

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

Complaint no. :	678 of 2021
Date of filing complaint:	12.02.2021
First date of hearing:	10.05.2021
Date of decision :	13.07.2022

Rajiv Sethi R/o: 17/104, 2nd floor, Vikram Vihar, Lajpat Nagar-IV, New Delhi-110024	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 (Advocate)	Complainant
Ms. Charu Rastogi (Advocate)	Respondent

ORDER

- 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 Premier" 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.	302, 3rd floor, Tower 3D [Page 28 of the complaint]
8.	Unit measuring (carpet area)	1450 sq. ft. [Page 28 of the complaint] Revised area-1595 sq. ft. [Annexure C at page no. 53 of the

		complaint] Further Revised area- 1587 sq. ft. [Page no. 54 of the complaint]
9.	Date of execution of apartment buyer agreement	26.03.2011 [Annexure A at page 25 of the complaint]
10.	Sanctions of the plans	April 2012 [As per email dated 19.02.2018 at page no. 71 of the complaint]
11.	Commencement of construction	02.03.2011 [As per Intimation cum demand letter dated 09.08.2013 at page 55 of the complaint]
12.	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)
13.	Due date of possession	October 2015 [Calculated from the date of sanctions of the plans i.e. April 2012] Grace period of 6 months is allowed *Note: The due date of possession for handing over of

		possession has been advertently recorded wrong in the proceeding of the day dated 13.07.2022
14.	Total sale consideration	Rs.52,90,900/- [Page 28 of the complaint] Revised sale consideration- Rs.58,74,090/- [Annexure C at page no. 53 of the complaint] Further Revised sale consideration- Rs.58,34,954/- [Page no. 54 of the complaint]
15.	Total amount paid by the complainants	Rs.57,12,002/- [As per statement of account dated 17.08.2021 at page no. 34 of the reply]
16.	Payment plan	Construction linked payment plan [Page 50 of the complaint]
17.	Occupation Certificate	06.04.2017 [Annexure D at page 56 of the complaint]
18.	Offer of possession	11.04.2017 [Annexure B at page no. 23 of the reply]

B. Facts of the complaint:

- That the complainant had booked flat no. 302, in Tower 3D, measuring 1450 sq. ft. in the said project. In furtherance of the same, a buyer's agreement dated 26.03.2011 was also executed between the parties. The base price agreed was Rs. 2,959 per sq. feet which works out to Rs. 42,90,550/-. The total sale consideration of the said unit was Rs. 52,90,900/- inclusive of

utility charges, PLC, EDW, IDC and club membership, in the buyer's agreement.

4. That the complainant availed housing loan to pay the installments as and when they became due from HDFC. The respondent issued a letter to HDFC dated 29.07.2011, stating that

"We confirm that we have obtained necessary permission/approvals/sanctions for construction of the said building from all the concerned competent authorities and the construction of the building as well as of the flat in accordance with the approved plans, We have not made any subdivisions in the flat after the plans have been approved by the concerned authority."

5. That the respondent vide letter dated 11.07.2013 without any justification increased the area of the said unit from 1450 sq. feet to 1595 sq. feet as the complainant had already paid Rs. 50,54,224/- before this date, this was nefarious plan of respondent to extort Rs. 4,99,090/- from complainant further. Thereafter, vide letter dated 09.08.2013, the area of the unit was revised to 1587 sq. feet. The excess amount being extorted reduced to Rs. 4,71,554/-.
6. That as per clause 1.4 of agreement, the respondent had sold the apartment on the basis of super area and the super area stated in the apartment buyer's agreement was tentative and subject to change till the construction of the said project was complete. The said clause further stated that the respondent could claim for change in super area only after completion of the project and getting occupancy certificate from competent authority whereas the respondent claimed the increase in super area in July 2013. It

is pertinent to mention here that the accused received the occupancy certificate from competent authority on 06.04.2017.

7. That the respondent had demanded and collected Rs. 48,65,709/- towards payment of sales consideration out of total sales consideration of Rs. 52,90,090/- already till August 2013. That is 91.96% was demanded and paid before mid of 2013. The Possession letter was accompanied with final statement of complainant's account as on 22.07.2016.
8. That the respondent in order to avoid payment of delay construction penalty, offered possession of the unit to complainant without occupation certificate. Fraudulently terming such illegal offer of possession as "possession for fit outs".
9. That the said statement of account dated 22.07.2016 showed that complainant had paid all instalments to the respondent as and when demanded by them amounting to Rs. 54,51,121/- in case of delay, I had paid interest as demanded by them amounting to Rs. 50,000/- against a demand of Rs. 85,011/-.
10. That the complainant received an email dated 09.08.2016 from Reena Gulati from the side of respondent informing that:
 - a. Handing over of units have already started in the said project and families have shifted.
 - b. Forcing me to take possession of the unit.
 - c. Denied inspection of said unit until I pay balance amount.Then by email dated 19.08.2016, informed that interim

OC process has been completed, vide email dated 31.08.2016 enquired the meaning of interim OC, this was vaguely answered by email dated 02.09.2016.

11. That as per clause 10.1 of the complainant's agreement with the respondent the possession of the unit ought to have been offered and handed over within 42 months which includes 6 months grace period, that is by 27.07.2014. Therefore, by email dated 17.05.2017 complainant demanded the delay construction penal interest which was Rs. 26,18,329/-. This email lead of various email exchanges with the respondent.
12. It is pertinent to mention that vide email dated 19.02.2018, the respondent informed that sanction was received in April 2012 and OC process was ongoing in July 2015. Whereas the respondent had claimed vide letter dated 29.07.2011 to HDFC Ltd. that it has received all sanctions. The respondent had demanded and took first installment at the time of registration on January 2011. The accused had claimed second instalment for commencement of construction on 02.03.2011 and within 2011 itself the respondent had demanded 6 installments amounting to Rs. 33,63,377/- for the work up to casting of 2nd floor roof slab, this comes to 63.5% of agreement price.
13. It is pertinent to mention here that the email dated 23.05.2018 from the respondent, the respondent stated that the increase in super area is due to service/common area that is the increase in contravention of clause 9.2 of the agreement.

14. The as per clause 14.3 the respondent can decide to apply to receive and distribute bulk supply of electricity and get the permission from competent authority, then the allottee undertakes to pay on demand to the company, proportionate shares as determined by the company of all deposits and charges paid/payable by the company or the maintenance agency/company to DHBVNL/Haryana Vidut Prasaran Nigam Ltd./any other body commission/regulatory/licensing authority constituted by the Government of Haryana. Rs. 2,38,050 is being charged by the respondent for electricity installation charges. Respondent vide email dated 23.05.2018 informed that this cost includes electric work, Transformer installation, HT panels, ET Panels, Lighting fixtures, meter charges, meter installation charges, power backup charges etc. This again is therefore, illegal charges being forced upon the complainant.

C. Relief sought by the complainant:

15. The complainant has sought following relief(s):
- i. Direct the respondent to refund an amount of Rs.54,51,121/- alongwith interest of delay at 18% p.a. or at prevailing rate of interest.
 - ii. Direct to pay litigation expenses.

D. Reply by respondent:

The respondent by way of written reply dated 26.03.2021 made the following submissions:

16. That the builder buyer agreement between the parties took place on 23.06.2011 wherein as per clause 10.1 of the buyer agreement, the respondent was supposed to hand over the possession within a period of 36 months from the date of the signing of agreement or within 36 months plus 6 month's grace period i.e. altogether 42 months from the date of execution of apartments buyers agreement by the company or sanctions of plans or commencement of construction whichever is later.
17. That further, as per clause 1.4 and 9.2 of the buyer's agreement, it was agreed between the parties that the super area as mentioned in the buyer's agreement is tentative, subject to change at the time of obtaining occupation certificate and handing over possession and any major alteration, wherein there is change in the super area of more than 10% shall be based upon prior approval from the allottee. Thus, when the area was revised which though was less than 10%, the said fact was duly communicated to the complainant.
18. Orders passed by Hon'ble High Court of Punjab and Haryana wherein the Hon'ble Court has restricted use of groundwater in construction activity and directed use of only treated water from available sewerage treatment plants. However, there was lack of number of sewage treatment plants which led to scarcity of water and further delayed the project. That in addition to this, labour rejected to work using the STP water over their health issues because of the pungent and foul smell coming from the STP water

as the water from the S.T.P' s of the State/Corporations had not undergone proper tertiary treatment as per prescribed norms.

19. That not only this, one of the Collaborator/ Landowner of land in the project – BE Automation Products (P) Ltd. who was the owner of only 5.8 acres of land in the entire project. BE indulged in frivolous litigation and put restraints in execution of the project and sale of apartments. BE filed cases against the company in each and every forum to create nuisance. The details of which are as narrated below:

- 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.

- That as per the collaboration agreement, it was agreed between BE and the respondent that the total saleable area relatable 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 ("GPA" for short) dated 22.10.2007 in favour of the respondent for various purposes related to development of the said project.
- 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.
- 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

- 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.
- 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.

- 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.
- 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.
- 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 respondent 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.

- 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.
- 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.
- 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.

- 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. 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 from 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.

- 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.
20. That from the facts as narrated above it becomes quite evident that the BE Automation Products Pvt Limited is also responsible for the delay in the construction of the project on account of various frivolous litigation initiated by the same. That it is also pertinent to mention here that BE Automation Products Pvt Limited falls under the definition of promoter being one of the landowners and is equally responsible for any delay. That the respondent would also like to point out that this Hon'ble Authority has already taken a consistent view that landowners falls within the definition of the promoter and are held to be the persons who causes to construct such project as defined under section 2 (zk) of the Act and the same view has to be followed by the Doctrine of Precedents".

21. That despite all these litigations and obstructions, the unit in question was made ready and available for the complainant and the complainant was offered possession for fit outs of the unit in question on 22.07.2016.
22. That the respondent had applied for occupation certificate vide application dated 20.11.2014 and the OC was duly received by the respondent on 06.04.2017
23. That immediately after the receipt of the OC, the complainant was offered possession vide letter dated 11.04.2017 and requested the complainant to comply with all the possession formalities and execution of the conveyance deed and thereafter, several reminders have been sent to the complainant after 11.04.2017, such as on 05.05.2017, 05.06.2017, 23.03.2018, 11.04.2018, 12.12.2018 and 16.12.2019 so that the complainant visits and take the possession of the unit in question,
24. That not only this, the complainant has been in proper communication with the respondent through e-mails also wherein the talks for some resolution/ settlement be initiated vide emails dated 18.10.2018, 14.11.2018, 03.06.2019, 06.06.2019 and 15.06.2019.
25. That it is submitted that as per the statement of account dated 17.08.2021, the total cost of the unit is Rs. 63,09,583/- and complainant has paid an amount of Rs. 57,12,002/-. The offer for possession for fit outs dated 22.07.2016 was sent to the complainant.

26. It is submitted that there is no connection between the sanctions obtained for construction of the project and obtaining the OC of that project and therefore, the respondent had correctly claimed to the HDFC bank when complainant required loan that the respondent had obtained all sanctions. It is further submitted that the email dated 19.02.2018 correctly mentions that the offer of possession is made in the tower-based manner and when turn for tower of the complainant came, the complainant was offered possession. Also, that the application to obtain OC was given in November 2014 and therefore, the process of obtaining OC was ongoing.
27. It is submitted that the electricity installation charges, and supply of electricity are two different things. When a particular item is installed, e.g., a wifi router, the company charges for its installation and the buyer pays the installation charges as well as the charges for the consumption of internet as per the applicable plans available. Similarly, the electricity installation is a different process and supply of bulk electricity is different process.
28. 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:

29. 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 there under.

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. Entitlement of the complainant for refund:

F.1 Direct the respondent to refund an amount of Rs 54,51,121/- alongwith interest of delay at 18% p.a. or at prevailing rate of interest.

30. The complainants were allotted the subject unit by the respondent for a total sale consideration of Rs. 52,90,000/-. A buyer's agreement dated 26.03.2011 was executed between M/s Orris Infrastructure Pvt. Ltd. and the complainants. 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 02.03.2011 as per Intimation cum demand letter dated 09.08.2013 at page 55 of the

complaint. Further the sanctions of the plans of the project was approved in April 2012 as per email dated 19.02.2013 at page no. 71 of the complaint and six months of grace period is allowed so the possession of the booked unit was to be delivered on or before October 2015. 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 26.03.2011 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 **October 2015 and there is delay of 2 years approximately** on the date of filing of the complaint as the respondent has already offered the unit on 11.04.2017 after obtaining occupation certificate from the competent authority on 06.04.2017. 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 complainants 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-allottees are 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., October 2015 till the date of offer of possession (11.04.2017) plus two months i.e. 11.06.2017.

F.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 complainants 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.

G. 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 are 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., October 2015 till the date of offer of possession (11.04.2017) plus two months i.e. 11.06.2017.
- ii) The arrears of such interest accrued from October 2015 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