

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

Complaint no. : 4683 of 2020
First date of hearing: 15.02.2021
Date of decision : 29.07.2022

Puneet Mittal
R/o: - Y-82, Hauz Khas, New Delhi- 110016

Complainant

Versus

M/s Ramprashtha Promoters and
Developers Private Limited.
Regd. office: Plot No. 114, Sector-44,
Gurugram-122002
Also at: - C-10, C Block
Market, Vasant Vihar, New Delhi- 110057

Respondent

CORAM:

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

Chairman
Member

APPEARANCE:

Sh. Gaurav Rawat (Advocate)
Sh. Dheeraj Kapoor (Advocate)

Complainant
Respondent

ORDER

1. The present complaint dated 15.12.202 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made there under or to the 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. N.	Particulars	Details
1.	Name of the project	"SKYZ", Sector 37C, Village Gadauli Kalan, Gurugram
2.	Project area	60.5112 acres
3.	Registered area	102000 sq. mt.
4.	Nature of the project	Group housing complex
5.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid upto 18.02.2025
6.	Name of licensee	Ramprastha Builders Pvt Ltd and 11 others
7.	Date of approval of building plans	12.04.2012 [As per information obtained by planning branch]
8.	Date of environment clearances	21.01.2010 [As per information obtained by planning branch]



9.	RERA Registered/ not registered	Registered vide no. 320 of 2017 dated 17.10.2017	
10.	RERA registration valid up to	31.03.2019	
11.	Extension applied on	17.06.2020	
12.	Extension certificate no.	Date	Validity
		In principal approval on 12.06.2019	30.03.2020
13.	Unit no.	A-1801, 18 th floor (Page 46 of reply)	
14.	Unit area admeasuring	1725 sq. ft. (As per booking application form page no. 46 of the reply)	
16.	Date of application of allotment	09.01.2011 [Page no. 51 of the reply]	
17.	Welcome letter	07.05.2012 (Page no. 22 of the complaint)	
18.	Allotment letter	NA	
19.	Date of execution of apartment buyer agreement	Not executed	
20.	Possession clause	13. Subject to other terms of this Application and Apartment	



		<p>Buyer Agreement including but not limited to timely payment of the Total Price, stamp duty, registration and other charges shall be paid by the Applicant(s). <i>The Company shall endeavour to complete the construction of the Said Apartment within 36 months from the date of execution of the Apartment Buyer Agreement by the Company.</i> Thereafter the Company shall offer the possession of the Said Apartment to the Applicant(s). Any delay by the Applicant(s) in taking the possession would attract holding charges @ Rs.10/- per sq. ft. per month for any delay of full one month or any part thereof.</p> <p>(As per booking application form Page no. 54 of the reply)</p>
21.	Due date of possession	31.08.2014 [As per mentioned in the buyer's agreement]
22.	Total sale consideration	Rs. 73,68,409/- (As per booking application form page no. 46 of the reply)



23.	Amount paid by the complainant	Rs. 63,99,956/- (As per receipt information, page 61 of the reply)
24.	Occupation certificate /Completion certificate	Not received
25.	Offer of possession	Not offered
26.	Delay in handing over the possession till date of filing complaint i.e., 15.12.2020	6 years 3 months and 15 days

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That the residential project under the name and style of "SKYZ Ramprastha City" was being developed by respondent in Sector 37-D, Gurugram, Haryana. The complainant herein booked a unit bearing flat no. A-1801 in the said project after he was got lured by the director of respondent company namely Mr. Amit Yadav on the pretext that his investment in the said project would fetch excellent returns as the township is being developed as an high end residential project with all the modern facilities and it's prices are likely to escalate in an exorbitant manner after its completion in next 3 years, and being lured by them, the



complainant decided to purchase the said unit as was offered by Mr. Amit Yadav for a sum of Rs.75,00,000/-.

- II. That the said booking made by the complainant, a sum of Rs. 15 Lac was paid by him as booking amount whereupon he was given a welcome letter on 07.05.2012. After the said welcome letter was issued, the different demand letters were issued by the respondent from time to time. But till today, no builder buyer agreement has been executed by the respondent in favour of the complainant with a sole intention of avoiding any legal complications. The complainant has paid a sum of Rs. 62,94,066/- to the respondent vide different bank transfers and the last of such payment was made on 09.10.2014 for a sum of Rs. 6,04,066/- apart from Rs.11,00,000/- in cash to the director of the respondent company namely Amit Yadav paid in the year 2014 itself.
- III. That the respondent has not only failed to execute builder buyer agreement in favour of complainant as stipulated in Section 12 of the Act 2016 but has also illegally extracted money from him by making several false promises. The construction work of the project has been stand still for several years now and is not even close to completion even after a delay of almost 7 years.
- IV. That all the assurances and commitments made by the respondent regarding timely delivery of possession and



execution of builder buyer agreement has been proved to be false and misleading. The complainant has been subjected to unethical/unfair trade practice and is being harassed by them who has taken the hard-earned money of the complainant and has siphoned it off for developing other projects or usurped the same.

- V. That the complainant has made numerous attempts to know the exact status of his flat and has made several oral requests on the helpline numbers of the respondent for execution of builder buyer agreement but till today neither the agreement has been given by the respondent nor the possession of the flat has been handed over to the complainant.
- VI. That in view of the facts and circumstances explained above, it is established that till date the respondent has not been able to develop the said project due to the reasons best known to them and it appears that they have siphoned off the money paid by complainant to their other ongoing projects. The respondent has misled the complainant on false pretexts and assurances of providing a world class luxurious home, while their sole intention is to usurp the hard money of the complainant.
- VII. The complainant herein has suffered grave financial loss as he has paid the money in a hope of getting the said unit for residential purposes, but the respondent has not only deprived the

complainant of timely possession of the said unit but has also deprived him of the benefit of escalation of cost.

- VIII. That the complaint sets out the various deficiencies in services, unfair and/or restrictive trade practices adopted by the respondent in sale of the unit and the provisions allied to it. The modus operandi adopted by the respondent is not unique and the strategies used to achieve its objective, invariably bears the irrefutable stamp of impunity and total lack of accountability and transparency, as well as breach of contract and duping it's allottee, be it either through by not implementing the services/utilities as promised in the brochure or by not delivering the project in time.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
- I. Direct the respondent to refund the money of Rs.62,94,066/- along with 18% interest per annum paid by the complainant towards sale consideration of the unit.
 - II. Direct the respondent to pay an amount of Rs. 2,00,000/- to the complainant as deficiency in service.
 - III. Direct the respondent to pay an amount of Rs. 2,00,000/- to the complainant as compensation for harassment, mental agony, hardship and trauma on account of unfair trade practice adopted by the respondent.



- IV. Direct the respondent to pay an amount of Rs. 1,00,000/- to the complainant as cost of the present litigation.
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 filed an application for rejection of complaint on the ground of jurisdiction along with reply. The respondent has contested the complaint on the following grounds.
- I. The complaint filed by the complainant is not maintainable and the adjudicating officer has no jurisdiction whatsoever to entertain the present complaint. The respondent has also separately filed an application for rejection of the complaint on the ground of jurisdiction and this reply is without prejudice to the rights and contentions of the respondent contained in the said application.
 - II. That prior to 12.09.2019, the complaints pertaining to refund, possession, compensation and interest for a grievance under section 12, 14, 18 and 19 of the Act, 2016 were required to be filed before the adjudicating officer under Rule-29 of the rules, 2017 read with section 31 and section 71 of the said Act and not before this authority under rule-28 as the authority had no jurisdiction

whatsoever to entertain such complaint and such complaint was liable to be rejected.

- III. The Haryana Real Estate (Regulation & Development) Amendment Rules, 2019 were notified on 12.09.2019, whereby inter alia amendments were made to rules-28 and rule-29 and the authority was given the jurisdiction to entertain and adjudicate the complaints seeking the relief of refund. The corresponding amendments were also made to Forms CRA and CAO.
- IV. That now, in terms of the Haryana Real Estate (Regulation and Development) Amendment Rules, 2019 (hereinafter referred to as the "said amendment rules"), the complainant has filed the present complaint under the amended rule-29 in the amended "form CRA" and is seeking the relief of refund, interest and compensation u/s 18 of the said Act.
- V. That statement of objects and reasons as well as the preamble of the said Act clearly state that the RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA 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 investor and not consumer and nowhere in the present complaint has the complainant pleaded as to how the complainant is consumer as defined in the Consumer Protection Act, 1986 qua



the respondent. The complainant, who is already the owner of Y-82, Hauz Khas, New Delhi- 110016 (address mentioned in the present complaint) is an investor, who never had any intention to buy the apartment for own personal use and kept on avoiding the performance of his contractual obligations of executing the apartment buyer agreement and making timely payments and have now filed the present complaint on false and frivolous grounds. It is most respectfully submitted that the adjudicating officer has no jurisdiction to entertain the present complaint as the complainant have not come to the adjudicating officer with clean hands and have concealed the material fact that he has invested in the apartment for earning profits and the transaction therefore is relatable to commercial purpose and the complainant not being a 'consumers' within the meaning of Section 2(1)(d) of the Consumer Protection Act, 1986, the complaint itself is not maintainable under the said Act. This has been the consistent view of the Hon'ble National Consumer Disputes Redressal Commission.

- VI. That that the complainant is an investor and also a defaulter, having deliberately failed to execute the apartment buyer agreement and make the payment of various installments within the time prescribed which resulted in delay payment charges.
- VII. Despite several adversities, the respondent has continued with the construction of the project and are in the process of completing the construction of the project and should be able to apply the occupation certificate for the apartment in question by



30.06.2022 (as mentioned at the time of application for extension of Registration of the project with RERA) or within such extended time, as may be extended by the Authority, as the case may be. However, as the complainant was only short term and speculative investor, therefore he was not interested in taking over the possession of the said apartment. It is apparent that the complainant had the motive and intention to make quick profit from sale of the said apartment through the process of allotment. Having failed to resell the said apartment due to general recession and because of slump in the real estate market, the complainant has developed an intention to raise false and frivolous issues to engage the respondent in unnecessary, protracted, and frivolous litigation. The alleged grievance of the complainant has origin and motive in sluggish real estate market.

- VIII. That this adjudicating officer is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer agreement signed by the complainants/allotment offered to him. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of said Act or said rules, has been executed between the complainant and the respondent. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the booking application form dated 09.01.2011, executed much prior to coming into force of said Act or said rules. The adjudication of the complaint for interest and compensation, as provided under



sections 12, 14, 18 and 19 of said Act, has to be in reference to the agreement for sale executed in terms of said Act and said Rules and no other agreement. This submission of the respondents *inter alia*, finds support from reading of the provisions of the said Act and the said Rules. Thus, in view of the submissions made above, no relief can be granted to the complainants.

- IX. The respondent submitted that out of the total amount paid i.e., Rs.63,99,956/- only Rs.62,08,124/- has been paid towards the sale consideration. The balance amount of Rs.1,91,832/- is towards the service tax as reflected in the statement of account.
- X. The respondent submitted that the proposed estimated time of handing over the possession of the said apartment i.e. 31.08.2014 plus 120 days, which comes to 31.12.2014, is applicable only subject to force majeure and the complainants having complied with all the terms and conditions and not being in default of any the terms and conditions of the apartment buyer agreement, including but not limited to the payment of instalments. In case of any default/delay in payment, the date of handing over of possession shall be extended accordingly solely at the respondent's discretion, till the payment of all outstanding amounts and at the same time in case of any default, the complainant would not be entitled to any compensation whatsoever in terms of clause 15 and clause 17 of the apartment buyer agreement.



- XI. That section 19(3) of the Act provides that the allottee shall be entitled to claim the possession of the apartment, plot, or building, as the case may be, as per the declaration given by the promoter under section 4(2)(l)(C). The entitlement to claim the possession or refund would only arise once the possession has not been handed over as per the declaration given by the promoter under section 4(2)(l)(C). In the present case, the respondent had made a declaration in terms of section 4(2)(l)(C) that it would complete the project by 31.03.2019 and has also applied for a further extension of one year with the revised date as 31.12.2020. Thus, no cause of action can be said to have arisen to the complainant in any event to claim possession or refund, along with interest and compensation, as sought to be claimed by them.
- XII. The projects in respect of which the respondent has obtained the occupation certificate are described as hereunder: -

S. No	Project Name	No. of Apartments	Status
1.	Atrium	336	OC received
2.	View	280	OC received
3.	Edge		
	Tower I, J, K, L, M	400	OC received
	Tower H, N	160	OC received
		80	OC received

	Tower-O (Nomenclature-P) (Tower A, B, C, D, E, F, G)	640	OC to be applied
4.	EWS	534	OC received
5.	Skyz	684	OC to be applied
6.	Rise	322	OC to be applied

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 application filed in the form CAO with the adjudicating officer and on being transferred to the authority in view of the judgement quoted above, the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case allottee wishes to withdraw from the project on failure of the promoter to give possession as per agreement for sale. It has been deliberated in the proceedings dated 10.5.2022 in CR No. 3688/2021 titled Harish Goel Versus Adani M2K Projects LLP and was observed that there is no material difference



in the contents of the forms and the different headings whether it is filed before the adjudicating officer or the authority.

9. Keeping in view the judgement of Hon'ble Supreme Court in case titled as *M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. 2021-22(1) RCR (C), 357* the authority is proceeding further in the matter where allottee wishes to withdraw from the project and the promoter has failed to give possession of the unit as per agreement for sale irrespective of the fact whether application has been made in form CAO/ CRA. Both the parties want to proceed further in the matter accordingly. The Hon'ble Supreme Court in case of *Varun Pahwa v/s Renu Chaudhary, Civil appeal no. 2431 of 2019 decided on 01.03.2019* has ruled that procedures are hand made in the administration of justice and a party should not suffer injustice merely due to some mistake or negligence or technicalities. Accordingly, the authority is proceeding further to decide the matter based on the pleading mentioned in the complaint and the reply received from the respondent and submissions made by both the parties during the proceedings.

E. Jurisdiction of the authority

The application of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

E.II Subject matter jurisdiction

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

Section 11

.....

(4) The promoter shall-

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

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

12. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation



which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

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

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

14. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the

jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent

F.I Objection regarding handing over possession as per declaration given under section 4(2)(l)(C) of RERA Act

15. The counsel for the respondent has stated that the entitlement to claim possession or refund would arise once the possession has not been handed over as per declaration given by the promoter under section 4(2)(l)(C). Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.
16. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.
17. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

Section 4: - Application for registration of real estate projects

(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —.....

(1): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: —

.....

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be....”

18. The time period for handing over the possession is committed by the builder as per the relevant clause of apartment buyer agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the apartment buyer agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(1)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble

Bombay High Court in case titled as *Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors.* and has observed 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..."

F. II Objection regarding entitlement of DPC on ground of complainant being investor

19. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is a buyer and paid total price of Rs.63,99,956/- to the



promoter towards purchase of an apartment 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;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

F.III Objection regarding jurisdiction of authority w.r.t. booking application form executed prior to coming into force of the Act

20. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the booking application form 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)* decided on 06.12.2017 which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...."

122. *We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

21. 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."

22. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective



departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the relief sought by the complainant

G.1 Direct the respondent to refund the money of Rs.62,94,066/- along with 18% interest per annum paid by the complainant towards sale consideration of the unit.

23. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building,-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”

(Emphasis supplied)

24. As per clause 13 of the booking application form provides for handing over of possession and is reproduced below:



"13. Subject to other terms of this Application and Apartment Buyer Agreement including but not limited to timely payment of the Total Price, stamp duty, registration and other charges shall be paid by the Applicant(s). The Company shall endeavour to complete the construction of the Said Apartment within 36 months from the date of execution of the Apartment Buyer Agreement by the Company. Thereafter the Company shall offer the possession of the Said Apartment to the Applicant(s). Any delay by the Applicant(s) in taking the possession would attract holding charges @ Rs.10/- per sq. ft. per month for any delay of full one month or any part thereof."

25. The authority has gone through the possession clause and observes that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of apartment buyer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.
26. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and 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 buyer 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. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

27. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him at the rate of 18%. However, the allottees intend to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules.

Rule 15 has been reproduced as under:

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

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

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

28. 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.
29. 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., 29.07.2022 is **7.80%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **9.80%**.
30. 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 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;"*

31. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule **28(1)**, the authority is satisfied that the respondent



is in contravention of the provisions of the Act. By virtue of clause 13 of the booking application form executed between the parties on 09.01.2011, the possession of the subject unit was to be delivered within a period of 36 months from the date of execution of buyer's agreement which comes out to be 09.01.2014. (Calculated on the basis of the date of booking application form i.e., 09.01.2011 in the absence of BBA). It is pertinent to mentioned here that it is of no difference if we consider the due date of possession from the date of booking or to take into consideration the due date mentioned in similar situated allotments.

32. The authority has further, observes that due date of possession of the same project being developed by the same promoter is specifically mentioned in the possession clause i.e., 31.08.2014. It is pertinent to mention over here that even after a passage of more than 8 years (i.e., from the date of booking till date) neither the construction is completed nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to him and for which he has paid a considerable amount of money towards the sale consideration. It is also to mention that complainant has paid almost 86% of total consideration till 2014. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the

respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottee intends to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.

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

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

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



25. *The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."*
35. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
36. 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 complainant is entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @



9.80% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.II Direct the respondent to pay an amount of Rs. 2,00,000/- to the complainant as deficiency in service.

G.III. Direct the respondent to pay an amount of Rs. 2,00,000/- to the complainant as compensation for harassment, mental agony, hardship and trauma on account of unfair trade practice adopted by the respondent.

G.III Direct the respondent to pay an amount of Rs. 1,00,000/- to the complainant as cost of the present litigation

37. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & 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. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.



H. Directions of the authority

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

- i. The respondent/promoter is directed to refund the amount i.e., Rs.63,99,409/- received by it from the complainant alongwith interest at the rate of 9.80% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

39. Complaint stands disposed of.

40. File be consigned to registry.

V.1-3
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

[Signature]
(Dr. K.K. Khandelwal)

Chairman

Dated: 29.07.2022