



**BEFORE THE HARYANA REALESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 4944 of 2022
Date of filing of complaint: 22.07.2022
Date of decision : 18.05.2023

1. Mrs. Arushi Patel
2. Mr. Anil Kumar
Both RR/o: - Flat No. 0402, Tower-4, Gurgaon Green,
Sector- 102, Gurugram- 122505

Complainants

Versus

1. M/s Revital Reality Private Limited.
2. M/s Supertech Limited
Regd. Office at: 1114, 11th Floor, Hemkunt Chamber,
89, Nehru Place, New Delhi- 110019

Respondents

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Sh. Jagdeep Kumar (Advocate)
Sh. Bhrigu Dhami (Advocate)

Complainants
Respondents

ORDER

1. This complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations,



responsibilities and functions under the provision of the Act or the Rules and regulations made 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.N.	Particulars	Details	
1.	Name of the project	"Supertech Basera" sector-79&79B, Gurugram	
2.	Project area	12.10 area	
3.	Nature of project	Affordable Group Housing Project	
4.	RERA registered/not registered	Registered vide no. 108 of 2017 dated 24.08.2017	
5.	RERA registration valid upto	31.01.2020	
6.	DTPC License no.	163 of 2014 dated 12.09.2014	164 of 2014 dated 12.09.2014
	Validity status	11.09.2019	11.09.2019
	Name of licensee	Revital Reality Private Limited and others	
7.	Date of approval of building plans	19.12.2014 [as per information obtained by	



		the planning branch]
8.	Date of grant of environment clearance	22.01.2016 (Page no. 27 of the reply)
9.	Unit no.	0207, 2 nd floor, tower/block- 15, (Page no. 26 of the complaint)
10.	Unit measuring	473 sq. ft. (Carpet area) (Page no. 26 of the complaint)
11.	Allotment letter	19.09.2015 (Page no. 22 of the complaint)
12.	Date of execution of flat buyer's agreement	15.06.2016 (Page no. 25 of the complaint)
13.	Possession clause	3.1 Possession <i>Subject to force majeure circumstances, intervention of Statutory Authorities, receipt of occupation certificate and Allottee/Buyer having timely complied with all its obligations, formalities, or documentation, as prescribed by the Developer and not being in default under any part hereof and Flat Buyer's Agreement, including but not limited to the timely payment of installments of the other charges as per payment plan, Stamp Duty and registration charges, the Developers Proposes to offer possession of the said Flat to the Allottee/Buyer within a period</i>



		<p><i>of 4 (four) years from the date of approval of building plans or grant of environment clearance, (hereinafter referred to as the "Commencement Date") , whichever is later. The Developer also agrees to compensate the Allottee/Buyer @ Rs.5.00/- (Five rupees only) per sq. ft. of the area of the flat per month for any delay in handing over possession of the Flat beyond the given promised period plus the grace period of 6 months and upto offer letter of possession or actual physical possession whichever is earlier.</i></p> <p>(Page no. 29 of the complaint).</p>
14.	Grace period	<p>Not allowed</p> <p>There is no provision in relation to grace period in Affordable Group Housing Policy, 2013. As such in absence of any provision related to grace period, the said grace period of six months as sought by the respondent promoter is disallowed in the present case.</p>
15.	Due date of possession	<p>22.01.2020</p> <p>[Note: - the due date of possession can be calculated by the 4 years from 22.01.2016]</p>
16.	Total sale consideration	<p>Rs.19,28,500/-</p>



		(As per payment plan page no. 28 of the complaint)
17.	Total amount paid by the complainant	Rs.20,33,930/- (As alleged statement of payment received dated 13.07.2022 at page no. 42 of the complaint)
18.	Occupation certificate	Not obtained
19.	Offer of possession	Not offered
20.	Delay in handing over possession till the date of filing of this complaint i.e., 22.07.2022	2 years 6 months

B. Facts of the complaint

3. The complainants have made the following submissions: -

- I. That the respondents advertised themselves as a very ethical business group that lives onto commitments in delivering the housing projects as per promised quality standards and agreed timelines. The respondent no. 2 while launching and advertising any new housing project always commits and promises to the targeted consumer that their dream home would be completed and delivered within the time agreed initially in the agreement while selling the dwelling unit to them. They also assure to the consumers like the complainants that they have secured all the necessary sanctions and approvals from the appropriate

authorities for the construction and completion of the real estate project sold by them.

- II. That the respondents were very well aware of the fact that in today's scenario looking at the status of the construction of housing projects in India, especially in NCR, the key factor to sell any dwelling unit is the delivery of completed house within the agreed and promised timelines and that is the prime factor which a consumer would consider while purchasing his/her dream home.
- III. That somewhere in the month of March 2015, the respondent /promoter through its business development associate approached the complainants with an offer to invest and buy a flat in the proposed said project. On 19.03.2015, they had a meeting with respondent no. 2 at their branch office at M/s Supertech Limited, 702-703, 7th Floor, Tower - A, Signature Tower, South City- 1, Gurgaon 122001 where the respondent/promoter explained the project and highlighted that allotment of apartments under project would be done through draw of lots as per procedure defined under Affordable Housing Policy 2013 notified vide No. PF-27/48921 dated 19.08.2013, the respondents represented to the complainants that they are a very ethical business house in the field of construction of residential and commercial project. In case, they would invest in the project, then they would deliver the possession of booked flat on the assured

delivery date as per the best quality. The respondent/promoter had further assured the complainants that the respondent has already processed the file for all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. They while relying upon those assurances and believing them to be true, submitted an application with respondents for 2 BHK flat measuring 473 sq. ft. under draw of lots in the aforesaid project and made payment of application amount of Rs. 96,425/- vide cheque no. 107283 dated 19.03.2016.

- IV. That, the price of the said flat was agreed at the rate of Rs.4000/- per sq. ft. mentioned in the said application form. At the time of execution of the said application form, it was agreed and promised that there shall be no change, amendment or variation in the area or sale price of the said flat from the area or the price committed by the respondent.
- V. That on 19.09.2015, the respondents issued an offer of allotment through letter dated 19.09.2015 in the name of complainants and offered a residential unit no. 207, tower -15 (area 546 sq. ft.) in the said project at price of Rs.19,95,998/- (Inclusive of taxes) The said offer of respondent was accepted by them and made the requisite payment of Rs.4,02,575/- to respondent /promoter through cheque no. 474546 dated. 05.10.2015.



- VI. That building plan for the said project was approved by the office of DGTCP on 19.12.2014 and Environment clearance by respective office on 22.01.2016 as per the information provided by the company.
- VII. That on 15.06.2016, the respondent/promoter issued a flat buyer's agreement consisting very stringent and biased contractual terms being illegal, arbitrary, unilateral and discriminatory in nature, as every clause of agreement drafted in a one-sided way and a single breach of unilateral terms of flat buyer's agreement by complainants, would cost them forfeiting of earnest money. About delay payment charges of 15% it was mentioned that standard rule of company and would also compensate at the rate of Rs.5/- per sq ft per month in case of delay in possession of flat by company. They opposed these illegal, arbitrary, unilateral, and discriminatory terms of flat buyer's agreement but as there were no other option left with complainants because if complainants stop the further payment of installments, then in that case respondent forfeit 15% of total consideration value from the total amount paid by them, so they sign the flat buyer's agreement. They repeatedly requested the respondent to prepare buyer's agreement as per the terms and condition mention under the Haryana Affordable Policy 2013, but respondent did not pay any heed to repeated requests of them.

VIII. That in the flat buyer's agreement dated 15.06.2016, the respondents formulate a possession clause - 3.1 contrary to the clause 5 (III)(B) of Haryana Affordable Housing Policy 2013, where respondent had agreed and promise to complete the construction of the said flat and deliver its possession within a period of 4 Years with a 6 months of grace period thereon from the date of approval of building plans or grant of environment clearance, which was contrary to the possession clause (clause 5(III)(B)) mention in Haryana Affordable Housing Policy 2013. However, the respondent has breached the terms of said clause 5(III)(B) of Haryana Affordable Housing Policy 2013 and failed to fulfill its obligations and has not delivered possession of said flat within the agreed time frame of the Haryana Affordable Housing Policy 2013. The proposed possession date as per Haryana Affordable Housing Policy 2013 was due on 22.01.2020.

IX. That from the date of submitting application for allotment 26.02.2015 and till 31.12.2019, the respondents had raised various demands for the payment of installments on complainants towards the sale consideration of said flat and they have duly paid and satisfied all those demands as per policy of 2013 without any default or delay on their part and have also fulfilled otherwise also their part of obligations as narrated in the buyer's agreement. They

were and have always been ready and willing to fulfill their part of agreement, if any pending.

- X. That they have paid the total sale consideration along with applicable taxes to the respondents for the said flat. As per the statement dated 13.07.2022, issued by the respondent/promoter, they have already paid Rs.20,33,930/- towards total sale consideration and applicable taxes as on today to the respondent/promoter as demanded time to time.
- XI. That the respondent has committed grave deficiency in services by delaying the delivery of possession and false promises made at the time of sale of the said flat which amounts to unfair trade practice which is immoral as well as illegal. The respondent has also criminally misappropriated the money paid by them as sale consideration of said flat by not delivering the unit on agreed timelines. The respondent has also acted fraudulently and arbitrarily by inducing the complainant to buy the said flat on basis of its false and frivolous promises and representations about the delivery timelines aforesaid housing project.

C. Relief sought by the complainant:

4. The complainants have sought following relief(s).
- I. Direct the respondent to refund the amount of Rs.20,33,930/- along with prescribed rate of interest till the date of realization.



- II. Direct the respondent to pay an amount of Rs.55,000/- to the complainants towards the cost of litigation.
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 no. 1

6. The respondent no. 1 has contested the complaint on the following grounds: -
- i. That on 04.09.2015, the complainants in the presence of officials of DGTCP/DC, vide draw was allotted apartment bearing no. Flat#0207, 2nd floor, in tower- 15, having a carpet area of 473 sq. ft. (approx.) and balcony area 73 sq. ft. for a total consideration of Rs.19,28,500/-
 - ii. That consequentially, after fully understanding the various contractual stipulations and payment plans for the said apartment, the complainant executed the flat buyer agreement dated 15.06.2016.
 - iii. That the complaint filed by the complainant is not maintainable in the authority and is filed on the false and frivolous grounds. The bare reading of the complaint does not disclose any cause of action in favor of the complainant and the complaint has been

- filed with malafide intention to blackmail the respondent with this frivolous complaint.
- iv. That as on date vide order dated 25.03.2022, the Hon'ble National Company Law Tribunal, Delhi has initiated Corporate Insolvency Resolutions Process (CIR Process) against the respondent no. 2 i.e., M/s Supertech Limited and vide the said order also imposed Moratorium under section 14 of the IBC, 2016. Thus, as a result of the same the present case deems to be adjourned sine die awaiting the outcome of the CIR process against the respondent no. 2. Till the time the said moratorium is not lifted the present proceedings cannot continued in law.
- v. That in view of the *force majeure* clause, it is clear that the occurrence of delay beyond the control of the respondent, including but not limited to the dispute with the construction agencies employed by the respondent for completion of the project is not a delay on account of the respondent for completion of the project, stay order(s) issued by the various courts judicial and/or quasi-judicial authorities, demonetizations etc. are not a delays on account of respondent for completion of the project.
- vi. That the buyer's agreement, the time stipulated for delivering the possession of the unit was on or before 4 years after obtaining the requisite approval of the building plans or environmental clearance, whichever is later. The delivery of a project is a



dynamic process and heavily dependent on various circumstances and contingencies. In the present case also, the respondent had endeavored to deliver the property within the stipulated time. The respondent earnestly has endeavored to deliver the properties within the stipulated period but for reasons stated in the reply could not complete the same due to reasons beyond its control.

vii. That apart from the defaults on the part of the allottee, like the complainant herein, the delay in completion of project was on account of the following reasons/circumstances that were above and beyond the control of the respondents: -

- Shortage of labour/workforce in the real estate market as the available labour had to return to their respective states due to guaranteed employment by the Central/State Government under NREGA and JNNURM Schemes;
- that such acute shortage of labour, water and other raw materials or the additional permits, licenses, sanctions by different departments were not in control of the respondent and were not at all foreseeable at the time of launching of the project and commencement of construction of the complex. The respondent cannot be held solely responsible for things that are not in control of the respondent.



- viii. The respondent has further submitted that the intention of the force majeure clause is to save the performing party from the consequences of anything over which he has no control. It is no more *res integra* that force majeure is intended to include risks beyond the reasonable control of a party, incurred not as a product or result of the *negligence or malfeasance* of a party, which have a materially adverse effect on the ability of such party to perform its obligations, as where non-performance is caused by the usual and natural consequences of external forces or where the intervening circumstances are specifically contemplated. Thus, in light of the aforementioned, it is submitted that the delay in construction, if any, is attributable to reasons beyond the control of the respondent and as such the respondent may be granted reasonable extension in terms of the allotment letter.
- ix. It is public knowledge, and several courts and quasi-judicial forums have taken cognisance of the devastating impact of the demonetisation of the Indian economy, on the real estate sector. The real estate sector is highly dependent on cash flow, especially with respect to payments made to labourers and contractors. The advent of demonetisation led to systemic operational hindrances in the real estate sector and whereby the respondent could not effectively undertake construction of the project for a period of 4-



6 months. Unfortunately, the real estate sector is still reeling from the aftereffects of demonetisation, which caused a delay in the completion of the project. The said delay would be well within the definition of 'Force Majeure', thereby extending the time period for completion of the project.

- x. That the possession of the said premises was proposed to be delivered by the respondent to the allottee by 21.01.2020. The respondent and its officials are trying to complete the said project as soon as possible and there is no malafide intention of the respondent to get the delivery of project, delayed, to the allottees. Due to orders also passed by the Environment Pollution (Prevention & Control) Authority, the construction was/has been stopped for a considerable period day due to high rise in pollution in Delhi NCR.
- xi. That the enactment of the Act of 2016 is to provide housing facilities with modern development infrastructure and amenities to the allottees and to protect their interest in the real estate sector market. The main intention of the respondent is just to complete the project. The project is ongoing project and construction is going on.
- xii. That in today's scenario, the Central Government has also decided to help bonafide Builders to complete the stalled projects which are not constructed due to scarcity of funds. The Central



Government announced Rs.25,000 Crore to help the bonafide builders for completing the stalled/unconstructed projects and deliver the homes to the homebuyers. The respondent/promoter, being a bonafide builder, has also applied for realty stress funds for its Gurgaon based projects.

- xiii. That compounding all these extraneous considerations, the Hon'ble Supreme Court vide order dated 04.11.2019, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the 'Basera' project was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period. Similar stay orders have been passed during winter period in the preceding years as well, i.e., 2017-2018 and 2018-2019. A complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban, the concerned labour is laid off and the travel to their native villages or look for work in other states. Thus, the resumption of work at site becomes a slow process and a steady pace of construction is realized after long period of time.
- xiv. Graded response action plan targeting key sources of pollution has been implemented during the winters of 2017-18 and 2018-2019, These short-term measures during smog episodes include shutting down power plant, industrial units, ban on construction,

ban on brick kilns, action on waste burning and construction, mechanized cleaning of road dust, etc. This also includes limited application of odd and even scheme.

- xv. That the circumstances have worsened for the respondent and the real estate sector in general. The pandemic of Covid 19 has had devastating effect on the world-wide economy. However, unlike the agricultural and tertiary sector, the industrial sector has been severally hit by the pandemic. The real estate sector is primarily dependent on its labour force and consequentially the speed of construction. Due to government-imposed lockdowns, there has been a complete stoppage on all construction activities in the NCR Area till July 2020. In fact, the entire labour force employed by the respondent was forced to return to their hometowns, leaving a severe paucity of labour. Till date, there is shortage of labour, and as such, the respondent has not been able to employ the requisite labour necessary for completion of its projects.
- xvi. That the parties have duly contracted and locked their legal obligations by way of the buyer's agreement, no relief over and above the clauses of the agreement can be granted to him. The buyer's agreement duly provides that for any period of delay beyond the contracted date of offer of possession, subject to force majeure clause.

- xvii. That the project is an ongoing project and orders of refund at a time when the real-estate sector is at its lowest point, would severally prejudice the development of the project which in turn would lead to transfer of funds which are necessary for timely completion of the project. Any refund order at this stage would severally prejudice the interest of the other allottees of the project as the diversion of funds would severally impact the project development. Thus, no order of refund may be passed by this authority in lieu of the present prevailing economic crisis and to safeguard the interest of the other allottees at large.
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 submissions made by the parties.
8. The respondent has brought to the notice of the authority on 2704.2023, that the complainants have pleaded this complaint against the two respondents, and the respondent no. 1, i.e., M/s Revital Reality Private Limited and respondent no. 2 i.e., M/s Supertech Limited. The buyer's agreement with regard to the allotted unit was executed between the complainant and respondent no. 1. Even after allotment and buyer's agreement, demands for various payments were raised against the allotted unit by respondent no. 1 only. Thus, it shows that there is no privity of contract against the respondent no. 2.

9. Thereafter, the counsel for the complainants is moving an application for deletion of respondent No.2 i.e., M/s Supertech Ltd. as the agreement has been signed with respondent No.1 only and all payments have been made to respondent No.1 only who is responsible for the compliance of conditions of the agreement. The copy of application has been supplied to the counsel of respondent no.1 during proceedings who has no objection for deletion of name of respondent No.2. In view of the same, the application is allowed. Hence, the plea raised by the respondent no. 1 is rejected.

E. Jurisdiction of the authority

10. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

11. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

12. 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.

13. 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.
14. 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 (Civil), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No.***



13005 of 2020 decided on 12.05.2022, wherein it has been laid down as under:

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

15. 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.1 Objection regarding the project being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

16. From the bare reading of the possession clause of the flat buyer agreement, it becomes very clear that the possession of the apartment was to be delivered by **22.01.2020**. The respondent in its reply pleaded the force majeure clause on the ground of Covid- 19. The High



Court of Delhi in case no. **O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020** title as **M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020**, held that 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. Thus, this means that the respondent/promoter has to complete the construction of the apartment/building by 22.01.2020. The respondent/promoter has not given any reasonable explanation as to why the construction of the project is being delayed and why the possession has not been offered to the complainant/allottee by the promised/committed time. The lockdown due to pandemic in the country began on 25.03.2020. So, the contention of the respondent/promoter to invoke the force majeure clause is to be rejected as it is a well settled law that **"No one can take benefit out of his own wrong"**. Moreover, there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate. Thus, in such a situation, the plea with regard to force majeure on ground of Covid- 19 is not sustainable.

F. II Objection regarding force majeure conditions.

17. The respondent/promoter has 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 in 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. 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/respondent 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

G. Findings on the relief sought by the complainant.

G.1 Direct the respondent to refund the amount of Rs.20,33,930/- along with prescribed rate of interest till the date of realization.



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

19. As per clause 3.1 of the booking application form provides for handing over of possession and is reproduced below: -

3.1 Possession

*Subject to force majeure circumstances, intervention of Statutory Authorities, receipt of occupation certificate and Allottee/Buyer having timely complied with all its obligations, formalities, or documentation, as prescribed by the Developer and not being in default under any part hereof and Flat Buyer's Agreement, including but not limited to the timely payment of installments of the other charges as per payment plan, Stamp Duty and registration charges, the Developers Proposes to offer possession of the said Flat to the Allottee/Buyer within a period of **4 (four) years from the date of approval of building plans or grant of environment clearance, (hereinafter referred to as the "Commencement Date")**, whichever is later. The Developer also agrees to compensate the Allottee/Buyer @ Rs.5.00/- (Five rupees only) per sq. ft. of the area of the flat per*

*month for any delay in handing over possession of the Flat beyond the given promised **period plus the grace period of 6 months and upto offer letter of possession or actual physical possession whichever is earlier**".*

20. 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 complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer developer 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 its 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.
21. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the



prescribed rate of interest per annum. However, the allottee intends 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.

22. 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.
23. 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., 18.05.2023 is **8.70%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%**.
24. 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 3.1 of the agreement executed between the parties on 15.06.2016, the possession of the subject apartment was to be delivered within stipulated time within 4 years from the date of approval of building plan i.e. (19.12.2014) or grant of environment clearance i.e. (22.01.2016) whichever is later. Therefore, the due date of handing over possession is calculated by the receipt of environment clearance dated 22.01.2016 which comes out to be 22.01.2020. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 22.01.2020. At the time of final argument on 18.05.2022, the counsel for the respondent stated that as per statement of payment received dated 13.07.2022, a concession was given to the complainants on a given amount as mentioned at serial No.9 and 13 which shall not be included in the refundable amount as the complainants did not pay the same amount. Further, the counsel of the complainants did not object the same. Hence, the above incentive/concession is allowed.

25. Keeping in view the fact that the allottee/complainants wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed



by the date specified therein, the matter is covered under section 18(1) of the Act of 2016.

26. The due date of possession as per agreement for sale as mentioned in the table above is 22.01.2020 and there is delay of 2 years 6 months till the date of filing of the present complaint. The due date of possession as per clause 3.1 of the flat buyer's agreement i.e., 4 years from the date of approval of building plans (19.12.2014) or grant of environment clearance, (22.01.2016) (hereinafter referred to as the "Commencement Date"), whichever is later which comes out to be 22.01.2020. It is pertinent to mention over here that even after a passage of more than 2.6 years neither the construction is complete nor an offer of possession of the allotted unit has been made to the allottee by the builder. Further, the authority observed that there is no document on record from which it can be ascertained as to whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project.
27. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of



India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

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

28. 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. and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others (supra)*** it was observed as under: -

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

29. 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 allottees as per agreement for sale under section 11(4)(a) of the Act. The promoter has failed to



complete or is unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as he 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.

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

G. II Direct the respondent to pay an amount of Rs.55,000/- to the complainants towards the cost of litigation.

31. The complainants are 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.

H. Directions of the authority

32. 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. 1 is directed to refund the amount i.e., Rs.20,33,930/- received by it from the complainants after deduction of incentive/concession of an amount of Rs.4,920/- and Rs.21,058/- respectively along with interest at the rate of 10.70% 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 no. 1 to comply with the directions given in this order and failing which legal consequences would follow.
- iii. The respondent no. 1 is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants



and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee/complainants.

33. Complaint stands disposed of.
34. File be consigned to registry.

Dated: 18.05.2023

v.1 - 3
(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram

