

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

Complaint no. 804 of 2019
Complaint filed on: 25.02.2019
Order reserved on : 11.04.2023
Order pronounced on: 23.05.2023

M/s Priority Agencies Pvt. Ltd.
Through its Director Mr. Vishal Agarwal,
Address: L-16, DLF Phase II, Gurugram, Haryana.

Complainant

Versus

M/s Emaar India Ltd.
(Earlier known as M/s Emaar MGF Land Ltd.)
Address: Emaar MGF Business Park,
MG Road, Sikandarpur Chowk, Sector 28,
Gurugram 122022, Haryana.

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

Shri Ashok Sangwan

Member

Shri Sanjeev Kumar Arora

Member

APPEARANCE:

Shri Mayank Agarwal

Counsel for the complainant

Shri J.K. Dang

Counsel for the respondent

ORDER

1. This 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 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. Project and unit related details

2. The particulars of the project, the amount of 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:

Sr. No.	Particulars	Details
1.	Name of the project	Imperial Garden, Sector 102, Gurugram, Haryana
2.	Total area of the project	12 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	107 of 2012 dated 10.10.2012
	Validity of license	09.10.2020
	Licensee	Kamdhenu Projects Pvt. Ltd.
	Area for which license was granted	12 acres
5.	Registered/not registered	Registered in two phases i. 208 of 2017 dated 15.09.2017 [Valid up to 31.12.2018 for 49637 sq. mtrs. and extension granted vide no.3/2019 dated 02.08.2019 which is extended up to 31.12.2019]

		ii. 14 of 2019 dated 28.03.2019 (Phase II) [Valid up to 17.10.2018 for 4.57 acres]
6.	Occupation certificate granted on	17.10.2019 [annexure R9, page 158 of reply]
7.	Provisional allotment letter	28.02.2013 [annexure R2, page 42 of reply]
8.	Unit no.	IG-07-0102, 1 st floor, building no.7 [annexure R6, page 99 of reply]
9.	Area of the unit (super area)	2000 sq. ft.
10.	Date of execution of buyer's agreement	01.05.2013 [annexure R6, page 96 of reply]
11.	Possession clause	<p>14. POSSESSION</p> <p>(a) Time of handing over the Possession</p> <p><i>Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee(s) having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 42 (Forty Two) months from the date of start of construction; subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be</i></p>

		<i>entitled to a grace period of 3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.</i> [page 114 of reply]	
12.	Date of start of construction as per the statement of account dated 01.12.2021 at page 89 of reply	11.11.2013	
13.	Due date of possession	11.05.2017 [Note: Grace period is not included]	
14.	Total consideration	As per statement of account dated 01.12.2021 at page 89 of reply	As per payment plan annexed with the buyer's agreement, page 129 of complaint
		Rs.1,55,57,579/-	Rs.1,51,62,175/-
15.	Total amount paid by the complainant as per the statement of account dated 01.12.2021 at page 89 of reply	Rs.1,12,79,268/-	
16.	Offer of possession	23.10.2019 [annexure R10, page 161 of reply]	

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:
 - i. That the present complaint is being filed in pursuance of the liberty granted by this Hon'ble Authority vide final order dated 22.10.2018 in CR/209/2018 wherein this Hon'ble Authority after adjudication of claims on merits had directed the respondent to handover



possession of the flat/apartment by 31.12.2018 and further granted liberty to approach this Hon'ble Authority u/s 19(4) of the Act seeking refund of the amount paid in the event of failure of handing over of possession by the respondent builder by that date. Hence, the present complaint in exercise of the right of the complainant under section 19(4) of the Act read with the liberty granted by Hon'ble Authority in order dated 22.10.2018 passed in CR/209/2018.

- ii. That the complainant however reserves the right to claim compensation, damages and other claims before the adjudicating officer. The present complaint should not in any way considered to be an abrogation or waiver of the said right to claim compensation against the respondent. It is pertinent to mention here that this Hon'ble Authority in the order dated 22.10.2018 has acknowledged this and while determining the issues.
- iii. That the representatives of the respondent had first approached the complainant in the month of December 2012 and credentials of the project Imperial Garden, Sector 102, Gurugram, Haryana were explained to the complainant. It was informed by the respondent that this was going to be a residential housing complex which was being developed by the respondent.
- iv. That the company representatives belonging to the respondent gave an unequivocal undertaking and impression to complainant that the respondent was an experienced and seasoned builder having great reputation in the market to develop and deliver projects in time. It was further assured to the complainant that the

said project shall be complete by June 2016 and that construction for the said project had already started and was in full swing. It is pursuant to such false claims/assurances that complainant had deposited initially an amount of Rs. 10 lacs with respondent by cheque.

- v. That despite making payment upfront as desired by the respondent, the respondent did not fulfil its part of the bargain/obligation and there was considerable delay in executing the buyer's agreement in favour of the complainant by the respondent till June 2013, due to malafide intentions of the respondent. It is submitted that the said delay solely due to dilly-dallying tactics employed by the respondent which the respondent employed for deliberately avoiding handing over the buyer's agreement. The said delay in itself amounts to gross misuse of dominant position and exercise of undue influence over the complainant by the respondent.
- vi. That that time was essence of the contract and the same also finds mention in the builder buyer agreement as well. That the terms of the buyer's agreement itself state in clause 12 that time is of essence in performing the obligations under the agreement. As such, clause 14(a) of the buyer's agreement stipulates that the delivery of the project shall be handed over to complainant within 42 months, i.e. by August 2017. However, in spite of time being of essence, the respondent has failed to complete the construction of the said project without explaining any reason as to why there has been delay in execution of the project. The said delay is solely due

to the default on part of the respondent and hence a violation of the terms of the contract.

- vii. That this Hon'ble Authority in the order dated 22.10.2018 between the same parties has already given a finding against the respondent in this regard. The authority in the said order has come to the below finding”

“Keeping in view the present status of the project and intervening circumstances, the authority is of the considered opinion that the respondent has failed to deliver the possession of the unit number IG-07-102 on first floor tower-7462 in the project 'Imperial Gardens to the complainant by the committed date i.e. 11.08.2017 as per the said agreement and the possession has been delayed by 1 year 2 months 12 days till the date of decision i.e. 22.10.2018.

Thus, the complainant is entitled to interest at prescribed rate for every month of delay till the handing over of the possession.”

- viii. That the complainant made payments to the respondent in accordance with the schedule of payment envisaged under the agreement as per the demands raised by the respondent from time to time. The respondent's failure to deliver the project within time has caused immense monetary loss and mental agony to complainant and his family and as such complainant seeks a refund of all monies paid along with interest as aforesaid.
- ix. That the Hon'ble Authority after appreciating the averments and arguments made by both sides had passed the order dated 22.10.2018 and directed the respondent to offer possession by 31.12.2018. However, till date offer of possession has not been made by the respondent in violation of the specific direction in that regard by this Hon'ble Authority. Complainant is now constrained to demand a full refund of all monies paid along with interest on the payment made from the date of making of such payment to the

respondent as per section 19(4) of the Act. The complainant further submitted that by failing to comply with the order dated 22.10.2018 and by violating the direction therein to handover possession of the flat/apartment to the complainant by 31.12.2018, the respondent/promoter has become liable for payment of penalty to the complainant under section 63 of the Act.

- x. That the buyer's agreement states that respondent has obtained license no. 107/ 2012 dated 15.10.2012 from the Director, Town & Country Planning, Govt. of Haryana under the provisions of Haryana Development & Regulation of Urban Areas Act, 1975 (the "1975 Act"). As such the respondent is admittedly bound by the terms of the said 1975 Act. That pursuant to the terms of the 1975 Act, a license is issued for a period of two years within which you are required to complete construction of the project. That the said license has since been renewed annually in favour of the respondent and several such renewals have been provided however the respondent has till date failed to complete the construction of the project Imperial Garden and is unlikely to complete it in the near future. As such the respondent has abused the license granted under section 3 of the 1975 Act and that the said license is liable to be cancelled in terms of section 8 of the 1975 Act. That therefore the renewals from the government only show that the respondent is in connivance with the Government in obtaining these renewals.
- xi. That the respondent has utilised the funds collected for the said project from complainant and other persons and used the same

funds for construction of other projects, which is patently a violation of section 5 of the 1975 Act. Section 5 mandates that funds collected for a particular project be used for construction of the said project only. That the respondent has illegally diverted funds collected for construction of the said project and has therefore duped complainant and several other customers of crores rupees. Such illegal diversion of funds prima facie constitutes the offence of cheating and criminal breach of trust. The failure to refund the monies paid by complainant along with interest has also compelled the complainant to commence criminal proceedings. The complainant has lodged criminal complaint against the respondent in this regard. It is also noteworthy that it has come to knowledge of the complainant that the respondent builder has mortgaged the project/assets of the project for securing loan without the approval of the buyers/complainant, in violation of the provisions of the Act. The malafide of the respondent is revealed from the fact that the instalments for repayment of the said loan have been scheduled till March 2019. It is clear that the respondent has no intention of delivery possession till at least March 2019 since before repayment of the loan, it cannot deliver possession of the mortgaged apartments/ project to the respective buyers.

- xii. That the courts have repeatedly refused to recognize one-sided contracts between builders and apartment buyers. That failure to carry out obligations in terms of the buyer's agreement cannot compel complainant to continue to make payments to respondent while respondent illegally diverts those funds to other projects and

- fails to complete construction. That respondent's several other projects located throughout the country are also facing delays and as such it is not expedient in the interest of justice that complainant should continue to pay respondent in such circumstances.
- xiii. That the promoters of the respondent have indulged in unfair practices in relation to the present project and hence the registration of the respondent is liable to be revoked in terms of the mandate of section 7 of the Act. Further they are liable to pay penalty to the complainant under section 63 of the Act. The promoters are further required to refund the amount paid by the complainant along with interest from the date of each payment till the date of actual refund under section 19(4) of the Act.
- xiv. That the respondent had made false promises at the time of execution of the agreement knowing fully well that it had no intention to honour the same. The respondent had further given incorrect and false representation that the project will be ready for delivery within 42 months of execution of the agreement. The malafide intentions and misrepresentation made by the respondent is evident from the fact that there was considerable delay in executing the buyer's agreement in favour of the complainant by the respondent till June 2013, due to malafide intentions of the respondent.
- xv. That the respondent vide letter dated 08.02.2018 and 28.03.2018 had illegally demanded some additional amount in contravention of the terms of the agreement from the complainant and also threatened to cancel the allotment of the apartment to the

complainant. The said demand/reminder letter dated 08.02.2018 is illegal, malafide and issued only with the intention of denying the rightful claim of the complainant and avoiding the liability of the respondent under the agreement to refund the money paid, compensation, interest and other amounts accruing in favour of the complainant against the respondent.

- xvi. Thus, the complainant in addition to the compensation is also entitled under section 19(4) of the Act to refund of the investment amount/deposit/ advance/ payment paid to the respondent along with interest in terms of the rule 15 of the rules, 2017.

C. Relief sought by the complainant:

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

- i. Direct the respondent to refund the amount paid by the complainant along with interest at the prescribed rate from the date of making each payment till the date of actual payment in terms of section 19(4) of the Act.
- ii. Impose penalty on the respondent for wilful non-compliance with the order dated 22.10.2018 passed by the authority in terms of section 63 of the Act.
- iii. Any other relief which this hon'ble authority deems fit and proper in the facts and circumstances of the present matter which may not have been specifically prayed for may also be granted in favour the complainant.

5. On the date of hearing, the authority explained to the respondent/ promoters 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 by way of written reply has made the following submissions:

- i. That the complainant has admitted that the order dated 22.10.2018 has been passed by the Hon'ble Authority after adjudication of the claims on merits and consequently the instant complaint is barred by res judicata and provisions of Order 2 Rule 2 of the Code of Civil Procedure, 1908. The complainant cannot be legally permitted to raise similar/identical issues which have already been adjudicated upon by this Hon'ble Authority in complaint bearing no. CRN/209/2018. The instant complaint is a gross misuse of process of law. The complainant is misusing the so-called liberty claimed to have been granted by this Hon'ble Authority as a tool to oppress and harass respondent. In any event, the order passed by the Hon'ble Authority is under appeal in appeal no. 316 of 2019 which is pending before the Hon'ble Appellate Authority. However, the complainant has preferred the instant complaint with malafide intention and to blackmail the respondent.
- ii. That the complainant is not an "allottee" but an investor who had booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. The apartment in question had been booked by the complainant as a speculative investment and not for the purpose of self use.



- iii. That the complainant vide an application form applied to the respondent for provisional allotment of a unit in the project. The complainant, in pursuance of the aforesaid application form, was allotted an independent unit bearing no. IG-07-0102, located on the 1st floor, in the project vide provisional allotment letter dated 23.10.2019. The complainant consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainant would remit every instalment on time as per the payment schedule. The respondent had no reason to suspect bona fide of the complainant. The complainant further undertook to be bound by the terms and conditions of the application form.
- iv. That the complainant had persistently and regularly defaulted in remittance of installments on time. The respondent was compelled to issue demand notices, reminders etc. calling upon the complainant to make payment of outstanding amounts payable by the complainant under the payment plan/instalment plan opted by it. However, the complainant despite having received the payment request letters, reminders etc. failed to remit the instalments on time to the respondent. Statement of account dated 01.12.2021 correctly maintained by respondent in due course of its business reflects the delay in remittance of various instalments on the part of the complainant.
- v. That clause 16(c) of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations



envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. As delineated hereinabove, the complainant, having defaulted in timely remittance of instalment, was/is thus not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.

- vi. That the rights and obligations of complainant as well as respondent are completely and entirely determined by the covenants incorporated in the buyer's agreement dated 01.05.2013 which continues to be binding upon the parties thereto with full force and effect. It is submitted that as per clause 14(a) of the buyer's agreement the possession of the unit in question was liable to be delivered within 42 months along with a grace period of 3 months from the date of start of construction subject to the allottee(s) having strictly complied with all terms and conditions of the buyer's agreement. It has also been provided therein that the date for delivery of possession of the unit would stand extended in the event of occurrence of the force majeure circumstances. The complainant has completely misconstrued, misinterpreted and miscalculated the time period as determined in the buyer's agreement. In the case of delay by the allottee in making payment or delay on account of reasons beyond the control of the



respondent, the time for delivery of possession stands extended automatically. In the present case, the complainant is a defaulter who has failed to make timely payment of sale consideration as per the payment plan and is thus in breach of the buyer's agreement. Therefore, on account of delay and defaults by the complainant, the due date for delivery of possession stands extended in accordance with clause 14(b)(iv) of the buyer's agreement, till payment of all outstanding amounts to the satisfaction of the respondent.

- vii. That the project of the respondent had been registered under the Act and the rules, 2017. Registration certificate was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-140/2017/1083 dated 15.09.2017. It is pertinent to mention that the respondent has applied for extension of the registration and the Hon'ble Authority has already extended the validity of registration vide memo bearing no. RC/REP/HARERA/GGM/2017/208 dated 02.08.2019. The registration had been extended till 31.12.2019 and the respondent had already offered possession of the unit in question to the complainant vide letter dated 23.10.2019. Therefore, there is no delay in delivery of possession of the unit in question. The complaint is devoid of any cause of action. The instant complaint is liable to be dismissed at the threshold.
- viii. That the complainant was offered possession of the unit in question through letter of offer of possession dated 23.10.2019. The complainant was called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in



question to them. However, the complainant intentionally refrained from completing its duties and obligations as enumerated in the buyer's agreement. The complainant has preferred the instant complaint in order to needlessly vex and harass the respondent.

- ix. That the complainant willfully refrained from obtaining possession of the unit in question. It is submitted that it appears that the complainant did not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the buyer's agreement and consequently in order to needlessly linger on the matter, the complainant has preferred the instant complaint in order to needlessly blackmail and vex the respondent. It needs to be highlighted that an amount of Rs. 80,61,957/- is due and payable by the complainant which includes principal amount of Rs. 42,90,776/-, delayed payment interest amounting to Rs 20,67,645/-, Common Area Maintenance charges of Rs 2,38,195/-. Furthermore, VAT security amounting to Rs 4,48,291, stamp duty amounting to Rs. 9,67,050 and e challan of Rs. 50,000/- is also payable by the complainant. The complainant has intentionally refrained from remitting the aforesaid amount to the respondent. It is submitted that the complainant has consciously defaulted in its obligations as enumerated in the buyer's agreement. The complainant cannot be permitted to take advantage of its own wrongs. The instant complaint constitutes a gross misuse of process of law.



- x. That the respondent has been prevented from timely implementation of the project by reasons beyond its power and control. It is submitted that the respondent had appointed a contractor operating under the name and style of Capacite Infraprojects Ltd. for construction and implementation of the project in question. The said contractor had represented and claimed that it has the necessary resources, competence, capacity, capability and expertise for undertaking, performing, effectuating and completing the work undertaken by it. The respondent had no reason to suspect the bona fide of the said contractor at the relevant time and awarded the work to the said contractor. However, the said contractor was not able to meet the agreed timeline for construction of the project. The said contractor failed to deploy adequate manpower, shortage of material, etc. The respondent was constrained to issue several notices, requests etc. to the said contractor to expedite progress of the work at the project site but to no avail. Copies of the said notices, requests, reminders from the respondent to the said contractor are annexed hereto as Annexure R11 (colly). The said contractor consciously and deliberately chose to ignore the legitimate and just requests of the respondent on one pretext or the other and defaulted in carrying out the work in a time bound manner. Therefore, no fault or lapse can be attributed to the respondent of the facts and circumstances of the case.
- xi. That the purchasers in the project in question have defaulted in timely remittance of the instalments. It is submitted that when the proposed allottees default in their payments as per schedule



agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and further causes enormous business losses to the respondent. It is submitted that the respondent despite defaults of several allottees earnestly fulfilled its obligations under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. The defaults committed by various allottees has delayed the contemplated implementation of the project. The respondent cannot be penalised for indiscipline of its customers. All the demands raised by the respondent are strictly in accordance with the terms and conditions of the buyer's agreement duly executed between the parties. There is no default or lapse on the part of the respondent. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present application deserves to be dismissed at the very threshold.

7. Written arguments have been filed by both the parties. Copies of all relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submissions made by parties.

E. Jurisdiction of the authority

8. 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 completed 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)(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;

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 complainant 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*** and 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 relief sought by the complainant

- F.1 Direct the respondent to refund the amount paid by the complainant along with interest at the prescribed rate from the date of making each payment till the date of actual payment in terms of section 19(4) of the Act.**



F.II Impose penalty on the respondent for wilful non-compliance with the order dated 22.10.2018 passed by the authority in terms of section 63 of the Act.

14. The authority observes that the complainant in the present complaint had filed a complaint bearing no. **209 of 2018** on 30.04.2018 seeking refund of the amount paid by the complainants with prescribed rate of interest along with compensation. The said complaint was disposed of by the authority on 22.10.2018 with the following directions to the respondent:

"34. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- i. The respondent is duty bound to hand over the possession of the said unit by 31.12.2018 as committed by the respondent.*
- ii. The respondent is directed to give interest to the complainant at the prescribed rate of 10.45% on the amount deposited by the complainant for every month of delay from the due date of possession i.e 11.08.2017 till 22.10.2018 within 90 days of this order and thereafter on 10th of every month of delay till the handing over of possession.*
- iii. The complainant has not made up to date payments so the buyer will be charged the same rate of interest which will be adjusted while making full and final payment at the time of delivery of possession of the unit.*
- iv. If the possession is not given on the date committed by the respondent, then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions, i.e. Section 19(4) of the Act *ibid.*" (Emphasis supplied)*

15. Instead of allowing refund at the primal instance, delay possession charges were allowed to the complainant vide order dated 22.10.2018 for the following reasons:

- I. That the project is nearing completion.



- II. That the project is not held up. The work on the project is continuing and likely to be completed by 31.12.2018 as per commitment given by the promoter
- III. That the promoter has declared a firm date of completion of project i.e., 31.12.2018.
- IV. That there are so-many number of allottees whose stake is there in the project and if refund is allowed indiscriminately in projects which are near completion, the interest of allottees of the project will suffer.
16. Therefore, keeping in view the overall interest of the allottees and progress of the project, the authority was of the considered view that the refund at that stage would be detrimental to the progress/completion of the project and large number of allottees who have preferred to wait for the project for its completion and take physical possession of their respective units with a view to make their permanent abodes.
17. In the meanwhile, the respondent-promoter has approached the Hon'ble Haryana Real Estate Appellate Tribunal, Chandigarh (hereinafter, in short "the Hon'ble HREAT") by filing an appeal bearing no. 316 of 2019 against the order dated 22.10.2018 passed by the Authority. The said appeal was disposed of by the Hon'ble HREAT vide order dated 12.05.2022 wherein it was observed as under:

"4. As per the aforesaid directions, the appellant-promoter was directed to give physical possession of the flat to the respondent-allottee on the date committed by the appellant-promoter i.e. 31st December, 2018. In the fourth direction, it was mentioned if the possession is not given on the committed



date by the respondent in the registration application then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions of Section 19(4) of the Real Estate (Regulation and Development) Act, 2016 (for short, 'the Act'). In the impugned order, the respondent-allottee was awarded interest for delayed possession at the prescribed rate.

5. It is an admitted fact that during the pendency of the present appeal, the respondent-allottee has exercised the liberty granted to him vide third direction and the respondent-allottee has filed the fresh complaint for refund of the amount along with interest. Once the respondent-allottee has chosen to file the fresh complaint to claim the relief of refund, it shows that the respondent-allottee has no intention to execute the impugned order. Moreover, as per Section 18 of the Act, the allottee can avail one option either to claim refund or to claim interest for delay in delivery of possession.

6. So, the present appeal is hereby disposed of as such. The amount deposited by the appellant-promoter i.e. Rs.20,89,765/- with this Tribunal to comply with the provisions of proviso to Section 43(5) of the Act be sent to the Ld. Authority for disbursement to the appellant-promoter along with interest accrued subject to tax liability, if any, as per law and rules."

18. The complainant, in pursuance of direction given in para 34(iv) of the order dated 22.10.2018, has again approached the authority by way of present complaint bearing no. **804 of 2019 dated 25.02.2019** as the respondent has again failed to handover possession by 31.12.2018 and in view of the liberty given vide order dated 22.10.2018, the present complaint is neither barred by res judicata nor barred by order 2 rule 2 of CPC, 1908.
19. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by it in respect of subject unit along with interest at prescribed rate as per provisions of section 18



of the Act. Section 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)

20. **Due date of handing over possession:** Clause 14(a) of the buyer's agreement provides the time period for handing over of possession and is reproduced below for the reference:

"14(a) Time of handing over the Possession

*Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee(s) having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit **within 42 (Forty Two) months from the date of start of construction**; subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of **3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/occupation certificate** in respect of the Unit and/or the Project."*

21. The respondent/promoter has proposed to handover the possession of the said unit within a period of 42 months from the date of start of construction and it is further provided in the agreement that promoter



shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of said unit/project. Date of start of construction as per the statement of account dated 01.12.2021 at page 89 of reply is 11.11.2013. The period of 42 months expired on 11.05.2017. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 3 months cannot be allowed to the promoter at this stage. Therefore, the due date of handing over possession as per the buyer's agreement comes out to be 11.05.2017 and there is delay of 1 years 9 months 11 days on the date of filing of the complaint.

22. The counsel for the respondent cites an order passed by the Hon'ble HREAT in appeal no. **255 of 2019 titled as Ravinder Pal Singh Versus Emaar MGF Land Ltd. and anr.** which he states is on similar grounds. In the said matter, the Hon'ble HREAT has ruled that the appellant would be entitled for refund of the amount paid by them after forfeiting 10% of the basic sale consideration. However, the counsel for the complainant states that the facts of the present matter are entirely different and full refund may be allowed.
23. The authority has gone through the written submission made in this regard and the citations placed on record. In the aforesaid appeal, there



was breach of the BBA on the part of the allottee by not taking the possession even after the receipt of occupation certificate from the competent authority. While declining the claim of refund, the Hon'ble Haryana Real Estate Appellate Tribunal has held as under:

"28. In the instant case also after completion of the project the respondent has moved an application for issuance of the Occupation Certificate on 21.12.2018 which was granted on 02.05.2019 and the letter of offer of possession was issued on 03.05.2019. Thus, as the construction is already complete and the appellant himself is at default, so he is not entitled for the relief of refund.

...

32. However, nobody can be forced or compelled to purchase the house, but as the appellant himself is at default in making the payment as per the payment schedule and if he still intends to withdraw from the project out of his own which will amount to the breach of the contract on his part, in that eventuality he will be entitled for refund of the amount paid by him after forfeiting 10% of the basic sale consideration, which will be considered to be the reasonable earnest money amount and after deducting the statutory dues already deposited with the government".

24. The authority is of the view that the aforesaid order in appeal no. 225 of 2019 Ravinder Pal Singh (supra) is not applicable to the present complaint for the following reasons. **Firstly**, the complainant had earlier filed a complaint bearing no. 209 of 2018 for seeking refund of the mount paid along with interest and the same was disposed on 22.10.2018 granting delay possession charges for the delay caused in handing over possession. Further, the respondent was directed to handover possession by 31.12.2018 and in case of failure to handover possession, the complainant was given liberty to approach authority for the remedy as provided under



section 19(4) of the Act. It is observed that at the time of passing order dated 22.10.2018, the respondent has not offered the possession of the subject unit after obtaining the occupation certificate from the competent authority. **Secondly**, in the present complaint bearing no. 804 of 2019, the possession of the subject unit has been offered by the respondent on 23.10.2019 after the filing of the present complaint on 25.02.2019 for return of the amount received by the promoter on failure of promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. The complainant-allottee has already wished to withdraw from the project and the allottee has become entitled to his right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as the promoter fails to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return the amount received by him from the allottee in respect of that unit with interest at the prescribed rate.

25. It is observed that the respondent promoter has failed to comply with the direction passes by the authority vide order dated 22.10.2018 and has failed to give possession of the subject unit as per the committed date i.e. 31.12.2018. Also, the occupation certificate in respect of the project where the subject unit is situated was not obtained till filing of the present complaint and only during the pendency of the present complaint, the OC was received from the competent authority on 17.10.2019. 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....."

26. 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. (11.11.2021) MANU/SC/1056/2021*** 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. 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."

27. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act, 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.

28. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under section 71 read with section 31(1) of the Act of 2016.
29. **Admissibility of refund along with prescribed rate of interest:** Section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the promoter shall refund of the amount paid by the allottee in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.: Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."



30. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
31. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **23.05.2023** is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
32. The authority hereby directs the promoter to return the amount received by him i.e. Rs. 1,12,79,268/- with interest at the rate of 10.70% (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 90 days from the date of this order as provided in rule 16 of the Rules *ibid*.

G. Directions of the authority

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



- i. The respondent is directed to refund the entire amount of Rs. 1,12,79,268/- paid by the complainant along with prescribed rate of interest @ 10.70% p.a. as prescribed under rule 15 of the rules from the date of each payment till the 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 the full realization of paid-up amount along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainant.
46. The complaints stand disposed of.
47. Files be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.05.2023