BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1966 of 2021**
Date of filing complaint:	**20.04.2021**
First date of hearing:	**13.07.2021**
Date of decision :	**12.07.2022**

1. 2.	Sh. Devender Singh S/o Sh. Yadram Sh. Vivek Singh S/o Sh. Devender Singh **Both R/O**: H.NO. 354, Godka Patti, Kapashera	**Complainants**
	Versus	
	M/s Almond Infrabuild Private Limited **Regd. office:** 711/92, Deepali, Nehru Place, New Delhi-110019	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Mayank Raghav (Advocate)	Complainants
Sh. M.K. Dang (Advocate)	Respondent

ORDER

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

S.n.	Particulars	Details
1.	Name of the project	"ATS Tourmaline", Sector- 109, Gurgaon
2.	Nature of project	Group housing project
3.	**RERA registered/not registered**	Registered vide registration no. 41 of 2017 dated 10.08.2017
	Validity status	10.08.2023
4.	**DTPC License no.**	250 of 2007 dated 02.11.2007
	Validity status	01.11.2019
	Licensed area	19.768 acres
	Name of licensee	Raj Kiran & 2 others
5.	Unit no.	4098 on 09th floor of tower 4 [As per page no. 12 of complaint]
6.	Unit area admeasuring	1466 sq. ft. [Super area] [As per page no. 12 of complaint]

7.	Date of apartment buyer agreement	25.05.2015 [As per page no. 10 of complaint]
8.	Total sale consideration	Rs. 1,46,00,000/- (BSP) Rs. 1,54,06,250/- (TSC) [As per payment plan on page no. 42 of complaint]
9.	Amount paid by the complainants	Rs. 1,60,96,172/- [As alleged by the complainants in CRA]
10.	Possession clause	**Clause 6.2** *The Developer endeavour to complete the construction of the apartment* ***within 42 months from the date of this agreement*** *(completion date). The company will send possession notice and offer possession of the Apartment to the applicant as and when the company receives the occupation certificate from the competent authority.*
11.	Due date of possession	**25.11.2018** [Calculated from the date of agreement i.e., 25.05.2015]
12.	Occupation certificate	09.08.2019 [As per page no. 41 of reply]
13.	Offer of possession	09.08.2019 [As per page no. 43 of reply]

B. Facts of the complaint:

3. That in year 2013, the complainants visited the office of the respondent for inquiry, where its officials show rosy pictures of their project and lured them to purchase a residential unit in their project "ATS Tourmaline, Sector 109" Gurugram. The complainants agreed to buy residential unit in said project and paid booking amount of Rs 32,00,000/-.

4. That a buyer's agreement for dwelling unit no. FF 3215 was executed between the parties on 25.05.2015 for total amount of Rs 1,59,54,883/-. The respondent issued possession letter dated 09.08.2019 for the Unit 4094, ATS without completing the project only to make fool of the customers. When the complainants reached the site to take possession, it was great surprise that the building was still in construction phase.

5. That the complainants want to get back their amount along with interest @ 12% p.a. as he do not want to go ahead as there is already delay of more than two years and the due date has for handing over possession was up to November 2018 as per clause 6.2 of BBA dated 25.05.2015.

6. That the purpose of buying the said unit was not served and the complainants were in dire need of a house for the residential purpose. So, the complainants filed a complaint seeking refund against purchased residential accommodation as there was intolerable delay at the part of the respondent. The respondent even not completed the said project site

till date. Several mails were sent to it regarding their concern for delay in construction but did not paid attention to the concerns raised by them. At last, the complainants sent a legal notice dated 09.10.2020 for the cancellation of the booking and refund of their money but all in vein.

7. That the complainants invested all their past and future earnings in said apartment and are living in rented accommodation paying rent of Rs 28,000/- per month along with the instalments of the bank loan of the above said apartment.

C. Relief sought by the complainants:

8. The complainants have sought following relief(s):

   i. Direct to the respondent to refund the entire amount paid by the complainants along with interest.

   ii. Direct the respondent to pay an amount of Rs 6,72,000/- on account of rent paid by complainants due to delay in possession at end of respondent and Rs 5,00,000/- on account of damages , hardships, mental agony, pain, sufferings and harassment experienced by the complainants along with interest of 12 % per annum.

D. Reply by respondent:

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

9. That the complaint is not maintainable as the matter is referable to arbitration as per the Arbitration and Conciliation Act, 1996 in view of clause 21.1 and 21.2 of the apartment buyer's agreement which contains

an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.

10. That the complainants, after checking the veracity of the project namely, 'Tourmaline', Sector 109, Gurugram applied for allotment of an apartment. The complainants were allotted unit no. 4094 in tower 4 having super built up area of 1750 square feet for a total sale consideration of Rs. 1,54,06,250/-. The complainants agreed to be bound by the terms and conditions of the documents executed by them with the respondent. It is pertinent to mention herein that the complainants were earlier allotted another unit. However, on their request, the unit was shifted to 4094 and all the amount paid by the complainant was accordingly adjusted.

11. That when the complainants booked the unit with the respondent, the Act of 2016 was not in force and the provisions of the same cannot be enforced retrospectively. The complainants booked the unit in question and had executed the Apartment Buyer's Agreement on their own free will and after reading, understanding and verifying the terms and conditions stipulated thereto. They are bound to adhere to the terms of the apartment buyer's agreement which were agreed upon by them vide clause 25.1 of the apartment buyer's agreement.

12. That the complainants were to make the payment towards the total sale consideration as per the terms of the agreement. The respondent raised

the payment demand on 25.05.2015. However, the said amount was remitted by the complainants only after a reminder dated 01.06.2015 was sent by the respondent. They even defaulted in making timely payment towards the HVAT demanded vide letter dated 08.12.2017 and accordingly the respondent was constrained to issue a reminder dated 09.08.2019 to the complainants.

13. That as per clause 6.2 of said agreement, it is evident that the construction was to be completed within a period of 42 months from the date of the agreement and the same was to be extended on account of any force majeure condition, outside the control of the respondent as defined in the apartment buyer's agreement. The possession of the unit was to be offered to the complainants only after grant of occupation certificate from the concerned authorities. It is submitted that the term 'force majeure event' was defined in clause 1 of said agreement.

14. That the respondent-company has been constructing the project in a timely manner and as per the terms of the said agreement, no default whatsoever has been committed by it. It is pertinent to mention herein that the project was badly affected on account of a restraint order dated 23.04.2014 passed by the SDM Kapashera on the basis of a report submitted by Halka Patwari, Kapashera and the respondent was making encroachment on the Gram Sabha land. In the restraint order dated 23.04.2014, it was stated that a case titled as ***Dilbagh Singh vs GNCTD*** of

Delhi pertaining to the land in dispute was pending before the Delhi High Court and SDM, Gurugram was requested to conduct joint demarcation. It is pertinent to mention herein that the order passed by the SDM Kapashera is covered under the ambit of the definition of 'force majeure event' as stipulated in the mutually agreed terms of the apartment buyer's agreement.

15. That in the demarcation reports dated 26.03.2015 and 27.03.2015 it was specifically mentioned that the respondent has not committed any encroachment. Furthermore, the case titled as ***Dilbagh Singh vs GNCTD*** of Delhi was ultimately dismissed vide order dated 12.10.2017. Hence, the respondent was prevented from completing its work as per the sanctioned plans, providing common services in the said affected area, raising boundary wall etc. due to circumstances absolutely beyond its power and control i.e. force majeure. In the meanwhile, the respondent kept on completing the remaining project which was not affected by the stay order and failing which further delay would have occurred. However, obviously, the respondent could not have applied for occupation certificate for the project without providing the mandatory common services like storm water, sewerage line, irrigation and external fire hydrants, electrical works and roads.

16. That as soon as the restraint order dated 23.04.2014 was set aside, the respondent completed the construction of the project and an application

was made to the concerned authorities for the grant of occupation certificate vide application dated 19.03.2018 and the same has been granted by the concerned authorities on 09.08.2019. The respondent has already offered the possession of the unit to the complainants vide notice of possession dated 09.08.2019.

17. That the complainant issued a cheque no. 178369 dated 23.09.2019 for an amount of Rs. 8,00,000/- towards the part-payment. However, the same was returned back by the bank and the same was intimated to the complainants vide email dated 26.09.2019. However, the same was later credited by the complainants vide RTGS and is evident from a bare perusal of statement of account. Despite reminder dated 04.11.2019, the complainants have till date did not make the payment towards the total sale consideration.

18. That the complainants are real estate investors who have made the booking with the respondent in order to gain profit in a short span of time. However, on account of slump in the real estate market, their calculations went wrong and now, they have filed the present baseless, false and frivolous complaint before this forum in order to somehow harass, pressurize and blackmail the respondent and illegally extract benefits from it.

19. 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:

20. 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 complete 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 promoter, 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 complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding complainants are in breach of agreement for non-invocation of arbitration.

21. The respondent has raised an objection that the complainants have not invoked arbitration proceedings as per flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

> *"Clause 21 All or any disputes that may arise with respect to the terms and conditions of this Agreement, including the interpretation and validity of the provisions hereof and the respective rights and obligations of the parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be under the Arbitration and Conciliation Act, 1996 and any statutory amendments/modification thereto by a sole arbitrator who shall be mutually appointed by the Parties or to be mutually appointed or if unable to be mutually appointed, then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties.*
>
> *The venue of Arbitration shall be at Gurgaon and only the courts at Gurgaon shall have the jurisdiction in all matters arising out of this Agreement".*

22. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism.The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force. Consequently, the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builder could not circumscribe the jurisdiction of a consumer.

23. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** **decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

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

24. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within their right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that

this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

F.II Objections regarding the complainants being investors:

25. It is pleaded on behalf of respondent that complainants are investors and not consumers. So, they are not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are buyers and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

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

person to whom such plot, apartment or building, as the case may be, is given on rent."

26. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainants are allottees as the subject unit allotted to them by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled *as* ***M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being an investor are not entitled to protection of this Act also stands rejected.

F.III Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

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

specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017*** which provides as under:

> *119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

28. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable*

rate of compensation mentioned in the agreement for sale is liable to be ignored."

29. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Entitlement of the complainants for refund:

G.I Direct to the respondent to refund the entire amount paid by the complainants along with interest.

30. The project detailed above was launched by the respondent as residential complex and the complainants were allotted the subject unit in tower 4 for total sale consideration of Rs. 1,54,06,250/-. It led to execution of builder buyer agreement between the parties on 25.05.2015, detailing the terms and conditions of allotment, total sale consideration of the allotted unit, its dimensions, due date of possession, etc. A period of 42 months from date of agreement was allowed to the respondent to complete the project and offer the possession of the allotted unit. However, that period has admittedly expired on 25.11.2018. It has come on record that against the total sale

consideration of Rs. 1,54,06,250/-, the complainants have paid a sum of Rs. 1,60,96,172/-.

31. The section 18(1) 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 allottees wish 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 **25.11.2018** and there is delay of 2 years 4 months 26 days on the date of filing of the complaint. The allottees in this case has filed this application/complaint on 20.04.2021 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 and demand for due payment was raised, then only they filed a complaint before the authority. The occupation certificate /part occupation certificate of the buildings/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 is 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 and observed as under:

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

35. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). 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. The allottee has to demand and make his intentions clear that the they wishes to withdraw from the project. Rather tacitly wished to continue with the project and thus made him 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.

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 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) running as under:

> *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.*

36. In case, the allottees 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 ***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.,***

37. The authority hereby directs that the allottees, shall be paid by the promoter an **interest for every month of delay till handing over of possession 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. The allottees are obligated to take possession of the apartment since the construction is completed and possession has been offered after obtaining of occupation certificate from the competent authority. However, the developer is 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.

38. The counsel for complainants further submitted photographs of the unit stating that the said unit is not habitable. The authority observes that the occupation certificate has been obtained on 09.08.2019, implying that the unit is habitable. However, there are certain lacunas with regard to finishing of the unit. In view of submissions of both the parties, the the respondent is directed to hand over the physical possession of the unit after making it complete in all aspects as per specifications of buyer's agreement within 2 weeks. The complainants shall take over the possession of the unit thereafter after making payment due, if any. The respondent shall also adjust the amount which he has received in excess. If the subject unit is not made habitable as per specification of BBA, then the complainants are at liberty to file a fresh complaint.

G.II Direct the respondent to pay an amount of Rs 6,72,000/- on account of rent paid by complainants due to delay in possession at end of respondent and Rs 5,00,000/- on account of damages , hardships, mental agony , pain, sufferings and harassment experienced by the complainants/applicant along with interest of 12 % per annum.

39. The complainants are seeking relief w.r.t compensation in the aforesaid relief, Hon'ble Supreme Court of India in civil appeal titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (supra),*** held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants may approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the Authority:

40. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i. The respondent shall pay interest at the prescribed rate i.e. 9.70% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 25.11.2018 till the expiry of 2 months from the date of offer of possession i.e. 09.10.2019, as per section 19(10) of the Act.

ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order.

iii. The respondent is directed to hand over the physical possession of unit complete in all aspects as per specifications of buyer's agreement within 2 weeks. Thereafter, the complainants are directed to take over the possession of the unit after making payment, if due. The respondent shall also adjust the amount which he has received in excess. If the subject unit is not made habitable as per specification of BBA, then the complainants are at liberty to file a fresh complaint.

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: 25.07.2022