

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

Complaint no. :	6124 of 2019
Date of filing complaint:	12.12.2019
First date of hearing:	21.10.2020
Date of decision :	13.07.2022

Subhash Chand Tyagi R/o: 3A/129, Nehru Nagar, Ghaziabad- 201001	Complainant
Versus	
M/s Orris Infrastructure Private Limited R/o: C-3/260, Janakpuri, New Delhi- 110058	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Mayank Sethi proxy counsel for Shri. Satya Prakash Yadav (Advocate)	Complainant
Ms. Charu Rastogi (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Aster Court" Sec 85, Gurugram
2.	Project area	29.018 acres
3.	Nature of the project	Residential project
4.	DTCP License	39 of 2009 dated 24.07.2009 and valid up to 23.07.2024 99 of 2011 dated 17.11.2011 and valid up to 16.11.2024
5.	Name of the licensee	BE Office Automation Products Pvt Ltd and 6 others M/S Radha Estate Pvt Ltd and 2 Ors.
6.	RERA Registered/ not registered	Registered GGM/287/2018/19 dated 13.10.2018 and valid up to 30.06.2020
7.	Unit no.	704, 7th floor, Tower 3B (Page 25 of complaint)
8.	Unit measuring (carpet area)	1450 sq. ft. (Page 25 of complaint) Revised area- 1587 sq. ft.



		(Page 78 of complaint)
9.	Allotment letter	25.08.2010 (Page 52 of complaint)
10.	Date of execution of apartment buyer agreement	24.01.2011 (Page 23 of complaint)
11.	Sanctions of the plans	Not placed on record
12.	Commencement of construction	28.05.2011 [Receipt annexed with the complaint on page 60 of the complaint]
13.	Possession clause	Clause 10.1. The company based on its present plans and estimates and subject to all just exceptions, contemplates to complete the construction of the said building/said unit within the period of 36 months plus grace period of 6 months from the date of execution of the apartment buyer's agreement by the company or sanctions of the plans or commencement of construction whichever is later unless there shall be delay or failure due to reasons mentioned in clauses 11.2, 11.3 and clause 38 or due to failure of allottee to pay in time the price of the said unit... (emphasis supplied)
14.	Due date of possession	28.11.2014 Calculated from the date of commencement of construction Grace period of 6 months is allowed
15.	Total sale consideration	Rs. 41,22,200/- (Page 26 of complaint)

		Rs. 44,83,332/- (Annexure R7 at page 30 of reply)
16.	Total amount paid by the complainant	Rs. 44,08,694/- (As per SOA at page no. 31 of reply)
17.	Payment plan	Construction linked payment plan
18.	Occupation Certificate	18.10.2018 (Annexure R3 page 20 of reply)
19.	Offer of possession	20.10.2018 (Annexure R4 at page 22 of reply) 14.02.2018 for fit out (Page 108 of complaint)

B. Facts of the complaint:

3. That the respondent had launched a residential group housing project named "Aster Court" at Sector 85, Gurgaon, Haryana. The complainant herein is the purchased of flat no. 704, 7th floor, Tower 3B measuring 1450 sq. feet. The said flat was originally booked by one Lalit Kr. Jain on 23.06.2010 and was later transferred in favour of one Archana Singh. The agreement dated 24.01.2011 in respect of said unit was entered between respondent and Smt. Archana Singh which was later transferred in favour of present applicant.
4. That it pertinent to note that that the respondent illegally accepted the booking of the unit. It is submitted that the building plan was sanctioned on 14.10.2010 whereas booking was taken on 23.06.2010. Thereafter revised sanction plan was obtained on 10.04.2012 as the respondent had added 4 acres of more land in the project in question at the cost of delay in completion of project without and consent from buyers. This additional 4 acres of land

was added in the project by illegally diverting the money of buyers for personal gains which caused unnecessary delay at the cost and expense of the investment of complainant herein.

5. That as per the apartment buyer agreement dated 24.01.2011, the possession was supposed to be handed over to complainant within a period of 42 months including grace period of 6 months. However, despite expiry of the said promised period in July, 2014, the respondent failed to deliver the possession to the complainant herein.
6. That the total sale consideration was Rs. 41,22,200/-. This consideration was payable by complainant in instalments as agreed in the agreement, which was to become due as per stages of construction completed. The respondent in the month of August 2013 revised super area and raised illegal demand which was paid in December 2013.
7. As per clause 10.1 of agreement, the respondent was bound to handover possession of project within 42 months inclusive of grace period of 6 months which expired on July 2014, but the respondent failed to deliver physical possession of unit. The respondent demanded and successfully received 95% payment from complainant herein till March 2014. That thereafter, the respondent offered illegal possession without occupancy certificate which is completely illegal. On 08.10.2018, respondent obtained occupancy certificate from concerned Govt. agency i.e.

after a delay of almost 5 years from the promised date of handing over of possession.

8. That the respondent had cheated the complainant from very beginning and submitted false documents to induce the complainant to pay instalments which includes:
- The respondent sold flat without approvals.
 - Failed to provide timely possession of the unit.
 - Raised various illegal demands and extorted money from complainant.
 - Increased super area illegally without any justification.

C. Relief sought by the complainant:

9. The complainant has sought following relief(s):
- Direct the respondent to refund of entire amount of Rs. 41,22,200/- paid by the complainant to the respondent towards the unit purchased along with delay interest @ 18% p.a. form the date of payments made till actual date of realization
 - Direct to pay cost of litigation be awarded in favour of complainant as against the respondent.

D. Reply by respondent:

The respondent by way of written reply dated 12.08.2021 made the following submissions:

10. That without prejudice to the aforementioned submissions, it is submitted that even otherwise the complainant cannot invoke the

jurisdiction in respect of the unit allotted to the complainant, especially when there is an arbitration clause provided in the flat 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. The apartment buyer's agreement attached by the complainant himself is containing the arbitration clause 50.

11. The complainant had approached the respondent and had expressed their desire to purchase apartment from the respondent after thorough investigation and site surveys. the complainant was, thereafter, was endorsed the aforementioned unit in question and the complainant being the second allottee to the unit in question agreed to all the terms and conditions. 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. That despite the slow-down in the construction work and difficulty in arranging the sufficient water required for the construction, no additional money has been demanded from the allottees and complainant,

even though the cost of the project has increased because of the unavailability of water in the adjoining areas of Gurgaon.

12. That it is further submitted that, the land so aggregated for the above said project was contributed by a consortium of land holders, who contributed around 19 acres. That one BE Office Automation Products (P) Ltd ("BE" for short) had also approached the respondent with 5.8 acres of land which was contiguous with the land already aggregated by the respondent and BE requested the respondent to make the said 5.8 acres of land owned by BE a part of the land already aggregated by the respondent, i.e. 19 acres. Accordingly, a collaboration agreement dated 22.10.2007 was executed between the respondent and BE setting out the terms and conditions of the collaboration. The said collaboration agreement also provided for the area entitlement of both the parties in the area to be developed on the 25.018 acres and the same was to be calculated on basis of saleable area attributable to 5.8 acres as contributed by BE. However, the land contributor i.e. BE indulged in frivolous litigation and put restraints in execution of the project and sale of apartments in the following manner:

- a. That as per the collaboration agreement, it was agreed between BE and the respondent that the total saleable area relating to the said land of 5.8 acres would be shared in the ratio of 1/3: 2/3, 1/3rd going to BE and 2/3rd going to the respondent. That simultaneous to the collaboration agreement, BE executed an irrevocable General Power of



Attorney dated 22.10.2007 in favour of the respondent for various purposes related to development of the said project.

- b. That in January 2011, the respondent in pursuance of its contractual obligations invited BE to identify the apartments that BE was interested to make part of its entitlement under the collaboration agreement. Accordingly, the representatives of the respondent and BE met on January 24, 2011 and in pursuance of the same BE identified 82 apartments that would form part of BE's entitlement under the collaboration agreement.
- c. That soon after the development of the said projects began, the part land contributor, BE, started indulging in frivolous litigation against the respondent. That after the aforesaid agreement with BE in 2007, the respondent had acquired 4-5 acres additional land by the virtue of which more flats could have been constructed. BE, by misrepresenting the collaboration agreement raised a claim that it was entitled to proportionate share in the construction on the additional land acquired by the respondent. That after the aforesaid event BE moved court and filed an application under section 9 of the Arbitration and Conciliation Act, 1996 before the Ld. Additional District and Sessions Judge, Gurgaon. The matter was heard, and an order dated 20.11.2014 was passed by the Ld. ADJ.
- d. That the Ld. ADJ granted a blanket stay in favour of BE and against the respondent, whereby the respondent was



restrained from creating third party interest in respect of any apartments, villas and commercial areas till the matter could be decided finally by the arbitrator. The respondent was also restrained from receiving any money in respect of sale of apartments, villas and commercial sites etc. or club membership charges or in any other form from any person till the adjudication of the dispute.

- e. That the abovementioned stay order caused immense hardship to the respondent as the restraint on alienation of the respondent's share of flats in the said project led to funds for the construction and development of the above projects getting held up as the respondent could not alienate its interest in the said flats nor could it collect money for flats already sold under construction linked plans and the pace of the construction slowed down considerably. That the above said order also led to a precarious cash flow position of the respondent. That selling of interest in the flats, prior to construction, to raise capital for construction and development is standard practice in the real estate sector.
- f. That after the above said stay order was passed, the respondent took further legal steps and filed F.A.O. No. 9901 of 2014 (O&M) whereby it was brought to the notice of the Hon'ble Punjab and Haryana High Court that the Ld. ADJ had committed an illegality and misdirected itself in not referring to the minutes of the meeting dated 24.01.2011 whereby the share and number of flats of BE had already been identified



and at best the injunction should have been limited to BE's share in the said project. That the Hon'ble High Court was pleased to vacate the stay by its order dated 08.12.2014 order and limit the injunction to BE's agreed share in the project.

- g.** That thereafter the respondent made serious efforts, and in order to resolve the disputes, Hon'ble Mr. Justice Chandramauli Kumar Prasad (Retd.), a former judge of the Hon'ble Supreme Court of India was appointed as Sole Arbitrator to adjudicate and decide the dispute between the two parties by the Hon'ble Punjab and Haryana High Court vide order dated 30.01.2015.
- h.** That the Hon'ble arbitrator commenced the arbitral proceedings and the process was going on for the said arbitration at New Delhi. The arbitrator passed interim award dated 19.08.2015 whereby the respondents stand was upheld, and the respondent was permitted to deal with their own share i.e., 2/3 share in the project as relatable to the land contributed by BE.
- i.** That in the meanwhile, BE filed a contempt petition, C.O.C.P. No. 1851 of 2015, alleging contempt of court of the Additional District Judge, Gurgaon by the respondent so as to delay the project and harass the respondent's directors/officials.
- j.** That the arbitration proceedings concluded with final award dated 12.12.2016 passed by the Ld. Single Arbitrator, Mr. Justice Chandramauli Kumar Prasad (Retd.), whereby



contentions of the respondent were upheld and the share of BE was restricted to the original 82 flats selected by it. That the above said award goes on to show that the respondent was subjected to constant and frivolous litigation by BE through the entire construction and development period which caused immense hardship to the respondent and resulted in loss of valuable time and resources which resulted in delay in completion of the said project.

- k. That even after the arbitral award was passed in the respondent favour, BE was not inclined to put an end to the frivolous litigation that it was pursuing against the respondent. BE challenged the arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 as also made a stay application before the competent court. The said stay application of BE was contested by the respondent and was dismissed vide order dated 20.03.2017.
- l. That, BE, upon the dismissal of its stay application on 20.03.2017, approached the Divisional Commissioner, Gurugram by filing an application. That the Divisional Commissioner, Gurugram passed an extra-jurisdictional order staying the alienation of property in the said project vide order dated 28.03.2017. The respondent challenged the said order before the Hon'ble Punjab and Haryana High Court in CWP No. 9075/2017 wherein vide order dated 01.05.2017, the said impugned order was stayed. From the events as mentioned above, the only inference that can be drawn is that



BE tried to create multiple hurdles in the way of the respondent completing its project on time through frivolous litigation. However, the respondent triumphed every time as can be seen from the fact that various judicial forums decided in favour of the respondent. That the respondent further submits that court proceedings certainly took a substantial amount of time during which the respondent was restrained qua even receiving the sale consideration/ selling the units in the project which resulted in delay. These kinds of delays are covered by and envisioned under Clauses 39 and 11.1, hence the respondent is entitled to reasonable extension of time for construction.

m. That in the meanwhile, the said C.O.C.P. No. 1851 of 2015 (Contempt Petition) as mentioned in paragraph (i) above was eventually dismissed by the Hon'ble High Court of Punjab and Haryana vide judgement dated 15.03.2017. However, it is pertinent to note that the respondent was kept under the constant threat of an adverse legal ruling if the contempt petition were to succeed which further put constraints on alienation of flats in the said project thereby depriving the respondent of valuable capital which was needed to finish the ongoing development and construction of the said projects.

13. That it is pertinent to note that the respondent was at all time was in proper communication with the complainant and the complainant was duly informed about the progress of the project and unit in question very promptly and thus, on 19.12.2017 the

respondent through a letter had communicated to the complainant that the respondent had applied for OC and the respondent also offered the complainant possession for the fit out of the unit in question.

14. That it will not be out of context to mention here that the complainant vide email dated 05.05.2018 was also communicated by the respondent that part OC has already been received by the respondent and the remaining is also expected soon. It is submitted that the complainant had duly replied to the said email on 05.05.2018 itself stating that he would like to take possession of the unit in question as soon as the OC is received and would like to execute the conveyance deed at the same time.
15. That even otherwise it is humbly submitted here that the project in which the unit in question is situated is completely ready and that the respondent has also received OC for the said unit on 18.10.2018.
16. That it is further submitted that immediately after receiving the OC, the respondent has offered possession of the unit in question to the complainant vide letter dated 20.10.2018 and requested the complainant to clear the requisite dues and complete the documentation formalities.
17. That on 14.03.2019 the respondent sent a letter to the complainant mentioning that on numerous occasions such as 12.12.2018, 15.01.2018 and 11.03.2018 the respondent had

communicated with the complainant to complete the formalities in lieu towards taking possession of the unit in question.

18. That the complainant had always been in communication with the representatives of the respondent and one such instance can be pointed out through email dated 07.07.2019 wherein the complainant had mentioned that since he is NRI he will be travelling to India in August 2019 to finalize the payments and possession and also on 24.08.2019 the complainant requested for the information from the representative of the respondent company what shall be the procedure of adding the name of the complainant's daughter and the charges if any in the said allotment. The representative of the respondent had replied the same promptly to which the complainant responded on 27.08.2019, that he would visit in September 2019 and finish all the transaction per se the unit in question along with execution of the conveyance deed.
19. That further the issue of taxation raised by the complainant in the present case is also not tenable in the eyes of the law, as the taxes are being imposed by the respondent as per the Tax policy of the government and the same is in no control of the respondent.
20. That it is pertinent to note that the complainant who is seeking refund through this present complaint, was not expecting that after the email exchanges between the complainant and the respondent, the respondent will receive OC soon as against the communication in May 2018 wherein the complainant had

promised and assured the respondent that the complainant is awaiting the OC and immediately after the receipt of OC, the complainant will take the possession of the unit in question and would fulfil the requirements of executing conveyance deed at the same time. Further, the last communication between the complainant and the respondent took place on 29.08.2019 wherein the complainant was all ready to make his daughter the co-allottee.

21. It is further submitted that the erstwhile signatory of the buyer's agreement, i.e., Ms. Archana Singh is the wife of Mr. Vishvendra Singh who is the SPA holder of the complainant and filed in order to defame the answering respondent despite the fact that the offer of possession has already been made and the present complaint was filed after receipt of the OC and issuance of the offer of possession.
22. It is submitted that during 2013, the second allottee was making the payments and as per the apartment buyer's agreement, clause 1.4, there can be change in the super area of the unit depending upon the completion of the construction of the project. The relevant portion of the clause 1.4 is observed as: -

"It is made clear by the Company and the Allottee agrees that the sale price of the said Apartment shall be calculated on the basis of its Super Area and that the Super Area stated in the Apartment Buyer Agreement is tentative and is subject to change till the construction of the said project is complete.....The total price payable for the said Apartment shall be recalculated upon confirmation by the company of the final Super Area of the said Apartment and any increase or reduction in the

Super Area of the said Apartment shall be payable or refundable, as the case may be, without any interest at the same rate per square feet as agreed in clause (1.2) of this Apartment Buyer Agreement.”.

23. It is submitted that the complainant had delayed in making payments and the same can be seen from the statement of accounts dated 14.07.2020. It is submitted that at no circumstances ever, the answering respondent ever offered possession to the complainant illegally, the occupation certificate was obtained on 18.10.2018 and possession was offered on 20.10.2018 which is completely valid and legal.
24. It is further submitted that the delay in handing over possession were due to the reasons beyond the control of the respondent but the respondent did not run away from its fiduciary duty of completing the project and unit in question and obtaining the OC. It is also submitted that the respondent has never raised any illegal demands from the complainant on the contrary, the complainant by filing this frivolous complaint for refund when the possession has already been offered on October 2018, wants to extort huge monies from the respondent. It is humbly submitted that the clause 1.4 of the apartment buyer agreement mentions that there can be a change in the super area of the unit till the time the construction of the project is not completed and the change in the super area could be increased or reduced and the amount payable or refundable would be calculated at the time of handing over the possession and the same was informed to the complainant on offering possession.

25. Copies of all the relevant documents have been filed and placed on 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.

E. Jurisdiction of the authority:

26. The plea 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

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 completed territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

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.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent:

F.1 Objections regarding the complaint in breach of agreement for non-invocation of arbitration:

27. The respondents have raised an objection that the complainant has not invoked the arbitration proceedings as per provisions of buyer's agreement which contain a specific provision regard initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated with regard arbitration in the buyer's agreement:

50. All or any disputes arising out or touching upon or in relation to this agreement including the interpretation and validity of the terms thereof and the respective rights and obligation of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration

proceedings shall be governed by the Arbitration & Conciliation Act 1996 or statutory amendments /modifications thereof for the time being in force. The arbitration proceedings shall be held at appropriate location in Delhi by a sole arbitrator who shall be held at the corporate office of the company alone at Gurgaon stated hereinabove by a sole arbitrator who shall be nominated by the company. The allottee hereby confirms that he/she shall have no objection to this appointment. The courts at Gurgaon and the Punjab and Haryana High Court at Chandigarh alone shall have the jurisdiction.

28. It is contended on behalf of respondents that as per terms and conditions of the Agreement duly executed between the parties, it was specifically mentioned that in the eventuality of any dispute, the same shall be settled by arbitration proceedings. However, the Authority is of the view that its jurisdiction cannot be fettered by the existence of any arbitration clause in Buyer's agreement. It may be noted that section 79 of the Act, 2016 bars the jurisdiction of civil courts about any matter falling within the purview of the Authority or the 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 no in derogation of the provision of any other law for the time being in force. Further, the Authority places reliance on catena of judgments of the Hon'ble Supreme Court, particularly in **National Seeds Corporation Limited Vs M. Madhusudhan Reddy & Anr(2012) 2 CC 506, Emmar MGF Land and Ors Vs Aftab Singh and Ors in Civil Appeal 23512/23513 of 2017 decided on 10.12.2018** and wherein it was held that the remedies provided under the Consumer Protection Act, 1986 are in addition to and not in derogation of other laws in force. It was

also held that under Article 141 of the Constitution of India, the law declared the Supreme Court shall be binding on all the courts within the territory of India. So, in view of law laid down in these cases, the Authority is bound by the same and cannot refer the parties to arbitration, even if the agreement between the parties had an arbitration clause. Thus, the Authority has no hesitation in holding that it has the jurisdiction to entertain the complaint and the dispute does not require to be referred to arbitration.

F.2 Objection regarding default in making payments due by the complainant:

29. The respondent has alleged that the complainants having breached the terms and conditions of the agreement and contract by defaulting in making timely payments. Further the above-mentioned contention is supported by the builder buyer agreement executed between both the parties. Clause 5 provides that timely payments of the instalments and other charges as stated in the schedule of payment is essence of the agreement.

But the respondent cannot take advantage of this objection of timely payments being himself at wrong firstly by still not obtaining the occupation certificate and offering the possession of the unit despite being delay of 5 years 14 days and the complainants have already paid more than 90% of the total sale consideration till date. Therefore, the respondent itself failed to complete its contractual and statutory obligations. Moreover,

there is no document on file to support the contentions of the respondent regarding delay in timely payments.

G. Entitlement of the complainant for refund:

G.1 Direct the respondent to refund of entire amount of Rs. 41,22,200/- paid by the complainant to the respondent towards the unit purchased along with delay interest @ 18% p.a. form the date of payments made till actual date of realization.

30. Vide allotment letter dated 25.08.2010, the complainant was allotted the subject unit by the respondent for a total sale consideration of Rs. 41,22,200/-. A buyer's agreement dated 24.01.2011 was executed between M/s Orris Infrastructure Pvt. Ltd. and the complainant. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 10.1 of the buyer's agreement, the developer proposes to hand over the possession of the apartment **within the period of 36 months plus grace period of 6 months from the date of execution of the apartment buyer's agreement by the company or sanctions of the plans or commencement of construction whichever is later.** The date of commencement of construction of the project is 28.05.2011 as per receipt annexed with the complaint at page 60 of the complaint. Further the sanctions of the plans of the project were not placed on record and six months of

grace period is allowed so the possession of the booked unit was to be delivered on or before 28.11.2014. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 24.01.2011 executed between the parties.

31. Section 18(1) of the Act of 2016 is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.
32. The due date of possession as per agreement for sale as mentioned in the table above is **28.11.2014 and there is delay of 4 years approximately** on the date of filing of the complaint as the respondent has already offered the unit on 20.10.2018 after obtaining occupation certificate from the competent authority on 18.10.2018. The allottees in this case have filed this application/complaint on 12.02.2021 after possession of the unit was offered to them after obtaining occupation certificate by the promoter. The allottees never earlier opted/wished to withdraw

from the project even after the due date of possession and only when offer of possession was made to them and demand for due payment was raised, then only filed a complaint before the authority. The occupation certificate /part occupation certificate of the building/towers where allotted unit of the complainant is situated has been received. Section 18(1) gives two options to the allottee if the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

- i) Allottee wishes to withdraw from the project; or
- ii) Allottee does not intend to withdraw from the project

33. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the allottee has tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of

every month of delay till the handing over of possession and allottee's interest for the money he has paid to the promoter are protected accordingly.

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

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed

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). This judgement of the Supreme Court of India recognized unqualified right of the allottee and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified

therein. But the allottees have failed to exercise this right although it is unqualified one. They have to demand and make their intentions clear that the allottee wishes to withdraw from the project. Rather tacitly wished to continue with the project and thus made them entitle to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottee in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.

36. In the case of *Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.2021*, some of the allottees failed to take possession where the developer has been granted occupation certificate and offer of possession has been made. The Hon'ble Apex court took a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate. However, the developer was obligated to pay delay compensation for the period

of delay occurred from the due date till the date of offer of possession was made to the allottees. As per proviso to sec 18(1)

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 possession, at such as rate as may be prescribed.

37. In case allottee wishes to withdraw from the project, the promoter is **liable on demand** to the allottee return of the amount received by the promoter with interest at the prescribed rate if promoter fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words **liable on demand** need to be understood in the sense that allottee has to make his intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready, then impliedly he has agreed to continue with the project i.e. he does not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and allottee shall be paid by the promoter interest at the prescribed rate for every month of delay. This view is supported by the judgement of Hon'ble Supreme Court of India in case of of *Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.(Supra)* and also in consonance with the judgement of Hon'ble Supreme Court of India in case of *M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors., .(Supra)*

38. The authority hereby directs that the allottees shall be paid by the promoter an interest for every month of delay till actual handing over of possession or offer of possession (after obtaining occupation certificate from the competent authority) plus two months whichever is earlier at prescribed rate i.e. the rate of 9.70% (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 within the timelines provided in rule 16(2) of the Haryana Rules 2017 *ibid*. Thus, the complainant-allottee is obligated to take the possession of the allotted unit after making outstanding payments along with prescribed rate of interest since its construction is complete and possession has been offered after obtaining of occupation certificate from the competent authority. However, the developer is obligated to pay delay interest for the period of delay occurred from the due date of possession i.e., 28.11.2014 till the date of offer of possession (20.10.2018) plus two months i.e. 20.12.2018.

G.2 Legal expenses:

39. The complainant is claiming compensation under the present relief. The Authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee(s) can claim. For claiming compensation under sections 12,14,18 and Section 19 of the Act, the complainant may file a separate

complaint before the adjudicating officer under Section 31 read with Section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority:

40. 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 section 34(f) of the Act of 2016:

- i) The relief for the refund of the deposited amount made by the complainant with the respondent is declined. However, the complainant-allottee is obligated to take possession of the allotted unit after making outstanding payments along with prescribed rate of interest since its construction is complete and possession has been offered after obtaining of occupation certificate from the competent authority. The developer is also directed to pay delay interest for the period of delay occurred from the due date of possession i.e., 28.11.2014 till the date of offer of possession (20.10.2018) plus two months i.e. 20.12.2018.
- ii) The arrears of such interest accrued from 28.11.2014 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order.
- iii) The rate of interest chargeable from the complainant/allottee by the promoter, in case of default shall be at the prescribed




rate i.e., 9.70% which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

- iv) The complainant is directed to take possession of the subject unit, within a period of two months after payment of outstanding dues, if any after adjustment of interest for the delayed period.
- v) The respondent would not charge anything which is not part of plot buyer's agreement. The holding charges shall not be charged by the promoter at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

41. Complaint stands disposed of.

42. File be consigned to the Registry.


(Vijay Kumar Goyal)
Member


(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.07.2022