

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

Complaint no. : 4745 of 2022
First date of hearing: 20.10.2022
Order reserved on: 23.11.2022
Order pronounced on: 08.02.2023

1. Mrs. Usha Kohli
2. Mr. Suneel Kohli
Both RR/o: - 1, Vivekananda Colony, Phalka Bazar,
Gwalior, M.P - 474001

Complainants

Versus

M/s Ramprashtha Promoters and Developers Private
Limited.

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

Respondent

CORAM:

Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member

APPEARANCE:

Sh. Kuldeep Kumar Kohli (Advocate)
Ms. Gayatri Mansa and Shri Navneet Kumar (Advocates)

Complainants
Respondent

ORDER

1. The present complaint dated 06.07.2022 has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it



is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made thereunder 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	"SKYZ", Sector 37C, Village Gadauli Kalan, Gurugram
2.	Project area	60.5112 acres
3.	Registered area	102000 sq. mt.
4.	Nature of the project	Group housing complex
5.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid upto 18.02.2025
6.	Name of licensee	Ramprastha Builders Pvt Ltd and 11 others
7.	Date of approval of building plans	12.04.2012 [As per information obtained by planning branch]
8.	Date of environment clearances	21.01.2010



		[As per information obtained by planning branch]	
9.	RERA Registered/ not registered	Registered vide no. 320 of 2017 dated 17.10.2017	
10.	RERA registration valid up to	31.03.2019	
11.	Extension applied on	26.03.2019	
12.	Extension certificate no.	Date	Validity
		HARERA/GGM/REP/RC/320/2017/EXT/122/2019 In principal approval on 12.06.2019	30.03.2020
13.	Unit no.	F- 103, tower/block- F (Page no. 66 of the complaint)	
14.	Unit area admeasuring	1750 sq. ft. (Page no. 66 of the complaint)	
15.	Allotment letter	15.11.2011 (Page no. 66 of the complaint)	
16.	Date of execution of apartment agreement buyer	Not executed	
17.	Possession clause	15. POSSESSION (a) Time of handing over the Possession	



		<p>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 proposed to hand over <i>the possession of the Apartment by 31.08.2014</i> 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.</p> <p>(Emphasis supplied) (Possession clause taken from the BBA annexed in complaint no. 4888-2021 of the same project being developed by the same promoter)</p>
18.	Due date of possession	31.08.2014



		[As per mentioned in the buyer's agreement]
19.	Grace period	Not utilized The promoter has proposed to hand over the possession of the apartment by 31.08.2014 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.
20.	Total sale consideration	Rs.74,70,738/- (As per allotment letter at page no. 66 of the complaint)
21.	Amount paid by the complainants	Rs.61,90,486/- (As per statement of account dated 05.01.2017 at page no. 89 of the complaint) Rs.65,76,424/-

		[As per averment of complainant's page no. 11 of the complaint]
22.	Occupation certificate /Completion certificate	Not received
23.	Offer of possession	Not offered
24.	Delay in handing over the possession till date of filing complaint i.e., 06.07.2022	7 years 10 months and 6 days

B. Facts of the complaint

3. The complainants have made the following submissions: -

- I. That pursuant to the elaborate advertisements, assurances, representations and promises made by respondent about their project called "**Ramprastha City**" at sector 37D, Gurugram with impeccable facilities and believing the same to be correct and true, the complainants considered booking a 3 BHK flat and paid an advance amount of Rs. 1,00,000/- vide cheque no. 062824 dated 06.09.2011.
- II. That the respondent vide letter dated 15.11.2011 allotted the complainants a 3 BHK flat bearing no. F-103, "Skyz", in Ramprastha City measuring 1750 sw. ft. situated in sector 37D, Gurugram, for a total sale consideration of Rs.74,70,738/-. The

payments towards the flat were to be made as per the Installment plan.

- III. That the complainants in order to pay for the said flat availed a home loan of Rs.56,94,000/- from SBI bank, RACPL, Gwalior branch for which they entered into a tripartite agreement with the respondent and the bank. However, the bank required the buyer's agreement to be made available which was not provided to the complainants. Thereafter, the complainants wrote to the respondent company on 25.03.2012 for providing them with the buyer's agreement and in response, the company vide email dated 26.03.2012 asked the complainants to come to their office to sign the buyer's agreement.
- IV. That without providing a copy of the buyer's agreement to the complainants, the respondent raised demands of amount as per the different stages of construction vide letters dated 10.12.2012, 18.02.2014, 28.04.2014, 19.06.2014, 17.10.2016, 05.01.2017. In pursuance of the demand letters mentioned above, the complainants continued to make payments. Further, the complainants had paid sum of Rs.65,76,424/- till 19.01.2017, the receipt of which is annexed herewith towards the above mentioned flat. The respondent had received more than 90% of the total sale consideration and still not provided a copy of the

buyer's agreement in blatant violation of section 13(1) of the Act of 2016.

- V. That the said project is nowhere near completion despite it being more than 10 years since the project started and the booking was made, and no builder buyer's agreement was even signed.
- VI. That after timely payment against each and every demand letter, the complainants were hoping that they would soon get possession of the unit. Unfortunately, on regularly visiting the site, it was realized by the complainants that the construction on the site was not as per the construction plan. This fact was brought to the knowledge of the respondent company repeatedly through personal visits, letters, and mails but the respondent did not respond effectively.
- VII. That the respondent/promoter deliberately and with a mischievous intent tricked the complainants through false promises and forced into paying up huge amounts to it. The said dishonest intent is amply evident from the entire conduct and omissions on part of the respondent set out hereinafter: -
- failure to provide the buyer's agreement with the complainants.
 - failure to reply to the complainants concerns and to act in an absolutely high-handed manner.

- deliberately committing absolute breach of the promises and projections at the time of booking.
 - complete failure to keep the promised schedule of completion and delay without any valid reason whatsoever.
- VIII. That the present complaint sets out the various deficiencies in services, unfair and/or restrictive trade practices adopted by the builder in sale of the units and the provisions allied to it. The modus operandi adopted by the respondent invariably bears the irrefutable stamp of impunity and total lack of accountability and transparency, as well as breach of contract and duping of the consumers by not delivering the project in time.
- IX. They have booked the flat in 2011 and were promised that the possession would be delivered to them. However, not only is the construction of the project heavily delayed, but the respondent has also not even executed the builder buyer's agreement for the past 11 years. Hence, the complainants no longer wish to continue in the project as there is no certainty about the delivery of possession.
- X. That the respondent is guilty of deficiency in service within the purview of provisions of the Act, 2016 and the provisions of the rules, 2017. The complainants have suffered on account of deficiency in service by them and as such the respondent is fully

liable to cure the deficiency as per the provisions of the Act, 2016 and the provisions of the Rules, 2017.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

- I. To refund the entire amount of Rs.65,76,424/- paid by the complainants with prescribed rate of interest.
- II. Restrain the respondent from raising any fresh demand with respect to the project.
- III. Restrain the respondent from cancelling the allotment till the time the entire amount paid by them is refunded with interest.
- IV. Restrain the respondent from creating third party rights in the said property till the time the entire amount with interest is refund.

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.

6. The respondent filed reply on 20.10.2022. On 23.11.2022, the counsel of the respondent stated that the reply submitted was defective as the correct facts of the case have not been brought in the reply and requested to file amended reply. The said request was allowed, and the respondent was directed to file the reply /written submission within a

period of one week. The respondent filed amended written reply on 08.12.2022.

D. Reply by the respondent.

7. The respondent has contested the complaint on the following grounds: -
- i. That at the very outset, it is most respectfully submitted that the complaint filed by the complainants is not maintainable and this authority has no jurisdiction whatsoever to entertain the present complaint due to lack of cause of action.
 - ii. That without prejudice to the above, it is further submitted that the complainants are not "Consumers" within the meaning of the Consumer Protection Act, 2019 as 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 complainants having full knowledge of the uncertainties involved have out of their own will and accord decided to invest in the present futuristic project, and they have no intention of using the said flat for their personal residence or the residence of any of their family members. If the complainant had such intentions, they would not have invested in futuristic project. The sole purpose of

the complainants was to make profit from sale of the flat at a future date. Now since the real estate market is seeing downfall, the complainants cleverly resorted to the present exit strategy to conveniently exit from the project by arm twisting the respondent. It is submitted that the complainants having 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 be dismissed in limine.

- iv. That the complainants have not intentionally filed their personal declarations with respect to the properties owned and/or bought/sold by them at the time of booking of 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 them.
- v. That the complainants have approached the respondent office in 2011 and communicated that they were interested in a project "not ready to move" and expressed their interest in a futuristic project. It is submitted that the complainants were not interested in any of the ready to move in/near completion projects. It is submitted that on the specific request of the complainants, the investment was accepted towards a futuristic project. Now, the complainants are trying to shift the burden on the respondent as the real estate

market is facing rough weather. Therefore, the complainants cannot be said to be genuine consumer by any standards; Rather they are 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.

- vi. That the complainants have not approached this authority with clean hands and concealed the material fact that they are 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 complainants along with several other reasons beyond the control of the respondent as cited caused the present unpleasant situation. That it is due to the default of the complainants, the allotment could not have been carried out.
- vii. 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 respondents 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 buyers/allottees. However, now, despite of its efforts and endeavors to serve the buyers/allottees in the best manner possible, is now forced to face the wrath of unnecessary and unwarranted litigation due to the mischief of the complainants.

- viii. That from the initial date of booking to the filing of the present complaint, the complainants have never raised any issues or objections. Had any valid issue been raised by complainants 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 complainants have filed the present complaint based on fabricated story woven out of threads of malice and fallacy.
- ix. That this conduct of the complainants itself claims that the complainants are mere speculative investors who have invested in the property to earn quick profits and due to the falling & harsh real estate market conditions, the complainants are making a desperate attempt herein to quickly grab the possession along with high interests on the basis of concocted facts. Further in a desperate attempt to bring forth a legal action against the respondent the complainants have generated certain fabricated documents in order to support their false contentions.

- x. That the complainant's primary prayer for refund of payment made against the unit bearing no. F-103 is entirely based on imaginary and concocted facts by the complainants and the contention that the respondent was obliged to hand over possession within any fixed time period from the date of issue of provisional allotment letter is completely false, baseless and without any substantiation; whereas in reality the complainants had complete knowledge of the fact that the zoning plans of the layout were yet to be approved and the initial booking dated 06.09.2011 was made by them towards a *future potential project* and hence, there was no question of handover of possession within any fixed time period as falsely claimed by the complainants; hence the complaint does not hold any ground on merits as well.
- xi. That further the respondent/promoter has applied for the mandatory registration of the project with the authority but however the same is still pending approval on the part of the authority. However, in this background that by any bound of imagination, the respondent cannot be made liable for the delay which has occurred due to delay in registration of the project with the authority. Since there was delay in zonal approval from the DGTCP, the same has acted as a causal effect in prolonging and obstructing the registration of the project under the Act for which the respondent is in no way responsible. The approval and

registration are a statutory and governmental process which is out of power and control of the respondent. This by any matter of fact be not counted as a default on the part of the respondent.

- xii. 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 complainants 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.
- xiii. The respondent/promoter was owner of vast tracts of undeveloped land in the revenue estates of Village Basai, Gadauli Kalan and falling within the boundaries of Sectors 37C and 37D Gurugram also known as Ramprastha City, Gurugram.

- xiv. 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.
- xv. That on November 06, 2019, the Honorable Finance Minister had announced that the Union Cabinet has cleared a proposal to set up a special window in the form of AIF to provide priority debt financing for the completion of stalled housing projects. Accordingly, SWAMIH (special window for funding stalled affordable and middle-income housing project) Investment Fund was created for this purpose.
- xvi. That approximately, there are about 1600 stalled projects across top cities in the country and in this regard, the union cabinet approved the setting up of Rs.25,000 Crores alternative investment funding (AIFs). The sponsor of the fund is the Secretary, Department of Economic Affairs, Ministry of Finance, Government of India on behalf of Government of India.
- xvii. That, accordingly, SWAMIH Fund was created by the Government of India to provide priority debt financing for the completion of stalled housing projects that are in the Affordable and Middle-Income Housing projects category. The fund has been set up as Category II AIF (Alternate Investment Fund) debt fund registered with SEBI. The fund is being managed by SBI Caps Ventures with

investments from the Ministry of Finance and other marquee investors like LIC, SBI etc. It has a corpus of Rs. 12,500 Crore with a green-shoe option of another Rs.12,500 Crore.

- xviii. That the respondent/promoter has been sanctioned funding facility to the tune of approx. 296 Crores for the completion of all the projects. The disbursement in respect of project Primera has already been received in January 2021. That SWAMIH and the respondent are in the final legs for the release of funds for the project Skyz.
- xix. That majority of the homebuyers of the project i.e., Skyz approx. 80% are not interested in obtaining refunds and the respondent /promoter is approaching each and every homebuyer to ensure that any grievance that they may have been resorted amicably. The respondent with reasonable certainty states that it has the confidence and faith of a large number of homebuyers who are absolutely dependent on it for the delivery of their homes and the respondent is duty bound to project their interest.
- xx. The projects in respect of which the respondent has obtained the occupation certificates are described as hereunder: -

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 Tower H, N Tower-O (Nomenclature-P) (Tower A, B, C, D, E, F, G)	400 160 80 640	OC received OC received OC received OC to be applied
4.	EWS	534	OC received
5.	Skyz	684	OC to be applied
6.	Rise	322	OC to be applied

8. 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

9. 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

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation

which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(C), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the 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.1 Objection regarding the complainants being investors.

14. The respondent has taken a stand that the complainants are the investors and not consumers, and therefore, are not entitled to the protection of the Act and to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and paid total price of Rs.65,76,424/- 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 complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainants

G.1 To refund the entire amount of Rs.65,76,424/- paid by the complainants with prescribed rate of interest.

15. The complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

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

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

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

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

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

(Emphasis supplied)

16. As per clause 15(a) of the apartment buyer agreement (Possession clause taken from the BBA annexed in complaint no. 4888-2021 of the same project being developed by the same promoter) 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 proposed to hand over the possession of the Apartment by **31.08.2014** 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. The authority has gone through the possession clause of the agreement and observes that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than

specifying period from some specific happening of an event such as signing of apartment buyer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.

18. 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 allottees 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 allottees of their 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.

19. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 31.08.2014 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.
20. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule **28(1)**, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 15(a) of the buyer agreement (possession clause taken from the BBA annexed in complaint no. 4888-2021 of the same project being developed by the same promoter), the due date of possession was specifically mentioned in the apartment buyer agreement as 31.08.2014. 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 31.08.2014.

21. The authority has further, observes that due date of possession of the same project being developed by the same promoter is specifically mentioned in the possession clause i.e., 31.08.2014. It is pertinent to mention over here that even after a passage of more than 11.2 years (i.e., from the date of allotment till date) neither the construction is completed nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to him and for which he has paid a considerable amount of money towards the sale consideration. It is also to mention that complainant has paid almost 88% of total consideration till 2017. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottee intends to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.
22. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent /promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards

the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

"... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

23. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others (Supra)***, it was 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."

24. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale

under section 11(4)(a) of the Act. The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as they wish 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.

25. **Admissibility of delay possession charges at prescribed rate of interest:** However, the allottees 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. 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.

28. 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., 08.02.2023 is **8.60%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.60%**.

29. 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;"*

30. Therefore, interest on the delay payments from the complainants 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.

31. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @

8.60% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G. II Restrain the respondent from raising any fresh demand with respect to the project.

G.III Restrain the respondent from cancelling the allotment till the time the entire amount paid by me is refunded with interest.

32. In view of the findings detailed above on issues no. 1, the above said relief become redundant as the complete amount paid by the complainants are refunded back.

G. IV Restrain the respondent from creating third party rights in the said property till the time the entire amount with interest is refund.

33. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee/complainants.

H. Directions of the authority

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

- i. The respondent/promoter is directed to refund the amount i.e., Rs.65,76,424/- received by it from the complainants along with interest at the rate of 10.60% 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 is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainants.

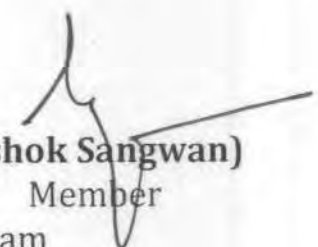
35. Complaint stands disposed of.

36. File be consigned to registry.


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Ashok Sangwan)

Member

Dated: 08.02.2023