

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

Complaint no. : 2617 of 2021
First date of hearing: 29.07.2021
Date of decision : 20.10.2022

Sangita Das
R/o: - House No. 328, Sector- 27, Gurugram- 122001

Complainant

Versus

M/s Ramprashtha Promoters and Developers Private
Limited.

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

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

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

Complainant

Respondent

ORDER

1. The present complaint dated 09.07.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it

is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made there under or to the allottees 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 | "Primera", Sector 37D, Village Gadauli Kalan, Gurugram |
| 2. | Project area | 13.156 acres |
| 3. | Registered area | 3.257 acres |
| 4. | Nature of the project | Group housing colony |
| 5. | DTCP license no. and validity status | 12 of 2009 dated 21.05.2009 valid upto 20.05.2024 |
| 6. | Name of licensee | Ramprastha realtor Pvt. Ltd. |
| 7. | Date of approval of building plans | 25.04.2013 [As per information obtained by planning branch] |
| 8. | RERA Registered/ not registered | Registered vide no. 21 of 2018 dated 23.10.2018 |

| | | |
|-----|---|---|
| 9. | RERA registration valid up to | 31.03.2020 |
| 10. | Unit no. | A-1602, 16 th floor, tower/block-A (Page no. 38 of the complaint) |
| 11. | Unit area admeasuring | 1720 sq. ft. (Page no. 38 of the complaint) |
| 12. | Allotment letter | 25.07.2013 (Page no. 29 of the complaint) |
| 13. | Date of execution of apartment agreement by buyer | 09.10.2013 (Page no. 34 of the complaint) |
| 14. | Possession clause | <p>15. POSSESSION</p> <p>(a) Time of handing over the Possession</p> <p>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 shall endeavour to complete the</p> |

| | | |
|-----|---------------------------------|---|
| | | <p>construction of the said <i>Apartment within a period of 54 months from the date of approvals of building plans by the office of DGTCP. 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></p> <p>(Emphasis supplied) (Page no. 48 of the complaint)</p> |
| 15. | Due date of possession | <p>25.10.2017</p> <p>[Note: - the due date of possession can be calculated by the 54 months from approval of building plans i.e., 25.04.2013]</p> |
| 16. | Grace period | Not utilized |
| 17. | Total sale consideration | <p>Rs.1,04,06,632/-</p> <p>(As per schedule of payment page 61 of the complaint)</p> |
| 18. | Amount paid by the complainants | <p>Rs.40,65,612/-</p> <p>(As per account statement dated 29.04.2019, page no. 74 of the complaint)</p> |

| | | |
|-----|---|--|
| 19. | Occupation certificate /Completion certificate | Not received |
| 20. | Offer of possession | Not offered |
| 21. | Request to withdraw from the project by the allottee | 18.05.2019 [Page no. 77 of the complaint] |
| 22. | Delay in handing over the possession till date of filing complaint i.e., 09.07.2021 | 3 years 8 months and 14 days |

B. Facts of the complaint

3. The complainant has made the following submissions: -

1. That the complainant made an application towards booking of a flat on a standard application form through Prop. Tiger Realty Pvt Ltd., SCO - 11, 12, 1st floor, sector-31, Gurgaon 122001 enclosing cheque no. 273549 dated 29.09.2012 for a sum of Rs.5,00,000/- favouring the respondent where upon she was assigned "priority no. 053" towards booking. The complainant was asked and paid a further amount of Rs.350,000/- under cheque no. 000028 dated 28.10.2012 favouring the respondent towards her booking application. Subsequently, she was asked yet again and therefore, made another payment of Rs.300,000/- vide Kotak Mahindra Bank cheque No. 000030 favouring the respondent towards her booking application. It is pertinent to note that the respondent acknowledged receiving from the complainant, the

- aforementioned amount on 04.07.2013 vide receipt Nos. RPDPL/A-1602/13-14/0215, RPDPL/A-1602/13-14/0216 and RPDPL/A-1602/13-14/0217 respectively.
- II. That the respondent vide allotment letter dated 25.07.2013 bearing Subject: Letter of allotment for flat number A-1602 in Primera located at Ramprastha City, Sector-37 D, Gurgaon, Haryana, assigning customer id: RP-000058 to the complainant, allotted 3 BHK flat no. A-1602, having area 1720 sq. ft. along with exclusive right of two car parking in the project Primera.
- III. That the Prop. issued credit note no. 2183 dated 13.09.2013 "Subject: Discounts offered on your real estate transaction" issued in suppression to their credit note no. 1969 dated 31.07.2013 which stood cancelled, detailing the booking details, acknowledged booking amount of Rs.500,000/- and offered discounts as 2.5% of BSP towards BSP adjustment and 2.5% of BSP towards loyalty discount. The loyalty discount was to be paid by cheque net of TDS as applicable. It is pertinent to note that the BSP was @ Rs.5,000/- per sq. ft.
- IV. That both the parties entered into apartment buyer's agreement regarding the said unit on 09.10.2013 against sale price of Rs.1,04,06,632/- including basic sale price, EDC, IDC, PLC (wherever applicable), IFMS, service tax (as applicable) and exclusive right to use the two dedicated car parking spaces. It is

pertinent to note that the annexure-II of the buyer's agreement details the break-down of the sale price as basic sale price @ Rs.5,340/- per sq. ft; EDC @ Rs.255/- per sq. ft; IDC @ Rs.45/- per sq. ft; IFMS and PLC @ Rs.100/- per sq. ft; (each) and includes service tax amount of Rs.361,832/-.

- V. That the respondent charged an increased basic sale price rate at the time of entering into the agreement. The complainant to avoid forfeiture of the earnest money @ 10% of the sale price along with processing fee and such other charges, had no option but to sign on the dotted lines of the agreement, the terms of which are oppressive to her and entirely one sided in its favour.
- VI. That the respondent undertook to complete the construction of the flat within a period of 54 months from the date of approval of building plans by the office of DGTCP. Thus, the flat should have been completed by 09.04.2018. Further, the respondent having drafted the agreement, terms of which are oppressive, one sided and entirely in its favour, entitled itself for a further grace period of one hundred and twenty (120) days for applying and obtaining the occupation certificate in respect of the project. It is humbly submitted that the respondent was obliged to obtain the occupation certificate for handing over of the possession on or before 09.08.2018.

- VII. That the complainant had been praying regularly till it was found out that the pace of construction was too slow in the project to be completed in time as committed. It is pertinent to note that the complainant had paid a sum of Rs.40,65,612/- till 08.05.2015. She stopped making payment since then as it was found out that the respondent, having received the entire amount towards EDC and IDS had done little towards the same. The complainant was overcome with shock at the dismal rate of external and internal development towards which the respondent claimed and received entirely the payment as applicable under the agreement from the complainant.
- VIII. That the respondent realising the fact that the complainant and other home buyers were getting impatient and worried with the delay, sent a letter "*Sub: Intimation Regarding Increased Pace of Construction in 'Primera'*" to the complainant on 20.07.2018, claiming to have increased the pace of construction in the last few months, and expressing hope to hand over the apartment by September 2019. The respondent was under contractual obligation to obtain the occupation certificate by 09.08.2.18, and to hand over possession thereafter.
- IX. That the respondent sent email dated 01.03.2019 as *reminder-1* wherein it demanded payment of outstanding amount warning of appropriate action including charging of interest in terms of the

agreement. Thereafter, the respondent sent letter reminder - II dated 25.03.2019 '*Sub: reminder -II for Payment of Outstanding Dues. Ref A-1602*' wherein it reiterated that failure in making payment of outstanding dues might lead to levy of interest/cancellation of booking and or forfeiture of the amount(s) as per policy of the company at the sole its discretion. The complainant was not informed of the "company policy".

- X. That the respondent sent letter dated 29.04.2019 '*Subject: Account Statement*' wherein it showed account outstanding at Rs.55,79,151/- and amount paid as Rs.40,65,612/-. In the said letter, the respondent requested the complainant to make the outstanding payment within 15 days from the issue date of the letter to avoid any interest being levied. But the said letter did not mention cancellation of booking and or forfeiture of amount(s) as per policy of the company, at the sole discretion of the Company, which was mentioned in previous letter dated 25.03.2019.
- XI. That the complainant sent an email dated 18.05.2019 to the respondent cancelling the booking and seeking refund of the amount paid Rs.40,65,612/- till then with applicable interest as per the NCDRC decision. The complainant repeated the demand of cancelling of the booking and refund of the amount paid vide letter dated 21.09.2019, and Emails dated 26.09.2019, 01.03.2020 and 26.10.2020. But the respondent chose to ignore, neither any

acknowledgement nor any response has been received by the complainant from the respondent till date.

XII. That the respondent vide email dated 30.07.2019 claimed that the project was in its final stage of completion and was most likely to be completed in March 2020. In the Email, the respondent, as a token of appreciation and to express its heart-felt gratitude to all those valuable and dependable customers who were willing to pay outstanding amount and future demands in timely manner, introduced *Timely Payment Rebate Scheme* and under which a straight reduction of 8% of the BSP (excluding parking), subject to signing of an MoU and terms and conditions extracted as under-

- "Half of rebate amount shall be adjusted after making payment as per MoU and another half, at the time of possession.
- Above mentioned proposal can be availed by 25.08.2019 by paying 10% of the amount due against the captioned unit.
- Complete payment should be cleared latest by 15.09.2019."

XIII. That the respondent's vide Email dated 10.02.2021 wishes to apprise the complainant of the latest developments towards its efforts to hand over possession of the flat at the earliest, and informed that post the disbursal of the first tranche of secured Swamih funding in October 2020, the construction had been in full swing. The respondent did not commit a firm date for the completion and handing over of possession in the said email. Not only that the respondent did not respond to the complainant's demand of cancellation of booking and refund of amount paid, but

also demanded payment of outstanding dues based on the statement of account as on 8th February attached with the said email, wherein the outstanding dues was shown as Rs.117,14,121/- inclusive interest charges of Rs. 20,69,358/-. The demand of interest was to coerce the complainant into withdrawing request for cancellation of booking and refund of amount paid with applicable interest. The respondent levied interest so as to forfeit the amount paid by her. Having breached the terms of agreement and delay such a long delay, the respondent had no right to charge interest.

- XIV. That the respondent is in breach of its obligations under the agreement, and also in violation of the responsibilities, obligations under the Act, 2016 and rules and regulations made there under.
- XV. That the complainant is entitled to full refund of the amount including but not limited to all the payments made in lieu of the said unit/flat, as per the terms and conditions of the agreement and even otherwise is entitled to the same.
- XVI. That the complainant is seeking applicable interest on the amount paid for the period of delay since the date of each payment. Besides, compensation towards mental agony and harassment and litigation cost suffered at the hands of the respondent.

C. Relief sought by the complainant:

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

- i. To cancel the booking of the flat made by the complainant and refund the total amount paid i.e., Rs.40,65,612/- with applicable interest.
 - ii. Direct the respondent to pay a sum of Rs.15,00,000/- to the complainant as compensation for the mental agony and harassment suffered by the complainant.
 - iii. Direct the respondent to pay a sum of Rs.2,00,000/- as cost of litigation to complainant.
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 has contested the complaint on the following grounds.
- I. That the present complaint has been filed by the complainant before this authority for refund along with interest and legal cost against the investment made by the complainant in one of the flat lots in the project "Primera" of the respondent. In this behalf, it is submitted that the adjudicating officer is precluded from entertaining the present matter due lack of jurisdiction.
 - II. That the complainant has 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 CAO' and is seeking the relief of refund along with interest under

section 18 of the Act. It is 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.

- III. The power to adjudicate the complaints pertaining to refund and interest for a grievance under Sections 12,14,18 and 19 are vested with the adjudicating authority 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 and therefore, the adjudicating officer has no jurisdiction in any manner to adjudicate upon the present complaint.
- IV. That the complaint pertains to the alleged delay in delivery of possession seeking relief of refund, interest, and compensation u/s 18 of the said Act. Therefore, even though the project of the respondent i.e. "Rise" (SIC i.e., "Primera") Ramprastha City, Sector-37D, Gurgaon is covered under the definition of "ongoing projects" and registered with the regulatory authority, the complaint, if any, is still required to be filed before the regulatory authority under the amended rule -28 of the said rules and not before adjudicating officer under the amended rule-29 as the adjudicating officer has no jurisdiction whatsoever to entertain such complaint and such complaint is liable to be rejected.

- V. That, without prejudice to the above, now, in terms of the said amendment rules, the complainant has filed the present complaint under the amended rule-29 (but not in the amended 'Form CAO') and is seeking the relief of refund, interest and compensation u/s 18 of the said Act. It is pertinent to mention here that as the present complaint is not in the amended 'Form CAO', therefore the present complaint is required to be rejected on this ground alone.
- VI. That the complainant is not "Consumers" within the meaning of the Consumer Protection Act, 2019 as the sole intention of the complainant 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 and 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.
- VII. That it is evident that the complainant has approached the authority by suppressing crucial facts with unclean hands which is evident from its own complaint. Therefore, the present complaint is liable to be rejected in limine based on this ground alone.
- VIII. That the complainant cannot be said to be genuine consumer by any standards; rather she is mere investor 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.

- IX. Even all through these years, the complainant has never raised any dispute regarding delay in possession or any other aspect. Furthermore, filing a complaint after all these years only hints at the malafide intentions of the complainant. Apparently, the complainant has been waiting eagerly all this while to raise dispute only to reap the benefits of the increase in value of property.
- X. 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 complainant cannot now suddenly show up and thoughtlessly file a complaint at her own whims and fancies by putting the interest of the builder and the several other genuine allottees at stake. If at all, the complainant had any doubts about the project, it is only reasonable to express so at much earlier stage. Further, filing such complaint after lapse of such a long time at such an interest only raises suspicions that the present complaint is only made with an intention to arm twist. The entire intention of the complainant is made crystal clear with the present complaint and concretes her status as an investor who merely invested in the present project with an intention to draw back the amount as an escalated and exaggerated amount later.
- XI. That the respondent had to bear with the losses and extra costs owing due delay of payment of installments on the part of the

complainant for which she is solely liable. However, the respondent owing to its general nature of good business ethics has always endeavored to serve the buyers with utmost efforts and good intentions. The respondent constantly strived to provide utmost satisfaction to the buyers/allottees. However, now, despite of its efforts and endeavors to serve the buyers/allottees in the best manner possible, is now forced to face the wrath of unnecessary and unwarranted litigation due to the mischief of the complainant.

- XII. That the complainant has been acting as genuine buyer and desperately attempting to attract the attention of this authority to arm twist the respondent into agreeing with her unreasonable demands. The reality behind filing such complaint is that the complainant has resorted to such coercive measures due to the downtrend of the real estate market and by way of the present complaint, is only intending to extract the amount invested along with profits in the form of exaggerated interest rates.
- XIII. That further the reasons for delay are solely attributable to the regulatory process for approval of layout which is within the purview of the town and country planning department. The complaint is liable to be rejected on the ground that the complainant had indirectly raised the question of approval of zoning plans beyond the control of the respondent and outside the purview of consumer courts and in further view of the fact the complainant had knowingly made an investment in a future potential project of the respondent. The relief claimed would

require an adjudication of the reasons for delay in approval of the layout plans which is beyond the jurisdiction of this authority and hence, the complaint is liable to be dismissed on this ground as well.

- XIV. That the complainant's primary prayer for handing over the possession of the said units is entirely based on imaginary and concocted facts and the contention that the opposite party 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 complainant 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 the complainant towards a *future potential project* of the respondent company and hence there was no question of handover of possession within any fixed time period as falsely claimed by the complainant; hence the complaint does not hold any ground on merits as well.
- XV. That further, the respondent has applied for the mandatory registration of the project with the authority and the same is still pending approval on the part of the authority. However, in this background, it is submitted that by any stretch of imagination, the respondent cannot be made liable for the delay which has occurred due to delay in registration of the project under the 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 is a statutory and governmental process which is way out of power and control of the respondent. This by any matter of fact be not counted as a default on the part of the respondent.

- XVI. There is no averment in the complaint which can establish that any so-called delay in possession could be attributable to the respondent as the finalization and approval of the layout plans has been held up for various reasons, beyond the control of the respondent including passing of an HT line over the layout, road deviations, depiction of villages etc. which have been elaborated in further detail herein below. The complainant 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 her own personal gain. 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.
- XVII. The respondent company is owner of vast tracts of undeveloped land in the revenue estate of Village Basai, Gadauli Kalan and falling within the boundaries of Sectors 37C and 37D Gurugram also known as Ramprastha City, Gurugram.
- XVIII. That when the complainant had approached the promoter, it was made unequivocally clear to her 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 complainant. On the date of the receipt of payment, the said preliminary allotment was nothing more than a payment towards a prospective undeveloped agricultural land.

- XIX. That even in such adversities and the unpredicted wrath of falling real estate market conditions, the respondent 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 will be able to complete the construction of the project.
- 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 respondent on 17.08.2021, they referred to allotment of a plot and that too with incorrect particulars of dates of buyer's agreement.

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

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

E.II Subject matter jurisdiction

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

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities, and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be.

Section 34-Functions of the Authority:

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

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (C), 357*** 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."

13. 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 the complainant being investor.

14. The respondent has taken a stand that the complainant is an investor and not a consumer, therefore, she 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 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 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 a buyer and paid total price of Rs.40,65,612/- to the

promoter towards purchase of an apartment in its project. 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 application for allotment, it is crystal clear that the complainant is an allottee as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant

- G.1 To cancel the booking of the flat booked by the complainant and refund the total amount paid i.e., Rs.40,65,612/- with applicable interest.**

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

"Section 18: - Return of amount and compensation

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

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

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

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

16. The clause 15(a) of the apartment buyer's 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 shall endeavour to complete the construction of the said Apartment within a period of 54 months from the date of approvals of building plans by the office of DGTCP. 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."

17. 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 complainant 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.
18. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by her at the prescribed rate interest. However, the allottee intends to withdraw from the

project and is seeking refund of the amount paid by her in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

19. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
20. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 20.10.2022 is **8.25%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.25%**.
21. 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;”*

22. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule **28(1)**, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 15(a) of the apartment buyer’s agreement executed between the parties on 09.10.2013, the possession of the subject unit was to be delivered within a period of 54 months from the date of approvals of building plans i.e., 25.04.2013 which comes out to be 25.10.2017. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over of possession is 25.10.2017.

23. Keeping in view the fact that the allottee/complainant wishes to withdraw from the project and is demanding return of the amount received by the promoter in respect of the unit with interest on its failure to complete or inability to give possession of the plot 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.

24. The due date of possession as per agreement for sale as mentioned in the table above is 25.10.2017 and there is delay of 3 years 8 months 14 days on the date of filing of the complaint.
25. 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 she 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....."

26. 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. and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others (supra)*** 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."

27. 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 she 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.
28. 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 her 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. Direct the respondent to pay a sum of Rs.15,00,000/- to the complainants as compensation for the mental agony and harassment suffered by the complainant.

G.III. Direct the respondent to pay a sum of Rs.2,00,000/- as cost of litigation to complainant.

29. 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 compensation.

H. Directions of the authority

30. 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):

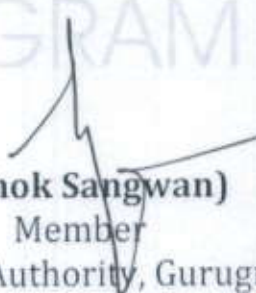
- i. The respondent/promoter is directed to refund the amount i.e., Rs.40,65,612/- received by it from the complainant along with interest at the rate of 10.25% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the 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 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 complainant, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee/complainant.
31. Complaint stands disposed of.
32. File be consigned to registry.


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.10.2022


(Ashok Sangwan)

Member

 v.1 - 3
(Vijay Kumar Goyal)

Member