

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

Complaint no. :	5882 of 2022
Date of filing complaint:	29.08.2022
First date of hearing:	18.11.2022
Date of decision :	20.04.2023

Sh. Dev Ashish Ahlawat S/o Sh. M.S. Ahlawat R/O: H. no. 80, Mohyal Colony, Sector-40, Gurugram	Complainant
Versus	
M/s Ashiana Dwellings Private Limited Regd. office: 3H, Plaza M6, Dist. Center Jasola, New Delhi- 110025	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Sukhbir Yadav (Advocate)	Complainant
Sh. Deeptanshu Jain (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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 the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.no.	Particulars	Details
1.	Name of the project	Ashiana Mulberry, Sector-2, Gurgaon
2.	Project type	Group Housing Project
3.	RERA registered/not registered	Registered vide registration no. 44 of 2017 dated 11.08.2017
	Validity status	30.06.2020
4.	DTPC License no.	16 of 2014 dated 10.06.2014
	Validity status	09.06.2014
	Licensed area	10.25 acres
	Name of licensee	Ashiana Dwellings Private Limited
5.	Provisional allotment dated	10.12.2015 (As per page no. 38 of complaint)
6.	Unit no.	C-522 on 5 th floor, tower T6 (As per page no. 38 of complaint)
7.	Unit area admeasuring	1210 sq. ft. (As per page no. 38 of complaint)
8.	Date of apartment buyer agreement	10.12.2015 (As per page no. 44 of complaint)
9.	Possession clause	Clause 11.2 of agreement

		<p>The company, based on its present plan and estimated and subject to force measure and all exceptions and conditions beyond control of the company and subject to the allottee making timely payments, endeavour to complete the construction work of the set apartment /building within <u>a period of 39 (thirty-nine) months from the date of this agreement or start of construction after grant of environment clearance by MOEF, whichever is later and grace period of 6 months ("completion date")</u> and shall thereafter apply for grant of occupation certificate and on receipt of the same will offer position of the set apartment to the allottee.</p>
10.	Date of start of construction of project	Not available on record
11.	Due date of possession	<p>10.09.2019</p> <p>(Calculated from date of agreement i.e. 10.12.2015 as date of start of construction of project is not available on record + 6 months grace period)</p> <p>Grace period of 6 months is allowed</p>
12.	Payment plan	Construction linked payment plan
13.	Total sale consideration	<p>BSP- Rs. 51,75,170/-</p> <p>TSC- Rs. 66,02,920/-</p> <p>(As per payment plan on page no. 82 of complaint)</p>
14.	Amount paid by the complainant	<p>Rs 13,28,030/-</p> <p>(As per applicant ledger dated</p>

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		17.03.2023 on page no. 79 of reply)
15.	Occupation certificate	Not obtained
16.	Offer of possession	Not offered

B. Facts of the complaint:

3. That the complainant-allottee received a marketing call from the office of the respondent, the caller represents himself as a sales manager of the respondent company and marketed the residential project by name and style "Ashiana Mulberry" situated at Sector-2, Sohna Road, Gurugram. The complainant visited the sales office of the respondent and consulted with the marketing staff of the respondent. They showed a rosy picture of the project and allured with proposed specifications and assured for the timely delivery of the flat/apartment. It also gave marketing brochure of the project, which stipulates that the project has "Less than 15% ground coverage which means lot of open and green space, large central lawn, beautiful water features, stunning sculptures, pretty walkways, variety of plantation, decorative lighting, ample seating, a club house, squash court, gym, banquet hall, billiards & pool table, table tennis & kids zone, lounge, a resort-styled swimming pool, gold class theatre in the club house, badminton court, basketball court, power back-up, high security, a shopping center, and nursery school".
4. That lured by assurances, promises, and representations made by the respondent, the complainant booked a 2BHK, flat bearing no. C - 522,

admeasuring 1210 sq. ft. on 5th floor of tower – T6 in the project “Ashiana Mulberry”, Sector – 2, Sohna Road, Gurugram on 23.11.2015, under the possession linked payment plan (20:20:40:20) at basic sale price (BSP) of Rs. 51,75,170/- @ Rs. 4277/- per sq. ft. and issued a cheque of Rs. 5,00,000/- in favour of “Ashiana Dwellings Pvt. Limited” as booking amount.

5. That on 10.12.2015, the respondent issued a provisional allotment letter in favour of the complainant wherein confirming the allotment of flat bearing no. C-522 in tower-6, in the project for a total sale consideration of Rs. 66,02,920/-.
6. That on 10.12.2015, a pre-printed, arbitrary, unilateral, and ex-facie apartment buyer agreement was executed inter-se parties. As per clause no. 11.2 of the buyer developer agreement, the respondent has to give possession of the apartment within a period of 39 months from the date of this agreement or start of construction after the grant of Environment Clearance by MoEF, whichever is later with a grace period of 6 months. Therefore, the due date of possession was 10.09.2019 with a grace period of 6 months. It is pertinent to mention here that the complainant booked this flat with the assurance that the possession of the flat will be handed over on or before 10.09.2019. It is further germane to mention here that the complainant is living in rented accommodation and the builder fails to start the construction of tower 6 till date.

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7. That the complainant issued cheques of Rs. 1,63,896/- and Rs. 6,64,134/- in favour of the respondent as per the agreed payment plan on 23.12.2015 and 13.04.2016 respectively.
8. That the complainant several times visited the office and project site of the respondent to know the status of the flat/ tower-6, but it is a matter of dismay that after passing of more than 80 months from the date of booking, it has not start the construction of tower-6. As per information provided by the respondent, the project was floated on a land admeasuring 10.25 acres and having 10 towers.
9. That on 20.02.2020 and thereafter, the complainant sent several emails to the respondent alleging failure to deliver the physical possession of the flat and asked for refund of the entire paid amount along with interest, which reads as "The agreement was signed on 10th December 2015 with reference to clause number 11.2 it was committed that possession will be given in 39 months. It has been over 50 months now but on visit to site I found out that no work has been done. With reference to clause 11.6 of the agreement I would like to get refund of the money with 9 percent per annum interest."
10. That since February 2020, the complainant has been regularly visiting the office of the respondent as well as the construction site and sent several emails to get a refund of the paid amount, but all went in vain.
11. That the main grievance of the complainant in the present complaint is that despite payment of Rs. 13,28,030/- i.e. 20% of the total cost of flat

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and despite his willingness to pay the remaining amount (if any amount become due), the respondent party has miserably failed to deliver the possession of flat.

12. That the complainant purchased the flat with an intention that after possession, his family will live in their own apartment, as it was promised by the respondent party at the time of receiving payment that the possession of fully constructed unit along like basement and surface parking, landscaped lawns, club/ pool, etc. as shown in the brochure at the time of sale, would be handed over to him as soon as construction work is complete i.e. by September 2019.
13. That it has been more than 6 years from the date of booking and even the construction of the tower is yet not started, it clearly shows the negligence of the builder. It is highly pertinent to mention here that the project of the respondent is registered with HARERA vide registration no. 44 of 2017 dated 11.08.2017 and the validity period of the registration was 30.06.2020.
14. That the facts and circumstances as enumerated above would lead to the only conclusion that there is a deficiency of service on the part of the respondent party and as such, they are liable to be punished and compensate the complainant.
15. That there is an apprehension in the mind of the complainant that the respondent has been playing fraud and there is something fishy, which is not disclosed to him just to embezzle his hard-earned money. It is

highly pertinent to mention here that now a day's many builders are being prosecuted by the court of law for siphoning off the funds and scraping the project mischievously. A probe needs to initiate to find out the financial and structural status of the project.

C. Relief sought by the complainant:

16. The complainant have sought following relief(s):

i. Direct the respondent to pay refund the amount paid by the complainant along with interest at the prescribed rate from date of making payment till final realization of payment as per section 12, 18 and 19(4) of Act.

17. On the date of hearing, the authority explained to the respondent/promoter about the contravention 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 respondent:

The respondent by way of written reply made following submissions

a. That the complainant has deliberately raised false allegations and made treacherous remarks since the unit allotted of the complainant is in phase-II of the project and the expiry date of RERA registration of Phase-II is 30.06.2023. Hence, the above submission made by the complainant is nothing but a malfunctioned attempt to tarnish the image of the respondent and enrich itself wrongfully him at its cost. The registration certificate

of the project 'Ashiana Mulberry' phase-II dated 23.10.2018 bearing no. RC/REP/HARERA/GGM/2018 holds validity till 30.06.2023.

- b. That the complainant has falsified the true import of the case and manipulated the facts qua the present circumstances with dishonest intention and deceitfulness, therefore, has not only suppressed the truth but also made fictitious averments which bear no ground against the respondent. In view thereof, the instant complaint is liable to be dismissed in limine.
- c. That the complainant, on 23.11.2015, out of his own free will and volition approached the respondent and applied for booking of unit bearing number C-522, (hereinafter referred to as "unit") 'type C' on the 5th floor of tower-T6 having super built up area of 1210 sq. ft. in the its project "Ashiana Mulberry Phase-II" situated at Sector-02, Sohna, Gurgaon, Haryana (hereinafter referred to as "project") by making payment of Rs. 5,00,000/- as booking amount as per clause 3.1 of the apartment buyer agreement. That the complainant opted for performance linked payment plan-C in order to make the payments of all the instalments.
- d. That thereafter, an apartment buyer agreement dated 10.12.2015 (hereinafter referred to as "said Agreement") was executed between the parties herein. It is further submitted that the said agreement also contained the schedule of payment plan.

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- e. That the complainant was under an obligation to adhere to the payment plan provided under clause 4.1 of application form and clause 3.2 & 11.2 of apartment buyer's agreement. As per clause 11.2 of the said agreement, the date of possession of unit was 10.09.2019 (10.03.2019 plus 6 months grace period) and the total sale consideration of the said unit as per clause 1.2 of the agreement was Rs. 66,02,920/- excluding taxes, out of which it has received a sum of Rs. 12,83,224/- towards consideration and Rs. 44,806/- towards taxes till date. However, he frequently, defaulted to adhere to the said payment plan. Despite receiving various reminders and demand letter(s) sent by it demanding the outstanding payments, he has failed to adhere to the said payment plan opted. It is submitted that the said act amounts to breach of terms of the said agreement.
- f. That there is a total delay of 49 days on account of the complainant in making the timely payments of due installments towards the total sale consideration. However, he has failed to adhere to the said payment plan opted and hence, has violated the clause 3.4 and 3.5 of the apartment buyer agreement. There is no iota of doubt that the said act of the complainant is highly deplorable and amounts to breach of terms of the apartment buyer agreement.
- g. That as per clause 11.3 of apartment buyer agreement, the respondent never promised the complainant to handover the possession of the unit within 39 months plus grace period of 6

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months from the date of execution of buyer agreement. The said clause clearly states that the respondent company shall handover the possession subject to application made for grant of occupation certificate and on receipt of the same shall offer possession of the said unit. Further, clause 11.3 of the agreement enumerates the "force majeure" clause wherein it has been laid down that completion date would automatically be deemed to be extended if the delay in completion of construction of the project has occurred due to force majeure or circumstances beyond the control of the respondent-company.

- h. That there were certain factors like non-availability of construction materials, electric power slow down, scarcity of water etc., were the substantial reasons which led to the delay in completing the construction of the project. Additionally, the construction of the project was stopped by Hon'ble National Green Tribunal pertaining to the factors of poor air quality. It is pertinent to point out here that due to stoppage of construction work, it may take another month's time to remobilize the construction work at project site. Thus, the calculation of period of completion for which the construction work was stopped shall be treated as zero period. Pursuant thereto, as per the terms of the apartment buyer agreement and the RERA registration, subject to timely payment by the allottee as well as subject to force majeure, the construction of the unit was to be completed by 10.03.2019 plus 6 months grace



period unless there is delay due to "force majeure", court order etc. It is pertinent to mention herein that the construction of the project was stopped several times during the year 2017, 2018, 2019 and 2020 by the order of EPCA, HSPCB, NGT and the Hon'ble Supreme Court of India. It is most respectfully submitted that due to the increase in the level of pollution in the NCR region, the Hon'ble Supreme Court vide its order dated 14.11.2019 passed in the matter of **"MC Mehta Vs Union of India & Others"** bearing **Writ Petition (c) No. 13029/1985** imposed complete ban on construction and excavation work across the National Capital Region from 04.11.2019, which was ultimately lifted on 14.02.2020. Ban on construction caused irreparable damage to the delivery timelines and the real estate developers' finances as it was unable to undertake any construction work during the aforesaid period and the same was beyond its control. Furthermore, the impact of Covid-19 pandemic has been felt throughout the globe and more particularly by real estate industry. The pandemic completely disrupted the supply chain of the respondent, therefore, the delay if any, is not attributable to the respondent herein.

- i. That in order to curb down the air pollution, the Environment & Pollution (Prevention & Control) Authority, for National Capital Region, has reviewed the urgent action that needs to be taken for the implementation of the Graded Response Action Plan (GRAP)



vide its notification dated EPCA-R/2020/L-38 dated 08.10.2020 and has imposed ban on the use of diesel generator set with effect from 15.10.2020, which has further led to delay in the construction being raised.

- j. That even after the delay caused by the various complainant in making the payments towards their respective units and various orders of the EPCA, HSPCB and the Apex Court, it has finished the construction work of phase-i of the said project and has received the occupation certificate on 02.11.2022 from the Director General, Town & Country Planning Department, Chandigarh bearing Memo No. ZP-1062/JD(RA)/2022/32955 (hereinafter referred to as the "occupation certificate").
- k. That the respondent has always kept him updated with respect to the development of surrounding area as well as of construction of the project and repetitively apprised the complainant of the factors which has a visible adverse impact on the real estate industry. During the last three years, there has seen several events which severely impacted the real estate sector.
- l. That the instant complaint is an afterthought and has been filed with the ulterior motive to avoid the contractual obligation and earn wrongfully from the respondent. He is seeking refund, interest and compensation without placing on record substantial evidentiary proof. It is relevant to mention here that the Hon'ble

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Supreme Court in a number of judgments has held that compensation for delay is to be the loss incurred by the customer and in the instant case the complainant has failed to provide proof for the same.

- m. That the jurisdiction of the Authority cannot be invoked as there is no cause of action which arose within the jurisdiction of the Authority. He has prayed for reliefs which otherwise have to be claimed in a suit for damages and recovery, after paying appropriate court fee. That in order to avoid the payment of court fee, he has raised a dispute of a civil nature, which requires elaborate evidence to be led and which cannot be adjudicated upon under the summary jurisdiction of the Authority. In this view of the matter, the complaint is liable to be dismissed with costs.
- n. That the dispute between the parties involves complicated questions of facts and law, which necessarily entail the leading of copious evidence. The issues raised by the complainant cannot be addressed in a complaint before the Authority which follows a summary procedure. In this view of the matter, the complaint is liable to be dismissed on this ground alone.
- o. That the complainant has applied for the allotment of the unit as an investment and not for personal use of the complainant which is abundantly clear and evident from the conduct of the complainant. Admittedly, he has invested in the unit with intent to have

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monetary gains by way of reselling the unit to a higher bidder at an appreciated value. Thus, in view of the constant precedents upheld by various Real Estate Regulatory Authorities across the country, the present complaint is not maintainable wherein, it is held unanimously that the investors of real estate projects are not entitled to relief from Real Estate Regulatory Authority.

18. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority: सत्यमेव जयते

19. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 promoter, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.

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.

20. 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.*** SCC Online SC 1044 decided on 11.11.2021 and followed in ***M/s Sana Realtors Private Limited & others V/s 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

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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."

21. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of *M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. And M/s Sana Realtors Private Limited & others V/s Union of India & others (supra)*, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the amount paid by him

F. Findings on objections raised by the respondent.

F.I Objection regarding the complainant being investor.

22. It is pleaded on behalf of respondent that complainant is investor and not consumer. So, he is not entitled to any protection under the Act and the complaint filed by her under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is

an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainant is buyer and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of the term allottee under the Act, and the same is reproduced below for ready reference:

"Z(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."

23. In view of above-mentioned definition of allottee as well as the terms and conditions of the apartment buyer's agreement executed between the parties, it is crystal clear that the complainant are allottee as the subject unit allotted to them by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as *M/s Srushti*

Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.

has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being investors are not entitled to protection of this Act also stands rejected.

F.II Objection regarding delay due to force majeure circumstances

24. The respondent-promoter has raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the National Green Tribunal, Environment Pollution (Prevention & Control) Authority. Since there were circumstances beyond the control of respondent, so taking into consideration the above-mentioned facts, the respondent be allowed the period during which his construction activities came to stand still, and the said period be excluded while calculating the due date. But the plea taken in this regard is not tenable. The due date for completion of project is calculated as per clause 11.2 of agreement. Though there have been various orders issued to curb the environment pollution, but these were for a short period of time. So, the circumstances/conditions after that period can't be taken into consideration for delay in completion of the project.

25. The respondent-promoter has raised the contention that the construction of the project was delayed due to reasons beyond the control of the respondent such as COVID-19 outbreak, lockdown due to outbreak of such pandemic and shortage of labour on this account.

Da The authority put reliance judgment of Hon'ble Delhi High Court in

case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020* dated 29.05.2020 which has observed that-

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

26. In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 10.09.2019. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession

F.III Objection regarding non-payment by the complainant.

27. The respondent-builder submitted that the complainant-allottee has failed to make timely payment towards consideration of allotted unit. Despite issuance of various notices, it never came forward to make payment towards due installments. The Authority observes that the subject unit was booked under construction linked payment plan and



he has already paid an amount of Rs. 13,28,030/- towards basic sale consideration of Rs. 51,75,170/- despite the fact that the construction of the tower in which the subject unit of the complainant is situated is yet not started. Thus, the plea of the respondent is not tenable.

G. Findings on the relief sought by the complainant

Relief sought by the complainant:

G.I Direct the respondent to pay refund the amount paid by the complainant along with interest at the prescribed rate from date of making payment till final realization of payment as per section 12, 18 and 19(4) of Act.

28. The project detailed above was launched by the respondent as residential complex and the complainant was allotted the subject unit bearing no. C-522 on 5th floor, tower T6 vide allotment letter dated 10.12.2015. A builder buyer's agreement detailing area, payment plan and other terms and conditions of allotment was executed in this regard on 10.12.2015 between the parties. As per clause 11.2 of the said agreement executed between the parties, the possession of the subject apartment was to be delivered within a period of 39 months from the date of this agreement or start of construction after grant of environment clearance by MOEF, whichever is later and grace period of 6 months. Since date of start of construction of project is not available on record, the due date of possession is calculated from date of agreement i.e. 10.12.2015. The respondent through its written reply also submitted that the due date for possession as per clause 11.2 was 10.09.2019 (date of agreement i.e. 10.12.2015 + 6 months). The said period has admittedly expired on 10.09.2019.



29. In the present case, the complainant booked the aforesaid unit under construction linked payment plan and paid an amount of Rs. 13,28,030/- towards basic sale consideration of Rs. 51,75,170/- constituting 25.67 % of basic sale price. The complainant submitted that it has made payment of Rs. 13,28,030/- as per construction linked payment plan booked by him. The complainant visited the site and found that the construction of tower-6 has not been started and due date of handing over of possession has already expired on 10.09.2019.
30. The respondent on the hand submitted that the complainant has failed to make payment towards consideration of allotted unit which was a pre-condition to clause of handing over of possession.
31. Vide proceeding dated 20.04.2023, the complainant submitted that despite booking of subject unit way back in 2015, the construction of the tower in which the unit of the complainant is situated is yet not even started. To which it has been confirmed by both the parties that the construction of subject unit has yet to be commenced. Keeping in view the fact that the allottee-complainant 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 allotment or duly completed by the date specified therein, the matter is covered under section 18(1) of the Act of 2016.

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32. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit 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 allottee cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

33. Further 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. (Supra)** reiterated in case of **M/s Sana Realtors Private Limited & other Vs Union of India & others (Supra)** observed as under:

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

34. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and

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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 allotment letter or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as they wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

35. This is without prejudice to any other remedy available to the allottee including compensation for which they may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

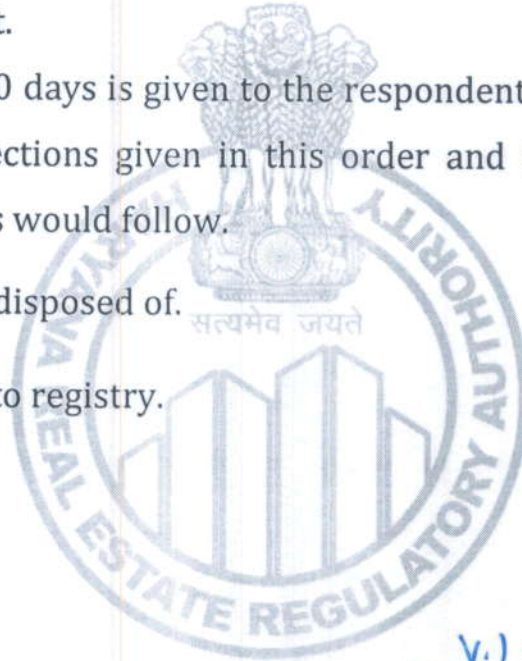
The Authority hereby directs the promoter to return the amount received by him i.e., Rs. 13,28,030/- with interest at the rate of 10.70% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

36. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of

obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent /promoter is directed to refund the amount i.e. Rs. 13,28,030/- received by it from the complainant 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 amount.
 - ii. A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.
37. Complaint stands disposed of.
38. File be consigned to registry.



V. J. - *[Signature]*
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.04.2023