

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

Date of decision: 24.08.2022

NAME OF THE BUILDER		ANSAL PROPERTIES & INFRASTRUCTURE LTD.	
PROJECT NAME		THE FERNHILL	
S. No.	Case No.	Case title	APPEARANCE
1	CR/856/2019	Suresh Goyal Vs Ansal Properties & Infrastructure Ltd. & Samyak Projects Pvt. Ltd.	Shri Samit Kumar Shri Tushar Behmani
2	CR/857/2019	Super Cloth Store Pvt. Ltd. Vs Ansal Properties & Infrastructure Ltd. & Samyak Projects Pvt. Ltd.	Shri Samit Kumar Shri Tushar Behmani
3	CR/1058/2019	Pradeep Kumar Gupta Vs Ansal Properties & Infrastructure Ltd.	Shri Pawan Kumar Ray Shri Tushar Behmani
4	CR/1739/2019	Gulshan Malik through its legal heirs & Alka Malik Vs Ansal Properties & Infrastructure Ltd. & Samyak Projects Pvt. Ltd.	Shri Nilotpal Shyam Shri Tushar Behmani

CORAM:Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal**Chairman**
Member**ORDER**

1. This order shall dispose of all the 4 complaints titled as above filed before this authority in form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules,



- 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, "The Fernhill" (group housing colony) being developed by the same respondent/promoter i.e., M/s Ansal Properties & Infrastructure Limited. The terms and conditions of the buyer's agreements, fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of refund the entire amount along with interest and the compensation.
 3. The details of the complaints, reply to status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project Name and Location	ANSAL PROPERTIES & INFRASTRUCTURE LTD "THE FERNHILL" Sector-91, Gurugram.
5. POSSESSION OF FLAT <i>"5.1. Subject to Clause 5.2 and further subject to all the buyers/allottees of the flats in the said residential project, making timely payment, the company shall endeavour to complete the development said residential project and the said flat as far as possible within 48(forty eight) months, with an extended period of 6 months, from the date of execution of this agreement or from the date of commencement of construction of the particular tower/block in which the said unit is situated subject to sanction of the building plan whichever is later ."</i>	
(Emphasis supplied)	
Occupation certificate: - Not obtained	

6 months grace period allowed being unqualified				
Complaint No., Case Title, and Date of filing of complaint	CR/856/2019 Suresh Goyal Vs Ansal Properties & Infrastructure Ltd. & Samyak Projects Pvt. Ltd.	CR/857/2019 Super Cloth Store Pvt. Ltd. Vs Ansal Properties & Infrastructure Ltd. & Samyak Projects Pvt. Ltd.	CR/1058/2019 9 Pradeep Kumar Gupta Vs Ansal Properties & Infrastructure Ltd.	CR/1739/2019 9 Gulshan Malik through its legal heirs & Alka Malik Vs Ansal Properties & Infrastructure Ltd. & Samyak Projects Pvt. Ltd.
Reply status	Reply received on 14.05.2019	Reply received on 14.05.2019	Reply received on 03.05.2019	Reply received on 26.07.2019
Unit No.	0705-GH-001 [pg. 14 of complaint]	0705-GH-003 [pg. 19 of complaint]	0704-E-0603 [pg. 20 of complaint]	0704-F-0101 [pg. 25 of complaint]
Date of allotment letter	15.11.2011 [Page 6 of the complaint]	12.12.2011 [pg. 9 of complaint]	10.07.2013 [Page 18 of the complaint]	26.07.2013 [Page 23 of the complaint]
Due date of possession	15.05.2016 Note: - due date calculated from allotment letter i.e., 15.11.2011, as date of BBA and Commencement of	12.06.2016 Note: - due date calculated from allotment letter i.e., 12.12.2011, as date of BBA and Commencement of	14.02.2019 Note: - due date calculated from commencement of construction i.e., 14.08.2014 being later. Grace period	14.02.2019 Note: - due date calculated from Commencement of construction i.e., 14.08.2014 being later. Grace period

	construction not known. Grace period allowed being unqualified	construction not known. Grace period allowed being unqualified.	allowed being unqualified.	allowed being unqualified.
Total Consideration / Total Amount paid by the complainant(s)	BSC: ₹ 1,68,75,650/- AP: ₹ 54,72,267/-	BSC: ₹ 1,68,75,650/- AP: ₹ 35,73,722/-	BSC: ₹ 39,67,660/- AP: ₹ 40,97,262/-	BSC: ₹ 46,09,050/- AP: ₹ 47,47,740/-
Relief Sought	1. Refund the entire amount along with interest	1. Refund the entire amount along with interest	1. Refund the entire amount along with interest 2. Cost of litigation ₹ 60,000/-	1. Refund the entire amount along with interest 2. Refund the amount of ₹ 45,298/- as service tax 3. Cost of litigation ₹ 1,00,000/-

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the apartment buyer's agreement executed between the parties in respect of said unit for not handing over the possession by the due date, seeking award of refund the entire amount along with interest and compensation.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in terms of section 34(f) of the Act which mandates the

authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.

6. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case **CR/1739/2019 Gulshan Malik through its legal heirs & Alka Malik Vs Ansal Properties & Infrastructure Ltd. & Samyak Projects Pvt. Ltd.** are being taken into consideration for determining the rights of the allottee(s) qua refund the entire amount along with interest and compensation.

A. Project and unit related details

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

CR/1739/2019 Gulshan Malik through its legal heirs & Alka Malik Vs Ansal Properties & Infrastructure Ltd. & Samyak Projects Pvt. Ltd.

S.No.	Heads		Information		
1.	Project name and location		"The Fernhill", Sector 91, Gurugram		
2.	Project area		14,412 acres		
3.	Nature of the project		Group Housing Colony		
4.	DTCP license no. and validity status		48 of 2010 valid up to 20.06.2016		
5.	Name of licensee		Aravali Heights Infratech Pvt. Ltd. & ors.		
6.	RERA registration details				
	S no.	Registration No.	Registration date	Valid up to	Towers



	i. 392 of 2017	22.12.2017	31.12.2019	Tower A, B, C, D, P, EWS 2 & convenient shopping
	ii. 389 of 2017	22.12.2017	31.12.2020	Tower L, M, E, F, G, H, J, K, EWS 1, nursery school (2 nos.), community building, 28 villas
7.	Unit no.	0704-F-0101 [Page 25 of the complaint]		
8.	Unit measuring	1618 sq. ft.		
9.	Date of execution of flat buyer agreement	26.07.2013 [Page 23 of the complaint]		
10.	Payment plan	Construction link		
11.	Possession clause	"5. POSSESSION OF FLAT: - <i>5.1. Subject to Clause 5.2 and further subject to all the buyers/allottees of the flats in the said residential project, making timely payment, the company shall endeavour to complete the development said residential project and the said flat as far as possible within 48(forty eight) months, with an extended period of 6 months, from the date of execution of this agreement or from the date of commencement of construction of the particular tower/block in which the said unit is situated subject to sanction of the building plan whichever is later."</i> (Page no. 33 of the complaint)		
12.	Date of commencement of construction as per customer ledger dated 31.12.2018 at 62 of the complaint	14.08.2014		



13.	Due date of possession	14.02.2019 Note: - due date calculated from Commencement of construction i.e., 14.08.2014 being later. Grace period allowed being unqualified.
14.	Delay in handing over possession till the date of filing of this complaint i.e., 23.04.2019	2 months and 9 days
15.	Basic sale consideration as per payment plan annexed with BBA at page 28 of complaint.	₹.46,09,050/-
16.	Total sale consideration as per customer ledger dated 31.12.2018 at 56 of the complaint	₹.55,39,400/-
17.	Total amount paid by the complainant as per customer ledger dated 31.12.2018 at 62 of the complaint	₹.47,47,740 /-
18.	Offer of possession	Not offered
19.	Occupation certificate	Not yet been obtained

B. Facts of the complaint

8. The complainant has made the following submissions in the complaint: -
- That the respondents are in the business of development of real estate project, represents itself as one of the flagship companies having its Corporate Office at 115, Ansal Bhawan, 16, K.G Marg, New Delhi-110001 and is competent to defend the complaint.
 - That the respondent no. 2 has claimed that they have acquired rights, title and interests from landowners (Aravali Heights Infratech Ltd. and SRP Builders Ltd.) wherein the said landowners have obtained license from the Director General, Town & Country Planning, Haryana ("DGTCP") for development of the project land into group housing

- complex comprising of multi-storied residential apartments in accordance with law. The respondent no. 1 (hereinafter referred to as "**respondent company**") claimed that they have obtained marketable, construction and development rights regarding the impugned project from respondent no. 2 wherein the respondent no. 1 was further assigned to realize the sale price from the allottees including complainants in accordance with terms of agreements entered between respondents. Accordingly, all the payments were made by the complainant through respondent company only.
- c. That based on representation and enquiries made, the complainants submitted application for allotment of unit no. 0704-F-0101 of "THE FERNHILL" project. Accordingly, allotment letter dated 14.07.2011 was issued for the impugned unit by the respondent company in favour of complainants. The said application form was submitted to the respondent company on 27.08.2011 along with the booking amount Rs. 4,00,000/- (Four Lakh Only/-) was paid before the issue of said allotment letter. The complainants had opted for equal instalments construction linked plan.
- d. That the parties (complainants and respondents) entered into agreement i.e., flat buyer's agreement (hereinafter referred as "**FBA**") dated 26.07.2013 for the sale of said unit no.0704-F-0101. That the respondent company in terms of the application of the complainants executed the agreement for sale and agreed to the terms and conditions as set forth under this agreement.
- e. That as per FBA, the Respondent company agreed to sell/ convey/ transfer the Flat unit number 0704-F-0101, with the right to exclusive

use of parking space for an amount of Rs. 55,39,400/- (fifty-five lakh thirty-nine thousand four hundred only) which includes basic sale price, car parking charges, external development charges and infrastructure development charges, preferential location charges and interest free maintenance security and in addition to, club membership, electricity connection, as per payment plan annexed to the "schedule", plus applicable taxes. The complainant had already paid a sum of Rs. 47,47,740/- (forty-seven lakh forty-seven thousand seven hundred and forty only) on account of part sales consideration, taxes, etc. In respect of the impugned project.

- f. That the respondent company issued allotment letter dated 26.07.2011 wherein the total consideration for the said unit no. 0704-F-0101 was fixed as Rs. Rs. 55,39,400/- (including PLC) and requested to remit Rs. 1,29,367/- towards the amount due as on that date.
- g. It is a matter of record that the FBA signed between complainants and respondents is a standard form of contract which was signed by every other allottees wherein there was no option to the complainants but to sign on the dotted lines on a contract which was framed by the builder with no room for any negotiation whatsoever. The clause 5.1 provides for unreasonable condition such as due possession date from the commencement of construction of particular tower and which started only on 29th July 2014 in so far as impugned tower relates wherein the complainants made the first payment on 26th June 2011. The FBA was executed on 26th July 2013, therefore, further the delaying the time period of handing over possession i.e., 4 years + 6 months (grace period) from 29th July 2014 is arbitrary and amounts to unfair trade



practice. Further, the said clause 5.1 further stipulates that the possession is subject to all the buyers/allottees in the impugned project, the said condition is *ex facie* arbitrary and unreasonable as the complainants have no control over the timely payments of other allottees who are neither privy to the instant FBA nor holds any interest in impugned unit. Therefore, in view of the binding judgment of Hon'ble Supreme Court, the said clause 5.1 of FBA in so far as it counts.

- h. That the FBA further stipulates under clause 5.5 that respondent, if failed to deliver the possession of the impugned unit within 30 days from the date of intimation of possession by the respondent and subject to the force majeure conditions shall pay compensation @ Rs.10/- per sq. ft. of the super area per month for the entire period till the date of handing over the possession. The said compensation clause is also in direct conflict with the RERA Act, 2016 and rules made there -under. Therefore, the clause 5.5 of FBA is *non est* in law as it is discriminatory *qua* clause 4.5 of FBA and in view of the fact that it is repugnant to the explicit statutory provision. The complainant(s) craves leave of hon'ble adjudicating officer to produce and rely upon relevant judgments at the time of oral hearing as may be required.
- i. That the complainants paid Rs.45298/- towards service tax for the impugned project. However, the said service tax/GST was not payable in accordance with the judgment of Hon'ble Delhi High Court in **Suresh Kumar Bansalv. Union of India & Ors.** 2016[43] S.T.R.3(Del.) and which has been followed by Hon'ble Punjab and Haryana High Court in **Balvinder Singh v. Union of India** CWP No. 23404 of 2016, decision

dated 25.09.2018. The complainant(s) are not liable to pay GST which would not have accrued if the respondents would have handed over the possession in accordance with the FBA, the same has been held by coordinate bench (Panchkula) of Hon'ble Authority in *Madhu Sareenv M/s. BPTP Ltd.* complaint No.113/2018 decision dated 16.07.2018. Therefore, the respondents are under a legal obligation to refund the service tax/GST paid by the complainants.

- j. That there is unexplained delay in handing over the possession by the respondent company to the complainants without any sign of them meeting the future deadline. Therefore, the complainants have genuine grievance which require the intervention of the Hon'ble Authority in order to do justice with them.

C. Relief sought by the complainant: -

9. The complainant has sought following relief(s)
 - a. Direct the respondent to refund the amount paid along with prescribed rate of interest per annum on compounded rate from the date of booking from the flat in question.
 - b. Refund the amount of ₹ 45,298/- as service tax.
 - c. Cost of litigation.
10. 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

11. The respondent has contested the complaint on the following grounds.

- a. That the present complaint is not maintainable before this Learned Authority for want of jurisdiction. That the complainant has approached this Learned Authority making such please and averments and seeking such reliefs which are not maintainable and beyond the jurisdiction of this Ld. Authority and hence, liable to be dismissed.
- b. It is submitted that the main intent of the legislature in enactment of the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as the "said Act") is to provide relief to aggrieved buyers/customers however, same cannot be misused by wishful buyers/customers to arm-twist the builders into extracting unlawful gains from them and wriggle out of their contractual liability. It is further submitted that this Hon'ble Authority is liable to be guided by the principle of natural justice, reasonableness, and fair play to decide the matter in dispute and avoid any injustice being meted out to builder/promoter or any other party to the dispute.
- c. The present complaint is liable to be dismissed as the same has been filed without any valid or tenable cause of action. The conduct of the respondent has been in consonance with the terms and conditions agreed between the parties and the complainants are trying to wriggle out of their responsibility by making false and baseless allegations against the respondent company.

- d. That the complainants approached the respondent company in the month of June 2011 and applied for booking of a unit in the "Fernhill Project" (hereinafter referred to as the "said project") of the respondent company proposed to be developed at Gurgaon, Haryana by filing application form dated 26.06.2011.
- e. Based on the representation made by the complainants in the aforesaid application, a flat/unit no. F-101 (hereinafter referred to as the "unit") in tower-F, phase-2 of the said project was provisionally allotted in name of the complainant for a basic sale price of Rs.46,09,050/- (Rupees forty six lakh nine thousand and fifty only) (excluding EDC/IDC/PLC/Car parking etc.) and an allotment letter dated 26.07.2011 was duly issued in name of the complainants in this regard.
- f. That the respondent company in its said FBA, by way of clause 5.1 provided for the timeline for handover of possession of the units to its various buyers. As per said clause 5.1, the handover of the units was to be calculated from the date of execution of the said FBA or from the date of commencement of construction of the particular tower/block in which the said unit is situated subject to sanctioning of the building plan, whichever is later.
- g. It is submitted that the said project was launched on procurement of requisite license and immediately thereafter, booking of units in the said project was allowed on the basis of application forms submitted



and representations made therein with the respondent company and provisional allotments of units were done in name of the respective applicants/buyers. That sometimes thereafter, FBAs were executed between the respective buyers/applicants as per the prevalent market practices and oral understanding between the parties and there was no violation or breach of any terms or conditions agreed between the parties. Subsequently, construction work at the site commenced from 14.08.2014 and as per clause 5.1. of the flat buyer agreement, the time limit for handover of possession of the flat/unit was to be calculated from the said date of commencement of construction work, which was very well in consonance with and within the ambit of the aforesaid FBA.

- h. It is pertinent to mention that post issuance of the license for development of the project by the concerned authorities, the respondent also got issued layout plan and zoning plan and the respondent was fully committed to complete the project on time. However, the construction and development activities of the project came to a standstill due to a government notification wherein the government notified some part of the project to be covered under newly declared green belt. That due to this environmental notification/hindrance the project got delayed and only after great persuasions and follow ups the issue got resolved and respondent

could move ahead with the construction and development work on the said project.

- i. That, on the present date phase 1 of the project stands completed and construction work of phase 2 is going on. It is submitted that out of total 14 (fourteen) towers in the said project, tower-N and tower-P along with lift facilities are fully completed and occupancy certificate has also been applied for the same. As far as said tower-F having the said unit of the complainants is concerned, it is submitted that construction work up to the 11th floors of said tower F (total 16 floors) has been completed and further construction is going on presently.
- j. That the respondent company has also got the project registered under RERA, Haryana as per RERA guidelines and norms, wherein a RERA registration certificate dated 22.12.2017 with **validity upto December 2020** for phase - 2 of the project has been duly issued in favour of the respondent company. That as per the said RERA certificate the respondent is liable to complete the said project by the end of December 2020 and handover the units/flats to respective buyers/allottees. That the said RERA registration certificate is also available on the official website of RERA, Haryana.
- k. That the development of the project is at a very advanced stage and the respondent is fully committed and also hopeful to get the project completed and handover the possession of units of respective buyers

in some time. It is submitted that the provisions RERA Act has to be read in its true essence and not in a mechanical way so that the interest of buyers is protected and at the same time genuine promoters/builders and live projects are also not penalized and brought to a halt/dead-end in a wrongful way.

- i. That the complainant is fully aware of these facts however, allegedly feeling aggrieved by the alleged delay in development and handover of the unit the complainant went ahead and filed the present complaint making baseless allegations against the respondent company. It is submitted that seeing the downturn in the real estate market the complainants have approached this Hon'ble Authority seeking refund along with interest and compensation.
- m. That the project under which the complainant had applied for and executed the FBA, had commenced prior to enforcement/commencement of RERA Act, 2016 and as such prior to said RERA Act, 2016, the parties were bound by the agreed terms of the said FBA. Subsequently, the RERA, 2016 came into force and the respondent company got the project registered under RERA Authority, Gurugram as per RERA guidelines and norms, wherein a RERA registration certificate dated 22.12.2017 with validity up to December 2020 for phase-2 of the project was issued in favour of the respondent company. That in term of said RERA certificate, the respondent company is fully

committed and also mandated to complete the development work of the project by the said date and deliver the plots/floors/flats to the buyers including complainants.

- n. It is submitted that subsequent to launching of the project various relevant approvals/sanctions were obtained from concerned authorities and thereafter, construction work at the site/project commenced from 14.08.2014. Further, some delay in the development/construction of the project was caused by environmental notification issues, loading factors and other technical issues, etc. which were beyond the reasonable control of the respondent company. That as on the present dated the respondent company has all the relevant clearances, licenses, plans in place and the project is at a very advanced stage of development. That in view of the same and in terms of the said FBA it cannot be said that the respondent company has breached any terms or conditions agreed between the parties and that there is any delay in handover of possession of unit to the complainants attributable to the respondent company. That as on the present date the term of the FBA still subsists and the respondent company is contractually liable, obligated and committed to complete the construction work of the project and handover the possession of the subject unit complete in all respect to the complainants.

- o. It is further submitted that post registration with RERA Authority, Haryana, the respondent company has been mandated by the provisions of RERA to complete the development work of the project with revised timeline of December 2020. That the respondent company has neither violated the terms of the FBA nor the provisions of RERA and even if this Learned Forum adopts either of the above stated two approaches then still the respondent company cannot be held liable for any alleged default/delay in handover of possession of the floor/flat.
- p. That the project commenced prior to RERA Act and hence the agreed terms and conditions mentioned in the FBA between the parties were pre-dominant till the commencement of RERA Act. Now, some of the terms have been changed/ revised in terms of applicable RERA provisions and the project is now RERA registered and completion/ possession date has been revised/ changed. The respondent company is committed to handover the possession before the stipulated date. Hence, the present complaint is filed at a premature stage and without any cause of action and hence, liable to be rejected forthwith. Besides, the complainant has filed the present complaint without exhausting the agreed alternate remedies for his alleged grievances, which is neither tenable nor permissible either in law or equity.

12. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.
13. The application filed in the form CAO with the adjudicating officer and on being transferred to the authority in view of the judgement *M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. SLP(Civil) No(s). 3711-3715 OF 2021*), the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case allottee wishes to withdraw from the project on failure of the promoter to give possession as per agreement for sale. It has been deliberated in the proceedings dated 10.5.2022 in *CR No. 3688/2021 titled Harish Goel Versus Adani M2K Projects LLP* and was observed that there is no material difference in the contents of the forms and the different headings whether it is filed before the adjudicating officer or the authority.
14. Keeping in view the judgement of Hon'ble Supreme Court in case titled as *M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. (Supra)* the authority is proceeding further in the matter where allottee wishes to withdraw from the project and the promoter has failed to give possession of the unit as per agreement for sale irrespective of the fact whether application has been made in form CAO/CRA. Both the parties want to proceed further in the matter accordingly. The Hon'ble Supreme Court in case of *Varun Pahwa v/s Renu Chaudhary, Civil appeal no. 2431 of 2019 decided on 01.03.2019* has ruled that procedures are hand made

in the administration of justice and a party should not suffer injustice merely due to some mistake or negligence or technicalities. Accordingly, the authority is proceeding further to decide the matter based on the pleading and submissions made by both the parties during the proceedings.

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

17. 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.

18. 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.
19. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Supra)*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14,

18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

20. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainants

F.I Refund entire amount paid by the complainant along with the interest

21. In the present complaints, 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) i
n accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) d
ue to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

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

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

(Emphasis supplied)

22. Clause 5 of the allotment letter (in short, agreement) provides for handing over of possession and is reproduced below:

"clause 5.

5.1. Subject to Clause 5.2 and further subject to all the buyers/allottees of the flats in the said residential project, making timely payment, the company shall endeavour to complete the development said residential project and the said flat as far as possible within 48(forty eight) months, with an extended period of 6 months, from the date of execution of this agreement or from the date of commencement of construction of the particular tower/block in which the said unit is situated subject to sanction of the building plan whichever is later."

23. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

24. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 48 months from the date of execution of the agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later. The authority calculated due date of possession from the date of date of commencement of construction i.e., 14.08.014 being later. The period of 48 months expired on 14.08.2018. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage.
25. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by them at the prescribed rate of interest. However, the allottee intend 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., 24.08.2022 is **8.0%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10%**.
28. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

29. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5 of the allotment letter executed between the parties on 26.07.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by August 2018. As far as grace period is concerned, the same is allowed for the reasons

quoted above. Therefore, the due date of handing over possession is 14.02.2019.

30. Keeping in view the fact that the allottee/complainant wish 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 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.
31. The due date of possession as per agreement for sale as mentioned in the table above is 14.02.2019 and there is delay of 2 months and 9 days on the date of filing of the complaint.
32. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which 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....."
33. Further, the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*** reiterated in case of ***M/s Sana Realtors Private Limited & other***

Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022. observed as under: -

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

34. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the 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.
35. 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 them 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*.

F. II Refund the amount of ₹ 45,298/- as service tax.

36. The amount of service tax or GST, if not refundable from the concerned taxation authority, the same shall not be included in the refundable amount.

F.III Cost of litigation ₹ 1,00,000/-

37. 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 litigation expenses.

G. Directions of the authority

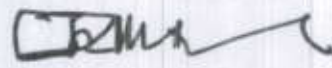
38. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent/promoter is directed to refund the amount received by it from the complainant along with interest at the rate of 9.70% 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 builder 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.
39. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
40. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter. There shall be separate decrees in individual cases.
41. Files be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 24.08.2022


(Dr. K.K. Khandelwal)
Chairman

