



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

Complaint no. : 1472 of 2018
First date of hearing: 18.12.2019
Date of decision : 31.08.2022

Mukesh Bansal
S/o Sh. Naresh Kumar Bansal
R/o: - House No. 39/8, Old Subzi Mandi, Kaithal
(Haryana)

Complainant

Versus

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

Respondent

CORAM:

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Sh. Mayank Raghav (Advocate)
None

Complainant
Respondent

ORDER

1. The present complaint dated 15.11.2018 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all



obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name of the project	"Raheja Navodaya", Sector-92&95, Gurugram
2.	Project area	17 acres
3.	Nature of the project	Residential group housing colony
4.	DTCP license no. and validity status	216 of 2007 dated 05.09.2007 valid till 04.09.2024
5.	Name of licensee	N.A. Buildwell Pvt. Ltd
6.	RERA Registered/ not registered	Not registered
7.	Unit no.	G-043, 4 th floor, tower/block- G (Page no. 28 of the complaint)
8.	Unit area admeasuring	1498 sq. ft. (Page no. 28 of the complaint)
9.	Allotment letter	21.05.2008 (Page no. 23 of the complaint)



10.	Date of execution of flat buyer agreement	01.08.2008 (Page no. 27 of the complaint)
11.	Possession clause	4.2 Possession Time and Compensation <i>That the company shall endeavors to give possession of the Apartment to the Allottee(s) within thirty-six (36) months from the date of the execution of this Agreement and after providing necessary infrastructure in the sector by the Government, but subject to force majeure, circumstances, and reasons beyond the control of the Company. The company on obtaining certificate for occupation and use by the competent authorities shall hand over the apartment to the allottee for his/her occupation and use and subject to the allottee having complied with all the terms and condition of this Flat Buyer agreement."</i> (Page no. 43 of the reply).
12.	Due date of possession	01.08.2011 (Note: 36 months from date of agreement i.e., 01.08.2008)
13.	Basic sale consideration as per payment plan page no. 45 of complaint	Rs.40,84,880/-
14.	Total sale consideration as per applicant ledger dated	Rs.51,43,060/-



	17.06.2021 at page no. 65 of the reply	
15.	Amount paid by the complainant	Rs.51,51,537/- (As per applicant ledger dated 17.06.2021 at page no. 65 of the reply) As per complainant the total paid is Rs.48,73,248/- out of which returned of Rs.2,78,500/- was made and now refund is being sought for Rs.45,94,748/-
16.	Payment plan	Installment linked payment plan [Page no. 45 of the complaint]
17.	Offer of possession without obtaining occupation certificate	15.11.2016 [Page no. 64 of the complaint]
18.	Occupation certificate details	OC received dated 11.11.2016 for tower/block: - <ul style="list-style-type: none">➤ Block- B (ground + 1st floor + 15th floor)➤ Block- C (ground + 1st floor + 15th floor)➤ Block- D (ground + 1st floor + 15th floor)➤ Block- E (ground + 1st floor + 15th floor)➤ Tower- 1 (ground + 1st floor + 14th floor)➤ Tower- 2 (ground + 1st floor + 6th floor)➤ EWS Block - (ground + 1st floor + 6th floor)➤ Community Building- II (ground + 1st floor)



19.	Legal notice sent by the complainant	12.07.2017 [Page no. 71 of the complainant]
20.	Delay in handing over the possession till date of filing complaint i.e., 15.11.2018	7 years 3 months and 14 days

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That, the respondent came up with a project under the name and style as " Navodaya " in the upcoming project situated at Sectors- 92 & 95, Gurugram (Haryana) and the company widely publicized the offer of selling units in the said project. The complainant was provided with information memorandum/prospectus for the said flat, indicating terms and conditions for allotment of flat in the project comprising the details pertaining to the offer being made as a part of application form.
- II. That the respondent proposed to set up a mega township comprises of plots, villas, multi-storey group housing, commercial complexes etc. Further, it has also been assured to the complainant that the layout plan of the said township has already been approved by the Government of Haryana. Therefore, for this reason also, the investment made by the complainant for the sole purpose of earning their livelihood seems to be safe at that time and he decided to



purchase the said flat by putting the hard-earned money and life's savings into it.

- III. That, the complainant applied for a flat/apartment in the above-mentioned project. The said flat/several apartment with the super area admeasuring 1498 sq. ft. at the rate of Rs.2275/- per sq. ft. was agreed by the complainant to the respondent and the total cost was Rs.34,07,950/-, which was to be paid as per construction in process. The overall the flat/apartment was Rs.40,84,880/- plus cost of registration charges.
- IV. That the complainant paid the 1st instalment/booking of Rs. 3,40,795/- i.e., 10 % of the total cost vide cheque no. 290140 dated 18.10.2007, drawn on HDFC Bank, Noida, beside a post-dated cheque for Rs.5,11,193/- bearing no. 290141 dated 18.12.2007 drawn on HDPC Bank, Noida along with the application form as further 15 % of the said basic sale price to be paid within 60 days of booking.
- V. That thereafter, complainant was allotted the said unit bearing no. G- 043 on dated 17.05.2008, in the project vide flat buyer's agreement and memorandum of understanding dated 01.08.2008 but was actually executed on 17.05.2008, for a total consideration of Rs.40,84,880/- including all the expenses. Thereafter, the complainant had paid an amount of Rs.37,83,873/-, under different heads, duly accepted under various receipts given by the



respondent. Further, it is relevant to mention here that it was also agreed between the complainant and the respondent under clause 4.2 in Article "Possession" that the possession of the unit would be delivered to the purchaser within 36 months from the date of execution of the agreement which has already been expired in the month of May 2011.

- VI. That, the complainant has paid all the instalments for the said unit as per the schedule and the demand raised including the amount of last instalment, to be paid on receipt of occupation certificate, of Rs.3,20,197.50/-, as per the payment plan in the agreement.
- VII. That, the respondent had failed to execute the project as per the assurances made. It has been observed by the complainant that there are serious lapses and breach of agreement on various issues viz. time of possession of the unit, start of construction, delay in execution of project. Complainant has already paid a total amount of Rs.48,73,2487/- (inclusive of taxes charged) till date and it is an admitted fact that there is a lapse of more than 7 years from the date of booking of the unit in question. The project was to be completed by the month of May 2011, but the same has not been given till date. Nor the amount of compensation of delay in offering possession has been paid till date which is an example of unfair trade practice and deficiency in service on the part of the respondent.



- VIII. That, the respondent on dated 15.11.2016 again raised a demand of Rs.7,35,475/- alleging that this amount is due, and the complainant had to clear the same by 30.11.2016. And the complainant has to complete some formalities, on the false assurance that the apartment no. G- 043 is ready for possession. The respondent also put a clause in the letter dated 15.11.2016 that in case of delay in payment and/ fulfilment of formalities, the complainant would have to pay Rs.5/- per sq. ft. per month of super area besides interest on delayed payment as per the terms and conditions. In this manner, the respondent pressurized the complainant to meet the illegal demand, in such unnatural manner. The said demand put by the respondent is totally wrong, illegal, null and void as the said unit is not even complete/ready for possession till today.
- IX. That, on receipt of demand letter dated 15.11.2016, the complainant asked the officials of the respondent to clearly explain the charges claimed by them, via email or on telephone as the amount claimed was not clear. But no clarification or explanation was provided to the complainant in due time. The complainant has to write an email on dated 30.11.2016 showing inability to make the payment as asked for, for want of explanation asked by him from the respondent. The email was replied on dated 02.12.2016 but no satisfactory explanation was given to the complainant. The date for making the payment was also extended to 15.12.2016.



- X. That, the complainant was assured that the possession would be delivered within four weeks as per the letter dated 15.11.2016 send by the respondent. But even after clearing the alleged outstanding amount on dated 14.12.2016, though under protest, possession had not been delivered till date. Further, no receipt of the said paid amount, except for Rs.25,200/- dated 19.12.2016 has been issued to the complainant.
- XI. That, while calculating the compensation for delay the date of signing of the agreement has been taken as 01.08.2008, whereas it was signed on the part of the complainant prior to 17.05.2008 and the unit number was allotted to him on 17.05.2008, the date of agreement has to be taken as 17.05.2008 and not 01.08.2008 for calculating the compensation. The latter date has been taken by the respondent intentionally and with malafide intentions. The agreement was complete on the part of the complainant prior to 17.05.2008. The further period has been taken by the respondent to complete the formalities of signing on its part and getting it notarized for which the complainant cannot be forced to suffer. The calculation for delay compensation made by the respondent is not correct.
- XII. That, the complainant is not able to use his own resource of money and the amount invested, with assurance of a reasonable income to ensure his livelihood, with the established fact that the respondent



has failed to honour the commitments and is violating the term and conditions of the agreement entered with the complainant, on all issues pertaining to the project in question. The complainant is left with no manner of doubt that the respondent had induced him to make investment of the hard-earned money by making false and incorrect representations/promises, with dishonest intention of causing wrongful loss to the complainant and for the own wrongful gain. The conduct of respondent amounts to be unfair trade practices and the respondent is liable to be proceeded against for the payment/refund of amount due to the complainant along with interest, damages, and penalties.

C. Relief sought by the complainant:

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

- i. To direct the respondent to refund the entire amount paid by the complainant i.e., Rs.45,94,748/- (Rs.48,73,248/- minus Rs.2,78,500/- as returned later on by the respondent) along with 18% per annum interest from the date of respective payment made by time till the actual realization of the entire amount.
- ii. To pay compensation for the torture, sufferings, harassment, and embarrassment etc. caused to the complainant by the respondents by their neglectful conduct and attitude in dealing with the complainant.
- iii. To award compensation to the complainant as penalty upon the respondent for the said unfair trade practices and deficiency in service



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 complainant booked a flat no. G- 043, in 'Raheja Navodya', at Sectors 92 and 95, Gurugram, Haryana vide an application form dated 18.10.2007. The respondent vide letter dated 21.05.2008 issued allotment letter to the complainant. The booking of the said allotted unit was done prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "RERA, 2016") and the provisions laid down in the said Act cannot be applied retrospectively.
 - ii. That the complainant after checking the veracity of the project namely, 'Raheja Navodya" had applied for allotment of flat no. G- 043 vide the booking application form. The complainant agreed to be bound by the terms and conditions of the booking application form. The complainant was aware of the fact that refund if any due to cancellation of the unit on his part can only be done as per the terms and conditions of the agreement to sell signed by the complainant.



- iii. That the construction of the tower in which the flat allotted to the complainant is located already complete and the respondent would hand over the possession of the same to him. The respondent is ready to handover the flat as it is ready for the possession and already has informed the complainant many times the same.
- iv. That the respondent vide email dated 15.11.2016 offered possession to the complainant. However, the complainant has not come forward to take possession of the flat till date. It is further submitted that refund if any due to cancellation of the unit on the part of complainant can only be done as per the terms and conditions of the agreement to sell signed by him.
- v. That the complaint is liable to be out-rightly rejected as this authority does not have the jurisdiction to try and decide the present false and frivolous complaint. It is submitted that the said project has already been developed and completed by the promoter and subsequently, occupation certificate has also been issued by the Directorate of Town and Country Planning, Haryana on 11.11.2016 with respect to the said project. It is pertinent to mention that the unit allotted to the complainant does not come under the scope and ambit of 'on-going project' as defined in section 2(o) of the rules, 2017.



vi. That the complainant has 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 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 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' and in most of these projects, a large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.
- That the complainant is a real estate investor and booked the unit in question with a view to earn quick profit in a short period. However, it appears that its calculations have gone wrong on account of severe slump in the real estate market, and he is now raising untenable and illegal pleas on highly flimsy and baseless grounds. Such malafide tactics of the complainant cannot be allowed to succeed.



- That the respondent raised payment demands from the complainant in accordance with the mutually agreed terms and conditions of allotment as well as of the payment plan and the complainant made the payment of the earnest money and part-amount of the total sale consideration.

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 complainant is an investor and not consumer, therefore, 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 consumers of the



real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is buyer and has paid total price of **Rs.48,73,248/-** to the promoter towards purchase of a unit in its project. At this stage, it is important to stress upon the definition of the 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 cum provisional allotment letter executed between promoter and complainant, it is crystal clear that he is an allottee(s) as the subject unit allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status



of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

F. II Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

16. An objection is raised by 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 and 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. To direct the respondent to refund the entire amount paid by the complainant i.e., Rs.45,94,748/- (Rs.48,73,248/- minus Rs.2,78,500/- as returned later on by the respondent) along with 18% per annum interest from the date of respective payment made by time till the actual realization of the entire amount.

19. The complainant booked a residential unit in the project named as 'Raheja Navodaya' situated at sector 92 & 95, Gurugram for a total sale consideration of Rs.51,43,060/- out of which he has made a payment of Rs.48,73,248/-. (At the time of argument the complainant stated that he has paid an amount of Rs.48,73,248/- and the amount of Rs.2,78,500/- returned by the respondent/promoter) The allotment of the unit and agreement to sell were executed on 01.08.2008. As per clause 4.2 of the agreement to sell, the respondent has to handover the possession of the allotted unit within a period of 36 months. Therefore, the due date for handing over of possession comes out to be 01.08.2011. The respondent has offered the possession of the subject unit vide letter dated



15.11.2016 to the complainant without obtaining part occupation certificate of the project.

20. The authority in complaint bearing no. 5137 of 2019 titled as ***Dr. Ashok Kumar Vaid and anr. Versus Emaar MGF Land Ltd.,*** has comprehensively dealt with the components of valid offer of possession and the same as follow:

- i. The possession must be offered after obtaining OC/CC;
- ii. The subject plot/unit should be in habitable condition;
- iii. The possession should not be accompanied by unreasonable additional demands.

21. In the present complaint, the respondent has offered the possession of the subject unit vide possession letter dated 15.11.2016 without obtaining part occupation certificate of the project to the allottee. Therefore, the said offer of possession dated 15.11.2016 is not valid in the eyes of law.

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

"Section 18: - Return of amount and compensation

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

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
- (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)

23. As per 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 company shall endeavors to give possession of the Apartment to the Allottee(s) within thirty-six (36) months from the date of the execution of this Agreement and after providing necessary infrastructure in the sector by the Government, but subject to force majeure, circumstances, and reasons beyond the control of the Company. **The company on obtaining certificate for occupation and use by the competent authorities shall hand over the apartment to the allottee for his/her occupation and use and subject to the allottee having complied with all the terms and condition of this Flat Buyer agreement"***

24. 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 is 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.

25. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him at the rate of 18%. However, the allottee intends to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

26. 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.

27. 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., 31.08.2022 is **8%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10%**.
28. 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 dated form executed between the parties on 01.08.2008, 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 which comes out to be 01.08.2011.
29. 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 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.



30. The due date of possession as per agreement for sale as mentioned in the table above is **01.08.2011** and there is delay of **7 years 3 months 14 days** on the date of filing of the complaint.
31. 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....."

32. 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."

33. 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 he 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.
34. 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*.

G. II To pay compensation for the torture, sufferings, harassment, and embarrassment etc. caused to the complainant by the respondents by their neglectful conduct and attitude in dealing with the complainant.

G. III To award compensation to the complainant as penalty upon the respondent for the said unfair trade practices and deficiency in service.

35. 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

36. 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):



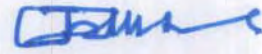
- i. The respondent/promoter is directed to refund the amount i.e., Rs.48,73,248/- received by it from the complainant along with interest at the rate of 10% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual 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.
- iii. The respondent/promoter is directed not to create third party right against the unit before full realization of the amount paid by the complainant. If any transfer is initiated with respect to the subject unit, the receivable from that property shall be first utilized for clearing dues of the complainant-allottee.

37. Complaint stands disposed of.

38. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. K.K. Khandelwal)
Chairman

Dated: 31.08.2022