

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

Complaint no. : 774 of 2021
First date of hearing: 12.04.2021
Date of decision : 25.01.2023

Suraj Prakash Gupta
S/o Sh. Desh Raj Gupta
R/o: - B-303, Sarve Satyam Apartments, Plot No, 12,
Sector- 4, Dwarka, New Delhi- 110078

Complainant

Versus

M/s Ramprashtha Promoters and Developers Private
Limited.
Regd. office: Plot No. 114, Sector-44, Gurugram-
122002

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Sanjeev Kumar Arora

Member
Member

APPEARANCE:

Sh. Dhruv Dutt Sharma (Advocate)
Sh. Dheeraj Kapoor (Advocate) with Shri
Varun Katyal AR of the respondent company

Complainant

Respondent

ORDER

1. The present complaint dated 25.02.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it

is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name of the project	"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.	C-102, 1 st floor, tower/block- C (Page no. 47 of the reply)	
14.	Unit area admeasuring	1750 sq. ft. (Page no. 47 of the reply)	
15.	Date of booking application form	12.03.2011 [Page no. 47 of the reply]	
16.	Welcome letter	29.04.20211 (Page no. 25 of the complaint)	
17.	Date of execution of apartment buyer agreement	Not executed	



18.	Possession clause	<p>15. POSSESSION</p> <p>(a) Time of handing over the Possession</p> <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 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><i>(Possession clause taken from the BBA annexed in complaint no. 3715-2019 of the same project being developed by the same promoter)</i></p>
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19.	Due date of possession	31.08.2014 [As per mentioned in the buyer's agreement]
20.	Grace period	Not utilized
21.	Total sale consideration	Rs.71,11,725/- (As per payment plan page no. 47 of the reply)
22.	Amount paid by the complainant	Rs.62,24,702/- (As per receipt information page no. 61 of the reply)
23.	Occupation certificate /Completion certificate	Not received
24.	Offer of possession	Not offered
25.	Delay in handing over the possession till date of filing complaint i.e., 25.02.2021	6 years 5 months and 25 days

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That in the year 2011, the respondent/promoter launched the upcoming residential group housing colony in the name and style of "Skyz" to be developed at Sector-37-D, Ramprastha City, District Gurugram. The respondent had advertised the project through

flyers, catalogues, magazines, brokers, newspapers etc. for persuading the public to invest in the project.

- II. That the respondent induced the complainant with tall claims and believing the representations to be true and correct, made a booking in the aforesaid project and duly paid a booking amount of Rs.5,74,420/-. The officials of the respondent also told the complainant that the possession would be offered within 3-4 years from the date of booking. The total cost of the flat was Rs.69,23,750/- including external development charges (EDC), infrastructure development charges (IDC), IFMS, preferential location charges (PLC) and parking.
- III. That on 29.04.2011, the respondent sent a letter to the complainant congratulating and welcoming him to the project. He was allotted a residential flat bearing no. C-102, in the aforesaid project.
- IV. That the respondent raised various demands from the complainant from time to time which were regularly paid by him and have also been acknowledged by various receipts issued by it. As such till date, he has paid a sum of Rs.62,24,702/-. Despite paying such huge amount the respondent has till date has not provided the copy of builder buyer agreement to him. Further, he was never apprised about the actual development status despite repeated requests.
- V. That the complainant has numerous calls and visits to the respondent asking it to sign the builder buyer agreement and

provide the actual date of offer of possession. But the respondent has been avoiding the complainant on one pretext or the other. Further, he also sent emails dated 18.02.2018 & 02.04.2018 to the respondent to provide the copy of builder buyer agreement. But it did not bother to reply to the complainant and provide the copy of the builder buyer agreement.

- VI. That the complainant after not getting satisfactory reply from the respondent visited the said project to enquire about its status. However, he was shocked to see that construction of the project had not even been completed and the entire project was lying unfinished and was far away from completion. Currently, no construction activity is going on in the said project.
- VII. That finding no other way, the complainant sent a legal notice through his counsel Sh. Saurabh Munjal, on 28.05.2018 for refund of Rs. 59,96,250/- along with 18% interest and Rs.5,00,000/- towards mental torture and harassment on account of failure by the respondent to sign the builder buyer agreement and not handing over the possession of the flat to him on time. The said notice was sent through registered post on the complete and correct address of the respondent and the said notice was delivered to it. However, the respondent did not bother to reply to the said notice.
- VIII. That the booking was made by the complainant in the said project about 10 years back and till date, no possession has been offered by

it. The complainant has now lost all hope and faith in the respondent and does not want to continue with the project.

IX. That the cause of action to file the complaint arose in favour of the complainant and against the respondent when he firstly made the booking in the said project. It further arose when the respondent raised various payment demands from the complainant and he has made the payments. The cause of action further arose on 28.05.2018 when the complainant sent a legal notice to it.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
 - I. Direct the respondent to refund total amount of Rs.62,24,702/- along with interest @18% per annum from the date of deposit of each amount till its actual realization.
 - II. To award a compensation of Rs.5,00,000/- to the complainant towards mental torture and harassment.
 - III. Cost of litigation to the tune of Rs.55,000/- may also be awarded to the complainant.
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 filed an application for rejection of complaint on the ground of jurisdiction along with reply. The respondent has contested the complaint on the following grounds.

- I. The complaint filed by the complainant is not maintainable and the adjudicating officer has no jurisdiction whatsoever to entertain the present complaint. The respondent has also separately filed an application for rejection of the complaint on the ground of jurisdiction and this reply is without prejudice to the rights and contentions of the respondent contained in the said application.
- II. That prior to 12.09.2019, the complaints pertaining to refund, possession, compensation and interest for a grievance under section 12, 14, 18 and 19 of the Act, 2016 were required to be filed before the adjudicating officer under Rule-29 of the rules, 2017 read with section 31 and section 71 of the said Act and not before this authority under rule-28 as the authority had no jurisdiction whatsoever to entertain such complaint and such complaint was liable to be rejected.
- III. The Haryana Real Estate (Regulation & Development) Amendment Rules, 2019 were notified on 12.09.2019, whereby inter alia amendments were made to rules-28 and rule-29 and the authority was given the jurisdiction to entertain and adjudicate the complaints seeking the relief of refund. The corresponding amendments were also made to Forms CRA and CAO.

- IV. That now, in terms of the Haryana Real Estate (Regulation and Development) Amendment Rules, 2019 (hereinafter referred to as the "said amendment rules"), the complainant has filed the present complaint under the amended rule-29 in the amended "form CRA" and is seeking the relief of refund, interest and compensation u/s 18 of the said Act.
- V. That statement of objects and reasons as well as the preamble of the said Act clearly state that the RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of "Consumer" as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. The complainant is investor and not consumer and nowhere in the present complaint has the complainant pleaded as to how the complainant is consumer as defined in the Consumer Protection Act, 1986 qua the respondent. The complainant, who is already the owner of A-104, PNB apartments, Dwarka, Plot no. 11, Sector-4, New Delhi and also B-303, Sarve Satyam Apartments, Plot No, 12, Sector- 4, Dwarka, New Delhi- 110078 (address provided at the time of booking and also mentioned in the booking application form) is an investor, who never had any intention to buy the apartment for own personal use and kept on avoiding the performance of his contractual obligations of executing the apartment buyer agreement and making timely payments and have now filed the

present complaint on false and frivolous grounds. It is most respectfully submitted that the adjudicating officer has no jurisdiction to entertain the present complaint as the complainant have not come to the adjudicating officer with clean hands and have concealed the material fact that he has invested in the apartment for earning profits and the transaction therefore is relatable to commercial purpose and the complainant not being a 'consumers' within the meaning of Section 2(1)(d) of the Consumer Protection Act, 1986, the complaint itself is not maintainable under the said Act. This has been the consistent view of the Hon'ble National Consumer Disputes Redressal Commission.

- VI. That that the complainant is an investor and also a defaulter, having deliberately failed to execute the apartment buyer agreement and make the payment of various installments within the time prescribed which resulted in delay payment charges.
- VII. Despite several adversities, the respondent has continued with the construction of the project and are in the process of completing the construction of the project and should be able to apply the occupation certificate for the apartment in question by 30.06.2022 (as mentioned at the time of application for extension of Registration of the project with RERA) or within such extended time, as may be extended by the Authority, as the case may be. However, as the complainant was only short term and speculative investor, therefore he was not interested in taking over the possession of the said apartment. It is apparent that the

complainant had the motive and intention to make quick profit from sale of the said apartment through the process of allotment. Having failed to resell the said apartment due to general recession and because of slump in the real estate market, the complainant has developed an intention to raise false and frivolous issues to engage the respondent in unnecessary, protracted, and frivolous litigation. The alleged grievance of the complainant has origin and motive in sluggish real estate market.

- VIII. That this adjudicating officer is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer agreement signed by the complainants/allotment offered to him. 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 the complainant and the respondent. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the booking application form dated 12.03.2011, executed much prior to coming into force of said Act or said rules. The adjudication of the complaint for 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 respondents *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 complainants.

- IX. The respondent submitted that out of the total amount paid i.e., Rs.59,96,521/- only Rs.62,24,702/- has been paid towards the sale consideration. The balance amount of Rs.1,57,076/- is towards the service tax and Rs.71,736/- is towards VAT as reflected in the statement of account.
- X. The respondent submitted that the proposed estimated time of handing over the possession of the said apartment i.e., 31.08.2014 plus 120 days, which comes to 31.12.2014, is applicable only subject to force majeure and the complainants having complied with all the terms and conditions and not being in default of any the terms and conditions of the apartment buyer agreement, including but not limited to the payment of instalments. In case of any default/delay in payment, the date of handing over of possession shall be extended accordingly solely at the respondent's discretion, till the payment of all outstanding amounts and at the same time in case of any default, the complainant would not be entitled to any compensation whatsoever in terms of clause 15 and clause 17 of the apartment buyer agreement.
- XI. That section 19(3) of the Act provides that the allottee shall be entitled to claim the possession of the apartment, plot, or building, as the case may be, as per the declaration given by the promoter under section 4(2)(I)(C). The entitlement to claim the possession or refund would only arise once the possession has not been handed over as per the declaration given by the promoter under section 4(2)(I)(C). In the present case, the



respondent had made a declaration in terms of section 4(2)(I)(C) that it would complete the project by 31.03.2019 and has also applied for a further extension of one year with the revised date as 31.12.2020. Thus, no cause of action can be said to have arisen to the complainant in any event to claim possession or refund, along with interest and compensation, as sought to be claimed by them.

XII. The projects in respect of which the respondent has obtained the occupation certificate 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	400	OC received
	Tower H, N	160	OC received
	Tower-O	80	OC received
	(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



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.
8. Vide order dated 16.09.2021 the present complaint was disposed of by the adjudicating officer granting refund of the amount paid by the complainant. On 19.10.2021 the counsel for respondent filed an application requesting for setting aside/recalling the order dated 16.09.2021 as the respondent had already applied for rejection of complaint on ground of jurisdiction which was listed for hearing on 30.07.2021. The matter was heard at length on 30.07.2021 and the order was reserved for pronouncement on 16.09.2021 which according to respondent was an adverse order. Acting upon this application the adjudicating officer recalled the said matter on 03.12.2021 and now matter is to be heard on merits as the issue of jurisdiction has already been settled by Hon'ble Supreme court of India in the case bearing no. ***SLP(Civil) No(s). 3711-3715 OF 2021) titled as M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors., and*** wherein it was held that as matters regarding refund and interest under section 18(1) are to be decided by the authority and matters regarding adjudging compensation to be decided by the Adjudicating officer.

E. Jurisdiction of the authority

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

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. (Supra)*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

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

adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

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

F. Findings on the objections raised by the respondent

F. I Objection regarding handing over possession as per declaration given under section 4(2)(I)(C) of RERA Act

14. The counsel for the respondent has stated that the entitlement to claim possession or refund would arise once the possession has not been handed over as per declaration given by the promoter under section 4(2)(I)(C). Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.
15. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.
16. Section 4(2)(I)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a

declaration under section 4(2)(1)(C) of the Act and the same is reproduced as under: -

Section 4: - Application for registration of real estate projects

(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —.....

*(1): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: —
.....*

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."

17. The time period for handing over the possession is committed by the builder as per the relevant clause of apartment buyer agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the apartment buyer agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(1)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and

obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as **Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors.** and has observed 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..."

F. II Objection regarding the complainant being investor

18. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer 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 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.62,24,702/- 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 him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as **M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.** has also held that the concept of investor is not defined or referred in the Act. Thus, the

contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

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

19. 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."*

20. 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."

21. 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 Direct the respondent to refund total amount of Rs.62,24,702/- along with interest @18% per annum from the date of deposit of each amount till its actual realization.**
22. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

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

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

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

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay,

*till the handing over of the possession, at such rate as may be prescribed.”
(Emphasis supplied)*

23. Clause 15(a) of the apartment buyer agreement (in short, 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 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.”*

24. The authority has gone through the possession clause of the similar cases in the same project is being developed by the same promoter 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.
25. 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.

26. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him at the rate of 18%. However, the 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.

27. 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.
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., 25.01.2023 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. 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 13 of the booking application form executed between the parties on 12.03.2011, the possession of the subject unit was to be delivered within a period of 36 months from the date of execution of buyer's agreement which comes out to be 09.01.2014. (Calculated on the basis of the date of booking application form i.e., 09.01.2011 in the absence of BBA). It is pertinent to mentioned here that it is of no difference if we consider the due date of possession from the date of booking or to take into consideration the due date mentioned in similar situated allotments.

31. 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 8.4 years (i.e., from the date of booking 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 87% of total consideration till 2016. 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.

32. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent /promoter. The authority is of the view that the 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....."

33. Further, the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*** reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022. observed as under: -

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

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

35. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @ 10.60% 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 To award a compensation of Rs.5,00,000/- to the complainants towards mental torture and harassment.

G.III Cost of litigation to the tune of Rs.55,000/- may also be awarded to the complainant.

36. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors

mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

H. Directions of the authority

37. 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.62,24,702/- received by it from the complainant 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 complainant and even if,



any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainant.

38. Complaint stands disposed of.
39. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.01.2023



HARERA
GURUGRAM