



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

Complaint no. : 2239 of 2022
Date of filing of complaint : 13.05.2022
Date of decision : 13.01.2023

Mrs. Nisha Agarwal Alias Neesha Aggarwal
W/o Parshuram Agarwal
R/o: - B-52, Mayfield Garden, Behind Hotel Hilton
Garden Inn, Sector- 50, Islampur (97), Gurugram,
South City, Farrukh Nagar, Haryana- 122018

Complainant

Versus

M/s Ramprashtha Promoters and Developers Private
Limited.

Regd. office at: - Plot No. 114, Sector-44, Gurugram-
122002

Also, at: - C-10, C-Block Market, Vasant Vihar, New
Delhi- 110057

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Sanjeev Kumar Arora

Member
Member

APPEARANCE:

Shri Garv Malhotra (Advocate)
Ms. Gayatri Mansa and Shri Navneet Kumar (Advocates)

Complainant
Respondent

ORDER

1. This 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 allottees 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	"Primera", Sector 37D, Village Gadauli Kalan, Gurugram
2.	Project area	13.156 acres
3.	Registered area	3.257 acres
4.	Nature of the project	Group housing colony
5.	DTCP license no. and validity status	12 of 2009 dated 21.05.2009 valid upto 20.05.2024
6.	Name of licensee	Ramprastha realtor Pvt. Ltd.
7.	Date of approval of building plans	25.04.2013 [as per information obtained from planning branch of authority]
8.	RERA registered/ not registered	Registered vide no. 21 of 2018 dated 23.10.2018
9.	RERA registration valid up to	31.03.2020



10.	Unit no.	C-202, 2 nd floor, tower/block- C (Page no. 24 of the complaint)
11.	Unit area admeasuring	1720 sq. ft. (Page no. 24 of the complaint)
12.	Allotment letter	24.07.2013 (Page no. 16 of the complaint)
13.	Date of execution of apartment buyer agreement in favour of the original allottee	10.06.2017 (Page no. 20 of the complaint)
14.	Possession clause	15. POSSESSION (a). Time of handing over the Possession Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA shall endeavour to complete the construction of the said <i>Apartment within a period of 54 months from the date</i>



		<p><i>of approvals of building plans by the office of DGTCP. The Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.</i></p> <p>(Emphasis supplied)</p> <p>(Page no. 34 of the complaint)</p>
15.	Due date of possession	25.10.2017 [Note: - the due date of possession can be calculated by the 54 months from approval of building plans i.e., 25.04.2013]
16.	Grace period	Not utilized
17.	Total sale consideration	Rs.1,04,31,800/- (As per schedule of payment page no. 47 of the complaint)
18.	Amount paid by the complainant	Rs.31,88,253/- (As per averment of complainant at page no. 09 of the complaint and the same was admitted by the respondent)
19.	Payment plan	Construction linked payment plan



		(Page no. 47 of the complaint)
20.	Occupation certificate /Completion certificate	Not received
21.	Offer of possession	Not offered
22.	Date of endorsement by way of transmission	06.07.2021 (Page no. 14 of the complaint)
23.	Delay in handing over the possession till date of this order i.e., 13.01.2023	5 years 2 months and 19 days

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That the complainant is the wife and legal heir of Late Dr. Parshuram Agarwal, who is the original allottee. So, she has stepped into the shoes of the original allottee through an endorsement by way of transmission dated 06.07.2021.
- II. That on 24.07.2013, the allottee received an application for allotment of a flat number C-202 having area of 3 BHK (1720 sq. ft.) along with exclusive right of two car parking in the project namely "**Primera**" located at Ramprastha City, Sector-37D, Gurgaon, Haryana. The total consideration of the unit was Rs.1,08,22,863/- including service tax opted for construction-payment plan etc.

- III. That a buyer's agreement was executed between the parties on 10.06.2017 for flat no. C-202 in the said project. As per buyer's agreement, the allottee paid an amount of Rs.30,77,940/- which includes the booking amount of Rs.9,39,980/-.
- IV. That as per clause 15(a) of buyer's agreement, the committed date of delivery of possession was 25.02.2018. The time of handing over the possession was a period of 54 months from the date of approval of building plans by the office of DGTCP and the builder was entitled to a grace period of 120 days. The date of approval of building plans is 25.04.2013. Thus, the due date of possession comes out to be 25.02.2018.
- V. That on 04.07.2013, the allottee has paid an amount of Rs.8,40,000/- and Rs.6,50,000/- vide cheques bearing no. 000012, and 000020, duly acknowledged by the respondent vide receipt no. RPDPL/C-202/13-14/0213. Further, the allottee has paid Rs.9,47,086/- vide cheque bearing no. 000039 dated 05.08.2013 duly acknowledged by the respondent vide receipt no. RPDPL/C-202/13-14/0689. On 16.01.2014, the allottee paid Rs.7,45,417/- vide cheque bearing no.000053 and the payment was confirmed by the respondent vide receipt no. RPDPL/C-202/13-14/1171 dated 20.01.2014. The payment of Rs.5,750/- vide cheque no 00147 dated 06.03.2017 is not updated on account statement. Those all cheques were drawn on Standard Chartered Bank, New Delhi.

Thus, the allottee paid a total amount of Rs.31,88,253 and not Rs.31,82,503 reflected in the account statement.

- VI. That by 04.07.2013, Rs.14,90,000/- were paid and by 05.08.2013, Rs.24,37,086/- were confirmed from the respondent. On that date, more than 10% of the total sale consideration was paid to the respondent. The conduct of the respondent is in gross violation of section 13 of the Act of 2016, as it accepted more than 10% of the total consideration. This fact is evident and apparent on the face of it from clause 1.2 consideration in the buyer's agreement.
- VII. That on 10.01.2017 according to annexure I, the total outstanding payment was Rs.60,42,744/- and on 08.02.2021, the outstanding amount of Rs.93,87,586/- was shown arbitrarily, illegally and malafide. The aforementioned acts were just a mere pressure tactic and a well thought out strategy by respondent /builder to illegally demand and extort more money from the allottee and to illegally levy interest when he is himself not meeting the timelines of construction and milestones as promised. This unfair trade practice resorted to by the builder was to threaten the honest complainant in order to dupe her of her hard-earned money.
- VIII. That the complainant complied with all the terms and conditions of the various documents executed but the respondent has failed to meet up with its part of the contractual obligations and thus is liable for delayed possession charges and interest for every month

of delay at prevailing rate of interest from the due date of possession till valid offer of actual possession. But till date, no amount has been paid back to her and the respondent is enjoying the hard-earned money of the complainant for past more than five years approximately.

- IX. That the complainant had approached the respondent time and again seeking the information and status of the project and date of offer of possession of the said premises. After repeated reminders the respondent assured that it would handover of possession soon. Yet no such offer has been made till now. Moreover, in the project, the respondent has charged the complainant on super built up area whereas as per the Act of 2016 and the basic sale price is liable to be paid on the carpet area only. This is a clear and blatant violation of the provisions, rules, and object of the Act.
- X. That for the purpose of the clarity, it is stated herein that in the column of registered mobile no and registered email id, the complainant give the express consent so as to specify/state the email id and mobile no of the lawyer who has been engaged by her and any communication made to such email id/mobile number would be deemed to be an express communication to her as she wants to shorten the process of communication.
- XI. That it is humbly submitted that the complainant has suffered great losses in terms of loss of rental income, opportunity to own

and enjoy a property in Gurugram, as majority of her life's hard-earned money is stuck in this project. The respondent is liable to compensate for its above acts and deeds causing loss of time, opportunity and resources of the complainant. Due to the malpractices of the respondent, the complainant suffered greatly on account of mental & physical agony, harassment, and litigation charges. Thus, due to such hardship faced by the complainant by the act and misconduct of the respondent, she also reserving her right to be adequately compensated by the learned adjudicating officer.

C. Relief sought by the complainant:

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

- i. Kindly allow delay possession charges interest for every month for delay at the prevailing rate of interest from the due date of possession till actual handing over of complete and valid physical possession.
- ii. Direct the respondent to waive of the arbitrarily and illegally levied interest of Rs.25,55,262/- (as per account statement of 08.02.2021), restoration cost and delayed payment charges, etc. (if any).
- iii. Direct the respondent to charge on the carpet area and to provide a detailed break-up of super area and common area applicable and allotted to the complainant and whether it includes the area designated under two paid car parking or not.

- iv. Direct the respondent to reimburse litigation cost of Rs.1,50,000/- to the complainant as she was constrained to file the same was to the callous and indifferent attitude of the respondent.
 - v. The complainant be adequately reimbursed, the burden of excess stamp duty charges due to increase in stamp duty as of delay in executing the conveyance deed by the respondent.
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 has contested the complaint on the following grounds.
- I. That at the very outset, that the complaint filed by the complainant is not maintainable and the authority has no jurisdiction whatsoever to entertain the complaint.
 - II. That without prejudice to the above, the complainant is not "Consumers" within the meaning of the Consumer Protection Act, 2019 since their sole intention was to make investment in a futuristic project of the respondent only to reap profits at a later stage when there is increase in the value of flat at a future date which was not certain and fixed. Neither there was any agreement with respect to any date in existence of which any date or default on such date could have been reckoned due to delay in handover of possession.

- III. That the complainant having full knowledge of the uncertainties involved have out of their own will and accord have decided to invest in the present futuristic project. She has no intention of using the said flat for their personal residence or the residence of any of their family members. If the allottee had such intention, she would not have invested in futuristic project. The sole purpose of the complainant was to make profit from sale of the flat at a future date. Now since the real estate market is seeing downfall, the complainant cleverly resorted to the present exit strategy to conveniently exit from the project by arm twisting the respondent. It is submitted that the complainant has purely commercial motives made investment in a futuristic project and therefore, they cannot be said to be genuine buyers of the said apartment and therefore, the complaint being not maintainable must be dismissed in limine.
- IV. That the complainant has not intentionally filed their personal declarations with respect to the properties owned and/or bought/sold by them at the time of booking the impugned plot and/or during the intervening period till the date of filing of the complaint and hence an adverse inference ought to be drawn against the complainant.
- V. That the complainant has approached the respondent office in 2013 and have communicated that the complainant interested in a

project which is "not ready to move" and expressed their interest in a futuristic project. It is submitted that the complainant was not interested in any of the ready to move in/near completion projects. It is submitted that on the specific request of the complainant, the investment was accepted towards a futuristic project. Now, the complainant is trying to shift the burden on the respondent as the real estate market is facing rough weather.

- VI. The complainant is investor, who never had any intention to buy the apartment for her own personal use and have now filed the present complaint on false and frivolous grounds. This authority has no jurisdiction howsoever to entertain the present complaint as the complainant has not come to this authority with clean hands and have concealed the material fact that they have invested in the apartment for earning profits and the transaction therefore is relatable to commercial purpose. The complainant not being 'consumers' within the meaning of section 2(1)(d) of the Consumer Protection Act, 1986, the complaint itself is not maintainable under the Act, of 2016. This has been the consistent view of the National Consumer Disputes Redressal Commission.
- VII. Therefore, the complainant cannot be said to be genuine consumer by any standards; rather the complainant is mere investors in the futuristic project. An investor by any extended interpretation cannot mean to fall within the definition of a "Consumer" under the



Consumer Protection Act, 2019. Therefore, the complaint is liable to be dismissed merely on this ground.

- VIII. That the complainant has not approached this authority with clean hands and concealed the material fact that she is defaulters, having deliberately failed to make the timely payment of installments within the time prescribed, which resulted in delay payment charges/interest, as reflected in the statement of account. Due the lackadaisical attitude of the complainant along with several other reasons beyond the control of the respondent as cited caused the present unpleasant situation. It is due to the default of the complainant, that the allotment could not have been carried out.
- IX. That further, even all through these years, the complainant has never raised any dispute regarding delay in possession or any other aspect. Furthermore, filing a complaint after all these years only hints at the malafide intentions of the complainant. Apparently, the complainant has been waiting eagerly all this while to raise dispute only to reap the benefits of the increase in value of property.
- X. That the respondent had to bear with the losses and extra costs owing due delay of payment of installments on the part of the complainants for which they are solely liable. However, the respondent owing to its general nature of good business ethics has always endeavored to serve the buyers with utmost efforts and

good intentions. The respondent constantly strived to provide utmost satisfaction to the buyer/allottees. However, now, despite of its efforts and endeavors to serve the buyer/allottees in the best manner possible, is now forced to face the wrath of unnecessary and unwarranted litigation due to the mischief of the complainant.

- XI. That from the initial date of booking to the filing of the present complaint, the complainant has never raised any issues or objections. Had any valid issue been raised by complainant at an earlier date, the respondent would have, to its best, endeavored to solve such issues much earlier. However, now to the utter disappointment of the respondent, the complainant has filed the present complaint based on fabricated story woven out of threads of malice and fallacy.
- XII. That further, the reasons for delay are solely attributable to the regulatory process for approval of layout which is within the purview of the Town and Country Planning Department. The complaint is liable to be rejected on the ground that the complainants had indirectly raised the question of approval of zoning plans which is beyond the control of the respondent and outside the purview of consumer courts and in further view of the fact the complainants had knowingly made an investment in a future potential project of the respondent. The reliefs claimed would require an adjudication of the reasons for delay in approval

of the layout plans which is beyond the jurisdiction of this authority and hence the complaint is liable to be dismissed on this ground as well.

XIII. There is no averment in the complaint which can establish that any so-called delay in possession could be attributable to the respondent as the finalization and approval of the layout plans has been held up for various reasons which have been and are beyond the control of the respondent including passing of an HT line over the layout, road deviations, depiction of villages etc. which have been elaborated in further detail herein below. The complainant while investing in a plot which was subject to zoning approvals were very well aware of the risk involved and had voluntarily accepted the same for their own personal gain. There is no averment with supporting document in the complaint which can establish that the respondent had acted in a manner which led to any so-called delay in handing over possession of the said flat. Hence the complaint is liable to be dismissed on this ground as well.

XIV. The respondent/promoter was owner of vast tracts of undeveloped land in the revenue estate of Villages Basai, Gadauli Kalan and falling within the boundaries of Sectors 37C and 37D Gurugram also known as Ramprastha City, Gurugram.

XV. That where the complainant approached the respondent company, it was made unequivocally clear to them that a specific plot cannot be earmarked out of large tracts of undeveloped and agriculture land; ii.) specific plot with preferred location can be demarcated only when the government releases the zoning plans applicable to the area villages Basai, Gadauli Kalan, Gurugram. It was on this basic understanding that a preliminary allotment was nothing more than a payment towards a prospective undeveloped agriculture plot of the respondent.

XVI. The below table shows the project name, its size, and the current status of the project. The respondent has been diligent in completing its entire project and shall be completing the remaining projects in phased manner. The respondent has completed major projects mentioned below and has been able to provide occupancy to the allottee.

S. No	Project Name	No. of Apartments	Status
1.	Atrium	336	OC received
2.	View	280	OC received
3.	Edge		
	Tower I, J, K, L, M	400	OC received
	Tower H, N	160	OC received
		80	OC received

	Tower-O (Nomenclature-P) (Tower A, B, C, D, E, F, G)	640	OC to be applied
4.	EWS	534	OC received
5.	Skyz	684	OC to be applied
6.	Rise	322	OC to be applied

XVII. That the complainant is short-term speculative investor, their only intention was to make a quick profit from the resale of the land and having failed to resell the said apartment due to recession and setbacks in the real estate world have resorted to this litigation to grab profits in the form of interests. It is most strongly submitted herein that the complainant was never interested in the possession of the property for personal use but only had intent to resell the property and by this, they clearly fall within the meaning of speculative investor.

XVIII. That thereafter Ministry of Finance, Government of India in the wake of COVID-19 pandemic has invoked *Force Majeure* and thereby extended the timelines for completion of real estate projects by 6 months period starting from February 2020.

- XIX. 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 apartment buyer's agreement signed by the complainant/allotment offered to them. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of said Act or said Rules, has been executed between both the parties. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the apartment buyer agreement dated 10.06.2017, executed much prior to coming into force of said Act or said rules. The adjudication of the complaint for possession, refund, interest and compensation, as provided under Sections 12, 14, 18, and 19 of said Act, has to be in reference to the agreement for sale executed in terms of said Act and said rules and no other agreement. This submission of the respondent *inter alia*, finds support from reading of the provisions of the said Act and the said Rules. Thus, in view of the submissions made above, no relief can be granted to the complainant.
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 submission made by the parties.

E. Jurisdiction of the authority

The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection 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

8. 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

9. 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.

10. 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.

F. Findings on the objections raised by the respondent

F. I Objection regarding the complainant being investor.

11. The respondent has taken a stand that the complainant is the investor and not consumer. Therefore, she is not entitled to the protection of the Act and are 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 consumer of the real estate sector. It is settled principle of interpretation that the 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 the promoter 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 a buyer and paid total price of Rs.31,88,253/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is allottee as the subject unit was allotted to her 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 an investor is not entitled to protection of this Act also stands rejected.

F. II Objection regarding jurisdiction of authority w.r.t. booking application form executed prior to coming into force of the Act

12. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the booking application form 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."*

13. 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."

14. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer 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 Kindly allow delay possession charges interest for every month for delay at the prevailing rate of interest from the due date of possession till actual handing over of complete and valid physical possession.

G. II Direct the respondent to waive of the arbitrarily and illegally levied interest of Rs.25,55,262/- (as per account statement of 08.02.2021), restoration cost and delayed payment charges, etc. (if any).

15. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"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, —

.....

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)

16. As per clause 15(a) of the apartment buyer's agreement provides for handing over of possession and is reproduced below:

"15. POSSESSION

(a). Time of handing over the Possession

Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA shall endeavour to complete the construction of the said Apartment

within a period of 54 months from the date of approvals of building plans by the office of DGTCP. The Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex."

17. 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 allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

18. **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 54 months from the date of approval of building plans i.e., 25.04.2013 and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.
19. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides 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 possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under.
20. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.



21. Taking the case from another angle, the complainants/allottees were entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @18% per annum compounded at the time of every succeeding Installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottees or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

22. 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., 13.01.2023 is **8.60%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.60%**.

23. The definition of term 'interest' as defined under section 2(z a) 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;"*

24. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.60% by the respondent /promoter which is the same as is being granted to the complainants in case of delayed possession charges.

25. On consideration of the documents available on record and submissions made by both the parties, 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



15(a) of the apartment buyer's agreement executed between the parties on 10.06.2017, the possession of the subject apartment was to be delivered within a period of 54 months from the date of approval of building plans i.e., 25.04.2013 which comes out to be 25.10.2017. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 25.10.2017. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 25.10.2017 till the handing over of the possession, at prescribed rate i.e., 10.60 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

G.III. Direct the respondent to charge on the carpet area and to provide a detailed break-up of super area and common area applicable and allotted to the complainants and whether it includes the area designated under two paid car parking or not.

26. This is an ongoing project, and the provisions of the Act are applicable to it. The allottee has a right to know as to how much the carpet area of the unit is and how much loading has been done on it along with components of super area as per the builder buyer's agreement.

Although, the agreements entered into prior to coming into force of the Act are treated as sacrosanct and the promoter is well within his right to charge on the basis of the super area but under this garb, allottee cannot be allowed to be cheated and they are to be informed as what is being charged from them in the name of super area. Accordingly, the respondent promoter is directed to make available the details of the super area.

G. IV Direct the respondent to reimbursed litigation cost of Rs.1,50,000/- to the complainant as she was constrained to file the same because of the callous and indifferent attitude of the respondent.

G. V. The complainant should be adequately reimbursed, the burden of excess stamp duty charges due to increase in stamp duty because of delay in executing the conveyance deed by the respondent.

27. 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

28. 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 is directed to pay interest to the complainant against the paid-up amount at the prescribed rate of 10.60% p.a. for every month of delay from the due date of possession i.e., 25.10.2017 till the date of handing over possession of the said unit after obtaining the occupancy certificate from the concerned authority.
- ii. The arrears of such interest accrued from 25.10.2017 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The respondent shall not charge anything from the complainant which is not the part of the apartment buyer's agreement.



- v. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.60% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

29. Complaint stands disposed of.

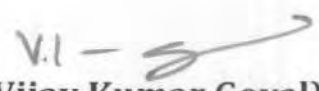
30. File be consigned to registry.


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.01.2023


(Vijay Kumar Goyal)

Member

HARERA
GURUGRAM