BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**3517/2021/3221/2019**
Date of filing complaint:	**09.08.2019**
First date of hearing:	**11.10.2019**
Date of decision :	**30.08.2022**

1. 2.	Dr. Mandeep Rathee Anita Rathee **Both R/o:** B-63, South City-1, Gurugram, Haryana-122007	**Complainants**
	Versus	
	M/s Orris Infrastructure Private Limited **R/o:** RZ-D-5, Mahavir Enclave, New Delhi – 110085	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Arvind Chaudhary (Advocate)	Complainants
Sh. Charu Rastogi (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.No.	Heads	Information
1.	Project name and location	"Aster Court Premier" Sec 85, Gurugram
2.	Project area	25.018 acres
3.	Nature of the project	Group housing 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.	201, 2nd floor, Building 3N [Page 24 of the complaint]

8.	Unit measuring (carpet area)	1970 sq. ft. [Page 24 of the complaint]
9.	Date of execution of apartment buyer agreement	19.09.2012 [Page 21 of the complaint]
10.	Sanctions of the plans	10.04.2012 As per project details mentioned in case no. 994/2021 of similar project
11.	Commencement of construction	15.10.2013 As per project details mentioned in case no. 994/2021 of similar project
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	15.04.2017 Calculated from the date of commencement of construction Grace period of 6 months is allowed
14.	Total sale consideration	Rs.82,56,221/- [As per payment plan at page no. 17 of the complaint]

15.	Total amount paid by the complainants	Rs.79,69,419/- [As alleged by the complainant on page 9 of the amended CRA] Rs.76,80,655/- [As per statement of account dated 17.06.2019 at page 51 of amended CRA]
16.	Payment plan	Construction linked payment plan [Page 28 of the complaint]
17.	Occupation Certificate	12.04.2021 [Page 128 of the reply]
18.	Offer of possession	16.04.2021 [Page 131 of the reply]
19.	Surrender/Withdrawal letter	30.05.2019 [Page 56 of the complaint]

B. Facts of the complaint:

3. That the complainants had booked an apartment in the project by the respondent in the year 2012, when the application form of the complainants was accepted in the project namely, Aster Court Premier, situated at Sector 85, Badha, Manesar, Gurugram, Haryana.

4. The project was also supposed to have 262+ units and the complainants booked one flat in the project after site visit in June 2012. At the time of booking, the complainant was informed that the project will be completed in 36 months of the sanction of the building plans or the execution of the BBA or the commencement of construction of the tower, whichever is later. At the time of submission of the application form, the complainants paid a sum of Rs. 4,00,000/- was made by the complainants to the

respondent. Thereafter in September 2012, another payment of Rs. 10,00,000/- was made by the complainants to the respondent.

5. The developer, however, executed the builder buyer agreement with the complainants on 19.09.2012. The said BBA was executed by the developer after the receipt of around 25% payment from the complainants. The term of handing over of the said apartment as mentioned in the builder buyers agreement was 36 months + 6 months grace period from the date of execution of the BBA or sanction of the building plans or commencement of construction or such extended periods as may be permitted. The respondent never informed any firm date of commencement of construction or development of the unit to the complainants.

6. Once the complainants received the BBA, they were left with no option but to sign the BBA on dotted line and continue making payment as per BBA because there was a condition in the application form and also the BBA which stated that if allottee fails to execute and deliver the agreement within thirty days from the date of dispatch of its dispatch by the company, then the allottee(s) authorizes the company to cancel the allotment and on such cancellation, the allottee(s) consents and authorizes the company to forfeit the earnest money along with non-refundable amounts. Thus, the company has now taken over seven years from the date of application/date of booking but has failed to deliver possession to the complainants.

7. The respondents have reckoned the period of delivery of possession as 36 months plus 6 months grace period from the date of the execution of the apartment buyer's agreement by the company or sanction of plans of commencement of construction, whichever is later. The apartment buyers agreement was executed on 19.09.2012, the construction has commenced, according to the respondent on 05.09.2012, as per the summary of account and the complainants assume that building plans must have been got sanctioned by the respondent before the commencement of construction in September 2012.

8. The complainants were surprises and astonished to know that the respondent had mentioned the super area in the BBA as 1970 sq. ft., whereas the actual carpet area being constructed and sold to the complainants is only around 50%. Therefore, the super area mentioned in the BBA is almost double the carpet area which would be delivered to the complainants, despite being charged on super built area. In addition, the developer had charged three additional preferential location charges besides charging for car parking, Club furnishing charges, External development charges, Internal Development Charges, Fire Fighting charges, Interest Free Maintenance charges on the super area and not on the carpet area.

9. However, the progress of construction at the site was also slow as despite a lapse of 104 months from the date of booking, when the possession was offered to the complainants on 16.04.2021. It is

noteworthy that the payment terms were front loaded and till date the complainants have paid over 90%+ of the payment whilst the construction activity at site is far less than this milestone.

10. The complainants were never conveyed as to what has been the status of construction and why the project had been delayed and had addressed numerous communications to the respondent requesting them to appraise them of the status of the project and are not getting any positive response from the respondent as to when the possession is likely to be delivered to them despite a lapse of over 8 years from the date of booking, therefore, the complainants are not interested in taking possession of the apartment.

11. The complainants issued a notice dated 30.05.2019 cancelling the agreement and sought the refund of the amounts paid by them alongwith interest. The said letter was duly received by the respondent on 01.06.2019 but no response has been received to the said letter till date.

12. During the pendency of the complaints earlier preferred by the complainants, the respondent has offered possession of the apartment to the complainants vide their letter dated 16.04.2021. The complainants responded to the respondent's letter offering possession vide their letter dated 28.04.2021.

13. The complainants have several grievances including the fact that the respondent in its offer of possession has increased the total

saleable area by 150 sq. ft. on the premise that the upon final calculation, the super area of the apartment has increased from 1970 sq. ft. to 2120 sq. ft. However, no justification or calculation has been provided by the respondent to the complainants despite numerous letters, reminders, and visits to the office of the respondent. The respondent has not given any justification for increase of the super area of the apartment, despite there being no change in the carpet area of the layout of the apartment.

14. The respondent has also raised a demand of Rs. 3,18,000/- towards electricity installation charges. However, despite repeated requests, personal visits and reminders, the respondent has failed to provide the basis to raise such a demand towards electricity installation charges. The amounts thus demanded by the respondent while offering possession are illegal and unjustified.

15. The respondent is intending to take undue advantage of force majeure condition on the premise that there were orders passed by the Punjab & Haryana High Court regarding drawing of ground water. However, the order on which the respondent is placing reliance is 31.07.2012, was passed even before the execution of the apartment buyer's agreement between the parties. The respondent in fact started demanding money from the complainants as per the payment linked plan, as early as September 2012. Thus, the respondent must have factored the

ban imposed by the Hon'ble High Court at the time of execution of the apartment buyer's agreement between the parties.

C. Relief sought by the complainants:

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

    i. Direct the respondent to refund the refund of the entire amount of Rs. 79,69,419/- alongwith interest at the rate prescribed under Rule 15 Haryana Real Estate Rules, to the respondent/Developer.

D. Reply by respondent:

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

17. In appreciating the rival contentions of the parties, regard must be placed to the sequence of events, which shall bear out the frivolity of the instant compliant:

    i. The complainants had approached the respondent and had expressed his desire to purchase apartment from the respondent after thorough investigation and site surveys. The apartment buyer agreement between complainants and the respondent was willingly and consensually signed by the complainants, in the year 2012.

    ii. That during that time, a writ petition was filed in the Hon'ble High Court of Punjab and Haryana titled as "Sunil Singh vs. Ministry of Environment & Forests Parayavaran" which was

numbered as CWP-20032-2008 wherein the Hon'ble High Court pursuant to order dated 31 July 2012 imposed a blanket ban on the use of ground water in the region of Gurgaon and adjoining areas for the purposes of construction.

iii. That on passing of the abovementioned orders by the High Court the entire construction work in the Gurgaon region came to stand still as the water is one of the essential parts for construction.

iv. That in light of the order passed by the Hon'ble High Court the respondent had to arrange and procure water from alternate sources which were far from the construction site. The arrangement of water from distant places required additional time and money which resulted in the alleged delay and further as per necessary requirements STP was required to be setup for the treatment of the procured water before the usage for construction which further resulted in the in alleged delay.

v. That despite the slow-down in the construction work and difficulty in arranging the sufficient water required for the construction, no additional money has been demanded from the allottees and complainants, even though the cost of the project has increased because of the unavailability of water in the adjoining areas.

18. That the land so aggregated for the above said project was contributed by a consortium of land holders, who contributed around 19 Acres. An entity namely BE Office Automation Products (P) Ltd ("BE") had also approached the respondent with 5.8 Acres of land which was contiguous with the land already aggregated by the respondent. BE requested the respondent to accept the said 5.8 Acres of land owned by BE a part of the land already aggregated by the respondent. 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.

19. As per the collaboration agreement, it was agreed between BE and the respondent that the total saleable area with respect to the said land of 5.8 acres would be shared in the ratio of 1/3: 2/3, i.e. 1/3rd going to BE and 2/3rd going to the respondent. In addition to the collaboration agreement, BE also executed an irrevocable General Power of Attorney dated 22.10.2007 in favour of the respondent for various purposes related to development of the said project.

20. On January 2011 in pursuance of its contractual obligations invited BE to identify the apartments that BE would accept as 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.

21. After the aforesaid agreement with BE in the year 2007, the respondent had acquired 4-5 acres additional land by the virtue of which more flats were constructed. BE, by misrepresenting the collaboration agreement raised a claim that it was entitled to proportionate share in the construction on the additional parcel of land which was acquired respondent which had no relation to BE. It moved to 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.

22. The Ld. ADJ granted a blanket stay in favour of BE and against the Respondent, whereby the respondent was restrained from creating any third party interest in respect of any apartments, villas and commercial areas till the matter could be decided finally by the arbitrator. The respondent was also restrained from receiving any money in respect of sale of apartments, villas and commercial sites etc. or club membership charges or in any other form from any person till the adjudication of the dispute.

23. 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 shortage of fund 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.

24. 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 on December 03, 2014 was pleased to vacate the stay order and limit the injunction to BE's agreed share in the project.

25. The respondent made serious efforts to bring the dispute to its logical ending and due to the same a Single Ld. Arbitrator, Hon'ble Mr Justice Chandramauli Kumar Prasad (Retd.), a former judge of the Hon'ble Supreme Court of India was appointed 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.

26. The Ld. arbitrator passed interim award dated 19.08.2015 whereby the respondent's 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.

27. 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. the above mentioned 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 opposite and resulted in loss of valuable time and resources which resulted in delay in completion of the said project.

28. That even after the arbitral award was passed in favour of respondent, BE was not inclined to put an end to the frivolous litigation that it was pursuing against the Opposite Part No. 1. BE challenged the arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 and also made a stay application before the competent court. The said stay application of BE was dismissed vide order dated 20.03.2017.

29. BE, upon the dismissal of its stay application on 20.03.2017, approached the Divisional Commissioner, Gurugram by filing an application. The Divisional Commissioner, Gurugram passed an extra jurisdictional order staying the alienation property in the said project vide order dated 28.03.2017. The respondent challenged the said order before the Hon'ble Punjab and Haryana

High Court in CWP No. 9075/2017 wherein vide order dated 01.05.2017, the said impugned order was stayed. Scrutiny of the said application shall make it evident that the petitioner had prior thereto preferred complaint dated 13th of January 2017 before Deputy Commissioner, Gurgaon. By virtue of application dated 13th March 2017, the petitioner had sought stay in respect of registration of apartments forming part of the project till such time the litigation between the parties was conclusively decided. The complainants had initially succeeded in getting passed an order from the Deputy Commissioner, Gurugram that no property or part thereof be alienated.

30. BE had also 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. The said contempt petition was eventually dismissed by the Hon'ble High Court of Punjab and Haryana vide judgment dated 15.03.2017.

31. It is submitted that the respondent was attacked into frivolous litigation cases by BE Office Automation Products (P) Ltd., due to which the growth of the project lowered down, and the completion of the project got delayed. It is submitted that these frivolous litigation cases, occupied the respondent and impacted the respondents to such an extent that the respondents were not able to monitor the progress of the project in question. It is submitted that the project is ready to be offered possession in few months' time.

32. That it is submitted that the complainant made an application for provisional allotment vide application dated 07.07.2012. that thereafter an apartment buyer's agreement was executed between the parties on 19.09.2012. Further the amount was escalation free subject to increase or decrease on the basis of the size of the unit upon issuance of final offer of possession along with other factors such as the governmental taxes, etc as mentioned in the buyers agreement. That it was also clearly provided under the agreement that the sale consideration at the time of signing of the agreement was not inclusive of increase in sale consideration which the allotee hereby agrees to pay due to change on super area as explained in clause 1.4 of the agreement along with other incremental amounts such as EDC/IDC, increase in the amount of bulk electricity supply, use of DG sets, installation of certain equipment's as mentioned in clause 1.10 of the buyers agreement, etc.

33. That it is pertinent to mention here that the respondent had categorically informed the complainant that the respondent has received OC and the respondent also offered the possession of the unit in question to the complainant vide letter dated 16.04.2021. The respondent again issued a reminder letter dated 12.07.2021 to the complainant pursuant to the offer of possession.

34. d) That the complainant is merely using a malicious intent of attaining wrongful gain by filing the present complaint before the authority in order to get the delay interest charges whereas the

said right has been relinquished by the vide an undertaking dated 04.04.2019 which reads as follows:

"I hereby confirm that the Company in lieu of waiver of interest is not liable to pay or reimburse any delay penalty charges whether partially or fully. Therefore, in this regard I undertake the following

i. That upon waiver of interest I shall make payment of all remaining instalment (if any) within on due dates notwithstanding I receive a demand letter or not. If in case I fail to make the payment of due instalments within/ on due date then I shall be liable to make the payment of waived off interest, due instalment and interest on due instalment.

ii. I shall not demand any penalty or interest or claim of any nature towards delay in construction or possession. I further indemnify the Company for all losses which it may incur due to breach of undertaking mentioned herein.

iii. That waiver of interest shall in no ways affect the terms and conditions of Builder Buyer Agreement/ Application Form which shall always remain valid and biding upon me.

35. That on the basis of the undertaking of the complainant no. 2, being the endorsee vide endorsement date 09.03.2013 by the complainant no. 1, the respondent had waived the interest part which was accrued due to default in making timely payments.

36. That the undertaking dated 04.04.2019 and emails dated 30.12.2020, 23.03.2021 mentions to take possession and emails dated 09.07.2021 and 19.10.2021 speaks for conditional possession wherein the complainant does not want to pay for increase in size of the unit and wants to deviate from the Buyers Agreement merely on the ground of convenience of not getting benefit since increase in area means increase in payment of money.

37. 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:

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

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

Section 11(4)(a)

> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to*

the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

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

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

F. Findings on the objections raised by the respondent:

F.1 Objections regarding the complainants being investors:

39. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed 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 main aims & objects of enacting a statute but at the same time preamble

cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of Rs. 79,69,419/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

40. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in ***appeal no.***

0006000000010557 titled as M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr. has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Entitlement of the complainants for refund:

G.1 Direct the respondent to refund the entire amount of Rs. 79,69,419/- alongwith interest at the rate prescribed.

41. The complainants were allotted the subject unit by the respondent for a total sale consideration of Rs. 82,56,221/- under the construction linked payment plan. An apartment buyer's agreement dated 19.09.2012 was executed between the parties with regard to that unit. The due date of possession of the subject unit was calculated as per clause 10.1 where the possession of the unit was to be handover **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 15.10.2013 (as per project details mentioned in case no. 994/2021 of similar project) and the sanctions of the plans is 10.04.2012 as per project details mentioned in case no. 994/2021 of similar project and six months of grace period is allowed so the possession of the booked unit was to be delivered on or before 15.04.2017. 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 complainants as per the terms and conditions of the buyer's agreement dated 19.09.2012 executed between the parties. After execution of buyer's agreement, the complainants started depositing various amounts against the allotted unit and paid a sum of Rs.76,80,655/- as evident from statement of accounts as on 17.06.2019 at page 51 of the amended CRA. That due date of possession has already expired. The respondent had applied for obtaining occupation certificate and the same has been obtained from the competent authority on 12.04.2021 but possession has been offered on 16.04.2021.

42. 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 **15.04.2017 and there is delay of more than 2 years** on the date of filing of the complaint. The allottee in this case has filed this application/complaint on **09.08.2019** before obtaining occupation certificate.

43. The occupation certificate/completion certificate of the project where the unit is situated has been obtained by the respondent-

promoter on **12.04.2021** and afterwards the respondent has offered the possession of the allotted unit on **16.04.2021**. 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....."*

44. 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

45. 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.

46. 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.

47. The authority hereby directs the promoter to return the amount received by him with interest at the rate of 10% (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.

H. Directions of the Authority:

48. 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 respondent /promoter is directed to refund the amount received by it from the complainants along with interest at the rate of 10% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till actual date of refund of the deposited amount.

    ii) A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

49. Complaint stands disposed of.

50. File be consigned to the Registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.08.2022