# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

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| **Complaint no.:** | **753 of 2021** |
| **First date of hearing:** | **15.04.2021** |
| **Date of decision:** | **06.07.2022** |

Ashok Kumar
**R/o** D-176, Freedom Fighters Enclave, Neb Sarai, South Delhi, IGNOU Delhi-110068 **Complainant**

Versus

1. Indentity Buildtech Pvt. Ltd.
   **Office address**: 110, Indraprakash, 21, Barkhamba Road, New Delhi- 110001
2. Ansal Housing Ltd.
   **Office address**: 606, 6th Floor, Indra Prakash, 21 Barakhamba Road, New Delhi-110001 **Respondents**

**CORAM:**
Dr. K.K. Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

**APPEARANCE:**
Shri. Anuruddha Singh (Advocate) Complainant
Smt. Meena Hooda (Advocate) Respondents

## ORDER

1. The present complaint dated 23.02.2021 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 as provided 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 unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

| Sno. | Heads | Information |
|---|---|---|
| 1. | Project name and location | "Ansal Highland Park", Sector-103, Gurugram |
| 2. | Project area | 11.7 acres |
| 3. | Nature of the project | Residential |
| 4. | DTCP license no. and validity status | 32 of 2012 dated 12.04.2012 valid upto 11.04.2020 |
| 5. | Name of licensee | M/s Identity Buildtech Pvt. Ltd.<br>M/s Agro Gold Chemicals India LLP |
| 6. | RERA registration details | Registered<br>Vide registration no. 16 of 2019 dated 01.04.2019 valid up to 30.11.2021 |
| 7. | Unit no. | EDNBG-1201<br>[annexure A, pg. 14 of complaint] |
| 8. | Unit measuring | 1940 sq. ft.<br>[annexure A, pg. 14 of complaint] |
| 9. | Date of execution of flat buyer agreement with original allottee | 25.06.2013<br>[annexure A, pg. 11 of complaint] |
| 10. | Transfer of unit in name of complainant | 01.08.2013<br>[pg. 33 of complaint] |
| 11. | Payment plan | Construction link |
| 12. | Basic sale consideration as per BBA at page 14 of complaint. | ₹ 95,24,003.20/- |
| 13. | Total sale consideration as per customer ledger dated | ₹ 1,03,78,842.20/- |

| | | |
|---|---|---|
| | 27.11.2020 at page 38 of complaint | |
| 14. | Total amount paid by the complainant as per customer ledger dated 27.11.2020 at page 36 of complaint. | ₹ 45,61,456/- |
| 15. | Possession clause | ***Clause 31.***<br>***31.*** *The developer shall offer possession of the unit any time,* ***within a period of 48 months from the date of execution of the agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later*** *subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be a grace* ***period of 6 months allowed to the developer over and above the period of 48 months*** *as above in offering the possession of the unit.*<br>*(Emphasis supplied)*<br>[annexure A, pg. 20 of complaint] |
| 16. | Date of commencement of construction as per customer ledger dated 27.11.2020 | 18.04.2013<br>[pg. 38 of complaint] |
| 17. | Due date of possession | 25.12.2017<br>(**Note:** 48 months from date of agreement i.e., 25.06.2013 being later + 6 months grace period allowed being unqualified) |
| 18. | Delay in handing over possession till the date of filling of this complaint i.e., 23.02.2021 | 3 years 1 month 29 days |
| 19. | Offer of possession | Not offered |
| 20. | Status of the project | Ongoing |

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| 21. | Occupation certificate | Not Obtained |

## B. Facts of the complaint

3. The complainant has pleaded the complaint on the following facts:

a. That M/s. Axiom Landbase Pvt. Ltd, a company registered under the companies Act, 1956 booked a unit bearing unit no. EDNBG-1201, 3BHK having super area admeasuring 1940 sq. ft. in the project named "ANSALS HIGHLAND PARK" situated at Sector- 103, Gurugram.

b. That after the booking of the unit an apartment buyer's agreement has been executed on 25th June 2013 between the respondent no. 1 and M/s. Axiom Landbase Pvt. Ltd. That as per clause 31 of apartment buyer's agreement, the respondent no. 1 promised to deliver the flat within 54 months (including six months of grace period) but failed to do so. The date of possession ended on 25th December 2017.

c. That M/s. Axiom Landbase Pvt. Ltd. applied for the transfer of the flat in the name of the complainant on 08th July 2013. The transfer application of M/s. Axiom Landbase Pvt. Ltd. was duly accepted by the respondent no. 1 and the above said unit has been transferred in favor of the complainant vide transfer confirmation letter dated 1st August 2013.

d. That it is pertinent to mention here that till date the complainant has paid almost **44 percent** of the total cost of the unit. That the complainant has paid a total sum of **Rs. 45,61,456/-**. It has been more than three years that the respondent no. 1 is misleading the complainant and other allottees of the project and providing several milestones to complete the project.

e. That it is surprising that the complainant has received a demand letter dated 13th December 2016 from the respondent no. 1 for making payment of more demand without fulfilling its obligation to complete the project as per construction linked plan which was promised but the respondent no. 1 has not fulfilled the same as agreed and kept raising demand letters.

f. That the complainant has invested its hard-earned money in this flat only due to belief in the respondent no. 1. That after waiting for more than three years, there is no work in progress in the project where the flat of the complainant located and is still not in deliverable condition. There is no possibility of getting the possession of the flat in near future.

g. That it is pertinent to mention here that till 2019 there was no approaching road through which the complainant could reach the construction site to observe the development of the project.

h. That the respondent no. 1 has shattered the dreams of the complainant and the complainant is now very much **financially stressed**. It is respondent no. 1 who is solely responsible to put the complainant in such **financial complexities** by not delivering the unit on time.

i. That it is pertinent to mention here that after knowing the condition of the unit and after waiting for years, the complainant due to frustration applied for the cancellation of the flat in December 2019 as the conduct of the respondent no. 1 shows that the possibility of completion of the project is very dim in near future and it has not taken any action even after promising that it will refund the full amount with Interest to the complainant.

j. That it is very pertinent to mention here that as per the Real Estate (Regulations and Development) Act, 2016 and the Haryana Real Estate Regulatory Authority, Gurugram (Registration of Projects), Regulations, 2018, the promoters cannot charge more than 10% of the cost of the apartment as earnest money without signing the agreement whereas the respondent no. 1 has demanded **20%** of the price of unit from the complainant as the earnest money. Therefore, the respondent has clearly violated the provisions & regulations of the Real Estate (Regulation and Development) Act, 2016 and **HARERA.**

k. That it is pertinent to mention that the project "Ansals Highland Park" is registered in the name of respondent no. 2 i.e., M/s Identity Buildtech Pvt. Ltd. in HARERA website while at the time of execution of apartment buyer's agreement the unit has been allotted to the complainant by the respondent no. 1 i.e., M/s Ansal Housing & Construction Ltd. which has been now changed into M/s Ansal Housing Ltd. and its office has been shifted to 606, 6th Floor, IndraPrakash, 21, Barakhamba Road, New Delhi- 110001.

## C. Relief sought by the complainant:

4. The complainant has sought following relief:

a. Refund entire amount paid by the complainant along with the interest.

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

## D. Reply by the respondent

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

a. That the present complaint is neither maintainable nor tenable by both law and facts. It is submitted that the present complaint is neither maintainable nor tenable by both law and facts before this. Hon'ble Authority, hence, the present complaint is liable to be dismissed on this ground alone.

b. That even otherwise, the Complainant has no locus-standi and cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the Apartment Buyer's Agreement dated 25.06.2013, as shall be evident from the submissions made in the following paragraphs of the reply.

c. That the respondent is a Public Limited Company registered under the companies Act, 1956, having its registered office at 606, Indraprakash, 21 Barakhamba Road, New Delhi-110001. The present reply is being filed by the respondent through its duly authorized representative named Mr. Vaibhav Chaudhary whose authority letter is attached herewith. The above said project is related to license no.32 of 2012 dated 12.04.2012, received from the Director General, Town & Country Planning, Haryana, Chandigarh (DGTCP) over the land measuring an area of 11.70 acres falling in the revenue estates of village Tikampura, District Gurugram and is the part of Sector-103 of Gurugram-Manesar Urban Development Plan-2021. The land under the said project named "Ansals Highland Park" is owned by developer's wholly

owned subsidiary company named M/s Identity Buildtech Pvt. Ltd., (Identity) and M/s Agro Gold Chemicals Pvt. Ltd. (AGCPL) having their registered offices at B-1/1345, Vasant Kunj, New Delhi-110070.

d. The building plans of the project have been approved by the Director General, Town & Country Planning, Haryana, Chandigarh vide memo No. ZP-851/AD(RA)/2013/36610 dated 16.04.2013. Thereafter, the respondent, named, Ansal Housing & Construction Limited was granted the approval of Fire Fighting Scheme from the Fire Safety Point of view of the Housing Colony measuring 11.70 acres by the Director, Haryana Fire Service, Chandigarh.

e. The relief sought in the complaint by the Complainant is based on false and frivolous grounds; thus, is not entitled to any discretionary relief from this Hon'ble Authority, as the person not coming with clean hands may be thrown out without going into the merits of the case.

f. That the complainant approached the respondent through an application, for the purchase of an independent unit in its upcoming residential project "Ansals Highland Park" situated in sector-103, Village Tikampur, Gurugram. It is submitted that the complainant prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after the complainant was fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the respondent to undertake development of the same, that the complainant took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent.

g. That thereafter, the complainant vide application form applied to the respondent for provisional allotment of a unit in the project. The complainant, in pursuance of the aforesaid application form, was allotted an independent unit bearing no. EDNBG-1201, admeasuring 1940 sq. ft. in the project, namely, Ansals Highland Park, situated at Sector-103, Gurugram. The complainant consciously and willfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainant shall remit every instalment on time as per the payment schedule. The respondent had no reason to suspect the bonafide of the complainant. The complainant further undertook to be bound by the terms and conditions of the Application Form and the agreement as well.

h. That despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. It is also submitted that the construction work of the project is swing on full mode and the work will be completed within prescribed time period had there been no force majeure.

i. That without prejudice to the aforesaid and the rights of the respondent, it is submitted that the respondent would have handed over the possession to the complainant within time had there been no force majeure circumstances beyond the control of the respondent, there had been several circumstances which were absolutely beyond and out of control of the respondent such as orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the

Hon'ble Punjab & Haryana High Court duly passed in civil writ petition no. 20032 of 2008 through which the shucking/extraction of water was banned which is the backbone of construction process, simultaneously orders at different dates passed by the Hon'ble National Green Tribunal restraining thereby the excavation work causing air quality index being worse, maybe harmful to the public at large without admitting any liability. Apart from these the demonetization is also one of the main factors to delay in giving possession to the home buyers as demonetization caused abrupt. stoppage of work in many projects. The payments especially to workers to only by liquid cash. The sudden restriction on withdrawals led the respondent unable to cope with the labour pressure. However, the respondent is carrying its business in letter and spirit of agreement as well as in compliance of other local bodies of Haryana Government as well as Government of Haryana or the Centre Government, as the case may be.

j. That, it is submitted that the complaint is not maintainable or tenable under the eyes of law, as the complainant have not approached the hon'ble authority with clean hands and have not disclosed the true and material facts relates to this case of complaint. The complainant, thus, have approached the hon'ble authority with unclean hands and have suppressed and concealed the material facts and proceedings which has direct bearing on the very maintainability of purported complaint and if there had been disclosure of these material facts and proceedings the question of entertaining the present complaint would have not arising in view of the case law titled as ***S.P. Chengalvaraya Naidu Vs. Jagan Nath***

***reported in 1994 (1) SCC Page-1*** in which the Hon'ble Apex Court of the land opined that non-disclosure of material facts and documents amounts to a fraud on not only the opposite party, but also upon the Hon'ble adjudicating officer and subsequently the same view was taken by even Hon'ble National Commission in case titled as ***Tata Motors Vs. Baba Huzoor Maharaj bearing RP No.2562 of 2012 decided on 25.09.2013.***

k. That without admitting or acknowledging the truth or legality of the allegations advanced by the complainant and without prejudice to the contentions of the respondent, it is respectfully submitted that the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainant seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the agreement. It is further submitted that the interest for the alleged delay demanded by the complainant is beyond the scope of the buyer's agreement. The complainant cannot demand any interest or compensation beyond the terms and conditions incorporated in the agreement. However, in view of the law as laid down by the Hon'ble Bombay High Court in case titled ***as Neelkamal Realtors Suburban Pvt. Ltd. Vs. Union of India published in 2018(1) RCR (C) 298***, the liberty to the promoters/developers has been given U/s 4 to intimate fresh date of offer of possession while complying

the provision of section 3 of RERA Act as it was opined that the said Act named RERA is having prospective effect instead of retrospective. Para No. 86 and 119 of the above said citation are very much relevant in this regard.

l. It is further submitted that the interest for the alleged delay demanded by the complainant is beyond the scope of the buyer's agreement. The complainant cannot demand any interest or compensation beyond the terms and conditions incorporated in the agreement.

m. That without prejudice to the contentions of the respondent, it is submitted that the present complaint is barred by limitation. The complainant has alleged that due date of possession in respect of the said unit was 25.12.2017, and therefore, no cause of action is arisen in favour of the complainant, and thus, the present complaint is barred by law of limitation and the hon'ble authority lacks jurisdiction. It is also a conceded and admitted fact that the project related to the present complaint has already been registered with RERA and more than 250 buyers have already been settled, meaning to say that demands of more than 250 buyers have duly been satisfied by special window for affordable and mid income housing (SWAMIH) investment fund, and as such the hon'ble authority also lacks jurisdiction.

n. That several allottees, including the complainant has defaulted in timely remittance of payment of instalment which was an essential, crucial and an indispensable requirement for conceptualization and development of the project in question. Furthermore, when the proposed allottees defaulted in their payment as per schedule

agreed upon, the failure has a cascading effecting on the operation and the cost for proper execution of the project increase exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees have diligently and earnest pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is further submitted that the respondent had applied for registration with the authority of the said project by giving afresh date for offering of possession, however, in this case the complainant has already been offered the possession by the respondent. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant is totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

o. That, it would be relevant to mention here in case titled as ***Mr. Abhishek Mohan Gupta Vs. Mis Ireo Grace Realtech (Pvt.) Ltd., complaint No.2044 of 2018***, date of first hearing 12.03.2019, decided on 12.03.2019 by the hon'ble authority, in para no.36, it was held by the hon'ble authority came across that as per clause 13.3 the respondent has agreed to offer the possession of the said apartment within a period of 42 months from the date of approval of building plans and/or fulfilment of preconditions imposed thereunder + 180 days grace period. The building plan for the project in question was approved on 23.07.2013 which contained a precondition under clause 17(iv) that respondent should obtain clearance from Ministry of Environment and Forest, Government of

India before starting construction of project. The said environment clearance for the project in question was granted on 12.12.2013 containing a pre-condition of obtaining fire safety plan duly approved by fire department before starting construction. The respondent obtained the said approval on 27.11.2014. Therefore, the due date of possession comes out to be 27.11.2018 and the possession has been delayed by 3 months and 13 days till the date of decision....."

7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.

**E. Jurisdiction of the authority**

8. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E.I. Territorial jurisdiction**

9. 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**

10. 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.*

11. 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

12. 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." SCC Online SC 1044 decided on 11.11.2021 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."*

13. Furthermore, the said view has been reiterated by the Division Bench of Hon'ble Punjab and Haryana High Court in "***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021***. The relevant paras of the above said judgment reads as under:

*"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.*

*24) The substantive provision of the Act having been interpreted by the Supreme Court, the Rules have to be in tandem with the substantive Act.*

*25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."*

14. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)***, and the Division Bench of Hon'ble Punjab and Haryana High Court in "***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of***

***India and others. (supra)***, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

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

**F.I. Refund entire amount paid by the complainant along with the interest.**

15. In the present complaint, the complainant intends to withdraw from the project and are seeking return of the amount paid by them 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)*

16. Clause 31 of the BBA dated 25.06.2013 provides for the handing over of possession and is reproduced below for the reference:

> *"**31.** The developer shall offer possession of the unit any time, **within a period of 48 months from the date of execution of the agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later** subject to timely payment of all*

*dues by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be a grace* ***period of 6 months allowed to the developer over and above the period of 48 months*** *as above in offering the possession of the unit."*

17. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement 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 flat buyer agreement by the promoter are 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.

**Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 48 months plus 6 months from date of agreement or from the date of approvals required for the commencement of construction which whichever is later. The due date of possession is calculated from the date of agreement i.e.,

25.06.2013 being later. The period of 48 months expired on 25.06.2017. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period of 6 months in the possession clause accordingly, the grace period of 6 months is allowed to the promoter being unqualified.

18. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid along with interest at the prescribed rate. However, the allottees intend to withdraw from the project and are seeking refund of the amount paid by them 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."*

19. 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.

20. 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., **06.07.2022** is 7.50%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.50%.

21. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016. The due date of possession as per agreement for sale as mentioned in the table above is **25.12.2017** and there is delay of 3 years 1 month 29 days on the date of filing of the complaint.

22. 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....."*

23. 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."*

24. 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.

25. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

26. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 45,61,456/- with interest at the rate of 9.50% (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. Directions of the authority**

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

    i. The respondent/promoter is directed to refund the entire amount of Rs. 45,61,456/- paid by the complainants along with prescribed rate of interest @ 9.50% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 from the date of each payment till the 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.

28. Complaint stands disposed of.

29. File be consigned to registry.



**(Vijay Kumar Goyal)**
Member

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

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.07.2022