

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

Complaint no. : 1190 of 2022
First date of hearing: 15.07.2022
Date of decision: 22.02.2023

1. Mr. Durga Das Bhatla
2. Mrs. Sakshi Bhatla
Both RR/o: - H. No. 15, Saraswati Kunj, Near Vatika
Tower, Gurugram- 122002

Complainants

Versus

1. M/s Ramprashtha Promoters and Developers Private
Limited.
2. M/s Bluebell Proptech Private Limited
Both having Regd. Office at: Plot No. 114, Sector-44,
Gurugram-122002
Also, At: - C-10, C Block Market, Vasant Vihar, New
Delhi- 110057

Respondents

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Sh. Venket Rao (Advocate)
Ms. Gayatri Mansa
None

Complainants
Respondent no. 1
Respondent no. 2

ORDER

1. The present complaint dated 24.03.2022 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 thereunder or to the allottees 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	"Skyz", Sector 37C, Village Gadauli Kalan, Gurugram
2.	Project area	60.5112 acres
3.	Registered area	102000 sq. mt.
4.	Nature of the project	Group housing complex
5.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid upto 18.02.2025
6.	Name of licensee	Ramprastha Builders Pvt Ltd and 11 others
7.	Date of approval of building plans	12.04.2012 [As per information obtained by planning branch]
8.	Date of environment clearances	21.01.2010 [As per information obtained by planning branch]





9.	RERA Registered/ not registered	Registered vide no. 320 of 2017 dated 17.10.2017	
10.	RERA registration valid up to	31.03.2019	
11.	Extension applied on	26.03.2019	
12.	Extension certificate no.	Date	Validity
		<i>HARERA/GGM/REP /RC/320/2017/ EXT/122/2019</i> In principal approval on 12.06.2019	30.03.2020
13.	Unit no.	E-703, 7 th floor, tower/block- E (Page no. 42 of the complaint)	
14.	Unit area admeasuring	1750 sq. ft. (Page no. 42 of the complaint)	
15.	Allotment letter	24.09.2011 (Page no. 71 of the complaint)	
16.	Date of execution of apartment buyer agreement	21.09.2011 (Page no. 38 of the complaint)	
17.	Date of application for allotment	06.08.2011	
18.	Possession clause	15. POSSESSION (a) Time of handing over the Possession Subject to terms of this clause and subject to the Allottee having complied with all the terms and	



		<p>condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over <i>the possession of the Apartment by 31.08.2014 the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.</i></p> <p style="text-align: right;">(Emphasis supplied)</p> <p>(Page no. 52 of the complaint)</p>
19.	Due date of possession	31.08.2014 [As per mentioned in the buyer's agreement]
20.	Grace period	Not utilized
21.	Total sale consideration	Rs.71,87,959/- (As per schedule of payment page 69 of the complaint)
22.	Amount paid by the complainants	Rs.63,44,978/- (As per receipt information page no. 32 to 34 and 74 to 86 of the complaint)

23.	Occupation certificate /Completion certificate	Not received
24.	Offer of possession	Not offered
25.	Delay in handing over the possession till date of filing complaint i.e., 24.03.2022	7 years 6 months and 24 days

B. Facts of the complaint

3. The complainants have made the following submissions: -

- I. That the real estate project “**Skyz**” situated at Sector 37D, Gurgaon Manesar Urban Complex, Gurugram (Haryana) came to the knowledge of complainants, through the authorized marketing representatives of the respondents. They approached the complainants for and on behalf of respondents, making tall claims in regard to the project and lured them to book a unit in the aforesaid project.
- II. That on 06.08.2011, the complainants based on representations and warranties made by or on behalf of respondents booked a unit bearing no. E-703, admeasuring super area of 1750 sq. ft. at total sale consideration at Rs.71,87,959/-.
- III. That the complainants paid an amount of Rs.2,00,000/- Rs.4,01,346/- and Rs.4,51,010/- vide cheques no. 856508, 856510 and 184683 on 06.08.2011, 18.08.2011 and 08.09.2011 respectively in favour of respondent/promoter and the same was acknowledged.



- IV. Thereafter, a builder buyer agreement was executed between the parties on 21.09.2011. That as per clause 15 of BBA, the respondents were under an obligation to complete the construction of the apartment handed over by 31.08.2014. The total consideration of the booked unit of complainants was agreed to be Rs.71,87,959/-. It was assured by the respondents that they would provide them with exclusive right to use one car parking space and undivided proportionate share in the footprint along with the booked unit. It was also further agreed that the respondents would be entitled to a maximum of grace period of 120 days for applying and obtaining the occupation certificate.
- V. That after repetitive following, the respondent/promoter issued the allotment letter on 24.09.2011 in favour of complainants and allotted with unit bearing no. E-703, 7th floor, tower no. E situated in the aforesaid project having ad-measuring super area 1750 sq. ft. along with exclusive right to use one parking space.
- VI. That they have made a visit to the project site of respondent's and were appalled to see that they have failed to achieve the scheduled development of the project as promised prior to booking. Thus, being aggrieved by the misrepresentation the respondents, the complainants rushed to their office to enquire about the delay in the aforesaid project. But the respondents did not pay any heed to the grievances raised by complainants and were unable to provide any

satisfactory reply which clearly shows their malafide and fraudulently intention to usurp financial gains from complainants.

- VII. That the complainants somewhere in end of December 2013 visited to the office of respondent/promoter to enquire about the status of the project wherein an officer on their behalf assured that their allotted unit would be handover as promised under the buyer's agreement i.e., on or before 31.08.2014.
- VIII. That the respondents have failed to comply with the terms and conditions as promised under clause 15(a). The complainants till 17.07.2014 has already paid an amount of Rs. 56,70,486/- towards the allotted unit in the aforesaid project. They always complied with the payments as and when demanded by respondents. Thus, it clearly shows the misrepresentations and fraud being committed by the respondents by not adhering to the terms and conditions of buyer's agreement.
- IX. That the complainants somewhere in September 2014 made further visit to the office of respondent/promoter in order to save their hard-earned money deposited with them and to know the exact period within which they would hand over the possession of the allotted unit. The respondents assured the complainants to handover the possession of the allotted unit within a short term of period and whereas no significant time period was mentioned clearly depicting the unfair trade practice on their part.



- X. That the complainants somewhere in between March 2015 to October 2015 raised concern for the delay in possession over the telephonic communication and also by visiting to the office of respondents and requested them to inform the status of aforesaid project and expected date of delivery. However, no satisfactory response was ever received from the respondents, clearly showing the fraudulent and malicious intention to cheat them in order to usurp financial gains.
- XI. That the complainants have already paid a total amount of Rs.63,44,978/- against the total sale consideration. But despite making huge payment approximately to 90% of the total sale consideration, the respondents have failed to handover the unit of complainants within stipulated time period as enumerated under clause 15 of the buyer's agreement. Thus, it clearly shows that the respondents have no intention to complete the aforesaid project and fraudulently siphoned off the huge amount collected from the complainants.
- XII. That while booking the said unit and thereafter on each receipt of the huge instalments from the complainants, the respondents had been assuring and promising them the actual possession of the unit with all amenities/facilities as promised. However, the said project is nothing as promised and is nowhere near of completion.
- XIII. That the respondents have acted unreasonably, arbitrarily and fraudulently just to deceive the complainants, by not providing all the amenities as promised at the time of booking and as mentioned under the agreement. The complainants booked a unit in the

respondent/promoter project with many hopes. However, due to arbitrary and illegal acts of both the respondents, they are facing a great deal of trouble. The difficulties and agony before the complainants are incomparable and undeniable, hard-earned money has been invested by them in the project, which now resulted in perpetual anguish.

XIV. That the respondents have made false assurances, false and frivolous promise to the complainants. They have already faced a lot of financial distress due to the *malafide* act of them. The present case is a clear exploitation of innocence and beliefs of the complainants and an act of the respondents to diverse the hard-earned money collected from them illegally and also failed to hand over possession along with all the promised amenities till date. The funds which were supposed to be utilized for the project have been diverted by the respondent/promoter which has caused immense loss to the complainants.

XV. Therefore, the complainants being aggrieved by the unfair trade practice of the respondents wanted to cancel the allotted unit and further made request to them to refund the entire money i.e., Rs.63,44,978/- so far deposited in regard to allotted unit along with interest @18% from the date of each respective payments till actual realization. But the respondents did not even bother to refund the principal money along with interest to complainants even after huge

delay of more than 7 years from the due date of possession i.e., 31.08.2014.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

- I. To direct the respondents to refund the entire amount paid by the complainants along with the interest @ 18% per annum from the date of respective deposits till its actual realization.
- II. Direct the respondent to pay the compensation of Rs.5,00,000/- for causing mental agony, harassment to the complainant.
- III. Direct the respondent to pay an amount of Rs.3,00,000/- towards the cost of proceeding/litigation.

5. Neither respondent no. 2 put in appearance nor filed any reply. Accordingly, the authority was left with no other option but to proceed ex parte on 22.02.2023 against that respondent no. 2.

6. 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.

7. The respondent no. 1 has contested the complaint on the following grounds: -

- i. That at the very outset, it is most respectfully submitted that the complaint filed by the complainants is not maintainable and this authority has no jurisdiction whatsoever to entertain the present complaint due to lack of cause of action.



- ii. That without prejudice to the above, it is further submitted that the complainants are not "Consumers" within the meaning of the Consumer Protection Act, 2019 as their sole intention was to make investment in a futuristic project of the respondent only to reap profits at a later stage when there is increase in the value of flat at a future date which was not certain and fixed. Neither there was any agreement with respect to any date in existence of which any date or default on such date could have been reckoned due to delay in handover of possession.
- iii. That the complainants having full knowledge of the uncertainties involved have out of their own will and accord decided to invest in the present futuristic project, and they have no intention of using the said flat for their personal residence or the residence of any of their family members. If the complainant had such intentions, they would not have invested in futuristic project. The sole purpose of the complainants was to make profit from sale of the flat at a future date. Now since the real estate market is seeing downfall, the complainants cleverly resorted to the present exit strategy to conveniently exit from the project by arm twisting the respondent. It is submitted that the complainants having purely commercial motives made investment in a futuristic project and therefore, they cannot be said to be genuine buyers of the said apartment and therefore, the complaint being not maintainable be dismissed in limine.



- iv. That the complainants have not intentionally filed their personal declarations with respect to the properties owned and/or bought/sold by them at the time of booking of the impugned plot and/or during the intervening period till the date of filing of the complaint and hence an adverse inference ought to be drawn against them.
- v. That the complainants have approached the respondent office in 2011 and communicated that they were interested in a project "not ready to move" and expressed their interest in a futuristic project. It is submitted that the complainants were not interested in any of the ready to move in/near completion projects. It is submitted that on the specific request of the complainants, the investment was accepted towards a futuristic project. Now, the complainants are trying to shift the burden on the respondent as the real estate market is facing rough weather. Therefore, the complainants cannot be said to be genuine consumer by any standards; Rather they are mere investors in the futuristic project. An investor by any extended interpretation cannot mean to fall within the definition of a "Consumer" under the Consumer Protection Act, 2019. Therefore, the complaint is liable to be dismissed merely on this ground.
- vi. That the complainants have not approached this authority with clean hands and concealed the material fact that they are defaulters, having deliberately failed to make the timely payment of installments within the time prescribed, which resulted in delay payment



charges/interest, as reflected in the statement of account. Due the lackadaisical attitude of the complainants along with several other reasons beyond the control of the respondent as cited caused the present unpleasant situation. That it is due to the default of the complainants, the allotment could not have been carried out.

- vii. That the respondent had to bear with the losses and extra costs owing due delay of payment of installments on the part of the complainants for which they are solely liable. However, the respondents owing to its general nature of good business ethics has always endeavored to serve the buyers with utmost efforts and good intentions. The respondent constantly strived to provide utmost satisfaction to the buyers/allottees. However, now, despite of its efforts and endeavors to serve the buyers/allottees in the best manner possible, is now forced to face the wrath of unnecessary and unwarranted litigation due to the mischief of the complainants.
- viii. That from the initial date of booking to the filing of the present complaint, the complainants have never raised any issues or objections. Had any valid issue been raised by complainants at an earlier date, the respondent would have, to its best, endeavored to solve such issues much earlier. However, now to the utter disappointment of the respondent, the complainants have filed the present complaint based on fabricated story woven out of threads of malice and fallacy.

- ix. That this conduct of the complainants itself claims that the complainants are mere speculative investors who have invested in the property to earn quick profits and due to the falling & harsh real estate market conditions, the complainants are making a desperate attempt herein to quickly grab the possession along with high interests on the basis of concocted facts. Further in a desperate attempt to bring forth a legal action against the respondent the complainants have generated certain fabricated documents in order to support their false contentions.
- x. That the complainant's primary prayer for handing over the possession of the said plot is entirely based on imaginary and concocted facts by the complainants and the contention that the respondent was obliged to hand over possession within any fixed time period from the date of issue of provisional allotment letter is completely false, baseless and without any substantiation; whereas in reality the complainants had complete knowledge of the fact that the zoning plans of the layout were yet to be approved and the initial booking dated 06.08.2011 was made by them towards a *future potential project* and hence, there was no question of handover of possession within any fixed time period as falsely claimed by the complainants; hence the complaint does not hold any ground on merits as well.
- xi. That further the respondent/promoter has applied for the mandatory registration of the project with the authority but however





the same is still pending approval on the part of the authority. However, in this background that by any bound of imagination, the respondent cannot be made liable for the delay which has occurred due to delay in registration of the project with the authority. Since there was delay in zonal approval from the DGTCP, the same has acted as a causal effect in prolonging and obstructing the registration of the project under the Act for which the respondent is in no way responsible. The approval and registration are a statutory and governmental process which is out of power and control of the respondent. This by any matter of fact be not counted as a default on the part of the respondent.

- xii. There is no averment in the complaint which can establish that any so-called delay in possession could be attributable to the respondent as the finalization and approval of the layout plans has been held up for various reasons which have been and are beyond the control of the respondent including passing of an HT line over the layout, road deviations, depiction of villages etc. which have been elaborated in further detail herein below. The complainants while investing in a plot which was subject to zoning approvals were very well aware of the risk involved and had voluntarily accepted the same for their own personal gain. There is no averment with supporting document in the complaint which can establish that the respondent had acted in a manner which led to any so-called delay in handing over possession

of the said flat. Hence the complaint is liable to be dismissed on this ground as well.

- xiii. The respondent/promoter was owner of vast tracts of undeveloped land in the revenue estates of Village Basai, Gadauli Kalan and falling within the boundaries of Sectors 37C and 37D Gurugram also known as Ramprastha City, Gurugram.
- xiv. That the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement signed by the complainants /allotment offered to him. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of said Act or said Rules, has been executed between the parties. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the apartment buyer's agreement dated 21.09.2011, executed much prior to coming into force of said Act or said Rules. The adjudication of the complaint for possession, refund, interest and compensation, as provided under sections 12, 14, 18 and 19 of said Act, has to be in reference to the agreement for Sale executed in terms of said Act and said Rules and no other agreement. This submission of the respondents *inter alia*, finds support from reading of the provisions of the said Act and the said Rules. Thus, in view of the submissions made above, no relief can be granted to the complainants.

- xv. That thereafter Ministry of Finance, Government of India in the wake of COVID-19 pandemic has invoked *Force Majeure* and thereby extended the timelines for completion of real estate projects by 6 months period starting from February 2020.
- xvi. That on November 06, 2019, the Honorable Finance Minister had announced that the Union Cabinet has cleared a proposal to set up a special window in the form of AIF to provide priority debt financing for the completion of stalled housing projects. Accordingly, SWAMIH (special window for funding stalled affordable and middle-income housing project) Investment Fund was created for this purpose.
- xvii. That approximately, there are about 1600 stalled projects across top cities in the country and in this regard, the union cabinet approved the setting up of Rs.25,000 Crores alternative investment funding (AIFs). The sponsor of the fund is the Secretary, Department of Economic Affairs, Ministry of Finance, Government of India on behalf of Government of India.
- xviii. That, accordingly, SWAMIH Fund was created by the Government of India to provide priority debt financing for the completion of stalled housing projects that are in the Affordable and Middle-Income Housing projects category. The fund has been set up as Category II AIF (Alternate Investment Fund) debt fund registered with SEBI. The fund is being managed by SBI Caps Ventures with investments from the Ministry of Finance and other marquee investors like LIC, SBI etc.

It has a corpus of Rs. 12,500 Crore with a green-shoe option of another Rs.12,500 Crore.

- xix. That the respondent/promoter has been sanctioned funding facility to the tune of approx. 296 Crores for the completion of all the projects. The disbursement in respect of project Primera has already been received in January 2021. That SWAMIH and the respondent are in the final legs for the release of funds for the project Skyz.
- xx. That majority of the homebuyers of the project i.e., Skyz approx. 80% are not interested in obtaining refunds and the respondent /promoter is approaching each and every homebuyer to ensure that any grievance that they may have been resorted amicably. The respondent with reasonable certainty states that it has the confidence and faith of a large number of homebuyers who are absolutely dependent on it for the delivery of their homes and the respondent is duty bound to project their interest.
- xxi. The projects in respect of which the respondent has obtained the occupation certificates are described as hereunder: -

S. No	Project Name	No. of Apartments	Status
1.	Atrium	336	OC received
2.	View	280	OC received



3.	Edge Tower I, J, K, L, M Tower H, N Tower-O (Nomenclature- P) (Tower A, B, C, D, E, F, G)	400 160 80 640	OC received OC received OC received OC to be applied
4.	EWS	534	OC received
5.	Skyz	684	OC to be applied
6.	Rise	322	OC to be applied

8. 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.

E. Jurisdiction of the authority

9. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection 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



10. 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

11. 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.

12. 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.



13. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(C), 357 and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** 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."

14. 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 objections raised by the respondent.

F. I Objection regarding the complainants being investors.



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15. The respondent has taken a stand that the complainants are the investors and not consumers, and therefore, are not entitled to the protection of the Act and to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority 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 main aims & 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 it 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 apartment buyer's agreement, it is revealed that the complainants are buyer and paid total price of Rs.63,44,978/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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



In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

F. II Objection regarding jurisdiction of authority w.r.t. booking application form executed prior to coming into force of the Act.

16. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the booking application form executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular

manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

17. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be

entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

18. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments /competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature

G. Findings on the relief sought by the complainants

G.1 To direct the respondents to refund the entire amount paid by the complainants along with the interest @ 18% per annum from the date of respective deposits till its actual realization.

19. 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. 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)

20. As per clause 15(a) of the apartment buyer agreement provides for handing over of possession and is reproduced below:

"15. POSSESSION

(a) Time of handing over the possession

*Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over the possession of the Apartment by **31.08.2014** the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex."*

21. The authority has gone through the possession clause of the agreement and observes that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of apartment buyer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing

over of possession but subject to observations of the authority given below.

22. 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 allottees 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 allottees of their 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.

23. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 31.08.2014 and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and



obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.

24. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the rate of 18%. However, the allottees intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

25. 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.

26. 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., 22.02.2023 is **8.70%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%**.

27. 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;"*

28. 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 15(a) of the buyer agreement, the due date of possession was specifically mentioned in the apartment buyer agreement as 31.08.2014. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 31.08.2014.

29. Keeping in view the fact that the allottees/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.

30. The due date of possession as per agreement for sale as mentioned in the table above is **31.08.2014** and there is delay of 7 years 6 months 24 days on the date of filing of the complaint.
31. The authority has further, observes that even after a passage of more than 7.6 years till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the unit which is allotted to them and for which they have paid a considerable amount of money towards the sale consideration. It is also pertinent to mention that complainants have paid almost 88% of total consideration till 2016. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottee intends to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.
32. 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....."

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

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

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

regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

35. 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 him 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 the compensation of Rs.5,00,000/- for causing mental agony, harassment to the complainant.

G.III. Direct the respondent to pay an amount of Rs.3,00,000/- towards the cost of proceeding/litigation.

G. IV. To direct the respondent to pay compensation to the complainant, as may deem fit and proper, for causing financial loss due to loss of appreciation and opportunity that has occurred an account of misrepresentation on the value of the unit

36. 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. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority

37. 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.63,44,978/- received by it from the complainants 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.



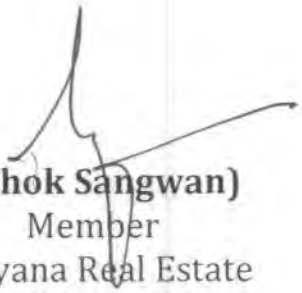


- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
- iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount 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.

38. Complaint stands disposed of.

39. File be consigned to registry.

Dated: 22.02.2023


(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram