



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

Complaint no. : 214 of 2021
First date of hearing: 16.04.2021
Date of decision : 05.09.2022

1. Mr. D.S. Mishra
2. Mrs. Soma Devi Mishra
Both RR/o: - C-28-29, Block-C, Sewak Park, Dwarka Mod
Metro, New Delhi- 110059

Complainants

Versus

M/s Raheja Developers Limited.
Regd. Office at: W4D, 204/5, Keshav Kunj, Cariappa
Marg, Western Avenue, Sainik Farms, New Delhi-
110062

Also, at: - 3rd Floor, Raheja Mall, Sohna Road, Sector- 47,
Gurugram, Haryana - 122018

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

Ms. Priyanka Agarwal
None

Complainants
Respondent

ORDER

1. The present complaint dated 21.01.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 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	"Raheja Trinity", Sector 84, Gurugram,
2.	Project area	2.281 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no. and validity status	26 of 2013 dated 17.05.2013 valid up to 16.05.2019
5.	Name of licensee	Sh. Bhoop Singh and Others
6.	RERA Registered/ not registered	Registered vide no. 24 of 2017 dated 25.07.2017
7.	RERA registration valid up to	25.07.2022 For a period commencing from 25.07.2017 to 5 years from the



		date revised Environment Clearance
8.	Date of environment clearance	17.10.2014 [as per obtained by planning branch]
9.	Shop no.	041, ground floor (Page no. 20 of the complaint)
10.	Unit area admeasuring	270.10 sq. ft. (Page no. 20 of the complaint)
11.	Date of execution of agreement to sell - Raheja Trinity	01.08.2014 (Page no. 19 of the complaint)
12.	Allotment letter	01.08.2014 (Page no. 17 of the complaint)
13.	Possession clause	4.2 Possession Time and Compensation <i>That the Seller shall sincerely endeavor to give possession of the shop/commercial space to the purchaser within thirty-six (36) months from the date of the execution of the Agreement to sell or sanction of building plans and environment clearance whichever is later and after providing of necessary infrastructure specially road sewer & water in the sector by the</i>



		<p><i>Government, but subject to force majeure circumstances, reasons conditions or any Government/Regulatory authority's action, inaction or omission and reasons beyond the control of the Seller. The seller on obtaining certificate for occupation and use by the Competent Authorities shall hand over the shop/ commercial space to the Purchaser for this occupation and use and subject to the Purchaser having complied with all the terms and conditions of this application form & Agreement To sell. In the event of his failure to take over possession and /or occupy and use the shop/commercial space provisionally and/or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be liable to compensation @ Rs.7/- per sq. ft. of the super area per month as holding charges for the entire period of such delay..... "</i></p>
14.	Due date of possession	17.10.2017 [Note: - 36 months from date of environment clearance i.e., 17.10.2014]



15.	Basic sale consideration as per BBA at page no. 47 of complaint	Rs.37,82,877/-
16.	Total sale consideration as per applicant ledger dated 26.10.2018 page no. 48 of complaint	Rs.41,03,355/-
17.	Amount paid by the complainant as per applicant ledger dated 26.10.2018 page no. 48 of complaint	Rs.19,89,020/-
18.	Payment Plan	Installment Payment Plan (Page no. 46 of the complaint)
19.	Occupation certificate /Completion certificate	Not received
20.	Offer of possession	Not offered
21.	Request to withdraw from the project by the allottees	05.11.2018 (Page no. 53 of the complaint)
22.	Delay in handing over the possession till date of filing complaint i.e., 21.01.2021	3 years 3 months and 4 days

B. Facts of the complaint

3. The complainants have made the following submissions: -



- I. That the respondent company has launched the commercial project namely "Raheja's Trinity" at Sector-84, Gurugram, Haryana being developed by M/s. Raheja Developers Limited under the license no. 26 of 2013 dated 17.05.2013, issued by DTCP, Haryana.
- II. That the complainants were subjected to unethical trade practice as well as subject of harassment in the name and guise of a lucrative moonshine presentation of a builder company. The respondent not only failed to adhere to fulfil its commitment but also illegally extracted money from the complainants by making false promises and statements. The respondent took the advantage of the complainants and did not leave any stone unturned to illegally extract money from them, as and when desired.
- III. That the complainants have been cheated by the malpractices adopted by the respondent who is a developer and promoter of real estate since long time. Based on the various representations made and assurances given the complainants showed interest in purchasing a commercial space in the said project. That the complainants being interested in the purchase of a commercial space for themselves and were approached by the respondent for selling a commercial space in commercial project.
- IV. That the respondent company under the guise of being a reputed builder and developer has perfected a system through organized tools and techniques to cheat and defraud the unsuspecting,



innocent, and gullible public at large. The respondent advertised its projects extensively through advertisements. The complainants were allured by an enamoured advertisement of the respondent and believing the plain words of respondent in utter good faith they were duped of their hard-earned money which they saved from bonafide resources.

- V. That the complainants approached to the respondent for booking of commercial unit admeasuring 270.10 sq. ft. in the said project. And the complainants have paid the booking amount of Rs.5,00,000/- through cheque no. 013356 dated 23.08.2023. Thereafter, the complainants were allotted the unit- 041 admeasuring 270.10 sq. ft. in project on 01.08.2014.
- VI. That the respondent to dupe the complainants in their nefarious net even executed agreement to sell signed between both the parties on dated 01.08.2014. Just to create a false belief that the project shall be completed in time bound manner and in the garb of this agreement, persistently raised demands due to which it was able to extract huge amount of money from the complainant.
- VII. That the total cost of the said unit is Rs.37,82,877/- inclusive EDC, IDC, PLC, Car parking, IFMS. Out of this, a sum of Rs.19,89,020/- was demanded by them from time to time and paid by the complainants in a time bound manner.

- VIII. That the complainants had paid the demanded instalments by respondent on time and deposited Rs.19,89,020/-in time bound manner. The builder extracted more than 50% amount before execution of agreement which is unilateral, arbitrary, and illegal. That respondent in endeavor to extract money from allottees, devised a payment plan under which respondent linked 90% amount for raising the super structure only. The total sale consideration to the timelines which was not depended on or co-related to the development of the site at all. After taking the same, respondent has not bothered to initiate any development of the project till today. That after taking more than 52% amount and for the last 5 years project is abandoned.
- IX. That respondent was liable to hand over the possession of a developed commercial unit before 01.08.2017. As per Agreement to sell clause no. 4.2, *"the Seller was sincerely to endeavor to give possession of the shop/ commercial space to the purchaser within thirty-six (36) months from the execution of this Agreement to Sell..."*
- X. That the complainants visited project site many times and found that builder had not carried out development work even super structure was also incomplete, even during year 2013 to 2020 (7 year). The project was abandoned, and development work was not carried out by the builder. That the complainants tried to approach the builder for knowing the reason for inordinate delay, but it



didn't reply. The complainants wrote several e-mails to the respondent and ask for date of possession/delivery of unit but there was no response. The complainants also wrote the email and demand for refund the paid amount with interest due and the project being abandoned but still respondent keep on sending demand/reminders on mails, but no satisfactory response to complainants.

- XI. That the respondent sold the unit in 2013, extracted more than 52% from innocent buyer by giving false millstone. That in view of the above said facts and circumstances of the case, the complainants are seeking refund of their paid amount with interest till the actual payment from the respondent.

C. Relief sought by the complainant:

4. The complainants have sought following relief(s).
- i. Direct the respondent to refund the entire paid amount to the complainants and consequently pay to them an amount of Rs.19,89,020/- with interest @ 18% per annum calculated from the date of respective deposit till the date of actual realization.
 - ii. To direct the respondent to pay 5,00,000/- as damages/compensation for subjecting him to long period of mental harassment and agony, litigation charges, etc.
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention 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 complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. It is submitted that the instant complaint is absolutely malicious, vexatious, and unjustifiable and accordingly has to pave the path of singular consequence, that is, dismissal. The said project is registered under the provisions of the Act of 2016 vide registration no. 24 of 2017 dated 25.07.2017.
- ii. That the present complaint seeks refund, interest and compensation for alleged delay in executing conveyance deed of the office/shop space booked by the complainants. The complaints pertaining to possession, compensation and refund are to be decided by the adjudicating officer under section 71 of the Act, 2016 read with rule 29 of the Rules, 2017 and not by this authority. The present complaint is liable to be dismissed on this ground alone.
- iii. That the complainants have no locus standi to file the present complaint. The present complaint is based on erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the application form dated 23.08.2013.

- iv. That the complainants booked shop no. 41, in Raheja Trinity at Sector - 84, Gurugram, Haryana vide application form dated 23.08.2013. It is submitted that the booking of the said allotted shop was done prior to the enactment of the Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.
- v. That the complainants have not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The complaint has been filed by it maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:
- That the respondent/promoter is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as 'Raheja Atlantis' 'Raheja Atharva', and 'Raheja Vedanta' Raheja Highway Arcade', 'Raheja Square', 'Raheja Trade Tower' and 'Raheja SCO Market 83 and 84' and in most of these projects, a large number of families have already shifted after having taken possession and are functioning their offices/shop without any problem.

- That the complainants, after checking the veracity of the project namely, 'Raheja Trinity', sector 84, Gurugram had applied for allotment of a shop vide booking application form dated 23.08.2013. The complainants agreed to be bound by the terms and conditions of the booking application form. The complainants were aware from the very inception and had acknowledged the application form dated 23.08.2013 that the plans as approved by the concerned authorities are tentative in nature and that the respondent might have to effect suitable and necessary alterations in the layout plans as and when required.
- That that the complainants are not "Consumers" but investors who applied for allotment of property in question in order to obtain better returns and appreciation in value, which was expected at the time of booking of the unit. In such circumstances, when the investment is made for capital appreciation and better returns, it is settled law that the transaction would be for 'commercial purpose' and complainants are not consumers. That the complainants are mere real estate speculators and investors and do not fall within definition of 'consumer' under the Consumer Protection Act, 1986. That the complainants have nowhere in the entire complaint, substantiated that the unit has been booked by them

for their personal use for residential purposes. They have also failed to substantiate as to how they fall within the ambit of the definition consumer as per the Consumer Protection Act, 1986.

- That the complainants read and understood the agreement in its entirety and voluntarily signed the agreement to sell thereby agreeing to adhere to all the terms and conditions enlisted therein.
- That the delay, if any, in the project has been due to the delay in grant of the necessary approvals by the competent authorities and not due to any deficiency on part of them. The process of grant of the necessary approvals by the competent authorities had been beyond the control of the respondent. The respondent has made best possible endeavour and all efforts at every stage to diligently follow with the competent authorities for the concerned approvals. In fact, it is in the interest of the respondent too to complete the project as early as possible and handover the possession to the complainants. However, much against the normal practice and expectations of them, at every stage, each division of the concerned authority has taken time, which was beyond normal course and practice.
- That the respondent had also filed RTI application for seeking information about the status of basic services such as road, sewerage, water, and electricity. Thereafter, the respondent

received reply from HSVP wherein it is clearly stated that the relevant work to provide infrastructure facilities is still in progress. The respondent can't be blamed in any manner on account of non-completion of the work by the government authorities.

- That the origin of the present complaint is because an investor is unable to get anticipated return due to bad real estate market. The present complaint has been filed with malafide motives and the same is liable to be dismissed with heavy costs payable to the respondent.
- That the shop buyers who had invested in the hope of rising markets, finding insufficient price rise – due to delay of Dwarka expressway, delay in development of allied roads and shifting of toll plaza engineered false and ingenious excuses to complain and then used social media to make other (non-speculator) shop buyers join them and make complaints, in all probability, by giving them an impression that the attempt may mean 'profit', and there is no penalty if the complaint failed.
- That the three factors: (1) delay in acquisition of land for development of roads and infrastructure (2) delay by government in construction of the Dwarka Expressway and allied roads; and (3) oversupply of the commercial units/shops in the NCR region, operated to not yield the price rise as was

expected by a few. This cannot be a ground for complaint for refund as the application form itself has abundantly cautioned about the possible delay that might happened due to non-performance by Government agencies.

- That in the present case, keeping in view the contracted price, the completed (and lived-in) unit including interest and opportunity cost to the respondent may not yield profits as expected than what envisaged as possible profit. The completed structure as also the price charged may be contrasted with the possible profits v/s cost of building investment, effort and intent. It is in this background that the complaint, the prevailing situation at site and this response may kindly be considered. The present complaint has been filed with malafide motives and the same is liable to be dismissed with heavy costs payable to the respondent

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.

E. Jurisdiction of the authority

8. The authority has complete territorial and 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, 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

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 complainants 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 (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."

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.I. Objections regarding the complainant being investor.

14. The respondent has taken a stand that the complainants are 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 observes 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 the preamble is an introduction of a statute and states the main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if 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 buyer and they have paid total price of **Rs.19,89,020/-** to the promoter towards purchase of a unit 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;"

15. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the 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.

16. Objection raised the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat 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 will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (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."

17. 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."

18. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the relief sought by the complainant.



- G.I. Direct the respondent to refund the entire paid amount to the complainants and consequently pay to them an amount of Rs.19,89,020/- with interest @18% per annum calculated from the date of respective deposit till the date of actual realization.
19. In the present complaint, 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)

20. The clause 4.2 of the agreement to sell dated 09.12.2013 provides for handing over of possession and is reproduced below:

4.2 Possession Time and Compensation

*That the Seller shall sincerely endeavor to give possession of the shop/commercial space to the purchaser **within thirty-six (36) months from the date of the execution of the Agreement to sell or sanction of building plans and environment clearance whichever is later** and after providing of necessary infrastructure specially road sewer & water in the sector by the Government, but subject to force*



majeure circumstances, reasons conditions or any Government/Regulatory authority's action, inaction or omission and reasons beyond the control of the Seller. The seller on obtaining certificate for occupation and use by the Competent Authorities shall hand over the shop/ commercial space to the Purchaser for this occupation and use and subject to the Purchaser having complied with all the terms and conditions of this application form & Agreement To sell. In the event of his failure to take over possession and /or occupy and use the shop/commercial space provisionally and/or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be liable to compensation @ Rs.7/- per sq. ft. of the super area per month as holding charges for the entire period of such delay....."

21. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. 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 making payment as per the plan 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 a clause in the agreement to sell 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 a mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

22. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them along with 18% 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.

23. 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.
24. 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., 05.09.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.



25. 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 4.2 of the agreement to sell executed between the parties on 01.08.2014, the possession of the subject unit was to be delivered within a period of 36 months from the date of execution of buyer's agreement or sanction of building plans and environment clearance whichever is later. Therefore, the due date of handing over possession is calculated by the receipt of environment clearance dated 17.10.2014 which comes out to be 17.10.2017.
26. Keeping in view the fact that the allottee/complainant wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the 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.
27. The due date of possession as per agreement for sale as mentioned in the table above is **17.10.2017** and there is **delay of 3 years 3 months and 4 days** on the date of filing of the complaint.
28. 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....."

29. 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."



30. 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 allottees, as they 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.
31. 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., @ 9.70% 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 To direct the respondent to pay 5,00,000/- as damages/compensation for subjecting them to long period of mental harassment and agony, litigation charges, etc.**
32. 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 for seeking the relief of compensation.

H. Directions of the authority

33. 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.19,89,020/- received by it from the complainants along with interest at the rate of 10% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.




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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.

34. Complaint stands disposed of.

35. File be consigned to registry.


Sanjeev Kumar Arora
Member


Ashok Sangwan
Member


Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.09.2022



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