

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

Complaint no. : 1743 of 2019
First date of hearing: 24.09.2019
Date of decision : 20.10.2022

Vinod Kumar Gupta
R/o: - House no. 232, Masjid Wali Gali, Railway Road,
Bazaria Ghaziabad- 201001, U.P.

Complainant

Versus

1. M/s Ramprashtha Promoters and Developers
Private Limited.
2. Mr. Sandeep Yadav
Both having Regd. office: Plot No. 114, Sector-44,
Gurugram- 122002

Respondents

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan

Member
Member

APPEARANCE:

Sh. Geetansh Nagpal (Advocate)
Sh. Dheeraj Kapoor (Advocate) with
Shri Tarun Arora (Authorized Representative)

Complainant
Respondent's

ORDER

1. The present complaint dated 08.05.2019 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 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:

S. N.	Particulars	Details
1.	Name of the project	"The Edge Tower", Sector 37D, Village Gadauli Kalan, Gurugram
2.	Project area	60.5112 acres
3.	Registered area	108894 sq. mt.
4.	Nature of the project	Group housing colony
5.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid upto 18.02.2025
6.	Name of licensee	Ramprastha Builders Pvt Ltd and 11 others
7.	Date of approval of building plans	12.04.2012 [As per information obtained by planning branch]



8.	Date of environment clearances	21.01.2010 [As per information obtained by planning branch]	
9.	RERA Registered/ not registered	Registered vide no. 279 of 2017 dated 09.10.2017	
10.	RERA registration valid up to	31.12.2018	
11.	Extension applied on	17.12.2018	
12.	Extension certificate detail	Date	Validity
		<i>HARERA/GGM/REP/RC/279/2017/EXT/98/2019</i> In principal approval on 12.06.2019	30.12.2020
13.	Unit no.	C-801, 8 th floor, tower/block- C (Page no. 59 of the complaint)	
14.	Unit admeasuring area	1990 sq. ft. (Page no. 59 of the complaint)	
15.	Date of booking application form	03.01.2010 (Page no. 40 of the complaint)	
16.	Allotment letter	30.05.2011 (Page no. 86 of the complaint)	
17.	Date of execution of apartment buyer agreement	20.04.2011 (Page no. 55 of the complaint)	

A



18.	Date of execution of tripartite agreement	30.05.2011 (Page no. 94 of the complaint)
19.	Possession clause	15. POSSESSION (a) Time of handing over the Possession Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over <i>the possession of the Apartment by 31/08/2012 the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.</i> (Emphasis supplied) (Page no. 69 of the complaint)
20.	Due date of possession	31.08.2012 [As per mentioned in the buyer's agreement]

A



21.	Grace period	Not utilized
22.	Total sale consideration	Rs.56,92,650/- (As per schedule of payment page 84 of the complaint)
23.	Amount paid by the complainant	Rs.49,78,157/- (As per receipt information page 149 of the complaint)
24.	Occupation certificate /Completion certificate	Not received The AR confirms that construction work is in progress and OC of the unit of the allottee is neither applied nor obtained till date.
25.	Offer of possession	Not offered
26.	Request to withdraw from the project by the allottee	20.03.2019 (Page no. 146 of the complaint)
27.	Delay in handing over the possession till date of filing complaint i.e., 08.05.2019	6 years 8 months and 8 days

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. This is with the reference to a multistoried residential apartments project "The Edge Towers" being developed by M/s Ramprastha

12



Promoters & Developers Pvt. Ltd. in the Ramprastha City on the land area of 60.511 acres falling in Sector -37D, Gurugram Sector-37D, Gurugram under the License Memo No.33 of 2008 dated 19.02.2008 issues by DTCP, Haryana.

- II. That in the year 2009, the respondent announced the launch of multi storied residential apartments project "The Edge Towers" consisting of 3BHK (w/o Servant Quarter), 3BHK (with sq.) apartments and other apartments format with committed amenities. The complainant being interested in the purchase of a residential apartment for himself and his family for living purposes were approached by the respondent's/their agents for selling a residential apartment in the "The Edge Towers".
- III. That the agents of the respondent company told the petitioner about the moonshine reputation of the company and the agents of the respondent company made huge presentations about their proposed project at Gurgaon and also assured that they have delivered several projects in the National Capital Region. The respondents showed the presentation to the complainant which portrayed the project like heaven and tried to hold him interest in every possible way. The petitioner was trapped in the hands of the agents of the respondent company like a fish.
- IV. That the complainant was asked to fill up an application for allotment containing price list and payment plans and agree to the

PA

assertions, declarations, terms, and conditions appearing therein. The "standard format" for "application comprised of one- sided contractual terms. The terms of the application for allotment stated that it being an application for provisional allotment, nevertheless the complainant would pay future installments as per the payment plan opted and as per the terms of apartment buyer agreement (ABA) to be executed on the respondent's standard format.

- V. That the complainant proceeded with the booking of one residential apartment N-1103 admeasuring 1675 sq. ft and paid a booking amount of Rs.3,93,625/-. Subsequently, a demand for payment of Rs.2,95,219/ was also paid in furtherance to the booking amount of residential unit.
- VI. That the respondent agreed to the complainant is request and asked him to complete the booking formalities for the residential apartment with an SQ option vide its letter dated 08.01.2010. It was further agreed that the booking amount paid by complainant vide earlier receipts RE/1031 and RE/1033 for residential apartment N-1103, would be adjusted against new apartment consideration. Hence, the apartment no. N-1103 earlier booked by complainant got cancelled and a new apartment C-801 was provisionally booked for the complainant.
- VII. That the complainant filled up an "application for allotment for apartment no.C-801, measuring 1990 sq. ft. of super area, on 80

12

floor of Block C in the multi-storied residential apartments in the said project consisting of 3BHK (with Servant Quarter) @ Rs. 2,350/- sq. ft. for a total sale consideration of Rs.56,92,650/- including base price, EDC, IFMS & covered car parking.

- VIII. That he had already paid Rs.8,18,389/-which was approx. 14% of the total consideration and no initiative for allotment letter, buyer's agreement was forthcoming from respondent. The complainant was asked to deposit at least 50% of the total consideration in order to get allotment letter. The complainant was shocked to learn that as it was never agreed and there was no such pre- condition as per the terms of the application form signed by him on 03.01.2010.
- IX. That the apprehension of cancellation of booking by respondent and deduction of earnest money thereof forced the complainant to honour the unjustified demands raised by it. The complainant ran pillar to post to respondent office and home loan disbursing agencies that simply refused to consider any request in the absence of allotment letter.
- X. The respondent raised series of demand letters against milestones "for start of construction, completion of foundation, completion of basement roof, completion of 2nd floor slab" which remained unpaid by the complainant. Each demand letter alerted the complainant of interest penalty. During the period starting 09.01.2010 up till 21.04.2011, the respondent loaded the complainant with approx.

7a

Rs.30,45,877/-worth demands and paid no heed to complaint request for allotment letter so that funding could be arranged by him to meet the demands raised on him.

- XI. That the complainant account carried a net outstanding of Rs.23,54,460/- including delay interest and service taxes. Neither the allotment letter nor the apartment buyer agreement was executed during this period between date of booking of 06.10.2009 till 21.04.2011.
- XII. That the complainant strongly objected to the concerns arising on delayed payment interest charged in the demand letters and reiterated that it was not justifiable in view of non-execution of ABA and allotment letter for 18 odd months the project progressed only till 2nd floor while the possession for multi-storied tower was falling on 31.08.2012.
- XIII. That the apartment buyer agreement for the unit C-801 sold to the complainant admeasuring 1990 sq. ft of super area, on 8th floor of Block C in the multi-storied residential apartments project "The Edge Towers consisting of 3BHK (with servant quarter) @ Rs.2,350/- sq. ft mentioned the sales price as Rs.56,92,650/-. Including base price, EDC, IDC, car parking and IFMS.
- XIV. That the apartment buyer agreement got executed on 20.04.2011. The scheduled possession clause 15 was set as 31.08.2012 with a grace period of 120 days.

A

- XV. That the complainant reiterated his request for an allotment letter. An allotment letter was issued to the complainant on 30.05.2011 confirming the allotment of apartment C-801 having 3BHK(L) with 1990 sq. ft. It along with one parking in the said project for a total consideration of Rs.56,92,650/- with payment plan as construction linked. The respondent shared the project approval documents dated back 03.06.2010 containing NOC for availing a home loan with complainant for meeting the requirements of home loan sanctioning authorities.
- XVI. That the complainant got sanctioned a home loan within a week of execution of buyer's agreement of Rs.24,00,000/ - by SBI for period of 180 months ending on 25.05.2026 with an EMI of Rs.26,159/- payable monthly by him on the disbursals made to the respondent. A tripartite agreement got executed amongst complainant, respondent and SBI on 30.05.2011.
- XVII. That the complainant observed that billed milestones were actually a fraud; the factual position was different from one appearing in the billed milestones. The respondent didn't rectify the invoices. The complainant was asked to settle the outstanding demand of Rs.20,43,792/ as per demand letter.
- XVIII. That the payments made by the complainant and by bank under the home loan arrangement by him were based on the delayed construction on the ground. But unfortunately, the demands being

raised were not corresponding to the factual situation on ground. The complainant approached the respondent and raised objections towards slow progress of the project. But the respondent cunningly answered that they have set procedure and accordingly they have raised demand letters. As is the practice with all the builders, before the Act of 2016 came into existence, nothing was being disclosed and the payment was being asked on regular basis.

- XIX. That the complainant utilized his sanctioned home loan limit for Rs.24,00,000/-to the fullest extent after the above payment was made to respondent by the banker. The demand letters continued pouring in despite the fact that possession was scheduled for 31.08.2012. The respondent raised a demand letter for "16th floor roof slab "on 08.08.2012 with the interest penalty of Rs. 4,43,579/-.
- XX. That as per the demand letter above, a sum of Rs.43,78,158/- was already paid by the complainant, approx. 78% of the total consideration of Rs: 56,92,650/ and project completion seem to be uncertain. So, the complainant asked for the refund.
- XXI. That the complainant sets out the various deficiencies in services, unfair and/or restrictive trade practices adopted by the respondent in sale of their flats and the provisions allied to it. The modus operandi adopted by the respondents, from their point of view may be unique and innovative but from the consumers point of view, the strategies used to achieve its objective, invariably bears the

irrefutable stamp of impunity and total lack of accountability and transparency, as well as breach of contract and duping of the consumers, be it either through not implementing the services/ utilities as promised in the brochure or through not delivering the project in time.

XXII. That the complainant is one of those who have put in their life savings in the said project and is dreaming of a home for himself and the respondents have not only cheated and betrayed them but also used his hard-earned money for their enjoyment.

C. Relief sought by the complainants:

4. The complainant has sought following relief(s):

- I. Direct the respondent to refund the entire amount paid by them since 06.10.2009 along with interest as per the Act MCLR plus 2% till the date of actual refund.
- II. The authority be pleased to order the respondent to pay the litigation fee incurred by the complainant on account of this case of Rs.2,00,000/-.

5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions 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 filed an application for rejection of complaint on the ground of jurisdiction along with reply. The respondent has contested the complaint on the following grounds.

- I. The complaint filed by the complainant is not maintainable and the adjudicating officer has no jurisdiction whatsoever to entertain the present complaint. The respondent has also separately filed an application for rejection of the complaint on the ground of jurisdiction and this reply is without prejudice to the rights and contentions of the respondent contained in the said application.
- II. That the complaint pertaining to compensation and interest for grievances under section 12, 14, 18 and 19 of the Act, 2016 are required to be filed before the adjudicating officer under rule-29 of the rules, 2017 read with section 31 and section 71 of the said Act and not before this authority under rule-28.
- III. The complaint pertains to the alleged delay in delivery of possession for which the complainants have filed the present complaint and are seeking the relief of possession, interest, and compensation u/s 18 of the said Act. Therefore, even though the project of the respondent i.e., "The Edge Tower" Ramprastha City, Sector-37D, Gurgaon is covered under the definition of "ongoing projects" and registered with this authority, the complaint, if any, is still required to be filed before the adjudicating officer under rule 29 of the said rules and not before this authority under rule

28 as this authority has no jurisdiction whatsoever to entertain such complaint and is liable to be rejected.

- IV. That without prejudice to the above, the position is further substantiated by the proviso to section 71 which clearly states that even in a case where a complaint is withdrawn from a Consumer Forum/Commission/NCDRC for the purpose of filing of an application under the said Act and the said rules, the application, if any, can only be filed before the adjudicating officer and not before the authority.
- V. That the complaint is not supported by any proper affidavit with a proper verification. In the absence of a proper verified and attested affidavit supporting the complaint, it is liable to be rejected.
- VI. That the complainant is investor and not consumer and nowhere in the complaint, the complainant pleaded as to how they are consumers as defined in the Consumer Protection Act, 1986 qua the respondent. The complainant has deliberately not pleaded the purpose for which the complainant has entered into an agreement with the respondent to purchase the apartment in question. The complainant, who is already the owner of the house no. 232, Masjid Wali Gali, Railway Road, Bazaria, Ghaziabad-201001 (address mentioned in the booking application form, apartment buyer's agreement and in the present complaint) are investors, who never had any intention to buy the apartment for own personal use and kept on avoiding the performance of

12



contractual obligations of executing the apartment buyer agreement and making timely payments and have now filed the present complaint on false and frivolous grounds.

- VII. That this authority has no jurisdiction to entertain the present complaint as the complainants have not come this authority with clean hands and have concealed the material fact that he is defaulter, duly admitted in para-18 of the complaint, having deliberately failed to make the payment of installments within the time prescribed, which resulted in outstanding dues of Rs.6,07,799/- and also delay payment charges/interest, of Rs.5,72,114/- as reflected in the payment requests and statement of account.
- VIII. Despite several adversities, the respondent continued with the construction is in the process of completing the project and have already obtained the occupation certificate of 5 towers out of 15 towers should be able to apply the occupation certificate for the apartment in question by 31.12.2019 (as mentioned at the time of registration of the project with this authority). However, the complainants are only short term and speculative investors, and are not interested in taking over the possession of the said apartment. Moreover, due to slump in the real estate market, the complainants failed to make the payments in time. It is apparent that the complainants had the motive and intention to make quick profit from sale of the said apartment through the process of allotment. Having failed to resell the said apartment due to general recession, the complainants have developed an intention

Am



to raise false and frivolous issues to engage the respondent in unnecessary, protracted and frivolous litigation. The alleged grievance of the complainant has the origin and motive in sluggish real estate market.

- IX. That this authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement signed by the complainant/allotment offered to them.
- X. That the proposed estimated time of handing over the possession of the said apartment i.e., 31.08.2012 plus 120 days, comes to 31.12.2012, and is applicable only subject to force majeure and the complainants having complied with all the terms and conditions and not being in default of any the terms and conditions of the apartment buyer agreement, including but not limited to the payment of instalments. In case of any default/delay in payment, the date of handing over of possession was to be extended accordingly solely at the respondent's discretion, till the payment of all outstanding amounts and at the same time in case of any default, the complainant would not be entitled to any compensation whatsoever in terms of clause 15 and clause 17 of the apartment buyer agreement.
- XI. That section 19(3) of the Act provides that the allottee shall be entitled to claim the possession of the apartment, plot, or building, as the case may be, as per the declaration given by the promoter under section 4(2)(l)(C). The entitlement to claim the

A

possession or refund would only arise once the possession has not been handed over as per the declaration given by the promoter under section 4(2)(l)(C). In the present case, the respondent had made a declaration in terms of section 4(2)(l)(C) that it would complete the project by 31.12.2018 and has also applied for a further extension of one year with the revised date as 31.12.2019. Thus, no cause of action can be said to have arisen to the complainants in any event to claim possession or refund, along with interest and compensation, as sought to be claimed by them.

XII. The projects in respect of which the respondent has obtained the occupation certificate are described as hereunder: -

S. No	Project Name	No. of Apartments	Status
1.	Atrium	336	OC received
2.	View	280	OC received
3.	Edge		
	Tower I, J, K, L, M	400	OC received
	Tower H, N	160	OC received
	Tower-O	80	OC received
	(Nomenclature-P)	640	OC to be applied
	(Tower A, B, C, D, E, F, G)		
4.	EWS	534	OC received



5.	Skyz	684	OC to be applied
6.	Rise	322	OC to be applied

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

The application 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

8. 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

R

9. 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.

10. 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.
11. 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. (Supra)*** and 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*** 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."

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent

F.1 Objection regarding handing over possession as per declaration given under section 4(2)(I)(C) of RERA Act.

13. The counsel for the respondent has stated that the entitlement to claim possession or refund would arise once the possession has not been handed over as per declaration given by the promoter under section 4(2)(I)(C). Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.

14. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.
15. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

Section 4: - Application for registration of real estate projects

(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —.....

*(l): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: —
.....*

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."

16. The time period for handing over the possession is committed by the builder as per the relevant clause of apartment buyer agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the apartment buyer agreement. The new timeline as indicated by the



promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as *Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors. W.P 2737 of 2017 decided on 06.12.2017* and observed 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..."

F. II Objections regarding the complainant being investor.

17. The respondent has taken a stand that the complainant is the investor and not consumer and therefore, he is 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

Handwritten signature/initials.



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 consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & 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 he 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 complainant is buyers and paid total price of **Rs.49,78,157/-** 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;"

In view of above-mentioned definition of "allottees" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is allottee as the subject unit was

1A



allotted to him 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 investor is not entitled to protection of this Act also stands rejected.

F.III Objection regarding jurisdiction of authority w.r.t. booking application form executed prior to coming into force of the Act.

18. 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 booking application form 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

Am

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. (Supra)** 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."

19. 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

na



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."

20. 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. Findings on the relief sought by the complainant

G. I Direct the respondent to refund the entire amount paid by the complainant since 06.10.2009 along with interest as per the Act MCLR plus 2% till the date of actual refund.

21. The complainant intends to withdraw from the project and is seeking return of the amount paid by him 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

12



(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)

22. Clause 15(a) of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

"15. POSSESSION

(a). Time of handing over the possession

Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over the possession of the Apartment by 31/08/2012 the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex."

23. The authority has gone through the possession clause and observes that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of apartment buyer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing

JA



over of possession but subject to observations of the authority given below.

24. At the outset, it is relevant to comment on the preset 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 complainants not being in default under any provisions of these agreements 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 buyer agreement by the promoter is 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.

25. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the



apartment by 31.08.2012 and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.

26. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him at the prescribed rate of interest. However, the allottee intend to withdraw from the project and is seeking refund of the amount paid by him 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.

27. 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.

28. 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., 20.10.2022 is **8.25%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.25%**.

29. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(z) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. — For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

30. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 15(a) of the agreement executed between the parties on 20.04.2011 and the due



date of possession was specifically mentioned in the apartment buyer agreement as 31.08.2012. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 31.08.2012.

31. Keeping in view the fact that the allottee/complainant wish to withdraw from the project and are 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.
32. The due date of possession as per agreement for sale as mentioned in the table above is **31.08.2012** and there is delay of 6 years 8 months 8 days on the date of filing of the complaint.
33. 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....."

34. Further, 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. 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). 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.

36. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @ 10.25% p.a. (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. II The authority be pleased to order the respondent to pay the litigation fee incurred by the complainant on account of this case of Rs.2,00,000/-.

37. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges 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 & litigation expense 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 & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

H. Directions of the authority

38. 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 function entrusted to the authority under section 34(f):

- i. The respondent/promoter is directed to refund the amount i.e., Rs.49,78,157/- received by it from the complainant along with interest at the rate of 10.25% p.a. 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 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.
- iii. The respondent/builder is directed not to create third party right against the unit before full realization of the amount paid by the



complainant. If any transfer is initiated with respect to the subject unit, the receivable from that property shall be first utilized for clearing dues of the complainant/allottee.

39. Complaint stands disposed of.

40. File be consigned to registry.


(Ashok Sangwan)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.10.2022


(Vijay Kumar Goyal)

Member