

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

Complaint no. : 2594 of 2021
First date of hearing: 29.07.2021
Date of decision : 20.10.2022

1. Mr. Bhupesh Kanyal
2. Mrs. Dimple Kanyal

Both RR/o: -Flat No. 331, Vasant Apartments, Old Delhi
Road, Gurugram

Complainants

Versus

1. M/s Ramprashtha Promoters and Developers Private
Limited.

Regd. office: Plot No. 114, Sector-44, Gurugram-122002

2. Bluebell Proptech Private Limited.

Regd. office: C-10, C-Block Market, Vasant Vihar Delhi-
11005

Respondents

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

Col. M.S. Sehrawat (Advocate)
Ms. R. Gayatri, Shri Navneet Kumar Pandey, and
Shri Varun Katyal (Advocates) along with
Shri Tarun Arora (A.R)

Complainants

Respondents

ORDER

1. The present complaint dated 05.07.2021 has been filed by the complainant/allottees 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 details

2. The particulars of unit, sale consideration, the amount paid by the complainants, 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	"RISE", Sector 37D, Village Gadauli Kalan, Gurugram
2.	Project area	60.5112 acres
3.	Registered area	48364 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. 278 of 2017 dated 09.10.2017	
10.	RERA registration valid up to	30.06.2019	
11.	HARERA extension certificate no.	08 of 2020	
12.	Extension certificate detail	Date	Validity
		In principal approval on 17.06.2020	30.12.2020
13.	Unit no.	C-1203, 12 th floor, tower/block-C (Page no. 26 of the complaint)	
14.	Unit area admeasuring	1765 sq. ft. (Page no. 26 of the complaint)	
15.	Welcome letter	14.02.2012 (Page no. 23 of the complaint)	
16.	Date of execution of apartment agreement buyer	26.07.2012 (Page no. 24 of the complaint)	
17.	Possession clause	15. POSSESSION (a) Time of handing over the Possession Subject to terms of this clause and subject to the	



		<p>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.</p> <p>RAMPRASTHA proposed to hand over <i>the possession of the Apartment by September 2015</i> the Allottee agrees and understands that <i>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></p> <p>(Emphasis supplied)</p> <p>(Page no. 31 of the complaint)</p>
18.	Due date of possession	30.09.2015 [As per mentioned in the buyer's agreement]
19.	Grace period	Not utilized



20.	Total sale consideration	Rs.84,82,680/- (As per schedule of payment page 38 of the complaint)
21.	Amount paid by the complainants	Rs.76,26,062/- [As per averment of complainant, page 9 of complaint]
22.	Occupation certificate /Completion certificate	Not received
23.	Offer of possession	Not offered
24.	Legal notice sent by the complainant	25.03.2021 (Page no. 42 of the complaint)
25.	Delay in handing over the possession till date of filing complaint i.e., 05.07.2021	5 years 9 months and 5 days

B. Fact of the complaint

3. The complainants have made the following submissions: -

- I. That one of the complainant is an employee of MNC and staying with all his family members including parents and school going children and decided to buy a home for residing in Gurugram with family members. The complainants invested almost entire savings for buying this flat for making permanent residence in Gurugram. They are hardly having any knowledge of real estate. However, in the year 2012, M/S Ramprastha Developers Pvt. Ltd. i.e., respondent No. 1 published many advertisements in the various

popular newspapers and through tele-callers. The representatives of the respondent/promoter approached personally the complainants for booking of the flat on luxurious group housing project in the name and style of "Rise" at Sector 37D Gurugram Manesar Urban Complex.

- II. The representative of respondent/promoter explained about respondent no. 1 and its legacy since 1960 till 2012 and shown few papers of its renowned projects like two integrated townships in Ghaziabad delivered in 1970 and handing over project possession in year 2000 in Vaishali Ghaziabad and starting its operation in Gurugram in year 2005. They further explained about its joint venture with Punj Lloyds and Sare Groups. The representatives shared details of 80-million-dollar funding received by the respondent no. 1 from Deutch Bank in year 2008 for the said project etc. and launch of project Ramprastha city in Sectors-92, 93 and 95 as big bang in year 2009 and in 2012 in Gurugram City of Haryana.
- III. That the complainants as prudent person checked credentials of the respondents by looking on to their website and into previous information and suggestion of their representative/employees. The complainant got convinced and agreed to book a flat of admeasuring area 1765 sq. ft. at project "Rise" and accordingly



- were allotted a flat no. 1203 at 12th floor of block C at a total sale price of Rs.82,42,680/- with exclusive right to use one car parking.
- IV. That the representatives further assured that as the construction of the project was in full swing and the possession of the flat would be given well before the date of possession as per the buyer's agreement i.e., September 2015. Further, the complainants paid the entire amount as and when demanded well within time without any delay to any of the demand whenever raised.
- V. That the AR of company also explained clause 17(a) and drawn the attention of the complainant by showing the clause that in case if any delay occurs, they would be entitlement to the payment of Rs.5/-sq. ft. per square feet per month from the date of possession promised till date of actual possession in case of any minor delay occurred due to any reason beyond the control of the respondent.
- VI. That the complainants were re-assured many times about their investment in the said flat. They were in dire need of house and started suffering doubly by paying EMI of the flat and rental of another house also. However, every promise including proper development or timely possession etc., were false and hyped/glorified.
- VII. That the complainants trusted their assurance of penalty clause for delayed possession and promise of delivering soon. Hence, they did not approach consumer court etc. However, now it is learnt that all

the statements, advertisements and representations of respondents regarding Ramprastha City Gurugram were false, and the complainants have been cheated of their hard-earned money.

- VIII. That the respondent never attended the complainants properly nor provided proper agreement duly signed to them and they were cheated. The complainants kept calling up telephonically and wrote various emails regarding timely possession and payment of delay charges @ Rs.5/- per square feet. However, no satisfactory reply was ever given by the respondents. The complainants had no option but to request for refund as they were not in position to pay EMI and rent both. Accordingly, they requested the respondents to refund their amount along with interest as applicable.
- IX. That complainants apart from several other communications also served respondents with a legal notice dated 25.03.2021 with request to return the amount of Rs.76,26,062/- along with 15% interest. They have neither given any reply to notice nor returned abovementioned amount to complainant till the date of this complaint.
- X. That after waiting for almost four years, the complainants purchased a ready to move house in year 2019 and took another bank loan and are paying hefty EMI of both.
- XI. That now the complainants are left with no option but to approach this authority to get their hard-earned money refunded with

interest from the respondents as per the law prescribed, in the interest of justice.

- XII. That it is most humbly submitted and prayed that action as per the Act of 2016 be initiated and the complaint be decided in favour of the complainants for refund of entire amount with interest as prescribed along with cost of mental harassment, unfair trade practices and legal cost/expenses etc., as per the law in vogue.

C. Relief sought by the complainants:

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

- I. Direct the respondents to cancel the said unit and the entire money paid by the complainants i.e., Rs.76,26,062/- be refunded with interest as applicable as per the provisions of the Act as per the date of payments made by them.
- II. That in addition of the above relief, the complainants may be paid amount for the rent of Rs.11,50,000/- which they have paid @ Rs.25,000/- per month as tenants due to delay in their possession of the ibid flat for the period delay i.e., 01.10.2015 till 31.07.2019, i.e., till the date of purchase of new flat. Also, payment for penalty of delay period from date of possession become due till date of payment to the complainant @5/- per sq. ft. per month as per the buyer's agreement.

5. On the date of hearing, the authority explained to the respondent/promoters 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 has contested the complaint on the following grounds.
 - I. That the present complaint has been filed before the authority claiming for refund along with interest and legal cost against the investment made by the complainants in one of the unit in the project "Rise" of the respondent. That the authority is precluded from entertaining the present matter due to lack of cause of action and lack of jurisdiction. Further, no violation or contravention of the provisions of the Act has been prima facie alleged by the complainants.
 - II. That the HRERA amendment rules, 2019 has been notified on 12.09.2019 whereby inter alia amendments were made to rule 28 and 29 of the Haryana rules. The Rule 28 deals with the provisions related to the jurisdiction of the authority.
 - III. That further the High Court of Punjab and Haryana, vide an order dated 16.10.2020 in *Experion Developers Pvt Ltd Vs State of Haryana and Ors, CWP 38144 of 2018 and batch*, has observed as hereunder when a question was raised before the said Hon'ble High Court pertaining to the jurisdiction of the authority and the adjudicating officer with respect to the Haryana amendment rules, 2019.
 - IV. That in this context, firstly, to file a complaint before the authority within rule 28, it is utmost crucial that *any violation or contravention of the provisions of the Act or the rules and*

regulations made thereunder, against any promoter, allottee or real estate agent has been therefore alleged by the complainants. In the present case, no such allegation has been made by the complainants which prima facie hints for a necessity for intervention of the authority. Therefore, the present case is liable to be dismissed before the authority for want of lack of cause of action and further, also the respondents cannot be held liable for an explanation when there is no such allegation of contravention.

- V. That, further, another aspect which needs attention herein is that when it comes to the part of compensation or compensation in the form of interest, the adjudicating officer shall be the sole authority to decide upon the question of the quantum of compensation to be granted.
- VI. That the complainants have now filed a complaint in terms of the Haryana Real Estate (Regulation & Development) amendment rules, 2019 under the amended rule 28 in the amended 'Form CRA' and are seeking the relief of possession, interest, and compensation under section 18 of the Act. That it is most respectfully submitted in this behalf that the power of the appropriate Government to make rules under section 84 of the said Act is only for the purpose of carrying out the provisions of the said Act and not to dilute, nullify or supersede any provision of the said Act.
- VII. That the power to adjudicate the complaints pertaining to refund, compensation and interest for a grievance under section 12,14,18 and 19 are vested with the adjudicating officer under section 71

read with section 31 of the said Act and not under the said rules and neither the said rules or any amendment thereof can dilute, nullify or supersede the powers of the adjudicating officer vested specifically under the said Act. Therefore, the authority has no jurisdiction in any manner to adjudicate upon the present complaint.

- VIII. That the complainants are not "Consumers" within the meaning of the Consumer Protection Act, 2019 as their sole intention was to make investment in a futuristic project of the respondent only to reap profits at a later stage when there is increase in the value of flat at a future date which was not certain and fixed. Neither there was any agreement with respect to any date in existence of which any date or default on such date could have been reckoned due to delay in handover of possession.
- IX. The complainants having full knowledge of the uncertainties involved have out of their own will and accord have decided to invest in the present futuristic project, and they have no intention of using the said unit for their personal residence or the residence of any of their family members. If the complainants had such intentions, they would not have invested in futuristic project. The sole purpose of the complainants was to make profit from sale of the flat at a future date and now since the real estate market is seeing downfall, they have cleverly resorted to the present exit strategy to conveniently exit from the project by arm twisting them. It is submitted herein that the complainants having purely commercial motives have made investment in a futuristic project and therefore, they cannot be said to be genuine buyers of the said

unit and therefore, the present complaint being not maintainable be dismissed in limine.

- X. That the complainants have approached the respondents' office in 2012 and have communicated that they are interested in a project which is "not ready to move" and expressed their interest in a futuristic project. They were not interested in any of the ready to move in/near completion projects. It is submitted that on the specific request of the complainants, the investment was accepted towards a futuristic project. Now, the complainants are trying to shift the burden on the respondent as the real estate market is facing rough weather.
- XI. That the complainants cannot be said to be genuine consumers by any standards; rather they are mere investors in the futuristic project. An investor by any extended interpretation cannot mean to fall within the definition of a "Consumer" under the Consumer Protection Act, 2019. Therefore, the complaint is liable to be dismissed merely on this ground.
- XII. That they have not cleared their outstanding dues and are in default of a large amount excluding the delay interests out of total consideration of Rs. 82,42,680/-. Therefore, they cannot rightfully claim for refund or possession since the possession has not been handed over due to their own default.
- XIII. That the complainant's primary prayer for handing over the possession of the said unit is entirely based on imaginary and concocted facts and the contention that the respondent was obliged to hand over possession within any fixed time period from

the date of issue of provisional allotment letter is completely false, baseless and without any substantiation; In reality, the complainants had complete knowledge of the fact that the zoning plans of the layout were yet to be approved and the initial booking dated 08.08.2012 was made by them towards a *future potential project*. Hence, there was no question of handover of possession within any fixed time period as falsely claimed by them. Thus, the complaint does not hold any ground on merits as well.

XIV. That further, the respondent has applied for the mandatory registration of the project under the Act of the authority. But however, the same is still pending approval on the part of the authority. In this background, it is submitted that by any bound of imagination, the respondent cannot be made liable for the delay occurred due to delay in registration of the project under Act of 2016. It is submitted herein that since there was delay in zonal approval from the DGTCP, the same has acted as a causal effect in prolonging and obstructing the registration of the project under the Act of 2016 for which the respondent is in no way responsible. The approval and registration are a statutory and governmental process which is way out of power and control of the respondents. This by any matter of fact be not counted as a default on the part of the respondents.

XV. There is no averment in the complaint which can establish that any so-called delay in possession could be attributable to them as the finalization and approval of the layout plans has been held up for various reasons which have been and are beyond the control of the respondent including passing of an HT line over the layout, road

deviations, depiction of villages etc. The complainants while investing in a plot which was subject to zoning approvals were very well aware of the risk involved and had voluntarily accepted the same for their own personal gains. There is no averment with supporting documents in the complaint which can establish that the respondent had acted in a manner which led to any so-called delay in handing over possession of the said plot. Hence, the complaint is liable to be dismissed on this ground as well.

XVI. It is submitted that when the complainants had approached the respondent company, it was made unequivocally clear to them that a specific plot cannot be earmarked out of large tracts of undeveloped and agricultural land; and ii) specific plot with preferred location can be demarcated only when the government releases the zoning plans applicable to the area village Basai, Gadauli Kalan, Gurugram. It was on this basic understanding that a preliminary allotment was made in favour of the complainants. On the date of the receipt of payments, the said preliminary allotment was nothing more than a payment towards a prospective undeveloped agricultural unit of them.

XVII. The complainants are not entitled to claim refund as claimed by them in the complaint and is clearly time barred. The complainants have themselves not come forward to execute the buyer's agreement and hence, cannot now push the entire blame onto the respondent. It is due to lackadaisical attitude of the complainants along with several other reasons beyond the control of the respondent as cited by them which caused the present delay. If any objections to the same was to be raised, the same should have been done in a

time bound manner while exercising time restrictions very cautiously to not cause prejudice to any other party. The complainants cannot now suddenly show up and thoughtlessly file a complaint against the respondent on their own whims and fancies by putting the interest of the builder and the several other genuine allottees at stake. The complainants had any doubts about the project, it is only reasonable to express so at much earlier stage. Further, filing such complaint after lapse of several years at such an interest only raises suspicions that the present complaint is only made with an intention to arm twist the respondent. The entire intention of the complainants is made crystal clear with the present complaint and concretises their status as investors who merely invested in the present project with an intention to draw back the amount as an escalated and exaggerated amount later.

XVIII. Despite several adversities and the unpredicted and unprecedented wrath of falling real estate market conditions, it has made an attempt to sail through the adversities only to handover the possession of the property at the earliest possible to the utmost satisfaction of the buyers/allottees. That even in such harsh market conditions, the respondent has been continuing with the construction of the project and sooner would be able to complete the construction of the project.

XIX. That till date, the complainants kept on making payments as per the payment plan, though not within the time prescribed, which resulted in delay payment charges/interest; From the date of booking till the filing of the present complaint, the complainants never raised any issue whatsoever, clearly reveals that the they

have no issue or concern about the said apartment/agreement and terms and conditions of the said apartment buyer's agreement and are now unnecessarily raising false and frivolous issues and have filed the present complaint.

XX. 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 Tower H, N Tower-O (Nomenclature-P) (Tower A, B, C, D, E, F, G)	400 160 80 640	OC received OC received OC received OC to be applied
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.
8. Through a perusal of the complaint, the complainants of the allotted unit in the group housing colony namely "Rise" situated in sector- 37D,

Gurugram but while filing written reply of the respondents on 17.08.2021, they referred to allotment of a plot and that too with incorrect particulars of dates of buyer's agreement.

9. The application filed in the form CAO with the adjudicating officer and on being transferred to the authority in view of the judgement *M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. SLP(Civil) No(s). 3711-3715 OF 2021*, the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case allottee wishes to withdraw from the project on failure of the promoter to give possession as per agreement for sale. It has been deliberated in the proceedings dated 10.5.2022 in *CR No. 3688/2021 titled Harish Goel Versus Adani M2K Projects LLP* and was observed that there is no material difference in the contents of the forms and the different headings whether it is filed before the adjudicating officer or the authority.
10. Keeping in view the judgement of Hon'ble Supreme Court in case titled as *M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. (Supra)* the authority is proceeding further in the matter where allottee wishes to withdraw from the project and the promoter has failed to give possession of the unit as per agreement for sale irrespective of the fact whether application has been made in form CAO/CRA. Both the parties want to proceed further in the matter

accordingly. The Hon'ble Supreme Court in case of *Varun Pahwa v/s Renu Chaudhary, Civil appeal no. 2431 of 2019 decided on 01.03.2019* has ruled that procedures are hand made in the administration of justice and a party should not suffer injustice merely due to some mistake or negligence or technicalities. Accordingly, the authority is proceeding further to decide the matter based on the pleading and submissions made by both the parties during the proceedings.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

12. 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

13. 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.

14. 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.
15. 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.”

16. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases 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 complainants being investor

17. 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 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 complainants are buyers and they have paid total price of **Rs.76,26,062/-** 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 "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 allottees being investors are not entitled to protection of this Act also stands rejected.

F.II Objection regarding jurisdiction of authority w.r.t. buyer's agreement 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 apartment 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 would be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The 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."

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 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 complainants

G.1 Direct the respondent to cancel the said unit and the entire money paid by the complainants i.e., Rs.76,26,062/- be refunded with interest as applicable as per the provisions of the Act as per the date of payments made by them.

21. The complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of

delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)."

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 September 2015** 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 of the agreement 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 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's 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. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 30.09.2015 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 it 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 delay possession charges at prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the prescribed rate of interest. However, the allottees intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.*

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

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(za) 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:

"(za) "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 26.07.2012, the possession of the subject apartment was to be delivered within stipulated time i.e., by September 2015. 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 30.09.2015.

31. Keeping in view the fact that the allottee/complainants 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 30.09.2015 and there is delay of 5 years 9 months 5 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 allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have 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 allottees 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 allottees, as they wish 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 complainants are entitled to refund of the entire amount paid by them 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 That in addition of the above relief the complainants may be paid amount for the rent of Rs.11,50,000/- which they have paid @ Rs.25,000/- per month as tenants due to delay in their possession of the *ibid* flat for the period delay i.e., 01.10.2015 till 31.07.2019, i.e., till the date of purchase of new flat. Also, payment for penalty of delay period from date of possession become due till date of payment to the complainants @5/- per sq. ft. per month as per the buyer's agreement.

37. The complainants are 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 complainants are advised to approach the adjudicating officer 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.76,26,062/- received by it from the complainants 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 is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee/complainants.
39. Complaint stands disposed of.
40. File be consigned to registry.


(Sanjeev Kumar Arora)

Member


(Ashok Sangwan)

Member


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.10.2022