BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	**2523 of 2022**
Date of complaint:	**03.06.2022**
Date of order:	**02.01.2025**

Backstage Retail Services Pvt. Ltd. through its Director
Regd. Office: - 386, Seemant Vihar, Sector 134 Kaushambi — **Complainant**

Versus

M/s SS Group Private Limited.
Regd. Office at: - SS House, Plot o. 77, Sector-44, Gurugram-122003. — **Respondent**

CORAM:
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:
Shri Shashank Singh (Advocate) — Complainant
Shri Dhruv Dutt Sharma (Advocate) — Respondent

ORDER

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

A. Unit and project related details.

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

S. No.	Particulars	Details
1.	Name of the project	"The Coralwood"
2.	Nature of the project	Group housing complex
3.	DTCP license no. and validity status	59 of 2008 dated 19.03.2008 valid upto 18.03.2025
4.	Allotment letter	14.03.2013 (page 34 of complaint)
5.	Unit no.	1603, Type-E, Tower-J, floor-16th
6.	Unit admeasuring	1425 sq. ft. (super area) (page 39 of complaint)
7.	Date of execution of Buyers agreement	03.12.2013 (page 09 of complaint)
8.	Amalgamation letter	16.05.2015 (page 48 of complaint)
9.	***Possession clause***	***8.1*** *Subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer,* ***the developer proposes to handover the possession of the flat within a period of thirty six months from the date of signing of this agreement.*** *However, this period will automatically stand extended for the time taken in getting the building plans sanctioned.* ***The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months or such extended period, for applying and obtaining occupation certificate in respect of the Group Housing Complex.*** *(Emphasis supplied)*

10.	Due date of possession	03.03.2017 (calculated from the date of execution of the agreement including grace period of 90 days)
11.	Total sale consideration	Rs.81,96,050/- (as per BBA page 11)
12.	Amount paid by the complainant	Rs.52,61,158/- (page 43 of reply)
13.	Amount refunded to the complainant	Rs.17,39,616/- (vide cheque dated 16.08.2021 page 09 & 44 of reply, but not encashed by the complainant as submitted by the respondent during proceedings dated 26.09.2024)
14.	Offer of possession for fit outs	14.09.2018 (page 51 of complaint)
15.	Demand letter	20.06.2015, 23.05.2016, 02.08.2016, 06.10.2016, 13.01.2017, 20.03.2017 (page 24-36 of reply)
16.	E-mail sent by respondent for taking possession and pay balance amount	22.10.2018, 17.11.2018, 10.12.2018, 23.08.2019 (page 57 of complaint)
17.	Possession reminder	18.01.2020 (page 69 of complaint)
18.	Request for refund by the complainant	20.01.2020 (page 70 of complaint)
19.	Notice of cancellation	08.04.2021 (page 39 of reply)
20.	Cancellation letter	20.08.2021 (page 74 of complaint)
21.	Occupation certificate	17.10.2018 (page 37 of reply)

B. Facts of the complaint:

3. The complainant has made the following submissions: -

I. That the complainant herein under the influence of respondents luring, offered to purchase a flat in his group housing society. As per the agreement the complainant herein applied to the builder through an application dated 13.02.2013 and agreed to the terms and conditions as set out in application

form for the allotment of residential flat no. 1603 Type-E located in Tower no. J, 16th floor in the group housing complex, having an approximate super area of 1425 square feet (132.39 Square Meters) and allotment of one open/covered parking space.

II. That the complainant herein had paid a sum of Rs.11,45,845/- towards the sale price of the flat at the time of application. The respondent confirmed registration for the allotment of unit in the above-mentioned project and also acknowledged the booking amount of Rs.11,45,845/- vide its letter dated 14.03.2013.

III. Further, an allotment letter dated 14.03.2013 was issued in favour of the complainant by the respondent. The complainant and the respondent entered into a flat buyer's agreement on 03.12.2013.

IV. As per clause 6 of the agreement time is the essence with respect to flat buyer's obligation to pay the sale price as provided in the annexure attached to the agreement. The respondent/developer shall also be entitled to charge @18% from the date of instalment as per the schedule of payment till the date of payment. As per clause 8 of the agreement the developer was obligated to hand over the possession of the flat within a period of 36 months from the date of signing of the agreement dated 03.12.2013. As per the agreement, the respondent/developer shall be entitled to a grace period of 90 days after the expiry of 36 months or such extended period (for want of building sanctioned plan, for applying and obtaining the occupation certificate in respect of the group housing complex.

V. That demand letter cum service invoice was generated by the respondent in favour of the complainant wherein the respondent demanded illegally demanded Rs.4,13,333/- from the complainant.

VI. That the respondent herein gave offer of possession for fitouts of the subject unit. In the said offer of possession, due and payable amount were

given that were asked to clear by the complainant herein before taking possession to carryout "fitout and improvement work". The complainant was requested to make due payment within 15 days from the date of this offer. The said letter was also carrying indemnity cum undertaking. The respondent reminded the complainant for the payment of due amount. The respondent did not state a single word about the delay caused by him in relation to delivery of possession, rather they mentioned in the said email that if the complainant fails to pay the due amount as claimed, he will be liable to pay delay payment charges.

VII. That the respondent sought due amount on offer of possession from the complainant, moreover the respondent also claimed that they have already received occupation certificate in relation to the said project. The respondent again reminded the complainant that they have not received their overdue payment demanded on offer of possession, an amount of Rs.46,82,191/-. In the said letter, the respondent did not state anything about the delay charges payable to the complainant. The complainant replied vide email dated 01.03.2019 to the respondent's email dated 28.02.2019, wherein the complainant informed that he has already spoken about the same and waiting the respondent's response. The respondent again raised its demand in pursuant to the demand letter for taking possession of the booked apartment. The respondent did not whisper anything about the delay caused in handing over the possession over the said flat and the respondent also did not pay any delayed compensation to the complainant till date. The complainant herein wrote a letter to the respondent, wherein the complainant informed the respondent about his letter dated 22.05.2018 through which a demand of balance amount Rs.26,54,064/- along with maintenance charge of Rs.12,870/- were claimed. In response to the said demand, the complainant brought the

respondent's attention towards the conditions of agreement dated 03.12.2013 wherein it was promised to give possession in the year 2015 but the same has only been completed and made ready for handover by October, 2018.

VIII. The complainant pointed out the three-year delay caused in handing over the possession and expressed his unwillingness to make further payment and thereby asking for refund of his entire amount paid till date with 18% interest. The respondent again reminded to the complainant about the balance amount in relation to the said unit. However, the respondent did not bother to whisper a single word about the delay caused in handing over the possession or delay payment and compensation in relation to the same. The respondent wrote a letter dated 20.08.2021 to the complainant and informed that the respondent has cancelled the allotment of subject unit.

C. Relief sought by the complainant:

4. The complainant has sought following relief:

I. Direct the respondent to refund the entire amount paid by the complainant to the respondent along with interest.

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

D. Reply by the respondent.

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

i. That the complaint filed by the complainant before the Authority, besides being misconceived and erroneous, is untenable in the eyes of law. The present complaint is also liable to be dismissed as the same has not been filed by the Authorized Person.

ii. That the reliefs sought by the complainant appear to be on misconceived and erroneous basis. Hence, the complainant is estopped from raising the pleas, as raised in respect thereof.

iii. That further, without prejudice to the aforementioned, even if it was to be assumed though not admitting that the filing of the complaint is not without jurisdiction, even then the claim as raised cannot be said to be maintainable and is liable to be rejected for the reasons as ensuing.

iv. That no such agreement, as referred to under the provisions of 2016 Act and 2017 Haryana Rules, has been executed between respondent and the complainant. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is the flat buyer's agreement, executed much prior to coming into force of 2016 Act.

v. That adjudication of the complaint for refund, interest and compensation, as provided under Sections 12, 14, 18 and 19 of 2016 Act, if any, has to be in reference to the agreement for sale executed in terms of 2016 Act and 2017 Haryana Rules and no other Agreement. This submission of the respondent *inter alia*, finds support from reading of the provisions of 2016 Act as well as 2017 Haryana Rules, including the aforementioned submissions. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainant.

vi. That apparently, the complaint filed by the complainant is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be dismissed. No relief much less any interim relief, as sought for, is liable to be granted to the complainant.

vii. That the complainant has miserably and wilfully failed to make payments in time or in accordance with the terms of the allotment/ flat buyer's agreement. Till date the total delay in rendering the payment towards due instalments by the complainant is approx. 14806 days on various occasions under different instalments. The complainant has defaulted in making timely payment of due instalments right from the inception. As per the records

maintained by the respondent, the complainant has not fulfilled its obligation and has not paid the instalments on time that had fallen due, despite receipt of repeated demand letters and reminders.

viii. That the complainant has frustrated the terms and conditions of the flat buyer's agreement, which were the essence of the arrangement between the parties and therefore, the complainant now cannot invoke a particular clause, and therefore, the complaint is not maintainable and should be rejected at the threshold. The complainant has also misdirected in claiming refund on account of alleged delayed offer for possession.

ix. That it has been categorically agreed between the parties that subject to the complainant having complied with all the terms and conditions of the flat buyer's agreement and not being in default under any of the provisions of the said agreement and having complied with all provisions, formalities, documentation, etc., the developer proposed to handover the possession of the unit in question within a period of 36 months from the date of signing of the agreement. It had been agreed that the respondent would also be entitled to a further grace period of 90 days after expiry of 36 months.

x. Further, it had been also agreed and accepted that in case of any default/delay in payment as per the schedule of payments as provided in Annexure 1 to the flat buyer's agreement, the date of handing over of the possession shall be extended accordingly. In the present case, it is a matter of record that the complainant has not fulfilled its obligation and has not even paid the instalments on time that had fallen due. Accordingly, no relief much less as claimed can be granted to the complainant.

xi. That on 14.03.2013, the complainant was allotted Unit no. J-1603, ,Type-E, having an approximate super area of 1,425 sq. ft. in the Tower-J of the project "The Coralwood" at the basic rate of Rs. 5,200/- per sq. ft. and External Development Charges (EDC) of Rs. 271/- per sq. ft., Infrastructure

Development Charges (IDC) of Rs. 35/- per sq. ft. to be payable as per the payment plan. The total sale consideration of the flat booked by the complainant was Rs.81,96,050/-However, the total sale consideration amount was exclusive of the registration charges, stamp duty charges, service tax and other charges which were to be paid by the complainant at the applicable stage.

xii. That the complainant agreed that the payment will be made as per the payment plan (Construction Linked Payment Plan) annexed with the allotment letter/ flat buyer agreement and the copy of same was read over to the complainant. However, the complainant defaulted in making payments towards the agreed sale consideration of the flat from the very inception. The complainant has failed to make payments in time in accordance with the terms and conditions as well as payment plan annexed with the allotment letter and flat buyer's agreement and as such the complaint is liable to be rejected.

xiii. That complainant made payments on 28.02.2013 of Rs.11,45,845/-, on 11.04.2013 of Rs.67,430/-, on 30.08.2013 of Rs.12,14,207/-, on 11.10.2013 of Rs.8,19,024/-, on 14.02.2014 of Rs.3,94,255/-, on 22.07.2014 of Rs.8,00,738/-, on 27.02.2015 of Rs.4,09,200/- and on 09.07.2015 of Rs.4,10,459/-. That a demand letter dated 23.05.2016 for Rs.4,08,927/- was issued to the complainant however, the complainant failed to make any payment. Another demand letter dated 02.08.2016 for Rs.8,28,647/- was also issued to the complainant however no payment was made by the complainant. That another demand letter dated 06.10.2016 for Rs.12,59,207/- was issued to the complainant, however again no payment was made by the complainant. Another demand letter dated 13.01.2017 for Rs.17,23,522/- was issued to the complainant, however again no payment was made by the complainant. That again another demand letter 16.01.2017

for Rs.37,073/- towards HVAT was issued to the complainant, however again no payment was made by the complainant. That again another demand letter dated 20.03.2017 for Rs.22,21,176/- was issued to the complainant, however again no payment was made by the complainant. The last payment was made by the complainant on 09.07.2015 that is much before the due date of possession and after that no payment has been made by the complainant. Out of the total sale consideration of Rs.81,96,050/- of the flat, the amount actually paid by the complainant is Rs.52,61,158/-.

xiv. That the complainant is a real estate investor who has made the booking with the respondent only with an intention to make profit in a short span of time. However, it appears that its calculations have gone wrong on account of severe slump in the real estate market and the complainant is now raising several untenable pleas on highly flimsy and baseless grounds. The complainant after defaulting in complying with the terms and conditions of the flat buyer's agreement, now wants to shift the burden on the part of the respondent whereas the respondent has suffered a lot financially due to such defaulters like the present complainant.

xv. That the respondent, after having applied for grant of occupation certificate on 25.07.2018 in respect of the project, which had thereafter been even issued through memo dated 17.10.2018 had offered possession to the complainant vide letter dated 14.09.2018 and thereafter on 22.10.2018, 17.11.2018, 10.12.2018, 28.02.2019, 23.08.2019 and 18.01.2020. The complaint filed by the complainant, being in any case belated, is even subsequent to the date of grant of occupation certificate. No indulgence much less as claimed by the complainant is liable to be shown to them.

xvi. That upon failure of the complainant to make the payment of outstanding instalments despite several demand letters and reminders, the respondent was constrained to cancel the allotment/booking of the unit of the

complainant vide a notice for cancellation dated 08.04.2021 and an email dated 10.04.2021. Subsequently, in furtherance to the said notice dated 08.04.2021 the respondent informed the complainant of the said cancellation of the allotment vide cancellation letter dated 20.08.2021 along with the calculation stating the applicable refund amount. The refund cheque dated 16.08.2021 for an amount of Rs.17,39,616/- was accordingly dispatched to the complainant. As per clause 1.2(f) of the flat buyer's agreement the respondent is entitled to forfeit the earnest money, brokerage amount, taxes paid by the respondent and other amount of non-refundable nature.

xvii. The following table clearly shows that after deducting the earnest money, brokerage amount, taxes paid by the respondent, an amount of Rs.35,21,542/- was forfeited and balance amount of Rs.17,39,616/- was refunded to the complainant vide cheque no. 006384 dated 16.08.2021.

A	Total Received Amount	52,61,158/-
B	Earnest Money	8,19,605/-
	Taxes including VAT	2,42,608/-
	Interest on 08.04.2021	24,59,329/-
	Total Forfeitable Amount	35,21,542/-
C	**Balance Refundable (A – B)**	**17,39,616/-**

xviii. Therefore, after payment of Rs. 17,39,616/- no amount is payable by the respondent to the complainant. That it is to be appreciated that a builder constructs a project phase wise for which it gets payment from the prospective buyers and the money received from the prospective buyers are further invested towards the completion of the project. A builder is supposed to construct in time when the prospective buyers make payments in terms of the agreement. That one particular buyer who makes payment in time can also not be segregated, if the payment from other prospective buyer does not reach in time. The problems and hurdles faced by the developer or builder have to be considered while adjudicating complaints of the prospective

buyers. The slow pace of work affects the interests of a developer, as it has to bear the increased cost of construction and pay to its workers, contractors, material suppliers, etc. The irregular and insufficient payment by the prospective buyers such as the complainant freezes the hands of developer / builder in proceeding towards timely completion of the project.

7. All other averments made in the complaint were denied in toto.
8. 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

9. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

10. 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

11. 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;

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.

12. 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.

F. Findings on the objections raised by the respondent.

F.I Objection regarding maintainability of the complaint and authorization.

13. That the respondent contends that the complaint is liable to be dismissed as it has not been filed by an Authorized Person. While the complainant initially submitted a Board Resolution duly signed by the authorized representative, it was undated. During the proceedings dated 26.09.2024, the Authority directed the complainant to submit the correct Board of Resolution. The complainant subsequently filed the corrected resolution during proceedings dated 21.11.2024 and same was taken on record. Therefore, the objections raised have been addressed and corrected.

F.II Objection regarding the complainant being investors.

14. The respondent has taken a stand that the complainant is an investor and not a consumer, 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 observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time

preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. 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;"*

15. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) 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". Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act stands rejected.

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

16. The respondent submitted that the buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

17. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after

coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation would be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment ***of Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....*
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

18. Also, 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."*

19. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the 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, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Relief sought by the complainant.

G.I Direct the respondent to refund the entire amount paid by the complainant to the respondent along with interest.

20. That the complainant entered into a builder-buyer agreement with the respondent on 03.12.2013 for unit no. 1603, Type-E, Tower-J, floor-16th, admeasuring 1425 sq. ft., for a total sale consideration of Rs. 81,96,050/- in the respondent's project "The Coralwood". The complainant paid an amount of Rs.52,61,158/- towards the subject unit. The respondent obtained the occupation certificate for the subject tower on 17.10.2018. Subsequently, the complainant sent an email to the respondent seeking refund of the paid-up amount on 20.01.2020, after the issuance of the occupation certificate for the tower where the unit is located.

21. The respondent's counsel argued during the proceedings dated 21.11.2024 that several reminders were issued to the complainant regarding overdue payments and to take the possession, but the complainant failed to make timely payments following which the subject unit was cancelled on 20.08.2021 and a refund cheque of Rs.17,39,616/- through cheque dated 16.08.2021 was sent to the complainant but same was not encashed by the complainant.

22. Based on the documents placed on record and submissions made by both parties, it is evident that the complainant has paid an amount of Rs. 52,61,158/- against the total sale consideration of Rs. 81,96,050/-. The respondent has sent various reminder letters on multiple dates between 2015 to 2019, demanding payment of the outstanding amount. The Authority observes that the respondent was justified in raising demands as per the agreed payment plan, and there is a default on the part of complainant to make payment of outstanding dues as per the agreed payment plan. The complainant through instant complaint is seeking refund of the amount paid to the respondent against the subject unit.

23. The Authority observes that Section 18(1) of the Act, 2016, is applicable only in the eventuality where the promoter fails to complete or is unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is a case where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottee wishes to withdraw from the project and is demanding refund of the amount paid by the complainant in respect of the unit with interest at the prescribed rate.

24. The due date of possession as per agreement for sale as mentioned is 03.03.2017. The occupation certificate for the unit of the complainant-allottee was obtained on 17.10.2018 from the competent Authority. The complainant in this case requested the respondent for refund of the paid-up amount after completion of project and possession reminder being sent by the respondent vide email dated 18.01.2020. As per the section 19(10) every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be. In the present case, the complainant did not take the possession and have sought refund. It is pertinent

to mention here that the allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when possession was offered.

25. The allottees have not exercised the right to withdraw from the project after the due date of possession was over, till the offer of possession was made. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Had the complainant wished to continue in the project, the consequences for delay provided in proviso to section 18(1) would come in force and the promoter would be liable to pay interest at the prescribed rate of every month of delay till the handing over of possession. However, in the present matter, this is not the case.

26. 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. The judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The complainant has to demand and make his intentions clear that they wish to withdraw from the project. Rather tacitly they wished to continue with the project. It is observed by the authority that such withdrawal on considerations other than delay will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

27. The authority has observed that the respondent-builder has offered possession of the unit after obtaining occupation certificate but the complainant wants to surrender the unit and refund the amount paid. Keeping in view the aforesaid

circumstances, that the respondent builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, and judgment of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.2021***, it is concluded that the allottees were obligated to take possession of the unit.

28. The Hon'ble Apex court of the land in cases of ***Maula Bux Vs. Union of India (1973) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136***, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as ***Jayant Singhal and Anr. Vs. M/s M3M India Ltd.*** decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under-

> ***"5. AMOUNT OF EARNEST MONEY***
>
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money* ***shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment /plot /building as the case may*** *be in all cases*

where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer.

29. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainant after deducting 10% of the sale consideration and return the remaining amount along with interest at the rate of 11.10% (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 request for refund made by the complainant i.e. 20.01.2020 till its realization within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the authority.

30. 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 refund the paid-up amount i.e. Rs.52,61,158/- to the complainant after deducting 10% of the sale consideration as earnest money along with interest at the prescribed rate i.e., 11.10%, from the date of request for refund made by the complainant i.e. 20.01.2020 till the date of realization of payment.

ii. A period of 90 days is given to the respondent to comply with the direction given in this order and failing which legal consequences would follow.

31. Complaint stands disposed of.

32. File be consigned to the registry.

Dated: 02.01.2025

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