BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Order Reserved on : **13.08.2024**
Order pronounced on : **04.02.2025**

1. Pradeep Kumar Bhatia
2. Deepti Dua

Both R/o: Flat No. F-604, F Block, Ardee Residency, Ardee City Gate No. 2, Sector-52, Gurugram, Haryana- 122002. **Complainants**

Versus

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

CORAM:

Shri Arun Kumar	**Chairman**
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**

APPEARANCE:

Shri Pradeep Kumar Bhatia complainant in person	Complainants
Ms. Charu Rustagi (Advocate)	Respondent

ORDER

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

A. Unit and project related details

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

S. No.	Particulars	Details
1.	Name of the project	"Aster Court", Sector-85, Gurugram
2.	Project area	25.018 acres
3.	Nature of project	Group Housing colony
4.	RERA registered/not registered	Registered vide no. 19 of 2018 dated 13.10.2018 Valid up to 31.12.2020 (Including 6 months Covid-19 period)
5.	DTPC License no.	39 of 2009 dated 24.07.2009 Valid up to 23.07.2024 99 of 2011 dated 17.11.2011 Valid up to 16.11.2024
	Name of licensee	BE Automobile Pvt. Ltd. & others in collaboration with Orris Infrastructure Pvt. Ltd.
6.	Unit no.	802, 8th floor, in tower/block-2A [Page no. 44 of the complaint]
7.	Unit measuring	1250 sq. ft. [Page no. 43 of the complaint]
8.	Date of Booking application form	28.07.2010 [Page no. 43 of the complaint]
9.	Allotment Letter in favour of original allottee i.e., Gaurav Suryavanshi	07.07.2011 [Page no. 73 of the complaint]
10.	Date of execution of apartment buyer agreement with the original allottee i.e., Gaurav Suryavanshi for unit no. 802, 8th floor, in tower/block-2A	07.07.2011 [Page no. 73 of the complaint]

11.	Date of endorsement	Endorsement made by the respondent in favour of the complainant Note: - date was not mentioned in the endorsement sheet
12.	Agreement to sell executed between the original allottee and the complainant herein	23.07.2011 (Page no. 68 of the complaint)
13.	Date of execution of supplementary apartment buyer agreement with the complainants for unit no. 906, 9th floor, in Tower- 2A for an area admeasuring 1250 sq. ft.	15.11.2013 (Page no. 100 of the complainant)
14.	Possession clause	***10.1 Schedule for Possession of the said Apartment*** *"The Company based on its present plans and estimates and subject to all just exceptions,* ***contemplates to complete construction of the said Building/ said Apartment within period of 36 months plus grace period of 6 months from the date of execution of the Apartment Buyer Agreement by the Company or Sanction of Plans or Commencement of Construction whichever is later,*** *unless there shall be delay or there shall be failure due to reasons mentioned in Clause (11.1),(11.2),(11.3) and Clause(38) or due to failure of Allottee(s) to pay in time the price of the said Apartment along with all other charges and dues in accordance with the schedule of payments given in annexure I or as per the demands raised by the company from time to*

		time or any failure on the part of the Allottee(s) to abide by any terms or conditions of this Apartment Buyer's Agreement.
15.	Date of commencement of construction	01.11.2010 (Page no. 76 of the reply)
16.	Date of approval of revised building plans	10.04.2012 (Page no. 82 of the reply)
17.	Date of grant of environment clearance	15.10.2013 (Page no. 88 of the reply)
18.	Due date of possession	15.05.2017 (Note: - the due date of possession is calculated from the date of execution of buyer's agreement and 6 month of grace period is allowed being unqualified.)
19.	Total sale consideration	Rs.41,98,125/- [As per SOA dated 21.02.2019 at pg. 148 of the complaint]
20.	Total amount paid by the complainant	Rs.46,06,684/- [As per SOA dated 21.02.2019 at pg. 148 of the complaint]
21.	Occupation certificate	18.10.2018 [Page no. 136 of the complaint]
22.	Offer of possession	Rs.20.10.2018 (Page no. 108 of reply)

B. Facts of the complaint

3. The complainants have made the following submission: -

I. That in the year 2009, the respondent in collaboration with land owners had obtained the license bearing no. 39 of 2009 dated 24.07.2009 from Director, Town and Country Planning, Haryana ("DTCP") to develop group housing colony on 25.018 acres of land situated Village Badha, Sector 85, Gurugram. Additional license over adjoining 4.05 acres of land was obtained by the respondent from DTCP vide license no. 99 of 2011 dated 17.11.2011. Respondent launched three residential group

housing projects under the name of "Carnation Residency", "Aster Court" and "Aster Court Premier' thereon.

II. That in July 2010 Mr. Gaurav Suryavanshi and Mrs. Silky Suryavanshi ("First Allottees") had purchased a 2BHK apartment bearing no. 802 measuring 1250 Square feet situated in Tower 2A in group housing project "Orris Aster Court", Sector-85 Gurugram, for a total price of Rs.37,81,250/- vide application dated 28.07.2010. At the time of booking/registration, respondent represented to the first allottees that Tower 2 A shall have nine floors only and shall be the premium tower in terms of living standards as the facilities therein shall be used by lesser occupants/lower population.

III. That the respondent failed to issue the allotment letter upon receipt of 20% of basic sale price from first allottees due to non-approval of building plans of Tower 2A (later on approved on 10.04.2012). After rigorous follow ups by the first allottees, respondent finally issued allotment letter dated 07.07.2011 in favour of first allottees in confirmation of allotment of apartment no. 802 in Tower 2A having area admeasuring 1250 sq. ft. and the apartment buyer agreement dated 07.07.2011 was executed between the first allottees and the respondent.

IV. That agreement to sell dated 23.07.2011 was executed between the first allottees and the complainants, wherein first allottees have agreed to sell the apartment no. 802, to complainants as per the terms mentioned therein. Complainants obtained home loan from Axis bank Limited to purchase the apartment vide sanction letter dated 02.09.2011. Complainants relied on sale broacher/prospectus issued by the respondent and the advertisements published by the respondent in the newspapers and on its website "www.orris.in" about project features

and amenities to be provided in the project. Complainants independently enquired about the number of floors to be constructed in tower-2A from the officials of the respondent and they confirmed that there are nine floors to be constructed in tower 2A.

V. That on 03.09.2011 the allotment transfer formalities stand completed and apartment buyer agreement dated 07.07.2011 was duly endorsed by respondent in favour of complainants. All the amounts paid by first allottees to respondent stand transferred in complainants' customer account. They have paid an amount of Rs.21,53,983/- against the total sale consideration.

VI. Thereafter, respondent raised the demand out of the agreement value on account of apartment area increase (revised area charges) on 22.08.2013 for Rs.1,77,943/- payable by 05.09.2013. They raised their concerns about this illegal demand. Respondent had not provided any satisfactory answer and stated that as per the terms of agreement respondent is entitled to increase the apartment area up to 10%, and by excising this right by the respondent, the apartment area stand revised from 1250 sq. ft. to 1312 sq. ft. As per clause no. 1.4 of the apartment buyer agreement any such increase in the apartment area can be charged by the respondent at the time of possession. This was premature unwarranted demand. Axis Bank refused to pay this demand because the same has not been built in/counted for while sanctioning the home loan limit as the quantum of the revised area charges had not been included in the total sale consideration value mentioned in the apartment buyer agreement date 07.07.2011. Further, the respondent failed to provide the calculation and justification of the increased area. Complainants visited the office of respondent and picked the newly published project sales brochures. By reviewing the same complainants

astonished to see there are three different layout plans of the 2BHK apartment being shown by the respondent in Tower 2A, while earlier only one layout plan was shown in sales brochures. On enquiry about the layout plans, complainants came to know that the layout plan of apartment bearing no. 802, as affixed/agreed/signed in the apartment buyer agreement was undergone charged. They raised their concerns about this, neither any intimation in this regard was provided by the respondent nor was any consent availed from the complainants in this regard.

VII. Thereafter, officials of the respondent approached the complainants and asked to shift the allotment to higher floor (apartment no. 906) having same layout plan with the threat that otherwise the allotment will be cancelled and earnest money will be forfeited by the respondent. By using its dominant position over the complainants, respondent succeeded to influence the complainants to shift on the higher floor. Complainants under the threat of cancellation had left with no other option but to accept the swapping/exchange of the apartment no. 802 to new apartment no. 906, is a south west facing apartment having lesser property valuation in terms of sales because of bad facing. Normally people don't prefer to buy the south facing apartment because of vastu defects/reason. The apartments having south west facing are being sold by the developers at discounted price (approx. 4-5 lakh) in comparison to other apartments having facing other than south west.

VIII. That in spite of compensating to the complainants, respondent charged extra PLC @ Rs.50/- per square feet on account of corner location of the apartment in the building. That all the apartments constructed in Tower 2A are having corner location and this PLC was not payable for apartment no. 802, while 802 is also having corner location. On

15.11.2013 apartment no. 906 measuring 1250 sq. ft. situated in Tower 2A was allotted in lieu of/exchange of apartment no. 802 and supplementary apartment buyer agreement dated 15.11.2013 was executed between the parties in respect of unit no. 906. On 25.01.2014, respondent further raised the revised demand of Rs.4,36,003/- on account of revised area charges (increase) by stating that the area of the said apartment stands increased from 1250 sq. ft. to 1375 sq. ft. Complainants asked the calculation and justification but respondent failed to provide the same. The revised area could be easily captured in the supplementary apartment buyer agreement but respondent remained silent on this part during swapping/exchange of apartments. That the complainants forced to enhance the home loan limit and for this purpose complainants shifted their home loan from Axis Bank to State Bank of India with revised home loan limit of Rs.34,62,000/-. Respondent has collected 95% of the sale consideration of the said apartment from the complainants by Oct 2014.

IX. That respondent offered possession of the apartment no. 906, for fit-outs on 18.04.2018 and asked the complainants to pay an amount of Rs.5,90,315/- under various heads within 21 days along with advance maintenance charges for one year. Complainants asked the respondent to share the copy of occupation certificate issued by DTCP for Tower 2A, respondent replied that they are in process of getting the occupation certificate from DTCP and since the construction is complete they have asked for the payment which is due on possession. They enquired about the status of apartment completion, respondent replied that post receipt of all the payments they will take next 45 days to complete the apartment. Complainants raised their concerns about club completion status, respondents replied till the club of aster court will get completed

(by June 2020) complainants may use the club of Carnation Residency project.

X. That occupation certificate for Tower 2A was granted by DTCP on 18.10.2018. Complainants visited the project site and came to know that neither the project is completed nor the apartment is ready for possession. Still, after the discussion with the officials of the respondent, complainants paid the entire sale consideration amount as per apartment buyer agreement.

XI. Hence, the complainants have filed the present complaint for handing over the physical possession of the unit along with delayed possession charges with effect from due date of possession till actual handing over of possession.

C. Relief sought by the complainants:

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

i. Direct the respondent to handover the possession of the apartment no. 906, in tower 2A, to the complainants with all the amenities promised.

ii. To set aside the illegal demands raised by the respondent on account of electricity installation charges.

iii. Direct the respondent to handover the possession of the allotted unit to the complainants without execution of any indemnity bond.

iv. Direct the respondent to provide the complainants with prescribed rate of interest on delayed possession from the schedule date of possession i.e., 07.01.2015 till the actual date of possession.

v. Direct the respondent to refund of Rs.1,54,495/- for not providing green area in the project as shown in project brochure.

vi. Direct the respondent refund of Rs.77,248/- charged by the respondent for corner PLC, while the same was not agreed in the agreement dated

07.07.2011, apartment no. 906 was forcibly allocated in lieu of apartment no. 802, which did not have corner location PLC.

vii. Direct the respondent to pay/reimburse Rs.70,000/- towards the litigation cost/expense.

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

D. Reply by the respondent.

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

i. That in the present complaint, the complainants by way of application form dated 28.07.2010 had applied for booking of a unit bearing no. 802, 8th floor, tower 2A, admeasuring 1250 sq. ft., 2BHK residential apartment with the respondent in the project 'Aster Court', located at sector-85, Gurugram, Haryana.

ii. That subsequent to the execution of the buyer's agreement between the original allottees and the respondent, the original allottees made a request for substitution of their names with the complainants for which the original allottees on affidavit dated 02.09.2011 assigned all the rights and title qua the unit in question along with acceptance of Rs.14,46,626/- from the complainants and simultaneously, the complainants on affidavit dated 02.09.2011 accepted making payment of Rs.14,46,626/- to the original allottees. The original allottees as well as the complainants also executed the indemnity bond dated 02.09.2011.

iii. That the complainants requested the respondent for issuance of one additional open parking in the name of the complainants qua the unit bearing no. 802, 8th floor, in tower 2A, admeasuring 1250 sq. ft., 2BHK residential apartment for which the respondent responded through the

email dated 26.06.2012 that the open parking shall be subject to an additional amount of Rs.2,00,000/- and the said demand was acknowledged and agreed by the complainants and request for issuance of demand letter vide email dated 27.06.2012.

iv. That the complainants vide request letter dated 02.08.2013 requested the respondent to exchange their present unit bearing no.802, 8th floor, tower 2A, admeasuring 1250 sq. ft., 2BHK residential apartment with unit bearing no. 906, 9th floor, tower 2A residential apartment for which the complainants vide email dated 11.09.2013 apprised the respondent that the complainants wishes to exchange their existing unit with new unit bearing no. 906 within the same tower, i.e., 2A in the project in question for which the complainants were in receipt of an email dated 13.09.2013 from axis bank limited that the complainants will have to visit the base loan centre along with the swapping letter, NOC from the builder/respondent and cheque book.

v. That the respondent subsequently issued a letter of re-allotment of unit dated 15.11.2013 in the name of the complainants wherein the complainants were allotted with unit no. 906, tower 2A, 9th floor in the project in question. The respondent also issued a separate letter dated 15.11.2013, in the name of the complainants wherein the total amount of Rs.14,83,346/- were transferred from unit no. 802 to unit no. 906. It is further submitted that the complainants executed a fresh buyer's agreement with the respondent dated 15.11.2013 with completely separate terms and clauses.

vi. That the complainants are defaulters for which the respondent issued various demand letters and reminder letters dated 27.12.2013, 03.02.2014, 20.02.2014 and 12.06.2014 in the name of the complainants, however, the complainants filed to make the respective

payment of the instalment amount. That the area of the unit was inadvertently incorrectly mentioned in the demand letters but the same was verified in the payment plan dated 03.02.2014 that the unit no. 906, 9th floor, tower 2A admeasuring 1375 sq. ft.

vii. That as per the buyer's agreement executed between the parties dated 15.11.2013, clause 10.1 of the buyer agreement, the respondent was supposed to hand over the possession within a period of 36 months from the date of the signing of agreement or within 36 months plus 6 month's grace period i.e., altogether 42 months from the date of execution of apartments buyers agreement by the company or sanctions of plans or commencement of construction whichever is later.

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

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

obtaining environmental clearance for the additional area on 15.10.2013.

x. That thereafter, several obstructions had taken place which hampered the pace of the construction wherein in the year, 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) were regulated. The Hon'ble Supreme Court directed framing of Modern Mineral Concession Rules. Reference in this regard may be had to the judgment of "***Deepak Kumar v. State of Haryana, (2012) 4 SCC 629***". The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce in the NCR as well as areas around it. Further, respondent was faced with certain other force majeure events including but not limited to non-availability of raw material due to various stay orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal thereby stopping/regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. It is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 2.11.2015 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna River bed. These orders inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the Hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh as well. It was almost 2 years that the scarcity as detailed above continued, despite which all efforts were

made and materials were procured at 3-4 times the rate and the construction continued without shifting any extra burden to the customer. That the above said restrictions clearly fall within the parameter "reasons beyond the control of the respondent as described under of clause 11.1 of the buyer's agreement.

xi. That during that time, a writ petition was filed in the Hon'ble High Court of Punjab and Haryana titled as "Sunil Singh vs. Ministry of Environment & Forests Parayavaran" which was numbered as CWP-20032-2008 wherein the Hon'ble High Court pursuant to order dated 31 July 2012 imposed a blanket ban on the use of ground water in the region of Gurgaon and adjoining areas for the purposes of construction. That on passing of the abovementioned orders by the High Court the entire construction work in the Gurgaon region came to stand still as the water is one of the essential part for construction. That in light of the Order passed by the Hon'ble High Court the respondent had to arrange and procure water from alternate sources which were far from the construction site. The arrangement of water from distant places required additional time and money which resulted in the alleged delay and further as per necessary requirements STP was required to be setup for the treatment of the procured water before the usage for construction which further resulted in the in alleged delay.

xii. The orders passed by Hon'ble High Court of Punjab and Haryana wherein the Hon'ble Court has restricted use of groundwater in construction activity and directed use of only treated water from available sewerage treatment plants. However, there was lack of number of sewage treatment plants which led to scarcity of water and further delayed the project. That in addition to this, labour rejected to work using the STP water over their health issues because of the

pungent and foul smell coming from the STP water as the water from the S.T.P' s of the State/Corporations had not undergone proper tertiary treatment as per prescribed norms.

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

xiv. That the occupation certificate of the project in question has been obtained in three phases due to the litigations and obstructions. It is submitted that the occupation certificate for the Phase-I of the project in question was obtained on 06.04.2017 however, the tower in which the unit of the Complainants falls was not mentioned in the "Description of Building". It is submitted that the tower 2A in which the unit in question belonging to the complainants falls, the occupation certificate was obtained on 18.10.2018. It is further submitted that the respondent had applied for occupation certificate vide application dated 20.11.2014, 15.01.2015 and 15.10.2018 since the construction of the project was done in phase-wise manner and also that the approvals of the revised building plan was obtained at different dates and durations.

xv. That the complainants were issued with letter for fit-outs dated 18.04.2018 along with a statement of account however, no payment was made by the complainants and thus, after obtaining the occupation certificate, the respondent vide email dated 18.10.2018 informed the complainants to take the possession and clear the outstanding dues. It

is further submitted that the respondent vide letter dated 20.10.2018 issued a letter for offer of possession separately.

xvi. That not only this, the respondent also issued a letter dated 14.09.2021 to the complainants to come forward and take the possession of the unit in question and clear the outstanding dues but the request of the respondent went to deaf ears of the complainants. That the respondent even by way of the said email tried to settle the matter with the complainants however, no solution was obtained and the complainants preferred to file appeal against the respondent.

xvii. That not only this, the complainants on 05.02.2023, taken the possession of the unit in question without making the payment of their respective outstanding dues for which the complainants are liable to make the payment of the outstanding dues along with interest as enshrined in section 2 (za) of the Act, 2016.

xviii. That the complainants wilfully executed buyer's agreement dated 15.11.2013 wherein as per the request of the complainants, the unit of the complainants was shifted to unit no. 906, tower 2A and hence the new buyers agreement and therefore the duration of 42 months is being calculated from 15.11.2013. It is submitted that the possession was to be offered on or before 15.05.2017 however the respondent was in receipt of occupation certificate of phase-I of the project in question.

xix. That without prejudice to the above, it is stated that the statement of objects and reasons of the said Act clearly state that the Act of 2016 is enacted for effective consumer protection. The Act of 2016 is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of "Consumer" as provided under the Consumer Protection Act, 1986 has to be referred

for adjudication of the present complaint. The complainant is an investor and not a consumer.

xx. That without prejudice to the aforementioned submissions, it is submitted that even otherwise the complainant cannot invoke the jurisdiction of this Authority in respect of the unit allotted to the complainant, especially when there is an arbitration clause provided in the apartment buyer's agreement, whereby all or any disputes arising out of or touching upon or in relation to the terms of the said agreement or its termination and respective rights and obligations, is to be settled amicable failing which the same is to be settled through arbitration. Once the parties have agreed to have adjudication carried out by an alternative dispute redressal Forum, invoking the jurisdiction of this Authority, is misconceived, erroneous and misplaced. The space buyer's agreement attached by the complainants themselves is containing the arbitration clause 49.

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

8. The complainants and respondent have filed the written submissions on 10.10.2024 and 29.10.2024 respectively which are taken on record and have been considered by the authority while adjudicating upon the relief sought by the complainants.

E. Jurisdiction of the authority

9. 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

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)(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 complainants at a later stage.

F. Findings on the objections raised by the respondent.

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

13. 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.

14. 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.

F.II Objections regarding force majeure.

15. The respondent-promoter has raised the contention that the construction of the project has been delayed due to force majeure circumstances such as orders/restrictions of the NGT as well as competent authorities, High Court and Supreme Court orders, shortage of labour force in the NCR region, ban on the use of underground water for construction purposes, heavy shortage of supply of construction material etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 10.10.2015. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong.

F. III Objection regarding the complainant being investor.

16. The respondent has taken a stand that the complainants are investor and not a consumer and therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are buyers and have paid total price of Rs.46,06,684/- to the promoter towards purchase of a unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

17. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the unit application for allotment, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and

"allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr***. has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investor are not entitled to protection of this Act also stands rejected.

G. Findings regarding relief sought by the complainants.

G. I Direct the respondent to handover the possession of the apartment no. 906, in tower 2A, to the complainants with all the amenities promised.

G.II Direct the respondent to handover the possession of the allotted unit to the complainants without execution of any indemnity bond.

18. The present complaint was filed on 18.03.2019, and no one appeared on behalf of respondent. Therefore, in view of the order dated 20.08.2019, the matter was proceeded ex-parte against the respondent. As per order dated 20.08.2019, the present complaint was disposed of by the Registrar – Cum – Administrative Officer (Petition) HARERA Gurugram (Authorized by resolution no. HARERA, GGM/Meeting/2019/Agenda29.2/Proceedings /16th July 2019) passed the following directions: -

> *The Authority exercising its power under section 37 of the Act of 2016 hereby directs the respondent to pay delayed possession charges at the prevalent prescribed rate of interest of 10.45% per annum with effect from the due date of delivery of possession i.e., 15.05.2017 till the date of this order within the period of 90 days and continue to pay charges month by month interest @10.45% per annum on or before the 10th day of each subsequent English calendar month till actual handing over of possession of the subject apartment to the complainants. The respondent is also directed to refund the Electricity installation charges (EIC) of Rs.2,06,250/- to the complainants within the same period of 90 days from the date of this order."*

19. Thereafter, the applicant/complainants filed an appeal against the order dated 20.08.2019, before the Haryana Real Estate Appellate Tribunal, Chandigarh. The said appeal was disposed of vide order dated 28.05.2024 with a direction to the authority for fresh decision after taking into consideration the established legal principals and observations made in

Newtech Promoter' case (supra). As already considerable delay has occurred, the Authority small endeavor to decide the matter expeditiously in any case not later than four months.

20. In the present complaint, the complainants are seeking the said relief with respect to handover the physical possession of the unit bearing no. 906, in tower 2A, with all the amenities promised by the respondent company.

21. During proceeding dated 13.08.2024, the counsel for the respondent brought to the notice of the Authority the complainants have taken over the physical possession of the allotted unit on 05.02.2023 (annexure R15 of the reply). So in view of the above, no direction can be given in this regard.

G.III Direct the respondent to provide the complainants with prescribed rate of interest on delayed possession from the schedule date of possession i.e., 07.01.2015 till the actual date of possession.

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

> *"**Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building. -*
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

23. Clause 10.1 of the apartment buyer's agreement (in short, the agreement) dated 15.11.2013, provides for handing over possession and the same is reproduced below:

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

Annexure I or as per the demands raised by the Company from time to time or any failure on the part of the Allottee (s) to abide by any terms or conditions of this Apartment Buyer Agreement."

24. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreement and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession.

25. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 36 months plus grace period of 6 months from the date of execution of the apartment buyer agreement by the company or sanction of plans or commencement of construction whichever is later. Therefore, the due date has been calculated as 36 months from date of execution of buyer's agreement i.e., 15.11.2013, being later. Further a grace period of 6 months is allowed to the respondent being unqualified. Thus, the due date of possession come out to be 15.05.2017.

26. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate of interest. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter,

interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

27. 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.

28. 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 04.02.2025 is 9.10%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11.10% per annum.

29. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
>
> *Explanation. —For the purpose of this clause—*
>
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
>
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest*

payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

30. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 11.10% by the respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.

31. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. During proceeding dated 10.12.2024, the complainant present in person stated that the complainants were subsequent allottees vide agreement to sell dated 07.07.2011 executed between the complainants herein and the original allottee i.e., Gaurav Suryavanshi for the unit bearing no. 802, 8th floor, in tower/block-2A. Thereafter, the respondent company executed a new buyer's agreement on 15.11.2013 for the new unit bearing no. 906, 9th floor, in tower-2A. Further, the respondent illegally revised the timelines for possession according to the new buyer's agreement dated 15.11.2013. On the other hand, the counsel for the respondent brought to the notice of the Authority, that the unit was changed on the request for the complainants vide email dated 11.09.2013 (annexure R5 at page no. 39 of reply). The Authority is of the view that the unit was changed on the request of the complainants and thus the plea raised by the complainants that the due date of possession may be considered as per the buyer's agreement dated 07.07.2011 is hereby rejected as it is a well settled law that ***"No one can take benefit out of his own wrong".*** By virtue of apartment buyer's agreement executed between the parties on 15.11.2013, the possession of the booked unit was to be delivered by 15.05.2017. The occupation certificate was granted by the concerned authority on 18.10.2018 and thereafter, the possession of the subject flat was offered to the complainants vide letter dated 20.10.2018.

Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 15.11.2013 to hand over the possession within the stipulated period.

32. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 18.10.2018. The respondent offered the possession of the unit in question to the complainants only on 20.10.2018, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months time from the date of offer of possession. These 2 months of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession till the expiry of 2 months from the date of offer of possession (20.10.2018) which comes out to be 20.12.2018.

33. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delayed possession at prescribed rate of interest i.e., 11.10 % p.a. w.e.f. 15.05.2017 till the expiry of 2 months from the date of offer of possession (20.10.2018) which comes out

to be 20.12.2018 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.

G.IV To set aside the illegal demands raised by the respondent on account of electricity installation charges.

34. The authority has already dealt with the above charges in the compliant bearing no. ***4031 of 2019 titled as Varun Gupta V/s Emaar MGF Land Limited*** wherein the authority has held that the colonizer would provide the detail of expenditure to the complainant(s) and they can verify the same from DHBVN, if required. Thus, when the claimant(s) agreed to pay charges under this head on the condition of the promoter providing the details of expenditure to them and the same to be verified by them, then promoter can legally charge the same from them.

G.V Direct the respondent to refund of Rs.1,54,495/- for not providing green area in the project as shown in project brochure.

G.VI Direct the respondent refund of Rs.77,248/- charged by the respondent for corner PLC, while the same was not agreed in the agreement dated 07.07.2011, apartment no. 906 was forcibly allocated in lieu of apartment no. 802, which did not have corner location PLC.

35. The complainants have sought the relief with regard to direct the respondent to refund the amount of Rs.1,54,495/- for not providing green area and Rs.77,248/- for corner PLC, as the unit of the complainants has not been cover under the same. A perusal of documents and submissions made by the parties the Authority has gone through the buyer's agreement as well as payment plan annexed with the buyer's agreement 15.11.2013, which was duly signed by both the parties, which is reproduced for ready reference:-

CONSTRUCTION LINKED PAYMENT PLAN

Schedule of payment	Amount
At the time of registration	2BHK-Rs.2,00,000/-, 3BHK-Rs.3,00,000/- 3BHK+1SR-Rs.3,50,000/- 4 BHK-Rs.4,00,000/-, 4BHK+1SR-Rs.4,50,000/-
Within 2 months of registration	20% of BSP. (less the registration amount)
Within 4 months of registration	10% of BSP+ 25% of EDW& IDC + 25 of PLC
On commencement of construction	10% of BSP+ 25% of EDW& IDC + 25 of PLC
On casting of Basement roof	10% of BSP+ 25% of EDW& IDC + 25 of PLC
On casting of 2nd Floor roof	10% of BSP+ 25% of EDW& IDC + 25 of PLC

On casting of 5th Floor roof	7.5% of BSP + 50% of utility charges
On casting of 7th Floor roof	7.5% of BSP + 50% of utility charges
On casting of 9th Floor roof	5% of BSP + 50% of club membership
On commencement of brick work within apartment	5% of BSP + 50% of club membership
On commencement of internal plaster within Apartment	5% of BSP
On commencement of flooring within apartment	5% of BSP
At the time of possession	5% of BSP + IFMS + other charges

Also, as per clause 1.2 of the buyer's agreement dated 15.11.2013, it is stated that 'PLC as applicable' an amount of Rs.1,87,500/-,. [Page no. 49 of the reply]

36. Therefore, the Authority is of the view that 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 agreement has been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Accordingly, 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.

37. In light of the above, the demand made by the respondent as per statement of account dated 21.02.2019 is quested. Accordingly, the respondent can charge only applicable PLC charges as agreed between the parties vide buyer's agreement dated 15.11.2013, and shall refund the excess amount received by it if any, along with interest from the amount received in lieu of PLC till it's actual realization.

G.VII Direct the respondent to pay/reimburse Rs.70,000/- towards the litigation cost/expense.

38. The complainants are also seeking relief w.r.t. cost of litigation /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. Vs. State of UP & Ors.*** (supra) has held that an allottee is entitled to claim compensation & 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 & 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 & legal expenses.

H. Directions of the authority: -

39. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the authority under sec 34(f) of the Act: -

i. The respondent/promoter is directed to pay interest to the complainants against the paid-up amount at the prescribed rate i.e., 11.10% per annum for every month of delay from due date of possession i.e., 15.05.2017 till the expiry of 2 months from the date of offer of possession (20.10.2018) i.e., up to 20.12.2018 whichever is earlier as per proviso to section 18(1) of the Act read with rule 15 of the rules. The respondent is directed to pay arrears of interest accrued so far within 90 days from the date of order of this order as per rule 16(2) of the rules.

ii. The respondent is directed to get the conveyance deed of the allotted unit executed in the favour of complainant in term of section 17(1) of the Act of 2016 on payment of stamp duty and registration charges as applicable.

iii. The respondent shall not charge anything from the complainants which is not the part of the apartment buyer's agreement. The respondent is debarred from claiming holding charges from the complainants

/allottees at any point of time even after being part of apartment buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3899/2020 decided on 14.12.2020.

40. Complaint stands disposed of.

41. File be consigned to the registry.

(Ashok Sangwan)
Member

(Vijay Kumar Goyal)
Member

(Arun Kumar)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.02.2025