

**BEFORE THE HARYANA REAL ESTATE REGULATORY  
AUTHORITY, GURUGRAM**

**Complaint no. : 1742 of 2021**  
**First date of hearing: 09.07.2021**  
**Date of decision : 13.10.2021**

1. Mr. Prabhakaran Dorairaj
2. Mrs. Poornima Prabhakaran  
Both RR/o: -4621, Dahlia Lane,  
DLF Phase-IV, Gurugram- 122002

**Complainants**

**Versus**

M/s Raheja Developers Limited.  
Regd. office: W4D, 204/5,  
Keshav Kunj, Western Avenue,  
Sainik Farms, New Delhi- 110062

**Respondent**

**CORAM:**

Dr. K.K Khandelwal  
Shri Samir Kumar  
Shri Vijay Kumar Goyal

**Chairman**  
**Member**  
**Member**

**APPEARANCE:**

Sh. Venket Rao  
Sh. Rahul Bhardwaj

Advocate for the complainants  
Advocate for the respondent

**ORDER**

1. The present complaint dated 09.04.2021 has been filed by the complainants/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 there under or to the allottee as per the agreement for sale executed *inter se*.

**A. Unit and project related details**

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

S.N.	Heads	Information
1.	Project name and location	"Raheja's Shilas", Sector 109, Gurugram
2.	Project area	14.812 acres
3.	Nature of the project	Residential Group Housing Colony
4.	DTCP license no. and validity status	257 of 2007 dated 07.11.2007 valid up to 06.11.2017
5.	Name of licensee	Brisk Construction Pvt. ltd and 3 others
6.	RERA Registered/ not registered	Registered vide no. 90 of 2017 dated 28.08.2017
7.	RERA registration valid up to	5 Years from the date of revised Environment Clearance
8.	Unit no.	IF19-01, ground floor, block- IF19 [Page 25A of the complaint]
9.	Unit measuring	2152.64 sq. ft. [Super area]
10.	Date of allotment letter	11.03.2010 [Page 43 of compliant]

11.	Date of execution of flat buyer agreement	11.03.2010 [Page 25 of complaint]
12.	Payment plan	Installment Payment Plan [Page 37A of complaint]
13.	Total consideration	Rs.97,30,083.34/- [As per applicant ledger dated 20.05.2016 page 44 of complaint]
14.	Total amount paid by the complainant	Rs.86,69,780/- [As per applicant ledger dated 20.05.2016 page 44 of complaint]
15.	Due date of delivery of possession as per clause 4.2 of agreement to sell (30 months in case of independent floor from the date of execution of this agreement and after providing necessary infrastructure in the sector by the Government] [Page 29A of complaint]	11.09.2012
16.	Delay in handing over possession till date of this order i.e. 13.10.2021	9 years 1 month and 2 days

**B. Facts of the complaint**

3. The complainants have made the following submissions in the complaint: -

- I. The complainants were in a search of residential accommodation and came across the advertisement of the residential group housing colony known as "Raheja Shilas" at Sector 109 Gurgaon, Haryana. The advertisement represented that the project is one of the finest and relying on such representations, assurances, brochures and meetings, the complainants booked an independent

floor IF-9 in the said project for total consideration of Rs.97,30,083.34/- in the year 2009.

II. That the complainants agreed to buy an independent floor in the "Raheja Shilas" apartment no. IF19 measuring 2152.64 sq. ft super area on ground floor and a court terrace area measuring 1485.75 sq. ft. in IF19. That the complainants paid an amount of Rs.7,45,000/- as the booking amount against the unit applied in the said project. It is further submitted that the booking amount Rs.11,87,300/- was charged against unit charge within 60 days of booking and Rs.37,706/- against the external & infrastructural development charges. That section 13 of the Real Estate (Regulation & Development) Act, 2016 prohibits a promoter to charge any deposit or advance more than ten percent before entering into an agreement. The complainants paid more than ten percent of the total amount as per demand of the respondent before entering into an agreement. The respondent has therefore violated the provisions of section 13 by charging more than 10 percent of the total amount even before entering into an agreement.

III. That the respondent issued an allotment letter to the complainants dated 11.03.2010 for the project located at Sector 109, Gurgaon, Haryana, apartment no. IF19-01 admeasuring 2,152.64 sq. ft. and 148875 terrace/court area. Consecutively, the complainants and

the respondent executed a flat buyer agreement- Shilas dated 11.03.2020. That the allotment letter and flat buyer agreement was executed on the same date. It is further submitted that the flat buyer agreement is completely unfair, one sided and unreasonable agreement and a perusal of the clauses shows the unambiguous inconsistencies on the remedy available to the complainants and the respondent.

- IV. That on one hand, the **Clause 3.13** of the flat buyer agreement entitled the respondent to charge 18% of interest in case of delay in making payments by the complainants whereas on the other hand, clause 4.2 of the agreement restricts the complainants to a compensation @ Rs. 7/- per sq. ft./month for delay in handing over of possession by the respondent. The respondent being in dominant position has compelled the complainants to execute the flat buyer agreement having arbitrary clauses. The clauses of the agreement are arbitrary and one sided, thus, on the same parity, clause 3.13 of the agreement is reproduced herein below: -

*3.13 The timely payment of instalments is the essence of this Agreement. It shall be incumbent on the Allottees(s) to comply with the terms of payments and the other terms and conditions of sale. If there is any delay or default in making payment of the instalments on time by the allottee(s), then the Allottees(s) shall pay the interest @ 18% per annum to the Company from the due date of payment of instalment on monthly compound basis.*

- V. That as per clause 4.2 of the agreement the respondent was under obligation to complete the construction of the independent floor within 30 months from the date of the execution of the agreement.

Accordingly, the independent floor of the complainant's unit was to be handed over by the respondent to the complainants by 11.09.2012. That as per clause 4.2 of the said agreement it was mentioned that if the respondent fails to complete the construction of the said unit within the prescribed time, then in such case the respondent shall pay to the complainants a compensation for the entire period of delay.

- VI. That the complainants having faith and trust on the respondent and endeavouring to fulfil the responsibility on their part, deposited more than 90% against the total sale consideration i.e. Rs.87,16,527/- as per the demands raised by the respondent and the schedule of payment. It is noteworthy that the respondents utterly failed to fulfil and adhere to the promises made at the time of booking and execution of the flat buyer agreement.
- VII. That the complainants were regularly approaching the respondent and were also paying visits to the office to enquire about the status of the project and date for handing over of possession, but no heed was paid to the concerns raised by the complainants. It is pertinent to note that the complainants sent various e-mails to the respondent asking about the status as well as obtaining the occupation certificate and expressed their resentment over the delay in handing over of possession. Despite of repeated request made by the complainants, the respondent failed to redress the

grievances of the complainants and continue to demand monies without completing the development work of the project. Due to the dishonest and illegal act of the respondent and their failure to handover the possession as per the terms of the agreement the complainants are entitled for compensation for delay in possession of the said unit.

- VIII. That the respondent was under the obligation to inform the actual status of the project with actual drawings and other approved letters and other project details including copies of the letters received from the respective government agencies but the respondent failed to do so.
- IX. The complainants have submitted that inordinate delay in handing over possession of the unit clearly amounts to deficiency of service on account of the respondent company and the complainants have rightly claimed for compensation for delay in possession of the said unit other interest and compensations as per section 18 of Real Estate (Regulation and Development) Act, 2016.
- X. The respondent has acted unreasonably, arbitrarily, and fraudulently just to deceive the complainants. The complainants had booked a unit in the respondent project with many hopes. However, due to the respondent arbitrary and illegal acts, the complainants are facing a great deal of trouble. The difficulties and agony before the complainants are incomparable and undeniable,

hard-earned money has been invested by the complainants in the project, which now resulted in perpetual anguish.

- XI. That the present case is a harassment, cheating and exploitation of innocence and beliefs of the complainants and an act of the respondent to divert the hard-earned money collected from the complainants illegally and failed to hand over possession along with all the promised amenities till date.

**C. Relief sought by the complainants**

4. The complainants have sought following relief(s).
- I. To direct the respondent to immediately handover the possession of the said unit to the complainants along with entire development as per agreed terms and conditions mentioned in the buyer agreement.
  - II. To direct the respondent to pay the interest on the delayed possession till the actual date of possession @ 24% per annum.
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention 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 contested the complaint on the following grounds. The submission made therein, in brief is as under: -



- I. That the present complaint is based on vague, misconceived notions and baseless assumptions of the complainant and these are, therefore, denied. The complainant has not approached this authority with clean hands and has suppressed the true and material facts. The complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. It is submitted that the instant complaint is absolutely malicious, vexatious, and unjustifiable and accordingly has to pave the path of singular consequence, that is, dismissal.
- II. That the respondent is traversing and dealing with only those allegations, contentions and/or submissions that are material and relevant for the purpose of adjudication of present dispute. It is further submitted that save and except what would appear from the record and what is expressly admitted herein, the remaining allegations, contentions and/or submissions shall be deemed to have been denied and disputed by the respondent.
- III. That the complainant booked floor no. IF19-01, in Raheja Shilas Low Rise, 'Raheja's Atharva' Sector -109, Gurgaon, vide application form dated 21.09.2009. The respondent vide letter dated 11.03.2010 issued allotment letter to the complainant. Booking of the said allotted unit was done prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied

retrospectively. Although the provisions of the RERA, 2016 are not applicable to the facts of the present case in hand yet without prejudice and in order to avoid complications later on, the respondent has registered the project with the authority. The said project is registered with RERA vide registration no. 90 of 2017 dated 28.08.2017. The authority had issued the said certificate which is valid for a period of five years commencing from 28.08.2017 the date of revised EC.

- IV. That the request for grant of occupation certificate for the unit allotted to the complainants in the project was made before the publication of Haryana Real Estate (Regulation and Development) Rules, 2017, That after completion of construction of Atharva Towers and Shilas Towers, the Company applied for Occupation Certificates. The Department of Town and Country Planning, Haryana granted two occupation Certificates consisting of all high rise Atharva Towers and Shilas Towers vide its letters bearing Memo No. ZP-331/SD(BS)/2014/10384 dated 20.05.2014 and Memo No. ZP-331/SD(BS)/2014/26665 dated 19.11.2014 respectively with respect to all high-rise apartments and EWS flats.
- V. That the project "Raheja Atharva" is a residential group colony situated at Sector - 109, Gurugram consists of three components namely (a) Raheja - Atharva towers consists of 8 high rise towers

from A to H, (Atharva Towers), (b) Raheja - Shilas Towers consists of three high rise towers named as T1, T2 and T3 (Shilas towers), (c) Raheja Shilas - independent floors (IF) which consists of low-rise floors apartment.

- VI. That the complainants after checking the veracity of the project namely, 'Raheja Shilas Low Rise" had applied for allotment of floor no. IF19-01 vide their booking application form. The complainants were agreed to be bound by the terms and conditions of the booking application form. That the complainants were aware of the facts as same is also stated in clause 3 of the booking application form dated 21.09.2009 and 4.3 of the agreement to sell dated 11.03.2010.
- VII. That the construction of the tower in which floor is allotted to the complainant is located already complete and the respondent shall hand over the possession of the same to the complainant after getting the occupation certificate which the respondent has already applied for which the concerned department subject to the complainant making the payment of the due installments amount as per the terms of the application and agreement to sell.
- VIII. That the construction activity of the Raheja Shilas- independent floors (IF) which consists of low-rise floor apartment is already completed and only after completion of construction of the Raheja Shilas- Independent floor(IF), the respondent applied

grant of occupation certificate to the department of Town and Country planning, Haryana on 05.06.2018 and the same is still pending with the department. That the departments are ready for delivery as is evident from the report of DTCP dated 31.07.2018. It is further submitted that the physical possession may only be offered to the complainants after obtaining occupation certificate from the concerned department.

- IX. That this authority does not have the jurisdiction to decide on the interest as claimed by the complainant. It is submitted that in accordance with section 71 of RERA, 2016 read with Rules 21(4) and 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 the authority shall appoint an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard. It is submitted that even otherwise, it is the adjudicating officer as defined in section 2(a) of RERA, 2016 who has the power and the authority to decide the claims of the complainant.
- X. The complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 59 of the booking application form and clause 14.2 of the buyer's agreement.

XI. That the complainants have not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by it maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:-

- That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as 'Raheja Atlantis', 'Raheja Atharva', and 'Raheja Vedanta' and in most of these projects large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.
- That the respondent launched the project Raheja Atharva- in the year 2010. That the project Raheja Atharva residential group colony situated at sector - 109, Gurugram consists of three components namely (a) Raheja - Atharva towers consists of 8 high rise towers from A to H, (Atharva towers), (b) Raheja - Shilas towers consists of three high rise towers named as T1,T2 and T3(Shilas towers), (c) Raheja Shilas -

independent floors (IF) which consists of low-rise floors apartment.

- That the complainant is real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that their calculations have gone wrong on account of severe slump in the real estate market and the complainants are now raising untenable and illegal pleas on highly flimsy and baseless grounds. Such malafide tactics of the complainants cannot be allowed to succeed.
- That period of 36 months for completion of construction of the said Unit was contingent on the providing of necessary infrastructure in the sector by the Government and subject to Force Majeure conditions

XII. Despite the respondent fulfilling all its obligations as per the provisions laid down by law, the government agencies have failed miserably to provide essential basic infrastructure facilities such as roads, sewerage line, water and electricity supply in the sector where the said project. The development of roads, sewerage, laying down of water and electricity supply lines has to be undertaken by the concerned governmental authorities and is not within the power and control of the respondent. The respondent cannot be held liable on account of non-performance by the concerned governmental authorities. The respondent company

has even paid all the requisite amounts including the external development charges (EDC) to the concerned authorities.

**E. Jurisdiction of the authority**

7. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act 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 jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.**

8. Objection raised by the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of

the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** 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."*

9. 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."*



10. 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.

**F.II Objection regarding complainants are breach of agreement for non-invocation of arbitration**

11. The respondent had raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The clause 59 of the booking application form and clause 15.2 has been incorporated w.r.t arbitration in the buyer's agreement:-

*"All or any disputes arising out or touching upon in relation to the terms of this Application/Agreement to Sell/ Conveyance Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereof for the time being in force. The arbitration proceedings shall be held at the office of the seller in New Delhi by a sole arbitrator who shall be appointed by mutual consent of the parties. If there is no consensus on appointment of the*

*Arbitrator, the matter will be referred to the concerned court for the same. In case of any proceeding, reference etc. touching upon the arbitrator subject including any award, the territorial jurisdiction of the Courts shall be Gurgaon as well as of Punjab and Haryana High Court at Chandigarh”.*

12. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force. Consequently, the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying the same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.
13. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has

held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

*"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*

*"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*

*It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*

...

*56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

14. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court in case titled as **M/s Emaar MGF Land Ltd. V. Aftab Singh** in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018 has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the

law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

*“25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above.”*

15. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within her right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

**F.III. Objection regarding entitlement of DPC on ground of complainants being investor**

16. The respondent has taken a stand that the complainants are investors and not consumer, therefore, they have 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 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 it 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 unit buyer's agreement, it is revealed that the complainants are buyers and has paid a total price of Rs.86,69,780/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

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 complainant, it is crystal clear that the complainants are

allottee(s) as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be “promoter” and “allottee” and there cannot be a party having a status of “investor”. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

**G. Findings on the relief sought by the complainant.**

**G. I Delayed possession charges**

17. In the present complaint, the complainants intends to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso 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.”*

18. Article 4.2 of the agreement to sell provides for handing over of possession and is reproduced below:

**4.2 Possession Time and Compensation**

*That the company shall endeavor to give possession of the apartment to the allottee(s) within thirty-six (36) months in case of tower and Thirty (30) months in case of Independent Floor from the date of the execution of the Agreement and after providing of necessary infrastructure e in the sector by the Government, but subject to force majeure circumstances and reasons beyond the control of the company. The company obtaining certificate for occupation and use by the Competent Authorities shall hand over the Apartments to the Allottee(s) for his/her occupation and use and subject to the allottee(s) having complied with all the terms and conditions of this Flay Buyer Agreement..."*

**19. Admissibility of delay possession charges at prescribed rate of**

**interest:** The complainants are seeking delay possession charges at the rate of 24% p.a. however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***

*(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.*

*Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

20. 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.

21. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.7/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @ 18% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.



22. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 13.10.2021 is **7.30%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **9.30%**.
23. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees 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. 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;"*

24. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **9.30%** by the respondent/promoter which is the same as is being granted her in case of delayed possession charges.
25. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By

virtue of clause 4.2 of the agreement executed between the parties on 11.03.2010, the possession of the subject apartment was to be delivered within 30 months from the date of execution of agreement to sell. Therefore, the due date of handing over possession is 11.09.2012. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the agreement to sell dated 11.03.2010 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.

26. 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 delay possession charges at rate of the prescribed interest @ 9.30% p.a. w.e.f. 11.09.2012 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.

#### **H. Directions of the authority**

27. 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 pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e. 11.09.2012 till the handing over of possession of the allotted unit;
- ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;
- iii. The arrears of such interest accrued from 11.09.2012 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoters to the allottees before 10<sup>th</sup> of the subsequent month as per rule 16(2) of the rules;
- iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.


- v. The respondent shall not charge anything from the complainants which is not the part of the agreement to sell.

28. Complaint stands disposed of.

29. File be consigned to registry.

**(Samir Kumar)**  
Member

**(Vijay Kumar Goyal)**  
Member

  
**(Dr. K.K. Khandelwal)**  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.10.2021

Judgement uploaded on 30.11.2021