notification no. 9/3-2020 dated 26.05.2020 for the projects having completion date on or after 25.03.2020, has already allowed the grace period of 6 months from 01.03.2020 to 01.09.2020. Therefore, there is no reason why this benefit cannot be allowed to the complainant/allottee who is duly affected during above such adverse eventualities and hence a relief of 6 months will be given equally to both the complainant/allottee, and the respondent and no interest shall be charged by either party, during the COVID period i.e., from 01.03.2020 to 01.09.2020.

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

18. Further, on 09.02.2024, the respondent issued a cancellation letter with regard to the complainant's unit, citing non-payment of outstanding dues.

It is crucial to note that the complainant has made payments totalling Rs. 28,17,519/- against the sale consideration of Rs. 26,24,260/-. As the complainant has paid an amount exceeding the total sale consideration, the Authority finds the respondent's cancellation of the agreement to be legally untenable and in violation of the terms of the agreement. Consequently, the Authority holds that the cancellation is invalid and must be set aside.

19. However, the complaint during proceedings dated 24.10.2024 stated that the complainant is willing to pay outstanding amount subject to the condition that no amount shall be demanded which is not part of BBA and interest should not be levied as per the date of demand notice. Also, the counsel for the respondent stated that offer of possession is already stands made, the complainant may take the possession after clearing the outstanding dues.

H. Directions of the Authority

19. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondent is directed to rescind the cancellation or termination of the unit and proceed with the transfer of possession of the unit to the complainant within 60 days of this order.

ii. The respondent has completed and offered the possession of the unit to the complainant as per the agreement, within the agreed timelines. Hence, the relief of the complainant regarding delayed possession charges does not hold any substance and is hereby declined.

iii. The respondent shall not charge anything from the complainant which is not the part of the apartment buyer's agreement.

iv. The benefit of six months grace period on account of Covid-19 shall be applicable to both the parties in the manner detailed herein above and no interest to be charged for the period of 01.03.2020 to 01.09.2020 from the complainants or to be paid by the respondent on account of delay for the above said covid period.

20. Complaint stands disposed of.

21. File be consigned to registry.

Dated: 24.10.2024

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