

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

Complaint no. : 461 of 2019
Complaint filed on: 31.01.2019
First date of hearing: 21.05.2019
Date of decision : 01.02.2023

Mr. Digvijay Singh

R/O: C1, 101, Gold Croft CGHS Apartments, Plot 4,
Sector- 11, Dwarka, New Delhi.

Complainant

Versus

1. M/s Lotus Greens developers Pvt. Ltd.
Registered office at: - Lotus Business Park, Sector-127,
Noida Expressway, Noida, UP-201304.
2. M/s Bright Buildtech Enclave Pvt Ltd
Registered office at: - D-107, Panchsheel Enclave-I,
New Delhi.

Respondents

CORAM:

Shri Vijay Kumar Goyal

Member

Shri Ashok Sangwan

Member

Shri Sanjeev Kumar Arora

Member

APPEARANCE:

Shri Pawan Bhushan Advocate

Complainant

Shri Deeptanshu Jain and Dhruv Gupta Advocates

Respondents

ORDER

1. The present complaint 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 provisions 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 the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Woodview Residences" Sector 89-90, Gurugram, Haryana
2.	Project area	101.081 acres
3.	Nature of the project	Plotted Colony
4.	DTCP License	59 of 2013 dated 16.06.2013, valid up to 15.07.2021
5.	Name of the licensee	Orris Land & Housing Pvt Ltd. and 42 Others.
6.	RERA Registered/ not registered	Registered vide no. 34 of 2020 dated 16.10.2020
	Valid up to	15.07.2023
7.	Unit location	B-48, Upper Ground Floor, Pocket 1 (Page no. 39 of complaint)



8.	Unit measuring (carpet area)	1090 sq. ft. (Page no. 39 of complaint)
9.	Date of allotment	11.02.2015 (Page No. 34 of complaint)
10.	Date of execution of Builder buyer agreement	18.09.2015 (Page No. 59 of complaint)
11.	Possession clause	5(1) The company shall endeavour to complete the construction of the building block in which the dwelling unit is situated within 36 months, with a grace period of 6 months from the date of issuance of allotment letter provided that all amounts due and payable by the buyer has been paid to the company in timely manner. (Page no. 43 of complaint)
12.	Due date of possession	11.08.2018 (Calculated from date of allotment letter dated 1.02.2015) Note: Grace period allowed, it being unqualified and unconditional)
13.	Total sale	Rs. 82,57,797/-

	consideration	(Page no. 40 of complaint)
14.	Total amount paid by the complainants	Rs. 21,86,633/- (Page 12 of complaint)
15.	Occupation Certificate	Not obtained
16.	Offer of possession	Not offered

B. Facts of the complaint:

3. That a project by the name of "Woodview Residences". Sector 89 & 90, Gurgaon was being developed by the respondents. The present complaint is preferred under section 31 read with section 18 of the Act for the benefit of the complainant, who is a buyer in a residential real estate project. By way of this complaint, the complainant seeks the relief of refund contemplated under section 18 of the Act i.e., the refund of the entire amount deposited towards the total consideration of their respective units B-48-UGF Floor-Upper Ground with interest of 12% p.a. in the project.
4. That as per clause 5.1 of builder buyer agreement, the dwelling unit is to be delivered by the respondent no. 2 within thirty-six months (not including a further six (6) months grace period) from the date of issuance of allotment letter.
5. That the respondents have failed to deliver possession of the respective unit to the complainant and have violated the terms of the builder-buyer agreement. That the date for giving possession has expired for the complainant herein. Dwelling units in the project are still at the stage of skeletal structures even after expiration of 5 years of the launch of the

project. The complainant has already paid up a substantial amount of the price of the dwelling unit pursuant to representations made by the respondents.

6. That the balance of convenience lies in favour of the complainant, who has invested his hard-earned savings with the respondents. Thus, the complainant humbly requests this authority to allow the present complaint. That the complainant is grossly aggrieved by the act of the respondents of not handing over the possession of the units even after expiration of the time for delivering such possession.
7. That the complainant has paid substantial amounts out of the total price of the unit purchased. The complainant has invested his life savings to make payments to the respondents. That the failure of the respondents to deliver possession of the units (which are currently languishing at the stage of incomplete skeletal structures) has caused immense pressure and financial burden on the complainant. The unfair trade practices of the respondents are evident from the fact that if an allottee defaulted in making payments of any instalment, the same would have invited forfeiture and cancellation at the option of respondent no. 2.
8. That the deficiency in service of the respondents is evident from the failure to deliver constructed dwelling units within the time period specified in the builder-buyer agreement. Further, the respondent no. 2 failed to offer any revised timeline after persistent defaults on originally stipulated timelines.
9. That the complainant, had applied for booking an independent floor admeasuring 1090 sq. ft. bearing unit no. B 48-UGF on 23.01.2014. That an allotment letter dated 11.02.2015 was issued to the complainant. The said

letter was to be provisional and subject to the execution of a builder-buyer agreement.

10. That a builder-buyer agreement dated 18.09.2015 was executed between the complainant and the respondent no. 2 with respect to unit no. B-48-UGF. In terms of clause 5.1 of the builder buyer agreement, the respondents were to deliver possession of the aforesaid unit within a period of 36 months from the date of issuance of the allotment letter by 11.02.2018. That the respondents have grossly failed to deliver possession to the complainant.
11. That the complainant made timely payments perfectly in accordance with the payment plan provided in buyer's agreement. In total, a sum of Rs.21,86,633/- out of total sale price of Rs.82,57,797/- has already been paid. This amount includes a payment of Rs.8,00,000/- made at the time of booking on 11.02.2015.
12. That the respondents have breached the terms of the agreement entered into between them and have failed to deliver the unit by the agreed possession date. The conduct, deficiency of service and unfair trade practices employed by the respondents has caused harassment and immense mental agony to the complainant. That the complainant is entitled to refund of the total amount deposited along with an interest of 18% p.a. from the date of payment.
13. That the cause of action arose when the respondents failed to handover the possession of the unit as agreed upon. The cause of action is a continuous one and continues to subsist as the respondents has not redressed the grievances of the complainant.

C. Relief sought by the complainant:

14. The complainant has sought the following relief(s):

- I. Direct the respondents to refund entire amount paid by him along with interest.
- II. Any other relief which this hon'ble authority deems fit and proper may also be granted in favour the complainant.

D. Reply by the respondents

15. That the complaints pertaining to compensation and interest for a grievance under section 12, 14, 18 and 19 of the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as the "said Act") are required to be filed before the Ld. Adjudicating Officer under Rule-29 of the Haryana Real Estate (Regulation & Development) Rules, 2017 (hereinafter referred to as the "said Rules") read with Section 31 and Section 71 of the said Act, in Form CAO, whereas, in the present case, the Complaint has been filed under Form-CRA, therefore, the same is not maintainable.

16. That the respondent no. 1, i.e., Lotus Greens Developers Pvt. Ltd. (now known as "Broad Homes Private Limited) is only the group company of the respondent no. 2 and has initially marketed the project being developed by the respondent no. 2. It is pertinent to mention that there is no privity of contract between the Respondent No. 1 and the Complainant. The respondent no. 1 does not owe any responsibility whether contractual or otherwise, so far as the completion and delivery of the units in the Project

is concerned and as such, the name of the respondent no. 1 should be deleted from the array of parties.

17. That the respondent no. 2 (Bright Buildtech Pvt. Ltd.) which is a group company of the respondent no.1, is developing the project namely "Woodview Residences" on its share in the project land measuring 101.081 acres situated at revenue estate of village Hayatpur, Sector-89 and 90, Gurugram. It is pertinent to mention that the respondent no.2 has appointed M/s. Ace Mega Structures Private Limited ("Ace") as 'Development Manager for development, construction, sales and marketing of the Project vide 'Development Management Agreement' dated 23.05.2019 only with the objective of ensuring expeditious development of the Project and to provide professionally proficient customer-care interaction.
18. It is pertinent to mention that the role and responsibility of 'Ace' is restricted to manage and supervise the construction and development of the said Project and to ensure timely completion. The status of 'Ace' is purely that of a service provider who shall receive a fee as consideration for providing project management and development services to the respondent no. 2.
19. That the complainant has submitted the application form along with an amount of Rs.8,00,000/-.

20. It is pertinent to mention here that at the time of submitting the application, the applicant was provisionally allotted 13-48 Dwelling Unit, UGF, at the basic sale price of Rs.77,46,030/- plus EDC, IDC charges, club members fee, interest free maintenance security, totalling to Rs 82,57,797/-as mentioned in application form duly signed by the complainant. The complainant had opted for construction linked plan.
21. That as per the agreed payment plan, the complainant was to pay the instalment within the agreed period and the respondent no. 2 issued a demand note on 21.03.2015 for payment of the next instalment which became due for payment after ninety days.
22. That the complainant failed to make the payment of above said instalment, even then the respondent no. 2 showing his bona-fide & sent the buyers agreement of the above said allotted unit to him vide letter dated 28.07.2015, calling upon to complete the formalities and submit the buyer's agreement duly signed with it.
23. That the complainant always remained negligent and never fulfilled his part of contract nor paid the instalment as per the agreed payment plan. It is the complainant who is at fault who has not paid the instalments in time because of which the construction of the project became delayed.
24. Furthermore, the respondent no. 2 issued a letter dated 07.03.2016, to intimate the complainant that the respondent no. 2 has availed finance from "Yes Bank Limited" for the purpose of the completion of the said

project against the security of the land and building and advised the complainant to make all future payments for the said dwelling unit as per the schedule of payments to the escrow account with Yes Bank Limited' as per the details mentioned in the said letter.

25. That the complainant who is at fault in making timely payment of due instalments because of which the construction of the said project was delayed. Non-payment of the instalments by the allottees is a force majeure' circumstance. Furthermore, the other reasons for delay in project are stoppage of construction activities in NCR region by the orders of Court, non- availability of construction material and labour, implementation of nationwide lockdown' to contain the spread of 'Covid-19', etc. Moreover, all these situations and adverse conditions is 'force majeure' situation which is beyond the control of the respondents.
26. That the complainant is well aware of the fact that the respondent no.2 has appointed the Development Manager 'Ace Mega Structures Pvt. Ltd. for construction and completion of the said project. The respondent no.2 vide letter dated 03.10.2019 informed the complainant about the appointment of the Development Manager" who is responsible for all activities including the construction and sales of the project as per the Development Management Agreement (DMA) dated 23.05.2019.
27. That the said project of the respondent no. 2 is at the final stage of the construction and is reasonably delayed because of 'force majeure' situation

which is beyond the control of the respondent no. 2. The respondent no.2 has also submitted the application for Change of Developer (COD) with the concerning authority, Director General Town and Country Planning (DGTCP) for the inclusion of the name of the Co-developer Bright Buildtech Pvt. Ltd., which is pending for adjudication before the concerned authority. However, despite all odds, still, the respondent no. 2 along with Development Manger Ace' is making all efforts to complete the construction work at project site at full pace and is expecting to handover the possession very soon.

28. Other than the above reasons, the delay in handing over the possession of the Dwelling Unit/ apartment has been caused due to the various reasons which are beyond the control of the respondent no. 2. Following important aspects are relevant which are submitted for the kind consideration of this Hon'ble Court;

- I. Non-booking of all apartments seriously affected the construction.
- II. Respondent No.2 seriously affected the construction;
- III. Lack of adequate sources of finance;
- IV. Shortage of labour;
- V. Rising manpower and material costs;
- VI. Approvals and procedural difficulties.
- VII. There was extreme shortage of water and bricks in the region.
- VIII. De-monetization.



- IX. Due to the increase in pollution in National Capital Region, the Hon'ble Supreme Court of India vide Order dated 04.11.2019 passed in **Writ Petition (Civil) No. 13029 of 1985 titled as "M.C. Mehta-Versus-Union of India & Ors"** had put restriction on construction activities. It is reiterated herein that the company was attempting to make its best efforts to complete the construction works and to give possession of the flat to the allottees as soon as possible. It is submitted that the whenever the construction activity has stopped at the project site, it is due to the above said reasons of force majeure' beyond the control of the respondent no.2. Therefore, the unfair and unreasonable demands of the complainant be not entertained. It is submitted herein that the respondent no.2 is attempting to make its best efforts to complete the construction work and to give possession of the unit' to the allottees as soon as possible.
29. It is noteworthy to mention that the project of the respondent no.2 is at advance stage of construction and is completed to the extent of 70%. It is submitted that this fact is evident in the light of the photographs of the Project site which are annexed along with the accompanying reply, therefore, in view of the same, the Complainant shall not raise unreasonable demands which can materially affect the entire project of the respondent no.2.
30. It is submitted that the complainant had applied for the allotment of the 'Dwelling Unit' as investment and not for personal use, which fact is abundantly clear and evident from the conduct of the complainant. He has

invested in the unit with intent to have monetary gains by way of reselling the unit to a higher bidder at an appreciated value. Thus, the present complaint is not maintainable.

31. That on 03.02.2021, the Secretary RERA, Haryana filed an affidavit before Hon'ble Supreme Court of India in SLP (Civil) No. 13005/2020 titled as "M/s. Sana Realtors Pvt. Ltd. vs. Union of India & Ors.", wherein, at Para Nos. 43 to 46 of the Counter Affidavit, it was submitted as under:

In the cases where the projects are delayed inordinately i.e. delay ranging from 2 to 10 years, the RERA Act and RERA Rules provide that in the event of delay, compensation shall be paid @SBI-MCLR +2% per year, which usually works out to simple interest@ of about 10%. It is further submitted by RERA, that keeping in view the overall interest of parties and in exercise of the regulatory functions the Authority can come to the finding that the compensation for the entire period of delay for entire period prior to enactment of RERA Act, 2016 be paid at the rate provided in Rule 15 of the RERA Rules and this provision can be made applicable on all the previous agreement also delay irrespective of period"

32. In view of the above stand, before the Hon'ble Supreme Court that in the cases of delay in completion of projects, the HRERA provides for compensation, keeping in view the overall interest of the parties. As such, this authority should take into account the adverse circumstances which were beyond the control of the respondents, and which has led to the delay in completion of project. However, the respondents are endeavouring to finish the project on or before June 2022. Therefore, this authority should not consider the prayer of refund of monies.
33. All other averments made in the complaint were denied in toto.

34. 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 those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

35. The plea of the respondents 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

36. 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

37. 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.

38. 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.
39. 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."

40. 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 objections raised by respondent

F.1 Objection regarding entitlement of Refund on ground of complainant being investor.

41. The respondents took 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 respondents 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 observed 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 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 plot buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of Rs.21,86,633 /- 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;"

42. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the plot buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is allottee 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 allottee being an investor is not entitled to protection of this Act also stands rejected.

F. II Objection regarding force majeure conditions

43. The respondent/promoters have raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as delay on part of the developer M/s. Ace Mega Structures Private Limited, shortage of labour, implementation of various social schemes by Government of India, demonetisation, lockdown due to covid-19 various orders passed by NGT, weather conditions in Gurugram and non-payment of instalment by different allottees of the project. But all the pleas advanced in this regard are devoid of merit. The plea advanced that the developer has failed to handover the possession of project on time as per 'development management agreement' entered between them on dated 23.05.2019. It is observed the plea advanced cannot be taken as the complainant was never a party to said contract and thus, there was no privity of contract. Further, the respondent has taken a plea that there was a delay in construction of the project on account of NGT orders, orders by EPCA, orders by Hon'ble Supreme Court of India, etc but did not particularly specify for which period such orders has been made operative. Though some allottees may

not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter respondents cannot be given any leniency on based of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrong.

F.III Objection regarding delay in completion of construction of project due to outbreak of Covid-19

44. The Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020* dated 29.05.2020 has observed as under:

69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

45. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 11.08.2018. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time

period cannot be excluded while calculating the delay in handing over possession.

F. IV. Objection with regard to mis joinder of respondent no. 1 in the complaint.

46. While filing the complaint the complainant sought relief against M/s Lotus Green Developers Private Limited and Bright Buildtech Private Limited being the developers of the project. On failure to fulfil their liability to complete the project by the due date, the complainants approach the authority seeking relief of refund the amount received against the allotted unit. A perusal of various documents placed on the record shows that respondent no. 2 is a group company of respondent no. 1 i.e., Lotus Green Developers Private Limited now known as "Broad Homes Private Limited". It is not disputed that the allotment of the unit in favour of the complainant was made by the respondent no. 2 though its group company i.e., of respondent no. 1. The buyer's agreement with regard to the allotted unit was executed between the complainant and respondent no. 2. Even after allotment and buyer's agreement, demands for various payments were raised against the allotted unit by respondent no. 2 only. Thus, it shows that there is no privity of contract between respondent no. 1 and the complainant and as such the plea of the respondent no. 1 is valid and thus, would be justified to delete his name from array of party.

G. Findings on the relief sought by the complainant:

G.1 Direct the respondent to refund the amount of Rs.21,86,633/- along with interest.

47. 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).

48. As per clause 5.1 of the buyer's agreement provides for handing over of possession and is reproduced below: -

5. POSSESSION OF DWELLING UNIT

*5.1 Subject to Clause 5.2 and subject to the Buyer Making timely payments, the company shall endeavor to complete the construction of the building block in which the dwelling unit is situated **within 36 months, with a grace period of 6 months from the date of issuance of allotment letter** provided that all amounts due and payable by the buyer has been paid to the company in timely manner"*

49. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 36 months (excluding a

grace period of 6 months) from the date of issuance of allotment letter. The period of 36 months with a grace period of 6 months expired on 25.11.2018. Since in the present matter, the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage.

50. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the rate of 12% interest. However, the allottees intend to withdraw from the project and are seeking refund of the amount paid by them 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.

51. 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.

52. 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., 01.02.2023 is **8.60%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.60%**.

53. 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;"*

54. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5.1 of

the apartment buyer's agreement, the possession of the subject apartment was to be delivered within a period of 36 months with a grace period of 6 months from the date of issuance of allotment letter i.e., 11.02.2015 which comes out to be 11.08.2018. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 11.08.2018. It is pertinent to mention over here that even after a passage of more than 7 years (i.e., from the date of allotment till date) neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottees 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 26% of total consideration till 2016. Further, the authority observes that there is no document placed 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 facts, the allottee intends to withdraw from the project and are well within the right to do the same in view of section 18(1) of the Act, 2016.

55. Moreover, occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent



/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have 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....."

56. 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."*

57. 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 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.
58. 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 respondents 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., @ 10.70% 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*.

H. Directions of the authority


59. 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 no. 2 is directed to refund the paid-up amount i.e., Rs.21,86,633/- 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.

60. Complaint stands disposed of.

61. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 01.02.2023