

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

Complaint no. : 3469 of 2022
First date of hearing: 15.07.2022
Date of decision: 22.02.2023

Mr. Nishant Mehra
R/o: - House no. 401, Shivalik Apartment, Sector- 10A,
Gurugram- 110088 (Haryana)

Complainant

Versus

M/s Ramprashtha Promoters and Developers Private
Limited.
Regd. Office at: Plot No. 114, Sector-44, Gurugram-
122002
Corporate office at: - C-10, C- Block, Market, Vasant
Vihar, New Delhi -110049

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Sh. Kuldeep Kumar Kohli (Advocate)
Ms. Gayatri Mansa (Advocate)

Complainant
Respondent

ORDER

1. The present complaint dated 06.07.2022 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of the



Act or the Rules and regulations made thereunder or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainant, 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	"The Edge Tower", Sector 37D, Village Gadauli Kalan, Gurugram
2.	Project area	60.5112 acres
3.	Registered area	108894 sq. mt.
4.	Nature of the project	Group housing colony
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. 279 of 2017 dated 09.10.2017



10.	RERA registration valid up to	31.12.2018	
11.	Extension applied on	17.12.2018	
12.	Extension certificate detail	Date	Validity
		<i>HARERA/GGM/REP/RC/279/2017/EXT/98/2019</i> In principal approval on 12.06.2019	30.12.2020
13.	Unit no.	C-1004, 10 th floor, tower/block- C (Page no. 48 of the complaint)	
14.	Unit area admeasuring	1990 sq. ft. (Page no. 48 of the complaint)	
15.	Allotment letter	19.04.2012 (Page no. 37 of the complaint)	
16.	Date of execution of apartment buyer agreement	19.04.2012 (Page no. 43 of the complaint)	
17.	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 condition of this Agreement and the Application, and not being in default under any of the provisions of this	

		<p>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 31/08/2012 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. 58 of the complaint)</p>
18.	Due date of possession	<p>31.08.2012</p> <p>[As per mentioned in the buyer's agreement]</p>
19.	Grace period	Not utilized
20.	Total sale consideration	<p>Rs.52,94,650/-</p> <p>(As per schedule of payment page 99 of the complaint)</p>
21.	Amount paid by the complainant	<p>Rs.44,55,000/-</p> <p>(As per customer ledger dated 23.10.2012 page 97 of the complaint)</p>



22.	Occupation certificate /Completion certificate	Not received
23.	Offer of possession	Not offered
24.	Legal notice sent by the allottee	03.03.2022 (Page no. 118 of the complaint)
25.	Delay in handing over the possession till date of filing complaint i.e., 10.06.2022	9 years 9 months and 10 days

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That while searching for an apartment the complainant was lured by advertisements and calls from the brokers of the respondent for buying an apartment in its project detailed above. The respondent company told the complainant about the moonshine reputation of the company and the made huge presentations about the project mentioned above and also assured that they have delivered several such projects in the National Capital Region. The respondent handed over one brochure to the complainant which showed the project like heaven and in every possible way tried to hold the complainant and incited the complainant for payment.
- II. That relying on various representations and assurances given by the respondent and on belief of such assurances, he booked a unit in the project by paying a booking amount of Rs.4,00,000/- vide

cheque no. 499714 dated 26.08.2008 towards the booking of the said unit bearing no. C-1004, 10th floor, Tower-C, in Sectors 37D, Gurugram having super area measuring 1990 sq. ft. in the aforesaid project of the developer for a total sale consideration of the unit i.e. Rs.52,94,650/- which includes basic price, car parking charges, and development charges, PLC, IFMS, IBRF, club membership charges and other specifications of the unit and providing the time frame within which the next instalments was to be paid.

- III. Thereafter, an apartment buyer's agreement was executed between the parties on 19.04.2012. As per clause 15(a) of the apartment buyer's agreement, the respondent who to deliver the possession of the apartment by 31.08.2012 + 120 day of grace period for applying and obtaining the occupation certificate in respect of the group housing project. Therefore, the due date of possession comes out to be 31.08.2012. But, in calculating the due date of possession, grace period is not to be included.
- IV. That the complainant was also handed over one detailed payment plan which was construction linked plan. The dream of owning a unit by the complainant was shattered due to dishonest, and unethical attitude of the respondent.
- V. That at the time of execution of the agreement, the complainant had objected towards the highly titled and one-sided clauses of the agreement, however, the respondent turned down the concerns of the complainant and curtly informed him that the terms and

conditions in the agreement are standard clauses and thus, no change can be made. A bare perusal of the agreement reveals that the terms and conditions imposed on the complainant were totally biased in so far as the disparity between the bargaining power and status of the parties, tilted the scale in the favour of the respondent.

- VI. Furthermore, since the respondent was in dominant position, it fabricated the agreement according to its whims and fancies. As per the demands raised by the respondent, based on the payment plan, the complainant to buy the captioned unit already paid a total sum of Rs.47,05,178/- towards the said unit against total sale consideration of Rs.52,94,650/-
- VII. That the payment plan was designed in such a way to extract maximum payment from the buyers *viz a viz or done/completed*. He approached the respondent/promoter and asked about the status of construction and also raised objections towards non-completion of the project. Such arbitrary and illegal practices have been prevalent amongst builders before the advent of the Act, wherein the payment/demands etc. have not been transparent and demands were being raised without sufficient justifications and maximum payment was extracted just raising structure leaving all amenities/finishing/facilities/common area/road and other things promised in the brochure, which counts to almost 50% of the total project work.



- VIII. That during the period, the complainant went to the office of respondent several times and requested it to allow him to visit the site, but it was never allowed saying that it would not permit any buyer to visit the site during construction period, and once complainant visited the site but was not allowed to enter the site. The complainant even after paying amounts still received nothing in return but only loss of the time and money invested by him.
- IX. That the complainant contacted the respondent on several occasions and was regularly in touch with it. It was never able to give any satisfactory response to him regarding the status of the construction and definite about the delivery of the possession. He kept pursuing the matter with the representatives of the respondent by visiting the office regularly as well as raising the matter to when would deliver the project and why construction was going on at such a slow pace, but to no avail. Some or the other reason was being given in terms of shortage of labour etc.
- X. That the respondent despite having made multiple tall representations to the complainant, choose deliberately and contemptuously not to act and fulfil the promises and gave a cold shoulder to the grievances raised by the cheated allottee.
- XI. That it is abundantly clear that the respondent has played a fraud upon the complainant and have cheated them fraudulently and dishonestly with a false promise to complete the construction over the project site within stipulated period. The respondent had

further malafide failed to implement the BBA executed with the complainant. Hence, the complainant being aggrieved by the offending misconduct, fraudulent activities, deficiency and failure in service of the respondent.

- XII. That the respondent is guilty of deficiency in service within the purview of provisions of the Act, 2016 and the provisions of the rules, 2017. The complainant suffered on account of deficiency in service and as such, the respondent is fully liable to cure the deficiency as per the provisions of the Act, 2016 and the provisions of the Rules, 2017.

C. Relief sought by the complainant:

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

- I. To refund the entire amount of Rs.44,55,000/- paid by the complainants with prescribed rate of interest.
- II. Restrain the respondent from raising any fresh demand with respect to the project.
- III. Restrain the respondent from cancelling the allotment till the time the entire amount paid by them is refunded with interest.
- IV. Restrain the respondent from creating third party rights in the said property till the time the entire amount with interest is refund.

5. On the date of hearing, the authority explained to the respondent /promoter about the contraventions as alleged to have been committed



in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent 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 complainant is not maintainable and this authority has no jurisdiction whatsoever to entertain the present complaint due to lack of cause of action.
- ii. That the present complaint has been filed by the complainant before this authority for possession along with compensation against investment made by the complainant in one of the flat in the project "The Edge Tower". That in this behalf, it is most respectfully submitted that the authority is precluded from entertaining the present complaint due lack of jurisdiction of this authority.
- iii. That the Haryana Real Estate (Regulation and Development) Amendment Rules, 2019 has been notified on 12.09.2019 whereby inter alia amendments were made to Rule 28 and 29 of the Haryana Rules. The Rule 28 deals with the provisions related to the jurisdiction of this authority.
- iv. That, further the High Court of Punjab and Haryana, vide an Order dated 16.10.2020 in *Experion Developers Pvt Ltd Vs State of Haryana and Ors, CWP 38144 of 2018* and batch, has observed as hereunder when a question was raised before the said Hon'ble High



Court pertaining to the jurisdiction of the authority and the adjudicating officer with respect to the Rules, 2019.

- v. That in this context, firstly, to file a complaint before this authority within Rule 28, it is utmost crucial that any violation or contravention of the provisions of the Act or the rules and regulations made thereunder, against any promoter, allottee or real estate agent has been therefore alleged by the complainants. That in the present case, no such allegation has been made by the complainant which prima facie hints for a necessity for intervention of this authority. Therefore, the present case is liable to be dismissed before this authority for want of lack of cause of action and further, also the respondent cannot be held liable for an explanation when there is no such allegation of contravention.
- vi. That, further, another aspect which needs attention herein is that when it comes to the part of compensation or compensation in the form of interest, the adjudicating officer shall be the sole authority to decide upon the question of the quantum of compensation to be granted. In this regard, the main excerpts of Rule 29 of the Haryana Amendment Rules, 2019.
- vii. That the complainant has now filed a complaint in terms of the Haryana Real Estate (Regulation & Development) Amendment Rules, 2019 under the amended Rule 28 in the amended 'Form CRA' and is seeking the relief of possession, interest, and compensation under section 18 of the Act. That it is most respectfully submitted in this

behalf that the power of the appropriate Government to make rules under section 84 of the said Act is only for the purpose of carrying out the provisions of the said Act and not to dilute, nullify or supersede any provision of the said Act.

- viii. That without prejudice to the above, it is further submitted that the complainant is not "Consumer" within the meaning of the Consumer Protection Act, 2019 since the sole intention of the complainant 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 and 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.
- ix. That the complainant having full knowledge of the uncertainties involved have out of their own will and accord have decided to invest in the present futuristic project and the complainant has no intention of using the said flat for their personal residence or the residence of any of his family members and if the complainant had such intentions they would not have invested in futuristic project. The sole purpose of the complainant was to make profit from sale of the flat at a future date and now since the real estate market is seeing downfall, the complainant has cleverly resorted to the present exit strategy to conveniently exit from the project by arm twisting the respondent. The complainant has purely commercial motives have made

investment in a futuristic project and therefore, they cannot be said to be genuine buyer of the said apartment and therefore, the complaint being not maintainable must be dismissed in limine.

- x. That the complainant has not intentionally filed their personal declarations with respect to the properties owned and/or bought /sold by them at the time of booking 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 the complainant.
- xi. That the complainant has approached the respondent office in 2008 and have communicated that the complainant was interested in a project which is "not ready to move" and expressed their interest in a futuristic project. He was not interested in any of the ready to move in/near completion projects. It is submitted that on the specific request of the complainant, the investment was accepted towards a futuristic project. Now the complainant is trying to shift the burden on the respondent as the real estate market is facing rough weather.
- xii. The complainant is investor, who never had any intention to buy the apartment for their own personal use and have now filed the present complaint on false and frivolous grounds. It is most respectfully submitted that this authority has no jurisdiction howsoever to entertain the present complaint as the complainant has not come to this authority with clean hands and has concealed the material fact that he has invested in the apartment for earning profits and the

transaction therefore is relatable to commercial purpose and the complainant is not being a 'consumers' within the meaning of section 2(1)(d) of the Consumer Protection Act, 1986, the complaint itself is not maintainable under the Act, of 2016. This has been the consistent view of the National Consumer Disputes Redressal Commission.

- xiii. Therefore, the complainant cannot be said to be genuine consumer by any standards; rather the complainant is mere investor 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.
- xiv. That the complainant has not approached this authority with clean hands and has concealed the material fact that the complainant is 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. The complainant has not cleared its outstanding dues and is in default of a large amount excluding the delay interest out of total consideration Rs.8,39,650/-. Therefore, the complainant cannot rightfully claim for refund or possession, since the possession has not been handed over due to complainant own default.
- xv. That it is due the lackadaisical attitude of the complainant along with several other reasons beyond the control of the respondent as cited by the respondent which caused the present unpleasant situation.



- That it is due to the default of the complainant, the allotment could not have been carried out.
- xvi. That if any objections to the same was to be raised the same should have been done in a time bound manner while exercising time restrictions very cautiously to not cause prejudice to any other party. The complainants cannot now suddenly show up and thoughtlessly file a complaint against the respondent on its own whims and fancies by putting the interest of the builder and the several other genuine allottee at stake. If at all, the complainant had any doubts about the project, it is only reasonable to express so at much earlier stage. Further, filing such complaint after lapse of such a long time at such an interest only raises suspicions that the present complaint is only made with an intention to arm twist the respondent. The entire intention of the complainant is made crystal clear with the present complaint and concretes the status of the complainant as an investor who merely invested in the present project with an intention to draw back the amount as an escalated and exaggerated amount later.
- xvii. That it is evident from the complaint that the complainant was actually waiting for the passage of several years to pounce upon the respondent and drag the respondent in unnecessary legal proceedings. It is submitted that huge costs must be levied on the complainant for this misadventure and abuse of the process of court for arm twisting and extracting money from respondent.

- xviii. That the respondent had to bear with the losses and extra costs owing due delay of payment of installments on the part of the complainant for which they are solely liable. However, the respondent 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 complainant.
- xix. That from the initial date of booking to the filing of the present complaint, the complainant has never raised any issues or objections. Had any valid issue been raised by complainant 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 complainant has filed the present complaint based on fabricated story woven out of threads of malice and fallacy.
- xx. That the complainant has been acting as genuine buyers and desperately attempting to attract the pity of this authority to arm twist the respondent into agreeing with the unreasonable demands of the complainant. The reality behind filing such complaint is that the complainant has resorted to such coercive measures due to the downtrend of the real estate market and by way of the present



complaint, is only intending to extract the amounts invested along with profits in the form of exaggerated interest rates.

- xxi. That this conduct of the complainants itself claims that the complainant is mere speculative investors who has invested in the property to earn quick profits and due to the falling & harsh real estate market conditions, the complainant is making a desperate attempt herein to quickly grab the possession along with high interests on the basis of concocted facts.
- xxii. That furthers the reasons for delays are solely attributable to the regulatory process for approval of layout which is within the purview of the Town and Country Planning Department. The complaint is liable to be rejected on the ground that the complainant had indirectly raised the question of approval of zoning plans which is beyond the control of the respondent and outside the purview of consumer courts and in further view of the fact the complainant had knowingly made an investment in a future potential project of the respondent. The reliefs claimed would require an adjudication of the reasons for delay in approval of the layout plans which is beyond the jurisdiction of this authority and hence the complaint is liable to be dismissed on this ground as well.
- xxiii. That the complainant primary prayer for handing over the possession of the said apartment is entirely based on imaginary and concocted facts by the complainant 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 complainant had complete knowledge of the fact that the zoning plans of the layout were yet to be approved and the initial booking in 2008 was made by the complainant towards a future potential project of the respondent and hence there was no question of handover of possession within any fixed time period as falsely claimed by the complainant; hence the complaint does not hold any ground on merits as well.

xxiv. That further the respondent has applied for the mandatory registration of the project with this authority but however the same is still pending approval on the part of the authority. However, in this background it is submitted 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 under the Act. It is submitted herein that 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. That the approval and registration is a statutory and governmental process which is way out of power and control of the respondent. This by any matter of fact is counted as a default on the part of the respondent.

xxv. 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 complainant while investing in an apartment 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 documents 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.

xxvi. The below table shows the project name, its size, and the current status of the project. The respondent has been diligent in completing its entire project and shall be completing the remaining projects in phased manner. The respondent has completed major projects mentioned below and has been able to provide occupancy to the allottees.

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

xxvii. That the complainant is short-term speculative investor, their only intention was to make a quick profit from the resale of the land and having failed to resell the said apartment due to recession and setbacks in the real estate world have resorted to this litigation to grab profits in the form of interests. It is most strongly submitted herein that the complainant was never interested in the possession of the property for personal use but only had intent to resell the property and by this, they clearly fall within the meaning of speculative investor.

xxviii. Further, that the delay in delivering the possession of the flat to the complainant herein has attributed solely because of the reasons beyond control of the respondents.



- xxix. There is no averment in the complaints 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 complainant 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 documents 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 unit. Hence the complaint is liable to be dismissed on this ground as well.
- xxx. That the delay has occurred only due to unforeseen circumstances which despite of best efforts of the respondent hindered the progress of construction, meeting the agreed construction schedule resulting into unintended delay in timely delivery of possession of the plot for which respondent cannot be held accountable. However, the complainant despite having knowledge of happening of such force majeure eventualities and despite agreeing to extension of time in case the delay has occurred as a result of such eventualities has filed this frivolous, tainted and misconceived complaint in order to harass the respondent with a wrongful intention to extract monies.



- xxxi. That despite several adversities and the unpredicted and unprecedented wrath of falling real estate market conditions, the respondent have made an attempt to sail through the adversities only to handover the possession of the property at the earliest possible to the utmost satisfaction of the buyer/allottee. That even in such harsh market conditions, the respondent have been continuing with the construction of the project and sooner will be able to complete the construction of the project.
- xxxii. The complainant persuaded the respondent to allot the said apartment in question to them with promise to execute all documents as per format by them and to make all due payments. The respondent continued with the development and construction of the said apartment and also had to incur interest liability towards its bankers. The complainant prevented the respondent from allotting the said apartment in question to any other suitable customer at the rate prevalent at that time and thus the respondent has suffered huge financial losses on account of breach of contract by the complainant
7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

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

8. 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

9. 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.



10. 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.
11. 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."



12. 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.1 Objection regarding the complainant being investor.

13. The respondent has taken a stand that the complainant is the investor and not consumer. Therefore, he is 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 the 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 complainant is buyer and paid total price of Rs.44,55,000/- 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 complainant is allottee as the subject unit was allotted to him 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 allottee being investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainants

- G.I To refund the entire amount of Rs.44,55,000/- paid by the complainants with prescribed rate of interest.**
14. 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)

15. 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 31.08.2012 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."

16. 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.

17. 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.



18. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 31.08.2012 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.
19. 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 31.08.2012. 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 31.08.2012.
20. The authority has further, observes that due date of possession of the same project being developed by the same promoter is specifically mentioned in the possession clause i.e., 31.08.2012. It is pertinent to mention over here that even after a passage of more than 9.9 years neither the construction is completed 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 allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to him and for which he has paid a considerable amount of money towards the sale consideration. It is also to mention that complainant has paid almost 84% of total consideration till 2012. 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.

21. 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....."



22. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others (Supra)***, it was observed as under: -

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

23. 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) of the Act. The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as they wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.



24. **Admissibility of delay possession charges at prescribed rate of interest:** However, the allottee intends 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.

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. Taking the case from another angle, the complainant/allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @18% per annum compounded at the time of every succeeding Installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottees or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to

take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumer/allottee in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

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

29. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.70% by the respondent /promoter which is the same as is being granted to the complainants in case of delayed possession charges.

30. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 8.70% 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 Restrain the respondent from raising any fresh demand with respect to the project.

G.III Restrain the respondent from cancelling the allotment till the time the entire amount paid by me is refunded with interest.

31. 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 are refunded back.



G. IV Restrain the respondent from creating third party rights in the said property till the time the entire amount with interest is refund.

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

H. Directions of the authority

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

- i. The respondent/promoter is directed to refund the amount i.e., Rs.44,55,000/- received by it from the complainant along with interest at the rate of 10.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the 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 complainant and



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

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

Dated: 22.02.2023



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



HARERA
GURUGRAM