

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

Date of decision: 15.11.2022

<b>NAME OF THE BUILDER</b>		<b>ANSAL HOUSING &amp; CONSTRUCTION LTD.</b>	
<b>PROJECT NAME</b>		<b>ANSAL HEIGHTS 86</b>	
<b>S. No.</b>	<b>Case No.</b>	<b>Case title</b>	<b>APPEARANCE</b>
1	CR/667/2021	Anamika Chaudhary V/s Ansal Housing & Construction Ltd.	Shri Anurudhha Singh Smt. Meena Hooda
2	CR/1507/2022	Raj Luxmi V/s Ansal Housing Construction Ltd.	Complainant in person Shri. Amandeep Kadyan

**CORAM:**

Shri Vijay Kumar Goyal

Shri Ashok Sangwan

Shri Sanjeev Kumar Arora

**Member****Member****Member****ORDER**

1. This order shall dispose of both the 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, "Ansal Heights 86" (group housing colony) being developed by the same respondent/promoter i.e., M/s Ansal Housing & Construction 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 HOUSING & CONSTRUCTION LTD "ANSAL HEIGHTS 86" Sector-86, Gurugram.
<b>Possession Clause: - 31</b>	
	<i>"The developer shall offer possession of the unit any time, within a period of 42 months from the date of execution of the agreement or within 42 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be a grace period of 6 months allowed to the developer over and above the period of 42 months as above in offering the possession of the unit."</i>
	<b>(Emphasis supplied)</b>
<b>Occupation certificate: - Not obtained</b>	
<b>Due date:</b>	
	01.10.2017 ( <b>Note:</b> 42 months from date of start of construction i.e., 01.10.2013 being later + 6 months grace period allowed being unqualified)
<b>Note:</b> Grace period is allowed being unqualified & included while computing due date of possession.	





<b>Complaint No., Case Title, and Date of filing of complaint</b>	<b>CR/667/2021 Anamika Chaudhary V/s Ansal Housing &amp; Construction Ltd.</b>	<b>CR/1507/2022 Raj Luxmi V/s Ansal Housing &amp; Construction Ltd.</b>
<b>Reply status</b>	<b>10.08.2022</b>	<b>10.08.2022</b>
<b>Unit No.</b>	D-0301 [pg. 18 of complaint]	G-1004 [pg. 20 of complaint]
<b>Date of apartment buyer agreement</b>	26.05.2014 [pg. 15 of complaint]	16.08.2012 [pg. 17 of complaint]
<b>Total Consideration / Total Amount paid by the complainant(s)</b>	<b>TC: ₹ 77,69,158.63/- AP: ₹ 78,04,386.99/-</b>	<b>BSP: ₹ 54,26,924/- AP: ₹ 54,28,411.54/-</b>
<b>Relief Sought</b>	Refund the entire amount paid by the complainants along with the interest	Refund the entire amount paid by the complainants along with the interest

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/1507/2022 Raj Luxmi V/s Ansal Housing & Construction 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/1507/2022 Raj Luxmi V/s Ansal Housing & Construction Ltd.**

Sr. No.	Particulars	Details
1.	Name of the project	"Ansal Heights 86", Sector 86, Gurugram.
2.	Total area of the project	12.843 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	48 of 2011 dated 29.05.2011 valid upto 28.05.2017.
5.	Name of licensee	Resolve Estate Pvt. Ltd.
6.	Registered/not registered	Not registered
7.	Unit no.	G-1004 [pg. 20 of complaint]
8.	Area of the unit	1360 sq. ft. [pg. 20 of complaint]
9.	Date of execution of buyer's agreement	16.08.2012 [pg. 17 of complaint]

*A*



10.	Possession clause	<p><b>31.</b></p> <p><i>The developer shall offer possession of the unit any time, within a period of 42 months from the date of execution of the agreement or within 42 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be a grace period of 6 months allowed to the developer over and above the period of 42 months as above in offering the possession of the unit."</i></p> <p><i>(Emphasis supplied)</i></p> <p>[pg. 25 of complaint]</p>
11.	Date of start of construction taken from another complaint of similar project	01.10.2013
12.	Due date of possession	01.10.2017 (Note: 42 months from date of start of construction i.e., 01.10.2013 being later + 6 months grace period allowed being unqualified)
13.	Delay in handing over possession till the date of filing of this complaint i.e., 11.04.2022	4 years 6 months 10 days
14.	Basic sale consideration as per payment plan annexed with BBA at page 33 of complaint.	₹ 54,26,924/-

15.	Total amount paid by the complainant as per statement dated 23.12.2021	₹ 54,28,411.54/-
16.	Offer of possession for fit outs	17.12.2021 [pg. 43 of complaint]

**B. Facts of the complaint**

8. The complainant has made the following submissions in the complaint: -
- The respondent/promoter launched a group housing project in 2011 in the name and style of "Ansal Height 86" in sector 86, Gurgaon, Haryana. The complainant applied for an allotment of a 2-BHK flat through M/s Property Junction Realtors Pvt. Ltd., the authorized broker of the respondent and deposited the requisite amount of Rs.15 lakhs as registration amount for booking to the respondent.
  - The complainant was allotted unit no. G-1004, a 2 BHK flat in tower G of the housing complex having super area of 1360 sq. ft. for a total consideration amount of Rs.54,26,924/ under the construction linked payment plan.
  - The printed booklet of flat buyer's agreement was handed over to the complainant by the respondent for signing on all pages. Most of the clauses of the agreement in question were completely unreasonable and tilted in the interest of the respondent/promoter and the complainant was not allowed for making any kind of changes or amendments and was simply asked to sign on the shown places of the agreement paper.

A



- d. The complainant has paid all instalments demanded by the respondent/builder from time to time before due dates and never defaulted. A total sum of Rs.54,28,411/- has already been paid which includes VAT taxes as against total cost of flat of Rs.54,26,924/- statement of accounts.
- e. That as per clause 31 of the flat buyer's agreement, the possession of the flat was to be handed over to the complainant by the respondent promoter within a period of 48 months (including grace period of six month) from the date of execution of agreement or from the date of obtaining all the required sanctions and approvals necessary for commencement of construction, whichever is later. Since the installment on commencement of construction was demanded by the respondent on 04.09.2013, the possession of the flat ought to have been handed over by the respondent to the complainant within a period of 48 months from this date i.e. by 04.09.2017 (including the grace period of six month).
- f. That more than four and half years and have elapsed since then and the respondent promoter has not yet handed over the legal possession of the flat to the complainant. This inordinate delay has destroyed the very purpose for which the complainant planned to own this flat. The complainant and her husband (co-owner of this Flat) both are senior citizens and has undergone through immense mental, physical, psychological & financial stress during these periods of inordinate delay. The complainant has left no trust in the project of the

A

respondent and is no longer in a position now to face any further sufferings.

- g. That as the complainant has lost all faith and confidence in the project, she decided to opt out and registered a complaint with the authority vide complaint no. 4115 of 2021 dated 07.10.2021 seeking refund of the paid money with interest, a copy of which was served upon the respondent on 21.10.2021. While submitting the complaint at the RERA office the complainant was advised to submit it in form CAO before the adjudicating officer which she complied vide complain no. 4511 of 2021. After serving a copy upon the respondent on 23.11.2021 it was submitted in the RERA office on 06.12.2021. Finally, the complainant has been advised to register a fresh complaint before the authority which she vide complaint no.1507 of 2022 and served at copy upon the respondent.
- h. The complainant received two letters from the respondent on 11.10.2021 and 17.12.2021 related to " offer of possession for fit out" and not for actual legal possession.

**C. Relief sought by the complainant: -**

9. The complainant has sought following relief(s)
- a. Refund the entire amount paid by the complainants along with the interest.
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 in law or on facts. It is submitted that the present complaint is not maintainable before this Hon'ble Authority. The complainant has filed the present complaint seeking refund and interest for alleged delay in delivering possession of the unit booked by the complainant. It is respectfully submitted that complaints pertaining to refund, compensation and interest are to be decided by the Adjudicating Officer under Section 71 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "the Act" for short) read with Rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, (hereinafter referred to as "the Rules") and not by this Hon'ble Authority. The present complaint is liable to be dismissed on this ground alone.
  - b. That even otherwise, the complainant has no locus-standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 24.08.2012, as shall be evident from the submissions made in the following paragraphs of the present reply.
  - c. That the complainant approached the respondent sometime in the year 2015 for purchase of an independent unit in its upcoming residential project "Ansal Heights" (hereinafter "the project") situated in Sector



86, Village Nawada, Fatehpur, Gurgaon. It is submitted that the complainant prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after the complainant was fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the respondent to undertake development of the same, that the complainant took an independent and informed decision to purchase the unit, un-influenced in any manner.

- d. That thereafter the complainant applied to the respondent for provisional allotment of a unit in the project on 06.11.2011. The complainant, in pursuance of the aforesaid application form, was allotted an independent unit bearing no. G-1004 in the project "Ansal Heights" situated at sector 86, Gurugram. The complainant consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainant shall remit every instalment on time as per the payment schedule. The respondent had no reason to suspect the bonafide of the complainant.
- e. It is further submitted that despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. It is also submitted that the construction work of the project is swing on full mode and the



work will be completed within prescribed time period as given by the respondent to the authority.

- f. That without prejudice to the aforesaid and the rights of the respondent, it is submitted that the respondent would have handed over the possession to the complainant within time had there been no force majeure circumstances beyond the control of the respondent, there had been several circumstances which were absolutely beyond and out of control of the respondent such as orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the Hon'ble Punjab & Haryana High Court duly passed in civil writ petition no.20032 of 2008 through which the shucking /extraction of water was banned which is the backbone of construction process, simultaneously orders at different dates passed by the Hon'ble National Green Tribunal restraining thereby the excavation work causing Air Quality Index being worse, may be harmful to the public at large without admitting any liability. Apart from these the demonetization is also one of the main factors to delay in giving possession to the home buyers as demonetization caused abrupt stoppage of work in many projects. The payments especially to workers to only buy liquid cash. The sudden restriction on withdrawals led the respondent unable to cope with the labour pressure. However, the respondent is carrying its business in letter and



spirit of the builder buyer agreement as well as in compliance of other local bodies of Haryana Government.

- g. That it is submitted that the complaint is not maintainable or tenable under the eyes of law as the complainant has not approached to this Hon'ble Authority with clean hands and has not disclosed the true and material facts relates to this case of complaint. The complainant thus has approached the Hon'ble Authority with unclean hands and has suppressed and concealed the material facts and proceedings which has direct bearing on the very maintainability of purported complaint and if there had been discloser of these material facts and proceedings the question of entertaining the present complaint would have not arising in view of the case law titled as *S.P. Chengalvaraya Naidu Vs. Jagan Nath reported in 1994 (1) SCC Page 1* in which the Hon'ble Apex Court of the land opined that non-discloser of material facts and documents amounts to a fraud on not only the opposite party, but also upon the Hon'ble Authority and subsequently the same view was taken by even Hon'ble National Commission in case titled as *Tata Motors Vs. Baba Huzoor Maharaj bearing RP No.2562 of 2012* decided on 25.09.2013.
- h. That without admitting or acknowledging the truth or legality of the allegations advanced by the complainant and without prejudice to the contentions of the respondent, it is respectfully submitted that the

A



provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which registered with the Authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainant seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement.

- i. That it is submitted that several allottees, including the complainant, have defaulted in timely remittance of payment of instalment which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payment as per schedule agreed upon, the failure has a cascading effecting on the operation and the cost for proper execution of the project increase exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees has diligently and earnest pursued the development of the project in question and has constructed the project in question as expeditiously as possible.
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*

*A*



*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 objections raised by the respondent**

**F.I Objection regarding jurisdiction of authority w.r.t. retrospectivity of the Act**

21. 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"

22. 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"

23. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the

A



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 complainants**

**G.1 Refund entire amount paid by the complainant along with the interest**

24. 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)

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:**

A

*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)*

25. Clause 31 of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

**"31.**

*The developer shall offer possession of the unit any time, within a period of 42 months from the date of execution of the agreement or within 42 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be a grace period of 6 months allowed to the developer over and above the period of 42 months as above in offering the possession of the unit."*

26. 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

A



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.

27. **Due date of handing over possession and admissibility of grace period:** The respondent/promoter has raised the contention that the construction of the project was badly affected on account of the orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the Hon'ble Punjab & Haryana High Court duly passed in civil writ petition no.20032 of 2008 through which the shucking /extraction of water was banned which is the backbone of construction process, simultaneously orders at different dates passed by the Hon'ble National Green Tribunal restraining thereby the excavation work causing Air Quality Index being worse, may be harmful to the public at large without admitting any liability. Apart from these the demonetization is also one of the main factors to delay in giving possession to the home buyers as demonetization caused abrupt stoppage of work in many projects. The payments especially to workers to only buy liquid cash. The sudden restriction on withdrawals led the respondent unable to cope with the labour pressure.
28. In this particular case, the Authority considered the above contentions raised by the respondent and observes that the promoter has proposed to hand over the possession of the apartment within a period of 42 months from the date of execution of the agreement or within 42 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 commencement of construction i.e., 01.10.2013 being later. The period of 42 months expired

A

on 01.04.2017. 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.

29. **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.

30. 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.
31. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 15.11.2022 is 8.25%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.25%.

A



32. 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;"*

33. 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 31 of the agreement executed between the parties on 16.08.2012, the possession of the subject apartment was to be delivered within stipulated time i.e., by April 2017. 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 01.10.2017.
34. 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.

35. The due date of possession as per agreement for sale as mentioned in the table above is 01.10.2017 and there is delay of 4 years 6 months and 10 days on the date of filing of the complaint.
36. 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....."*

37. 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*

*Ad*



*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."*

38. 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.
39. 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., @ 10.25% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.
- 40. Directions of the authority**
41. 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 10.25% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.
  - ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
  - iii. The respondent 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.
42. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
43. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter.
44. Files be consigned to registry.

  
(Sanjeev Kumar Arora)  
Member

  
(Ashok Sangwan)  
Member

  
(Vijay Kumar Goyal)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.11.2022