BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1529 of 2023**
Date of complaint	:	**27.04.2023**
Date of decision	:	**20.09.2024**

Subhashish Paul
Preety Pony
R/o: J-74, Ground Floor Vikas Puri, New Delhi **Complainants**

Versus

1. M/s Raheja Developers Limited.
Regd. Office at: W4D, 204/5, Keshav Kunj,
Western Avenue, Cariappa Marg, Sainik Farms,
New Delhi- 110062.
2. M/s Raheja Developers Limited.
Regd. Office at: 204/5, Keshav Kunj Western Avenue,
Sanik Farms, New Delhi **Respondents**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Sapna Sinha (Advocate) Complainants
Garvit Gupta (Advocate) Respondent no.1& 2

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 there under 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	Raheja's Maheshwara" township known as "Raheja's Aranya City, Sectors 11&14, Sohna Gurugram
2.	Project area	9.23 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	25 of 2012 dated 29.03.2012 valid up to 28.03.2018
5.	Name of licensee	Ajit Kumar and 21 others
6.	RERA Registered/ not registered	Registered vide no. 20 of 2017 dated 06.07.2017
7.	RERA registration valid up to	5 Years from the date of revised Environment Clearance
8.	Area registered	3.752 acres
9.	Unit no.	A 504 Tower A 5TH floor (Page 47 of complaint) (Inadvertently mentioned in the proceedings of the day as B-803, 1st floor, tower/block- B , As per page no. 24 of the complaint)
10.	Unit area admeasuring	110.65 sq. mts. and tentative gross area of approx. 151.44 sq. mts. Or 1630.00 sq. ft. (Page 47 of the complaint) (Inadvertently mentioned in the proceedings of the day as 1098.50 sq. ft., Page no. 35 of the complaint)
11.	Allotment letter	09.01.2017 (As per page no. 42 of the complaint)
12.	Date of execution of agreement to sell	09.01.2017 (As per page no. 45 of the complaint)

13.	Tripartite Agreement	14.07.2017 (Page 84 of complaint)
14.	Possession clause	21. *The Company shall endeavor to complete the construction of the said Apartment within* ***Forty-Eight (48) months plus/minus Twelve (12) months grace period from the date of the execution of the Agreement or Environment Clearance and Forest Clearance, whichever is later but subject to force majeure, political disturbances, circumstances cash flow mismatch and reasons beyond the control of the Company.*** *However, in case the Company completes the construction prior to the said period of 48 months plus 12 months grace period the Allottee shall not raise any objection in taking the possession after payment of Gross Consideration and other charges stipulated hereunder. The Company on obtaining certificate for occupation and use for the building in which said Apartment is situated, by the Competent Authorities shall hand over the said Apartment to the Allottee for his occupation and use and subject to the Allottee having complied with all the terms and conditions of the Agreement to Sell. In the event of failure of Allottee to take over and/ or occupy and use the said Apartment provisionally and/ or finally allotted within thirty (30) days from the date of intimation in writing by the Company, then the same shall lie at his risk and cost and Allottee shall be liable to pay compensation @ Rs.8/- per Sq. Ft. of the tentative Grass Area per month plus applicable taxes, if any, as holding charges for the entire period of such delay.....* (As per page no. 62 of the complaint).
15.	Grace period	As per clause 21 of the agreement to sell, the possession of the allotted unit was supposed

		to be offered within a stipulated timeframe of 48 months plus/minus12 months ***grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later***. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 12 months to the promoter at this stage.
16.	Due date of possession	09.01.2022 (Note: - 48 months from date of agreement i.e., 09.01.2017 + 12 months grace period)
17.	Total sale consideration	Rs.61,69,965/- (As per customer ledger ledger on page no. 91 of the complaint)
18.	Amount paid by the complainants	Rs. 34,04,000/-. (As alleged in complaint at page 12) The same is confirmed by the respondent vide proceedings dated 20.09.2024
19.	Payment Plan	Installment Link Payment Plan (As per payment plan page no. 68 of the complaint)
20.	Occupation certificate	Not received
21.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainants have made the following submissions: -

I. That the complainants are the joint allottee of the 'Subject Unit' in question and is covered under the definition of 'Allottee' within The Real Estate (Regulation & Development) Act 2016.

II. That the innocent complainants being anxious to secure a home for themselves at Gurugram near to their workplace got to know through an advertisement about the subject project i.e., 'Raheja Maheshwara, Sector- 11 and 14, Sohna Road, Gurugram-122101, Haryana

promoted, developed& marketed by the respondent and visited the project site & respondent's office in May-June, 2016.

III. That That the complainant got allured by the brochures, representations, assurances of the sales & marketing officials of the respondent. The complainants on being represented/assured that required sanctions &approvals have already been obtained vide license No. 25 of 2012 dated 29.03.2012 granted by DGTCP Chandigarh AND Memo No. ZP-869-A/AD(RA)/2016/2034dated 29.01.2016 for development of Group Housing Project on the said land falling in Sector-11 and 14, Sohna Distt., Gurugram and construction were to commence shortly & possession will be delivered positively by December,2021. Accordingly, the complainants booked a flat by paying the sum of Rs. 5,14,000/- to the respondent vide receipt numbers REC0026/00445-46/16-17both dated 14.11.2016. Again complainants paid the sum of Rs. 24,000/- vide no. REC0026/00460/16-17dated 07.12.2016 and the respondent issued a allotment letter dated 09.01.2017 thereby allotting a residential unit No. A-504, admeasuring carpet area of 110.655 sq.mts and tentative Gross Area or Super area of 151.55Sq.mts or 1630sq.ft.

IV. That after issuance of the allotment letter, the respondent also executed the agreement to sell on the same date for the purchase of a residential unit bearing no. 504 located on the 5' floor in tower no. a, Raheja Maheshwara, sector- 11 & 14, Sohna master plan, Gurugram Sohna Road, Haryana admeasuring 1630 sq.ft.(super area along with one covered car parking.

V. That the said agreement to sell dated 09.01.2017' is a completely one-sided standard printed format containing totally unjust, unfair, arbitrary & illegal clauses & the complainant had no option but to sign

the same. After a few days, the complainants were also informed that the project has been registered under RERA 2016, which gave more confidence to the complainants that the project will be handed over on time under the newly launched RERA scheme/ Act and there will not be any delay in possession of their dream home.

VI. That the respondent thereafter in 60 days of payment of an application raised a demand of 15% of sale consideration of Rs.8,05,600/- raised vide demand letter dated 14.01.2017.The complainants on the said demand applied for a loan with the PNB Housing Bank as both complainants work privately and did not have the readily available cash in hand. The Bank after doing their due diligence approved the loan of the complainants to the tune of Rs.46,00,000/- on the floating rate of interest of @14.33% - 5.60% = 8.75% per annum as on the date of execution of the agreement on the repayment term of 240 months on the monthly payment of Rs. 41,234/- after due execution of agreements and home loan documents dated 04.05.2017.

VII. That after the approval of the complainants' loan paid the sum of Rs.8,05,600/- along with sales tax of Rs. 34,691/- vide receipt no.REC0026/00517/16-17 dated 24.01.2017 having become due & payable against payment demand letter dated 14.01.2017.The complainants thereafter paid five more instalments as and when the demand was raised by the respondent totalling to sum of Rs. 20,61,160/- vide various dates i.e. on 17.02.2017, 20.04.2017, 12.05.2017as per the demand raised by the respondent.

VIII. That the complainants because of certain favourable terms and conditions and at a lower rate of interest ported their Bank loan from PNB Housing Finance to HDFC Bank. The HDFC Bank paid 5"Installment of Rs. 9,28,233/- against the demand of Rs. 931.603/-.

IX. . That the complainants accordingly paid a total sum of Rs. 34,04,000/- out of their hard-earned money to the respondent against the total sale consideration of Rs.61,01,090/- and as per the agreed payment plan. Out of the sum of Rs. 34,04, 000/-, the sum of Rs. 28,21,832/- was disbursed by the Bank. The complainants diligently paid their instalments and were never at fault. There were certain delays because of the dispersal from Bank. However, the respondent always charged interest on delayed payments.

X. That after the payment instalments of 2018 no demand was raised by the respondent and no money was paid by the complainants. The complainants since then have been following up with the respondents and they were always given the assurance that the unit will be delivered on time as promised under the agreement as the project is registered under RERA and there is a penalty clause in case the project is not delivered on time.

XI. That the complainants also had innumerable visits to the site and every time they were given the assurance that they will deliver the unit to the complainants as per the promised time of 48 months. Since between March 2020 till 2021 time there was a widespread Corona Pandemic and no construction activities were going on so the complainants could not follow up with the respondent. However, as a blessing to the reply to the complainants email, they received a response email dated 14.08.2021 from the respondent informing them about the construction work for the Project Maheshwara enhanced at the site. The Project team handling this project is regaining the pace of construction which is required to speedily deliver your unit. The complainants vide mail were further informed along with the pictures of the site that the MEB work and slab casting work is in the progress

of Tower A First Floor level but on the actual site visit they did not find anything as per the mail dated 14.08.2021.

XII. That on the receipt of the email from the respondent above the complainants became confident that they would get the timely delivery of their unit .But then again they did not receive any demand letter for payment of money from the respondent or any mail about the status of construction by the respondent the complainant dropped an email dated 20.11.2022 asking for the construction update.

XIII. That on 07.12.2022 the complainants received a letter dated 21.12.2022 whereby they were informed that no construction activities are happening on the project and that if the buyers want, they can port the project. Upon receipt of the said email the complainants wrote a mail to the respondent on 01.01.2023 asking for the proposal where they switch, but no response was received from the respondent. However, no response was received by the complainants to their email. Hence, they made a visit to the site and office of the respondent at Gurugram and met one of the officers, who mentioned that the email dated 21.11.2022 was wrongly sent to the complainants and as of now there is no proposal with regards to their project and the said proposal was only for the landowners.

XIV. That as per clause no. 21 of the agreement to sell dated 09.01.2017 the respondent had to deliver possession of the subject unit by January 2021 but to the utter surprise & dismay, hardly any construction has been carried on by the respondent on the project land till date.The respondent has miserably failed to deliver the unit within the time period .Also, the complainants do not see that there is any possibility of the project getting over anytime in the near future as construction

is going out there and all the company Board is being removed from the site and there is no office or any staff present there.

XV. That the complainants have been in constant touch all along with the respondent w.r.t, status & progress of construction but their response & assurance have always remained misleading & fraudulent without any intention to fulfill. By the act of the respondent, the complainants feel cheated and they see no possibility of their getting the house. Hence, they want a refund for their money along with damages as not only they did not get their house but over that they have to regularly pay the EMI to the tune of Rs. 24088/- and in addition to that monthly rent of Rs. 14,000/- towards the present house since 2017. So, it is a double, triple burden on the complainants on account of the failure on the part of the respondent in the timely delivery of the house to the complainants.

C. Relief sought by the complainants:

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

i. Direct the respondent to refund the paid-up amount along with prescribed rate of interest.

ii. Direct the respondent to pay the interest till the date of refund of money which the complainants have paid to the Bank towards the Bank Loan and continue to pay the same till date.

iii. Direct the respondent to pay the litigation cost.

iv. Restrain the respondent from cancelling the allotment of the subject unit on the project land and may further also restrain the respondent and their directors etc. from selling, alienating the project land or creating any third party right interest or rights of any nature on the same till the refund is not made to the complainants.

D. Reply by the respondents:

5. The respondents have contested the complaint on the following grounds:

i. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The agreement to sell was executed between the complainants and the respondent prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be enforced retrospectively. Although the provisions of the RERA Act, 2016 are not applicable to the facts of the present case in hand yet without prejudice and in order to avoid complications later on, the respondent has registered the project with the Hon'ble RERA Authority. The said project is registered under RERA with Registration No. 20 of 2017 dated 06.07.2017 .

ii. 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 i.e. Clause 59.

iii. That the complainants, after checking the veracity of the project namely, 'Raheja's Maheshwara', Gurgaon had applied for allotment of a unit vide its booking application form. On the basis of the representations of the complainants, the respondent allotted unit no. A504 to the complainants. The complainants agreed to be bound by the terms and conditions of the booking application form. The complainants were aware from the very inception and had acknowledged in clause 2 of application form that the plans as approved by the concerned authorities are tentative in nature and that the respondent might have to effect suitable and necessary

alterations in the layout plans as and when required. Eventually, agreement was executed between the parties.

iv. That it is submitted that the complainants are a real estate investor and not "customers" who had booked the unit in question with a view to earn quick profit in a short period. The possession of the unit is supposed to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement. The use of expression 'endeavour to give the possession' in Clause 21 of the Buyers Agreement clearly shows that the company has merely held out a hope that it will try to give the possession of the complainants within a specified time. However, no unequivocal promise was made to the prospective buyers that possession of the unit will be delivered at the end of a particular period.

v. That in view of Clause 25 of the Agreement, the delay in the completion of the project was not attributable towards the Respondent as while the initial foundation work was bring laid down , it was put on hold under the instructions of the Hon'ble National Green Tribunal due to SMOG. It is submitted that the delay was timely conveyed to the complainants. It is submitted that the said project shall be completed by 2023. During entire 2020 ,2021 and till date due to covid pandemic the entire sector was impacted and as such the period of over 2 years should in any case not to be counted while computing any alleged delay. The said pandemic period clearly comes within the ambit of "force majeure".

vi. That the respondent shall hand over the possession of the apartment as soon as the construction work is completed subject to availability of basic external infrastructure such as water, sewer, electricity etc. as per terms of the application and agreement to sell and the grant of

the occupational certificate by the authorities. It is submitted that due to the above-mentioned conditions which were beyond the reasonable control of the respondent, the unit allotted to the complainants have not been offered and the respondent cannot be held liable for the same. The respondent is also suffering unnecessarily and badly without any fault on its part. Due to these reasons the respondent has to face cost overruns without its fault. Under these circumstances passing any adverse order against the respondent at this stage would amount to complete travesty of justice.

vii. That the complainants are not 'awaiting' construction as per terms and tenure of application form and agreement signed but made complaints only to earn profits from the respondent/builder in the pretext of RERA Act, 2016.

viii. That the three factors: (1) delay in acquisition of land for development of roads and infrastructure (2) delay by government in construction of the Dwarka Expressway and allied roads; and (3) oversupply of the commercial units/shops in the NCR region, operated to not yield the price rise as was expected by a few. This cannot be a ground for complaint for refund as the application form itself has abundantly cautioned about the possible delay that might happened due to non-performance by Government Agencies.

ix. That in the present case, keeping in view the contracted price, the completed (and lived-in) unit including interest and opportunity cost to the respondent may not yield profits as expected than what envisaged as possible profit. The completed structure as also the price charged may be contrasted with the possible profits' v/s cost of building investment, effort and intent. It is in this background that

the complaint, the prevailing situation at site and this response may kindly be considered. The present complaint has been filed with malafide motives and the same is liable to be dismissed with heavy costs payable to the respondent.

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

E. Jurisdiction of the authority

7. The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

Section 11

.....

(4) The promoter shall-

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

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.

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 complainant at a later stage.

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.

12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** *and reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022,*** wherein it has been laid down as under:

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

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

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

F. Findings on the objections raised by the respondents.

F.I 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 and the same is reproduced below for the ready reference:

> ***59.*** *"All or any disputes arising out of or touching upon or relating to the terms of the Agreement to Sell/ Conveyance Deed including the interpretation and validity of the terms hereof and the respective rights and obligations of the parties, which cannot be amicably settled despite best efforts, shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments / modifications thereof for the time being in force. The arbitration proceedings shall be held at New Delhi by a sole arbitrator who shall be appointed by Company. The cost of the arbitration proceedings shall be borne by the parties equally. The territorial jurisdiction of the courts shall be Gurgaon, Haryana as well as of Punjab and Haryana High Court at Chandigarh."*

15. The respondent has submitted that the complaint is not maintainable for the reason that the agreement/application form contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute. 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. Further, 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. 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 right 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.II Objection regarding the complainant being investor.

17. The respondent has taken a stand that the complainant is an investor and not consumer and therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of 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

complainant is a buyer and has paid considerable amount to the promoter towards purchase of an unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

18. 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 complainant is an 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 investor is not entitled to protection of this Act also stands rejected.

F.III Objections regarding the circumstances being 'force majeure'

19. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, Covid-19 etc. However, all the pleas advanced in this regard are devoid of merit. The respondent also took a plea that the construction at the project site was delayed due to Covid-19 outbreak. In the instant complaint, the due date

of handing over of possession comes out to be 09.01.2022 and grace period of 12 months on account of force majeure has already been granted in this regard and thus, no period over and above grace period of 12 months can be given to the respondent-builder. Moreover, time taken in governmental clearances cannot be attributed as reason for delay in project. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

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

20. The respondent has raised an objection that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will 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 will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. 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."

21. 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."

22. 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.

G. Findings on the relief sought by the complainants.

G. I Direct the respondent to refund the paid-up amount along with prescribed rate of interest.

G.II Direct the respondent to pay the interest till the date of refund of money which the complainants have paid to the Bank towards the Bank Loan and continue to pay the same till date.

23. The above mentioned reliefs sought by the complainants are taken together being interconnected.

24. In the present complaint, the complainants intends to withdraw from the project and is seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act 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)

25. As per clause 21 of the agreement to sell provides for handing over of possession and is reproduced below:

> 21. *The company shall endeavour to complete the construction of the said apartment within* ***Forty-Eight (48) months plus/minus Twelve (12) months grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later but subject to force majeure****, political disturbances, circumstances cash flow mismatch and reason beyond the control of the company. However, in case the company completes the construction prior to the said period of 48 months plus 12 months grace period the allottee shall not raised any objections in taking the possession after payment of Gross Consideration and other charges stipulated hereunder. The company on obtaining certificate of occupation and use for the building in which said apartment is situated, by the competent authorities shall hand over the said apartment to the allottee for his occupation and use and subject to the allottee having complied with all the terms and condition of the agreement to sell....."*

26. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. 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 allottees that even a single default by the allottees in making payment as per the plan may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such a clause in the agreement to sell by the promoter is just to evade the liability towards the timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused

his dominant position and drafted such a mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

27. **Due date of handing over possession and admissibility of grace period:** As per clause 21 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 48 months plus/minus 12 months grace period from the date of execution of the agreement or environment clearance and forest clearance, whichever is later. The buyer's agreement was executed between the parties on 09.01.2017. However, no document with regard to EC, FC has been placed on record. Therefore, the Authority is taking these 48 months from date of execution of the buyer's agreement i.e., 09.01.2017. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 12 months to the promoter at this stage. Thus, the due date for handing over of possession comes out to be 09.01.2022.

28. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him in respect of the subject unit with interest at prescribed rate as provided 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.*

29. 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.

30. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 20.09.2024 is **9.10%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%.**

31. On consideration of the documents available on record as well as submissions made by the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 21 of the agreement to sell, the due date of possession comes out to be 09.01.2022 for the reasons quoted above.

32. Keeping in view the fact that the complainants/allottee wishes to withdraw from the project and is demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.

33. The due date of possession as per agreement for sale as mentioned in the table above is 09.01.2022 and even after a passage of more than 2 years till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit

which is allotted to it. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottee intend to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.

34. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

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

35. The judgement of the Hon'ble Supreme Court of India in the cases ***of Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022. it was observed:

> 25. *The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an*

obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

36. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale under section 11(4)(a). The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.

37. 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 refund of the entire amount paid by him at the prescribed rate of interest i.e., @11.10% 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 from the date of each deposit till its realization within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G.III Direct the respondent to pay the litigation cost

38. The complainants are seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)***, has held that an allottee is entitled to claim compensation and litigation charges under sections 12,14,18 and

section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation and litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

G.IV Restrain the respondent from cancelling the allotment of the subject unit on the project land and may further also restrain the respondent and their directors etc. from selling, alienating the project land or creating any third party right interest or rights of any nature on the same till the refund is not made to the complainants.

39. In view of findings in G.I the present relief became redundant.

H Directions of the authority

40. 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/promoter is directed to refund the entire amount received by it from the complainants along with interest at the rate of 11.10% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each deposit till its realization.

ii. Out of total amount so assessed, the amount paid by the bank/payee, be refunded in the account of bank and the balance amount along with interest will be refunded to the complainants.

iii. 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.

iv. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants. Even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of complainants/allottee.

41. Complaint stands disposed of.

42. File be consigned to registry.

Dated: 20.09.2024

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