

Corrected vide order dated 30.05-2023

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06/06/2023



Complaint No. 901 of 2021 and others

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY,
GURUGRAM

Date of decision: 13.09.2022

NAME OF THE BUILDER		ANSAL PROPERTIES & INFRASTRUCTURE LTD.	
PROJECT NAME		THE FERNHILL	
S. No.	Case No.	Case title	APPEARANCE
1.	CR/569/2019	INTEGRATED WEALTH SOLUTIONS PRIVATE LIMITED V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ORS.	Mr. Vishal Singh Mr. Tushar Behmani for R1
2.	CR/1395/2019	CHANDAN SOOD AND KARUNA NIDHI SOOD V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ORS.	Ms. Shivali Mr. Tushar Behmani
3.	CR/2066/2019	DEVENDER SINGH LATHER V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD.	Mr. Pawan Kumar Ray Mr. Tushar Behmani
4.	CR/3025/2019	ROOPAK SHARMA AND DEEPTI SHARMA V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ANR.	Ms. Shivali Mr. Tushar Behmani
5.	CR/3252/2019	GAURAV GAMBHIR AND MONIKA GAMBHIR V/S ANSAL PROPERTIES AND INFRASTRUCTURE LIMITED & ANR.	Mr. S. Nanda Mr. Tushar Behmani
6.	CR/5553/2019	ADITYA SHARMA AND ANUPAMA SHARMA V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ANR.	Ms. Shivali Mr. Tushar Behmani
7.	CR/1072/2020	MR SAURABH GOYAL V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ANR.	Ms. Priyanka Aggarwal Mr. Tushar Behmani
8.	CR/2747/2020	AJIT SINGH SANGWAN V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD.	Mr. R.V Rohtania Mr. Tushar Behmani
9.	CR/3082/2020	NARENDER KUMAR YADAV & SUDHA YADAV V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD.	Ms. Taniya Mr. Tushar Behmani

10.	CR/625/2021/ 4808/2019	MANJU RANI HARA & DHARUV KUMAR THROUGH POA V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ANR.	Ms. Shivali Mr. Tushar Behmani
11.	CR/626/2021/ 5039/2019	VINEET DWIVEDI THROUGH POA HOLDER RAMDAYAL DWIVEDI V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ANR.	Ms. Shivali Mr. Tushar Behmani
12.	CR/627/2021/ 5040/2019	VINEET DWIVEDI THROUGH POA HOLDER RAMDAYAL DWIVEDI V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ANR.	Ms. Shivali Mr. Tushar Behmani
13.	CR/901/2021	JYOTI GELRA THROUGH POA HOLDER DEEP CHAND JAIN V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ANR.	Ms. Shivali Mr. Tushar Behmani
14.	CR/902/2021	SAMEER SEHGAL V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ANR.	Ms. Shivali Mr. Tushar Behmani
15.	CR/903/2021	RADHA ABROL AND SUDHA ABROL V/S ANSAL PROPERTIES & INFRASTRUCTURE LTD. & ANR.	Ms. Shivali Mr. Tushar Behmani

CORAM:

Shri Vijay Kumar Goyal
 Shri Ashok Sangwan
 Shri Sanjeev Kumar Arora

Member
 Member
 Member

ORDER

1. This order shall dispose of all the 15 complaints titled as above filed before this authority in form CRA/CAO under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.

- The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, "THE FERNHILL" (group housing colony) being developed by the same respondent/promoter i.e., M/s Ansal Properties & Infrastructure Limited. The terms and conditions of the buyer's agreements, fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of refund the entire amount along with interest and the compensation.
- The details of the complaints, reply to status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project Name and Location	ANSAL PROPERTIES & INFRASTRUCTURE LTD "THE FERNHILL" Sector-91, Gurugram.
5. POSSESSION OF FLAT	
<i>"5.1. Subject to Clause 5.2 and further subject to all the buyers/allottees of the flats in the said residential project, making timely payment, the company shall endeavour to complete the development said residential project and the said flat as far as possible within 48(forty eight) months, with an extended period of 6 months, from the date of execution of this agreement or from the date of commencement of construction of the particular tower/block in which the said unit is situated subject to sanction of the building plan whichever is later."</i>	
(Emphasis supplied)	
Occupation certificate: - Not obtained	
Reply Status	In all the 15 below mentioned complaints on the last date of the hearing dated 24.08.2022 the respondent was directed to file the reply in a week failing which its defence may be struck off. Furthermore, the counsel for the respondent states that he has no instructions to file the reply in the matter

		and neither the same has been prepared. Since, till today no reply has been submitted and multiple opportunities have already been given to the respondent to file their reply despite which they have failed to do so. Therefore, from the conduct of the respondent, the authority assumes/observes that the respondent has nothing to say in the present matter and accordingly, the authority proceeds with the case without reply and the defence of the respondent stands struck off.			
Due date of possession		The due date of possession in the present matters have been calculated from the date of start of construction i.e., 14.08.2014 being later. Grace period is allowed being unqualified & included while computing due date of possession. Accordingly, the due date of possession comes out to be 14.02.2019 .			
S n o	Complaint No.	Unit No.	Date of BBA	Total Sale Consideration (TSC), Basic sale price (BSP) & Total Amount paid by the complainant (AP)	Relief Sought
1.	CR/569/2 019	0704-E-1104 [pg. 20 of complaint]	10.07.2013 [pg. 18 of complaint]	BSP: ₹ 39,67,660/- AP: ₹ 17,67,920/-	1. Refund of entire amount 2. Compensation & cost of litigation
2.	CR/1395/ 2019	0704-M-0204 [pg. 26 of complaint]	10.07.2013 [pg. 24 of complaint]	TSC: ₹ 56,20,300/- AP: ₹ 49,69,471/-	1. Refund of entire amount 2. Cost of litigation
3.	CR/2066/ 2019	0704-G-1103 [pg. 35 of complaint]	10.07.2013 [pg. 33 of complaint]	TSC: ₹ 56,12,210/- AP: ₹ 37,61,263/-	1. Refund of entire amount 2. Compensation & cost of litigation
4.	CR/3025/ 2019	0704-K-0001 [pg. 34 of complaint]	30.07.2013 [pg. 32 of complaint]	TSC: ₹ 64,31,640/- AP: ₹ 25,42,163/-	1. Refund of entire amount 2. Refund the service tax paid by the complainants

					3. Refund the excess amount of EDC/IDC paid by the complainants 4. Compensation & cost of litigation
5.	CR/3252/2019	0704-D-1104 [pg. 41 of complaint]	20.07.2013 [pg. 39 of complaint]	BSP: ₹ 38,32,860/- AP: ₹ 40,55,327/-	1. Refund of entire amount 2. Cost of litigation
6.	CR/5553/2019	0704-B-0803 [pg. 33 of complaint]	10.07.2013 [pg. 31 of complaint]	TSC: ₹ 59,62,390/- AP: ₹ 40,69,940/-	1. Refund of entire amount 2. Cost of litigation
7.	CR/1072/2020	0704-B-0701 [pg. 21 of complaint]	20.07.2013 [pg. 19 of complaint]	TSC: ₹ 52,07,710/- AP: ₹ 46,84,360/-	1. Refund of entire amount 2. Compensation & cost of litigation
8.	CR/2747/2020	0704-G-0404 [pg. 19 of complaint]	30.07.2013 [pg. 17 of complaint]	TSC: ₹ 46,09,050/- AP: ₹ 28,78,896/- ^{29,69,796/-}	1. Refund of entire amount 2. Compensation & cost of litigation
9.	CR/3082/2020	0704-D-E/1702 [pg. 27 of complaint]	10.07.2013 [pg. 25 of complaint]	TSC: ₹ 56,90,469.4/- AP: ₹ 48,04,539/-	1. Refund of entire amount 2. Compensation & cost of litigation
10.	CR/625/2021/4808/2019	0704-D-F/1701 [pg. 36 of complaint]	10.07.2013 [pg. 34 of complaint]	TSC: ₹ 53,37,150/- AP: ₹ 21,40,113/-	1. Refund of entire amount 2. Cost of litigation
11.	CR/626/2021/5039/2019	0704-F-1003 [pg. 36 of complaint]	23.07.2013 [pg. 34 of complaint]	TSC: ₹ 45,06,860/- AP: ₹ 38,48,517/-	1. Refund of entire amount 2. Cost of litigation
12.	CR/627/2021/5040/2019	0704-F-0904 [pg. 34 of complaint]	10.07.2013 [pg. 32 of complaint]	TSC: ₹ 45,74,260/- AP: ₹ 39,09,317/-	1. Refund of entire amount 2. Cost of litigation
13.	CR/901/2021	0704-C-0602 [pg. 39 of complaint]	10.07.2013 [pg. 37 of complaint]	BSP: ₹ 44,79,610/- AP: ₹ 44,41,036/-	1. Refund of entire amount 2. Refund the service tax paid

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					by the complainants 3. Refund the excess amount of EDC/IDC paid by the complainants 4. Compensation & cost of litigation
14.	CR/902/2021	0704-F-0102 [pg. 31 of complaint]	01.08.2013 [pg. 29 of complaint]	TSC: ₹ 53,69,510/- AP: ₹ 50,17,671/-	1. Refund of entire amount 2. Refund the service tax paid by the complainants 3. Refund the excess amount of EDC/IDC paid by the complainants 4. Compensation & cost of litigation
15.	CR/903/2021	0704-J-0602 [pg. 34 of complaint]	10.07.2013 [pg. 32 of complaint]	TSC: ₹ 60,56,240/- AP: ₹ 28,45,722/-	1. Refund of entire amount 2. Refund the service tax paid by the complainants 3. Refund the excess amount of EDC/IDC paid by the complainants 4. Compensation & cost of litigation

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the apartment buyer's agreement executed between the parties in respect of said unit for not handing over the possession by the due date, seeking award of refund the entire amount along with interest and compensation.

5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/ respondent in terms of section 34(f) of the Act which mandates the authority to ensure



compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.

6. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case *CR/2066/2019 Devender Singh Lather V/s Ansal Properties & Infrastructure Ltd.* are being taken into consideration for determining the rights of the allottee(s) qua refund of the entire amount along with interest and compensation.

A. Project and unit related details

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

CR/2066/2019 Devender Singh Lather V/s Ansal Properties & Infrastructure Ltd.

Sr. No.	Particulars	Details			
1.	Name of the project	"The Fernhill", Sector 91, Gurugram			
2.	Total area of the project	14.412 acres			
3.	Nature of the project	Group Housing Colony			
4.	DTCP license no.	48 of 2010 valid up to 20.06.2016			
5.	Name of licensee	Aravali Heights Infratech Pvt. Ltd. & ors.			
6.	Registered/not registered				
	S no.	Registration No.	Registration date	Valid up to	Towers

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i.	392 of 2017	22.12.2017	31.12.2019	Tower A, B, C, D, P, EWS 2 & convenient shopping
ii.	389 of 2017	22.12.2017	31.12.2020	Tower L, M, E, F, G, H, J, K, EWS 1, nursery school (2 nos.), community building, 28 villas
7.	Unit no.		0704-G-1103 [pg. 35 of complaint]	
8.	Area of the unit		1618 sq. ft. [pg. 35 of complaint]	
9.	Date of execution of buyer's agreement		10.07.2013 [pg. 33 of complaint]	
10.	Possession clause		5. POSSESSION OF FLAT: - <i>5.1. Subject to Clause 5.2 and further subject to all the buyers/allottees of the flats in the said residential project, making timely payment, the company shall endeavour to complete the development said residential project and the said flat as far as possible within 48(forty eight) months, with an extended period of 6 months, from the date of execution of this agreement or from the date of commencement of construction of the particular tower/block in which the said unit is situated subject to sanction of the building plan whichever is later.</i> (Emphasis supplied) [page 43 of complaint]	
11.	Date of start of construction as per call notice dated 29.07.2014 at pg. 67 of complaint		14.08.2014	
12.	Due date of possession		14.02.2019	

		(Note: 48 months from date of start of construction i.e., 14.08.2014 being later + 6 months grace period allowed being unqualified)
13.	Delay in handing over possession till the date of filing of this complaint i.e., 08.05.2019	2 months 24 days
14.	Total sale consideration as per customer ledger dated 19.09.2014 at pg. 98 of complaint	₹ 56,12,210/-
15.	Total amount paid by the complainant as per customer ledger dated 19.09.2014 at pg. 101 of complaint plus sum of receipts	₹ 37,61,263/-
16.	Occupation certificate	Not obtained
17.	Offer of possession	Not offered

B. Facts of the complaint

8. The complainant has made the following submissions in the complaint: -

- a. That the complainant Sh. Devender Singh Lather is a law-abiding citizen of India residing at House No. 1307, Block -A, Urban Estate, Jind, Haryana and had booked a unit in the project of the respondent namely, 'The Fernhill' located at Sector 91, Gurgaon.
- b. That the respondent Ansal Properties and Infrastructure Private Limited, is a company incorporated under the Companies Act 1956 and claims to be one of the leading real estate companies in the country. The respondent company has its registered office at 115, Ansal Bhawan, 16, Kasturba Gandhi Marg, New Delhi-110001, India and had launched the project 'THE FERNHILL' located at Sector- 91, Gurgaon, Haryana, India. The

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respondent company had launched the mentioned project somewhere in the year 2011.

- c. It is submitted that the complainant was approached by the respondent company's agents and representatives who made tall claims regarding their project, its viability, various amenities and features. It is submitted that the complainant was lured into by the respondent's representations and decided to apply in the project of the respondent company.
- d. It is submitted that the complainant on 24.11.2011 made an application to the respondent for allotment of a unit having an approximate super area admeasuring 1618 Sq. Ft. That the complainant hereby made a payment of Rs.7,08,261/- (Rupees seven lacs eight thousand two hundred and sixty-one only) vide cheques numbered 029179, 029180, 029177 and 029178 at the time of making the said booking.
- e. It is to be further noted that the basic sales price of the unit was estimated to be ₹ 2,845 per sq. ft. and the respondent had further given a discount of 4% on the same as is clearly evident from the endorsement made on the said application form.
- f. That a flat buyer agreement was executed between the parties on 10.07.2013. As per the agreement unit bearing no. 0704-G-1103 was allotted to the complainant.
- g. That as per the agreement the unit was to be delivered to the complainant within 48 months of the commencement of construction of the tower/block of the complainant. That as per the construction linked payment plan opted by the complainant, the construction had commenced in August 2014 as is clear from the demand made by the respondent on 14.08.2014 towards the commencement of construction. Thus, the project

was to be delivered by **14.08.2018**, which the respondent has miserably failed to do so. It is submitted that the complainant has not been intimated of any reason for which the delay has been caused by the respondent. Moreover, the construction work at the project site is stalled leading to a loss of confidence of the complainant on the respondent in completing the project anytime soon in the future.

- h. That the respondent was to deliver the possession in August 2018. It is to be noted that the respondent till date has miserably failed to deliver the possession of the unit to the complainant and is no condition to complete the project any time soon. That feeling duped and having parted with a considerable amount of his hard-earned money, the complainant has thus, preferred the present complaint for the redressal of his grievances and refund of the total amount paid by him along with a prescribed rate of interest. Thus, it is clear that the respondent company has miserably failed in fulfilling their own promises of delivering the unit by August 2018 as the demand at the time of commencement of construction was made on 14.08.2014 and from that period if we calculate 48 months it comes to 14.08.2018 so the respondent company had failed in completing and giving the possession within the stipulated time and moreover, is not in a condition to deliver the possession anytime soon in the near future as the project of the respondent is stalled, which is one of the main reasons they are not responding to the complainant nor are ready with a specific date for possession.

- A ✓ i. It is submitted that the booking of the apartment was made in the year 2011. At the time of booking the respondent company had assured to commence construction within few months. The complainant was under

the impression that the respondent company would commence construction as soon as possible and therefore made few payments as demanded by the respondent company. Despite accepting a considerable amount from the complainant no agreement was executed between the parties. That complainant visited the respondent several times with his enquiries regarding the commencement but was each time assured by the respondent company with no further action taken by them. Further, an addendum was also signed between the parties wherein the respondent company had assured to commence the construction along with the imposition of cost escalation charges on the complainant. Nevertheless, till date the possession has not been offered by the respondent company.

- j. It is submitted that the respondent company has falsely assured the complainant that they shall start construction within reasonable time, but they continued to linger on the matter for several years. They kept the money of the complainant but raised demand for commencement only in 2014. The complainant is aggrieved by the actions of the respondent company.
- k. It is submitted that the respondent company at the time of booking of the apartment had assured to deliver the same within 48 months. Despite this they did not commence construction and also misled the complainant since the agreement was deliberately not executed for few years. Even if we were to take conservative estimate of the calculation for the time period promised by the respondent company for the delivery of the apartment, the respondent company was liable and obligated to deliver the apartment latest by 14th August 2018.

- l. That the tower of the project where the apartment of the complainant is located is still way behind completion stage and might take years to complete. That the complainant has diligently been making the payments towards the said allotment and till date has made a payment of **Rs. 37,61,263/-**.
- m. It is submitted that the public notice came to the knowledge of the complainant recently in September 2018 when the complainant began enquiring regarding the project and its completion and other buyers shared the same with the complainant. It is submitted that the complainant had requested the respondent to deliver the possession of the apartment or refund the money several times personally and also over telephonic conversation, but the respondent has failed to adhere to the request of the complainant.
- n. It is submitted that, the respondent company had illegally and with malicious intentions withheld the money of the complainant. It is submitted that due to the illegal and non-cooperative attitude of the respondent, the complainant has been constrained to file the present complaint. It is submitted that the respondent cannot expect the complainant to wait endlessly for the possession of their unit.
- o. It is submitted that the booking was made by the complainant in the year 2011 and the construction itself commenced in 2014, the progress of which is still in question. That an unreasonable period has elapsed since the booking was made by the complainant way back in 2011. That the complainant has been made to suffer for a long period beginning from 2011 till date, that is for around 7 years and hence is liable to be compensated accordingly. That the complainant has hereby been kept in

dark regarding the construction and the stage of the project and has only been harassed financially and emotionally for a period of around 7 years, for which he seeks compensation from the Hon'ble Authority along with the refund of his hard-earned money.

- p. That it is only just and fair that this Hon'ble Authority may be pleased to hold that the respondents were liable to deliver the possession of the apartment by August 2018. It is submitted that in any case the respondent company is liable to deliver the possession within reasonable time from the booking and the buyer cannot be expected to wait endlessly for the possession. The same has been settled by the Hon'ble Apex Court in the case of the *Fortune Infrastructure and Ors versus Trevor D'Lima and Ors.*
- q. That it is only just and fair that this Hon'ble Authority may be pleased to direct the respondent to refund the amount paid by the complainant along with prescribed rate of interest from the date of the payment till realization.
- r. The complainant reserves the right to seek compensation by way of filing a separate complaint before the Adjudicating Officer. The complainant is aggrieved by the actions of the respondent company for withholding the money of the complainant for several years and causing immense mental agony and financial agony. The complainant is entitled to seek compensation for the same and for which he shall prefer separate application.

C. Relief sought by the complainant: -

9. The complainant has sought following relief(s)
- a. Refund of entire amount along with the prescribed rate of interest.

b. Compensation & cost of litigation.

10. 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

11. Notice to the promoter/respondent in all the 15 complaints through speed post as well as through e-mail address. In complaint bearing no. *CR/2066/2019 Devender Singh Lather V/s Ansal Properties & Infrastructure Ltd.* the notice was sent through speed post and through e-mail address (sharad.mishra@ansals.com, ahcl@ansals.com, customerconnect@ansals.com, marketing@ansals.com & rahularora@ansalapi.com); the delivery report of which shows that delivery was completed. Despite service of notice, the promoter/respondent has failed to file a reply within the stipulated time period. Since the respondent company's put in appearance through its counsel Shri. Tushar Behmani Advocate, on 24.08.2022. Further, the counsel for the respondent requested for adjournment to file a written reply and the same was allowed with a specific direction to file the same within 1 week with an advance copy to the complainant. However, the respondent has failed to comply with the orders of the authority dated 24.08.2022, by not filing a written reply within the time allowed, therefore, the defence of the respondent is struck off.

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

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13. The application filed in the form CAO with the adjudicating officer and on being transferred to the authority in view of the judgement passed by the Hon'ble supreme court *M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. SLP(Civil) No(s). 3711-3715 OF 2021*), the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case allottee wishes to withdraw from the project on failure of the promoter to give possession as per agreement for sale. It has been deliberated in the proceedings dated 10.5.2022 in *CR No. 3688/2021 titled Harish Goel Versus Adani M2K Projects LLP* and was observed that there is no material difference in the contents of the forms and the different headings whether it is filed before the adjudicating officer or the authority.
14. Keeping in view the judgement of Hon'ble Supreme Court in case titled as *M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. (Supra)* the authority is proceeding further in the matter where allottee wishes to withdraw from the project and the promoter has failed to give possession of the unit as per agreement for sale irrespective of the fact whether application has been made in form CAO/CRA. Both the parties want to proceed further in the matter accordingly. The Hon'ble Supreme Court in case of *Varun Pahwa v/s Renu Chaudhary, Civil appeal no. 2431 of 2019 decided on 01.03.2019* has ruled that procedures are hand made in the administration of justice and a party should not suffer injustice merely due to some mistake or negligence or technicalities. Accordingly, the authority is proceeding further to decide the matter based on the pleading and submissions made by both the parties during the proceedings.

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E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

16. 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

17. 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.

18. 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.

19. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Supra)* and reiterated in case of *M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022* wherein it has been laid down as under:

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

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

F. Findings on the relief sought by the complainants

F.I Refund entire amount paid by the complainant along with the interest

21. In the present complaints, the complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

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

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

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

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

22. Clause 5.1 of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

"5.1

5.1. Subject to Clause 5.2 and further subject to all the buyers/allottees of the flats in the said residential project, making timely payment, the company shall endeavour to complete the development said residential project and the said flat as far as possible within 48(forty eight) months, with an extended period of 6 months, from the date of execution of this agreement or from the date of commencement of construction of the particular tower/block in which the said unit is situated subject to sanction of the building plan whichever is later."

23. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
24. **Due date of handing over possession and admissibility of grace period:**
The promoter has proposed to hand over the possession of the apartment within a period of 48 months from the date of execution of the agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later. The authority calculated due date of possession from the date of date of commencement of construction i.e., 14.08.2014 being later. The period of 48 months expired on 14.08.2018. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the

possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage.

25. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by them at the prescribed rate of interest. However, the allottee intend to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

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

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

26. 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.
27. 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., 13.09.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.
28. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the

promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

31. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5.1 of the agreement executed between the parties on 10.07.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by August 2018. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 14.02.2019.
32. Keeping in view the fact that the allottee/complainant wish to withdraw from the project and is 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.

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33. The due date of possession as per agreement for sale as mentioned in the table above is 14.02.2019 and there is delay of 2 months and 24 days on the date of filing of the complaint.

34. 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 allottees 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....."

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

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

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the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

36. 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). 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 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.
37. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 10% 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*.

F.II Compensation for mental agony & litigation cost

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

compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

39. In the complaints bearing no. CR/3025/2019, CR/901/2021, CR/902/2021 & CR/903/2021 the following additional reliefs are sought by the complainants.

F.III Refund the service tax paid by the complainants

40. The amount of service tax, if not refundable from the concerned taxation authority, the same shall not be included in the refundable amount.

F.IV Refund the excess amount of EDC/IDC paid by the complainants

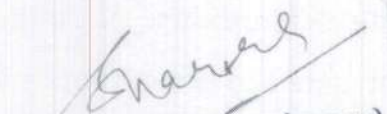
41. In view of the findings detailed above on issues no. 1, the above said relief become redundant as the complete amount paid by the complainants is refunded back.

G. Directions of the authority

46. 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):

- a. The respondent/promoter is directed to refund the amount received by it from the complainant along with interest at the rate of 10% 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.

- b. 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.
- c. 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 complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainants.
47. This decision shall mutatis mutandis apply to all the cases mentioned in para 3 of this order.
48. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter. There shall be separate decrees in individual cases.
49. Files be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.09.2022