

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

Complaint no. : 679 of 2019
Date of decision: 15.09.2022

Inderjeet Singh
Address: R/28, Greater Kailash, Part-II, New Delhi **Complainant**

Versus

Emaar MGF Land Limited
Address: - 306-308, Square One, C-2,
District Centre, Saket New Delhi-110017 **Respondent**

CORAM:

Shri Vijay Kumar Goyal **Member**
Shri Ashok Sangwan **Member**
Shri Sanjeev Kumar Arora **Member**

APPEARANCE:

Shri Surender Singh Yadav Advocate for the complainant
Shri J.K. Dang Advocate for the respondent

ORDER

1. The present complaint dated 18.02.2019 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the

Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	Capital Tower 1, Sector-26, Gurugram.
2.	Total area of the project	3.833 acres
3.	Nature of the project	Commercial Colony
4.	DTCP license no.	19 of 2012 dated 03.03.2012
	Validity of license	02.03.2018
	Licensee	Sh. Virender Kumar C/o Emaar MGF Land Ltd.
5.	Registered/not registered	31.07.2019 (Respondent filed an application for extension on 29.07.2019 and extension was granted vide Extension No. 6 of 2019 dated 16.10.2019 which is valid till 31.07.2020.)
6.	Occupation certificate granted on	11.09.2019 [annexure R10, page 125 of reply]
7.	Provisional allotment letter	19.02.2015 [annexure R2, page 47 of reply]
8.	Unit no.	CT-BE-051 -08-004, 8 th floor

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		[annexure R5, page 59 of reply]
9.	Area of the unit	1152 sq. ft. (super area)
10.	Date of execution of buyer's agreement	31.03.2015 [annexure R5, page 56 of reply]
11.	Possession clause	<p>10. POSSESSION</p> <p>(a) Time of handing over the Possession</p> <p>I. The Company shall endeavor to handover possession of the Unit to the Allottee within 36 (thirty six) months from the date of Execution of Agreement , subject , however , to the Force Majeure conditions as stated in clause 34 of this Agreement and further subject to the Allottee having strictly complied with all the terms and conditions of this Agreement and not being in default under any provisions of this Agreement and all amounts due and payable by the Allottee under this Agreement having been paid in time to the Company . The Company shall give notice to the Allottee, offering in writing, to the Allottee to take possession of the Unit for his occupation and use ("Notice of Possession"</p> <p>II. The Allottee agrees and understands that the Company shall be entitled to a grace period of 120 days over and above the period more particularly specified here-in-above in clause 17(a)(1), for applying and obtaining necessary approvals in respect of the Complex.</p> <p>(Emphasis supplied) [page 69 of reply]</p>

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12.	Due date of possession	31.03.2018 [Grace period not included]
13.	Consideration as per payment plan annexed with the buyer's agreement at page 93 of reply	Rs.2,39,52,453/-
14.	Total consideration as per the statement of account dated 06.03.2019 at page 118 of reply	Rs.2,35,91,904/-
15.	Total amount paid by the complainant as per the statement of account 06.03.2019 at page 119 of reply	Rs.57,38,337/-
17.	Offer of possession	Not offered
18.	Request by the complainant for withdraw from the project on	06.08.2018 (Page 115 of the complaint)
19.	Cancellation letter issued by the respondent on	21.11.2018 [annexure R12, page 129 of reply]

B. Facts of the complaint

3. The complainant has made the following submissions: -

- i. That the complainant is a senior citizen and is resident of R- 28, Greater Kailash, Part-1, New Delhi-110048.
- ii. That the complainant was approached in the month of January 2013 by a broker/ real estate agent to buy a flat in the residential real estate project of the respondent company by the name of "Ekantam". Thereafter, during negotiations the respondent company convinced the complainant that his investment/money was safe and secure with the respondent, which was a joint venture

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between Emaar Properties, Dubai and MGF Developments Ltd., India and both the companies were leaders in real estate development sector.

- iii. The complainant believing the assurances given by the respondent company agreed to buy their flat in residential real estate project "Ekantam" and paid a sum of Rs. 15,00,000/- to the respondent company on 31.01.2013 by virtue of a cheque no. 000013 drawn on Standard Chartered Bank, South Extn., New Delhi.
- iv. The above mentioned project of the respondent "Ekantam" did not take off for more than two years and when the complainant started claiming refund of its money along with interest, the respondent company in the month of January, 2015 came up with a proposal that in order to compensate the complainant they shall offer a flat/unit in their prime and prestigious commercial real estate project " Capital Towers 1 strategically located at the gateway of Gurugram, next to Dronacharya Metro Station on MG road, Sector-26, Gurugram, Haryana. The respondent also offered best price and again assured that the money/investment shall be safe in their hands.
- v. Thereafter, on 19.02.2015 the respondent company allotted to the complainant a flat/ unit bearing no.CT-1-08-004 admeasuring 107.02 sq. mt. in capital tower-1, sector-26, Gurugram (Haryana) for a total sale consideration of Rs. 2,31,19,488/- . The complainant paid a sum of Rs.25,00,000/- (15,00,000/- Plus10,00,000/-) towards the sale consideration of this flat/unit and the remaining sale consideration was agreed to be paid by the complainant as per construction liked plan. The respondent thus

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took more than 10% of the total sale consideration prior to execution of buyer's agreement in violation of RERA.

- vi. That on 31.03.2015 the parties to this complaint signed and executed the buyer's agreement (hereinafter called the agreement) at Gurugram on the terms and conditions contained therein. That it was agreed between the parties as per clause 17 (a) 1 of the agreement that the respondent shall endeavour to handover possession of the unit to the complainant within 36 months from the date of execution of this agreement.
- vii. It is further agreed in clause 17 (a) II that the respondent company was entitled to a grace period of 120 days over and above the period of 36 months for applying and obtaining necessary approvals in respect of the complex. It was further agreed as per clause 19 of the agreement that in case respondent fails to deliver the possession of the flat/unit in time they shall be responsible for compensation.
- viii. That thereafter, the complainant paid 2nd, 3rd, 4th and 5th instalments from April, 2015 to December, 2015 to the respondent before the due dates when the construction was in progress at site. That sometimes in February/ March 2016 the complainant came to know that the construction at site has come to a standstill owing to the internal disputes of the respondent company. The complainant stopped paying further instalments because he was apprehensive and doubtful about the project's completion. Since the payments of instalment were construction linked and no construction was going on at the site there was thus no obligation on the part of the complainant to pay. The complainant learnt that

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the respondent company was before National Company Law Tribunal (NCLT) for adjudication of their internal disputes and de-merger, if any. No construction took place at the site for more than 2 years nor any intimation was sent during this period by the respondent with regard to the status of the project. The complainant made several calls to the respondent company and to its employee specially Sh. Alok Singh Kushwaha, Deputy Manager (customer services) who did nothing but kept assuring the complainant that the work will commence soon. The complainant also visited the site office several times to find out about the status of the project but of no avail.

- ix. That on 30.03.2018 the contractual period of 36 months i.e. the time period for handing over the possession of the flat/unit expired and the respondent company miserably failed to deliver the possession of the said flat/ unit as per the contract. The respondent company also failed to restart / recommence the project.
- x. That on 08.06.2018 after a period of more than 2 years the respondent woke up and sent a notice of demand to the complainant without giving any explanation or justification as to why the project and the construction was halted for more than two years. The said notice did not even acknowledge that the time for handing over the possession was over due to delay on the part of the respondent who was completely responsible for the breach of the contract. The respondent on 19.06.2018 in the most unfair and unjust manner also sent a payment request letter to the





complainant without there being any progress and restart of construction at site.

- xi. That on 28.07.2018 the grace period of 120 days for delivery of possession of the flat/ unit after the original period of 36 months also expired and the respondent still failed to deliver possession of the flat/ unit and also failed to take steps to mitigate the loss suffered by the complainant for not completing and handing over the said flat/ unit to the complainant in time.
- xii. That on 31.07.2018 the complainant visited the site and clicked photographs. To his utter dismay he found that the construction had still not began. Then on 06.08.2018 the complainant who had completely lost faith in the respondent and its project sent a registered letter for cancellation/ termination of the agreement to the respondent. The complainant apprised the respondent of the abysmal/ appalling status of the project by attaching the photographs of the site and demanded the refund of the entire money paid to them along with interest.
- xiii. That on 17.08.2018 the respondent company sent an e-mail threatening to cancel the flat/ unit after forfeiting the earnest money and other charges. The complainant sent a reply e-mail on the same day requesting the company not to threaten him but to adopt a pragmatic approach and resolve the dispute. Thereafter, instead of refunding the entire amount along with interest and compensation the respondent company illegally and unlawfully issued a letter dated 21.11.2018 to the complainant for cancellation and further threatening to forfeit a sum of Rs.37,89, 681/- out of total amount of Rs. 57,38,3371-received by

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them. The complainant submits that the respondent is not entitled to deduct or forfeit any amount as the respondent company is itself guilty of breach of contract. The respondent company has thus acted in most unjust and unfair manner in not returning the amount paid by the complainant with Interest.

C. Relief sought by the complainant:

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

i. Direct to the respondent to refund the entire amount paid by the complainant to the respondent amounting to Rs.57,38,337/- along with interest at the prescribed rate from the date of making payment till the date of realization as the respondent has failed to adhere to the agreement as the respondent has not been able to handover possession of the subject unit as per the terms of the buyer's agreement.

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 contested the complaint on the following grounds: -

i. That the present complaint is not maintainable in law or on facts. The complainant has filed the present complaint seeking refund, compensation and interest for alleged delay in delivering possession of the commercial unit booked by the complainant. It is respectfully submitted that such complaints are to be decided by the adjudicating officer under section 71 of the real estate

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(regulation and development) act, 2016 (hereinafter referred to as "the act' for short) read with rule 29 of the Haryana real estate (regulation and development) rules, 2017 (hereinafter referred to as "the rules") and not by this authority. The present complaint is liable to be dismissed on this ground alone.

- ii. That the present complaint is not maintainable in law or on facts. The present complaint raises several such issues which cannot be decided in summary proceedings. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint are beyond the purview of this authority and can only be adjudicated by the adjudicating officer/civil court. The present complaint deserves to be dismissed on this ground alone. That the complainant has got no locus stand or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 31.03.2015, as shall be evident from the submissions made in the following paras of the present reply. The respondent craves leave of this authority to refer to and rely upon the terms and conditions set out in the buyer's agreement in detail at the time of the hearing of the present complaint, so as to bring out the mutual obligations and the responsibilities of the respondent as well as the complainants.
- iii. That the complainant has admittedly booked the unit in question as an investment and not for his own use. Thus, the complainant is an investor and not an "aggrieved person" under the Act. The



present complaint it is not maintainable at the behest of the complainant.

- iv. That the complainant is estopped by his own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint. It is pertinent to mention herein that the complainant has failed to challenge the cancellation of allotment by the respondent. Under the circumstances, having admitted and acknowledged that the provisional allotment in his favour was rightly terminated/cancelled by the respondent in accordance with the buyer's agreement dated 31.03.2015, the complainant is stopped from demanding refund, interest or compensation which is not payable to the complainant under the buyer's agreement dated 31.03.2015.
- v. That the complainant had approached the respondent and expressed an interest in booking an apartment in the commercial project being developed by the respondent known as "Capital Tower 1", situated in Sector 26, Sikanderpur Ghosi, Gurgaon. The complainant had previously made the payment towards booking a residential apartment in a residential project being developed by the respondent. However, the complainant was of the opinion that he would be able to obtain higher returns on his investment if he shifted his allotment from a residential property to a commercial unit. Accordingly, the complainant requested the respondent to transfer his proposed allotment in a residential project to a booking in the aforesaid commercial project of the respondent. It is submitted that prior to making the booking, the complainant conducted extensive and independent enquiries with regard to the

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project and it was only after the complainant was fully satisfied about all aspects of the project, that the complainant took an independent and informed decision, uninfluenced in any manner by the respondent, to book the unit in question. That unit number CT1-08-004 was provisionally allotted in favour of the complainant. That the complainant had opted for an instalment payment plan in terms of which the first instalment was time bound and the remaining instalments were payable upon achievement of the construction milestone indicated in the payment plan. It is submitted that the complainant had agreed and undertaken to make payment as per the payment plan, upon demands raised by the respondent. However, the complainant was extremely irregular in making payment and delayed the payment on several occasions. That the project was registered under the provisions of the Act and the certificate of registration issued by this authority bearing memo number HRERA-535/2017/1713 dated 24 October 2017 is annexed hereto as annexure R8. It is pertinent to mention herein that the project has been registered till 31st July 2019. Furthermore, the respondent had applied for extension of the period of registration of the project. Extension of the registration period was granted on 16.10.2019 vide extension no. 06 of 2019. The registration period was extended till 31.07.2020. In the meanwhile, the respondent had applied for occupation certificate of the unit in question on 01.04.2019 and the occupation certificate was granted by the authorities on 11.09.2019.

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- vi. That vide notice dated 04 September 2018 the respondent had requested the complainant to clear his outstanding dues failing which it was communicated to the complainant that the allotment made in his favour was liable to be terminated/cancelled in accordance with the buyer's agreement dated 31.03.2015. Despite the aforesaid notice the complainant refuses to clear his outstanding dues. consequently, the provisional allotment made in favour of the complainant was cancelled on 21st November 2018. It was communicated to the complainant that with effect from 21st November 2018, the complainant was not left with any right, title or interest over the unit in question. After forfeiture of earnest money and deduction of other amounts as set out under the buyer's agreement dated 31.03.2015, an amount of Rs. 19,48,656/- is refundable to the complainant upon further sale/resale of the unit in question.
- vii. That it is submitted that the contractual relationship between the complainant and the respondent is governed by the terms and conditions of the buyer's agreement dated 31.03.2015. The terms and conditions of the buyer's agreement have been deliberately misinterpreted and misconstrued by the complainant. Clause 2.2 (b) of the buyer's agreement dated 31.03.2015 provides that the allottee shall make payment of the sale consideration and other charges strictly in accordance with the payment plan appended to the buyer's agreement dated 31.03.2015. In the event the allottee fails or delays payment of instalments as per the payment plan, the respondent shall have the right to terminate the agreement and forfeit the earnest money along with other non-refundable

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amounts. Clause 2.2(g) of the buyer's agreement provides that 15% of the total consideration shall be treated as earnest money to ensure due fulfilment of the terms and conditions of the application for booking as well as the buyer's agreement dated 31.03.2015. In the event of cancellation, the respondent has the right to forfeit the earnest money along with non-refundable amounts including brokerage, charges paid or due in delayed payments and interest paid or due in instalments etc.

- viii. That it is wrong and denied that the time period for delivery of possession is to be calculated in the manner claimed by the complainant. The interpretation of the buyer's agreement by the complainant is erroneous and misconceived. Selective clauses of the buyer's agreement cannot be interpreted in isolation. The entire contract has to be read as a whole so as to fully understand and appreciate the respective rights and obligations of the parties thereto. It is wrong and denied that the respondent had promised that he possession of the unit would be handed over to the Complainant within 36 months from the date of execution of the buyer's agreement dated 31.03.2015, with further grace period of 120 days. The complainant has misinterpreted and misconstrued the buyer's agreement. It is submitted that clause 17 of the buyer's agreement provides for delivery of possession of the apartment within 36 months plus grace period of 120 days, from the date of execution of the buyer's agreement dated 31.03.2015, subject to timely payment of instalments and compliance by the complainant of all the terms and conditions of the said agreement. Furthermore, in case of delay by the complainant in making payment, the time

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for possession stands extended at the discretion of the developer. Moreover, delays caused due to reasons beyond the control of the respondent, including but not limited to the time taken by statutory authorities in granting approvals, permission etc. also has to be excluded from the aforesaid time frame. In the present case, there has been delay by the complainant in making payment of instalments as per the payment plan opted by him that and hence the time for handing over possession stands extended under clause 17(b)(v) of the buyer's agreement. force majeure conditions/delays caused due to reasons beyond the power and control of the respondent, as set out in the succeeding paras of the present reply have also contributed to the delay, for which the respondent cannot be held responsible.

- ix. That it is submitted that there is no default or lapse on the part of the respondent in so far as fulfilment of its contractual obligations under the buyer's agreement dated 31.03.2015 are concerned. On the other hand, the complainant is a persistent and wilful defaulter who has defaulted in payment of instalments on numerous occasions despite notices and reminders. It appears that the complainant does not have adequate funds to remit the sale consideration for the unit in question and consequently is falsely imputing lapses and breaches to the respondent in order to cover-up his own defaults.
- x. That it is submitted that several allottees, including the complainant, have defaulted in timely remittance of payment of instalments which is an essential, crucial and an indispensable requirement for conceptualisation and development of the project



in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainant. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

- xi. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainant and without prejudice to the contentions of the respondent, it is respectfully submitted that the provisions of the act are not retrospective in nature. The provisions of the act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the act. It is further submitted that merely because the act applies to ongoing projects which are registered with the authority, the act cannot be said to be operating retrospectively so as to rewrite existing contractual obligations that were voluntarily assumed by the parties prior to the enactment of the act. The complainant cannot take any relief which travels beyond the scope of the buyer's

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agreement dated 31.03.2015. That without prejudice to the submission of the respondent that there has been no delay on the part of the respondent in construction of the unit in question, it is submitted that the project has got delayed due to the following reasons which were beyond the control of the respondent.

- xii. It is evident from the above-mentioned sequence of events that, there were many issues with the project capital tower 1 from the filing of the scheme in May 2016 till September 2017, including the matter being pending in NCLT and also dispute/objections with the landowner. Due to the same, the construction & development of the project got delayed during this period. Once the said disputes were over in September 2017, the construction work was expedited with full force thereafter from October 2017. However, it is pertinent to mention that contract for carrying out construction activities had to be renewed with the contractor post September and the respondent also had to bear huge expenses towards the same.
- xiii. That in spite of all these hiccups, the respondent company being a Samaritan carried out the pending construction work with full force and was able to complete construction of the project Capital Towers 1 by April 2019. Subsequently, the respondent had applied for occupation certificate of the unit in question on 01.04.2019 and the occupation certificate was granted by the authorities on 11.09.2019.
- xiv. That it is submitted that all demands which have been raised by the respondent are strictly in accordance with the terms and conditions of the buyer's agreement between the parties. There is





no default or lapse on the part of the respondent. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegation levelled by the complainant are totally baseless.

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 submissions made by the parties.
8. The present complaint was filed in 'Form CAO' on 18.02.2019 and the reply has been filed by the respondent on 05.03.2020. Thereafter, the complaint has been filed in 'Form CRA' on 28.03.2022.

E. Jurisdiction of the authority

9. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

10. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

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11. 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.

12. 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.
13. 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 (Civil), 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."

14. 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 relief sought by the complainant.

F.I. Direct the respondent to refund the entire amount paid by the complainant to the respondent amounting to Rs.57,38,337/- along with interest at the prescribed rate from the date of making payment till the date of realization as the respondent has failed to adhere to the agreement as the respondent has not been able to handover possession of the subject unit as per the terms of the buyer's agreement.





15. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by it 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."

16. As per clause 10 of the flat buyer agreement dated 31.03.2015 provides for handing over of possession and is reproduced below:

14. POSSESSION

(a) Time of handing over the Possession

*The Company shall endeavour to handover possession of the Unit to the Allottee **within 36 (thirty six) months from the date of Execution of Agreement**, subject, however, to the Force Majeure conditions as stated in clause 34 of this Agreement and further subject to the Allottee having strictly complied with all the terms and conditions of this Agreement and not being in default under any provisions of this Agreement and all amounts due and payable by the Allottee under this Agreement having been paid in time to the Company. The Company shall give notice to the Allottee, offering*

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in writing, to the Allottee to take possession of the Unit for his occupation and use ("Notice of Possession")

*II. The Allottee agrees and understands that the Company shall be entitled to a **grace period of 120 days over** and above the period more particularly specified here-in-above in clause 17(a)(1), for applying and obtaining necessary approvals in respect of the Complex.*

17. At the outset, it is relevant to comment on the present possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement 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 time period 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.

18. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from



the date of execution of agreement and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining the completion certificate/occupation certificate in respect of the unit and/or the project. The date of execution of buyer's agreement is 31.03.2015. The period of 36 months expired on 31.03.2018 as a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the grace period prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

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

20. 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.

21. 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., 15.09.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.
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 10(a) of the agreement to sell dated form executed between the parties on 31.03.2015 the possession of the subject unit was to be delivered within 36 (thirty-six) months from the date of execution of agreement i.e. 31.03.2015 which comes out to be 31.03.2018. As far as grace period is concerned, the same is disallowed for the reasons quoted above.
23. Keeping in view the fact that the allottee/complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.





24. The due date of possession as per agreement for sale as mentioned in the table above is **31.03.2018 and there is delay of 10 months 11 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 he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in **Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021**

"" The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

26. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)** reiterated in case of **M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022.** it was observed

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

provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

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 the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed
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 him at the prescribed rate of interest i.e., @ 10% 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*.

H. Directions of the authority

29. 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. 57,38,337/- received by it from the complainant along with interest at the rate of 10% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till 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.

30. Complaint stands disposed of.

31. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.09.2022