

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

Complaint no.:	3395 of 2019
First date of hearing:	04.12.2019
Date of decision:	14.02.2023

1. Late Meneka Radhu (Through LRs)
2. Smt. Reshma Talwar
R/o D-828, New Friends Colony, New Delhi- 110025

Complainants

Versus

Emaar India Ltd.
(Earlier known as Emaar MGF Land Ltd.)
Office address: 306-308, Square One,
C-2, District Centre, Saket, New Delhi-110017

Respondent

CORAM:

Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

**Member
Member**

APPEARANCE:

Shri Manan Soni

Advocate for the
complainants

Shri Ishaan Dang

Advocate for the respondent

ORDER

1. The present complaint dated 26.08.2019 has been filed by the complainants/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 as provided under the provision 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Project name and location	Gurgaon Greens, Sector 102, Gurugram.
2.	Project area	13.531 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and	75 of 2012 dated 31.07.2012
	License validity status	30.07.2020
	Name of licensee	Kamdhenu Projects Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
5.	HRERA registered/ not registered	Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.
	HRERA registration valid up to	31.12.2018
6.	HRERA extension of registration vide	01 of 2019 dated 02.08.2019
	Extension valid up to	31.12.2019
7.	Unit no.	GGN-11-0102, 1 st floor, building no. 11. [pg. 59 of enclosure C3]
8.	Unit admeasuring	153.29 sq. mtrs. [pg. 59 of enclosure C3]
9.	Provisional allotment letter dated	30.01.2013 [pg. 59 of enclosure C3]



10.	Date of execution of buyer's agreement	10.05.2013 [page 5 of enclosure C2]
11.	Possession clause	14. POSSESSION (a) Time of handing over the possession <i>Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee(s) having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 (Thirty Six) months from the date of start of construction; subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five) for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project. (Emphasis supplied)</i> [pg. 21 of enclosure C2]
12.	Date of start of construction	14.06.2013 [page 67 of reply]
13.	Due date of possession	14.06.2016 [Note: - Grace period not allowed]
14.	Delay in handing over the possession till filling of this complaint	3 years 2 months 12 days
15.	Total consideration as per statement of account dated 13.02.2021 at page 67 of reply	Rs.1,30,38,619/-
16.	Total amount paid by the complainants as per statement of account dated 13.02.2021 at page 67 of reply	Rs.1,26,51,435/-



17.	Occupation certificate	30.05.2019 [page 64-66 of reply]
18.	Offer of possession	31.05.2019 [page 74-78 of reply]

B. Facts of the complaint

3. The complainants have pleaded the complaint on the following facts:

- a. That the respondent is a Company incorporated under the Companies Act. The Respondent registered with HRERA vide Registration No. 36(a) of 2017 Dated 05.12.2017. The registration expired on 31.12.2018. The Complainants learn that Emaar has applied for renewal of registration.
- b. That the respondent represented that it had entered into collaboration agreements with subsidiaries for the development of a land admeasuring 13.531 acres situated at Sector 102, Village Dhankot, Tehsil & District Gurgaon, Haryana (hereinafter 'scheduled land') and is fully competent to market and sell the units in the scheduled land. The respondent further represented that it has conceived, planned and is in the process of constructing and developing a group housing colony known as 'Gurgaon Greens' (hereinafter 'project') which inter alia comprises of multi-storied apartment buildings, car parking spaces, recreational facilities, landscaped gardens etc, to be developed on the scheduled land.
- c. That the complainants applied for a residential unit in the project. The respondent allotted unit no. GGN-11-0102 to the complainants in the project vide provisional allotment letter dated 30.01.2013. Thereafter, parties executed an agreement to sell, titled as the buyer's agreement dated 10.05.2013. The total sale consideration



for the said unit is Rs.1,21,47,550/-. The complainants have paid a sum of Rs. 1,21,98,604/- till 10.01.2019 as is evident by the statement of account dated 10.01.2019 issued by the respondent.

- d. That clause 14(a) of the buyer's agreement provides that the respondent was to handover possession of the unit within a period of 36 months from the date of start of construction. The buyer's agreement provided an additional grace period of 5 months for applying and obtaining the completion certificate /occupation certificate in respect of the unit and/or the project after the period of 36 months. The said buyer's agreement provided that this period was (i) "barring force majeure conditions and (ii) subject to the Allottee having complied with all the terms and conditions of this agreement..." That the promoter has not informed them at any point of time of any force majeure conditions. That they have punctually complied with all terms and conditions of the said buyer's agreement. As per statement of account dated 10.01.2019, the start of PCC Foundation was on 14.06.2013. Thus, this is the date of start of construction. The 36 months period for completion of construction expired on 13.06.2016. The five months grace period for obtaining occupation certificate expired on 13.11.2016. The respondent did not complete the construction in time and did not offer possession of the allotted unit to the complainants within the appointed time or thereafter. Therefore, the complainants through their counsel served a notice dated 16.04.2019 upon the respondent.



- e. That clause 16(a) of the buyer's agreement provides that in case the company is not able to handover the possession of the unit within the period as stipulated hereinabove or any extended period, the allottee shall be entitled to payment of compensation @ Rs. 7.50/- per sq. ft. per month of the super area of the unit for the period of delay beyond 36+5 months or such extended periods as permitted under this agreement. However, clause 13 deals with 'delay in payments' and clause 17 deals with 'failure to take possession' provided that in case of delay or default by the allottee, he shall be liable to pay interest @ 24% per annum. Clearly, the buyer's agreement is one-sided. The terms thereof are substantially unfair, and they are harsh, oppressive and unconscionable against the complainants. A perusal of the buyer's agreement reveals stark incongruities between the options available to the respective parties.
- f. That the respondent thereafter sent a possession offer by its letter dated 04.07.2019 received by the complainants on 06.07.2019. It is dishonestly titled as 'possession reminder'. The complainants specifically state that they have not received any possession letter before the letter dated 04.07.2019.
- g. That the complainants are now not bound to take possession and have a continued legal right to seek the refund of the amounts paid along with interest and compensation. There is a failure to handover possession of the allotted flat to the complainants within the time agreed in the buyer's agreement.



- n. That section 11(4)(a) of the Act requires that the promoter shall "be responsible for all obligations, responsibilities and functions of this Act or the rules and regulations made thereunder of allottees as *per the agreement to sell...*". Section 11 (4)(a) of the Act requires that the promoter shall "be responsible for all obligations, responsibilities and functions of this Act or the Rules and Regulations made thereunder of allottees as *per the agreement to sell ...*" Section 19(4) of the Act thus makes it an entitlement of an allottee to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act from the promoter, if the promoter is unable to give possession of the apartment in accordance with the terms of agreement for sale.
- i. That the complainants had hired the respondent services for the construction of the apartment for them. The inordinate delay in handing over possession of the flat clearly amounts to deficiency of service. Certainly, the complainants cannot be made to wait indefinitely for possession of the flat allotted to them. Due to inordinate delay, the complainants have terminated the contract by notice dated 16.04.2019 and are entitled to seek refund of the amounts paid by them along with interest.
- j. That the respondent did not reply or comply with the legal notice sent by complainants. Therefore, the respondent is liable to refund a sum of Rs. 1,21,98,604/- along with interest till the date of the complaint. The complainants are entitled to claim interest @ 10.7% per annum as per rule 15 of the rules. Such interest as on



01.08.2019 i.e. the date of the complaint came to Rs. 58,84, 729/-.
The complainants are also entitled to the pendente lite and future interest at the same rate from the date of the complaint till the respondent pays the entire due amounts to the complainants.

- k. That the cause of action for filing the complaint arose in favour of the complainants and against the respondent in January 2013 when the complainants applied for allotment of a residential unit in the project being developed by the respondent. It further arose on 29.01.2013 when the respondent issued allotment letter for unit no. GGN-11-0102 in favour of the complainants. It again arose on 10.05.2013 when an apartment buyer's agreement was executed between the parties. It again arose on all such occasions when the complainants made the payments to the respondent and they issued acknowledgment-cum-receipt to complainants. It further arose on 13.11.2016 when the agreed period for delivery of possession expired. It again arose on 16.04.2019 when the complainants terminated the contract between the parties and demanded the refund of "entire amount with interest". The cause of action continues.

C. Relief sought by the complainants:

4. The complainants have sought following reliefs:

- a. Direct the respondent to refund a sum of Rs.1,21,98,604/- and interest to the complainants under section 19(4) of the Act read with rule 15 of the Rules.
- b. Direct the respondent to pay Rs.4,50,000/- as compensation for the expenses incurred by them in pursuing this complaint.



- c. Any other relief which the authority may deem fit and proper in the circumstances of the case be also granted in the interest of justice.
5. On the date of hearing, the authority explained to the respondents/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds:
- a. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement. The provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest and refund cannot be called in to aid, in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement.
- b. That the complainants were provisionally allotted apartment bearing no. GGN-11-0102, located on the 18th floor in tower no. 11, admeasuring 1650 sq. ft. approx. (super area) vide allotment letter dated 30.01.2013 along with terms and conditions stated therein.



It is pertinent to mention herein that clause 30 of the allotment letter specifically mentions that possession of the apartments shall be handed over within a period of 36 months plus five months grace period, from the date of start of construction of the project, subject to any limitations as may be provided in the buyer's agreement. The said condition, as well as others set out in the allotment letter, including timely payment of instalments and other amounts as and when demanded by the respondent, were duly understood and accepted by the complainants and the complainants undertook to abide by the same. The complainants had opted for a construction linked payment plan.

- c. That the complainants are wilful and persistent defaulters who have failed to make payment of the sale consideration as per the payment plan opted by them. The complainants have concealed the real and true facts. Even as on 13.02.2021, an amount of Rs. 17,41,888/- is outstanding and payable by the complainants to the respondent in respect of apartment booked for purchase by them.
- d. That moreover, the complainants have purchased the apartment in question as a speculative investment. The complainants never intended to reside in the said apartment and have admittedly booked the same with a view to earn a huge profit from resale of the same. This is evident from the fact that the complainants did not come forward to obtain possession of the unit in question even after receipt of offer of possession. It is submitted that the complainants were not able to find a prospective purchaser and consequently, have preferred the instant complaint in order to



evade their liabilities under the buyer's agreement. Thus, the complainants are not "allottees" under the Act but investors and accordingly, the present complaint is not maintainable at their behest.

- e. That the respondent has been prevented by reasons beyond its power and control from timely implementation and development of the project in question. That clause 16 of the buyer's agreement further provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. The respondent had submitted an application dated 31.12.2018 for issuance of occupation certificate in respect of the project before the concerned statutory authority. It is respectfully submitted that once an application is submitted before the statutory authority, the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any influence in any manner whatsoever over the same. Therefore, the time taken by the concerned statutory authority to issue an occupation certificate in



respect of the project has to be excluded from the computation of the time for implementation and development of the project.

f. That the complainants by way of instant complaint are demanding interest for alleged delay in delivery of possession. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement. It is further pertinent to mention that despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. The respondent had applied for occupation certificate on 31.12.2018. Therefore, no fault or lapse can be attributed to the respondent in the facts and circumstances of the case. The occupation certificate was eventually granted by Directorate of Town and Country Planning, Haryana, Chandigarh vide memo dated 30.05.2019.

g. That the complainants are wilful defaulters who have failed to make payment of the sale consideration as per the payment plan opted by them. Statement of account dated 13.02.2021 maintained by the respondent in due course of its business depicting delay in remittance of various payments by the complainants. It is respectfully submitted that the rights and obligations of the complainants as well as respondent are completely and entirely determined by the covenants incorporated in the buyer's agreement which continue to be binding upon the parties thereto with full force and effect. Clause 14 of the buyer's agreement provides that subject to the allottees having complied with all the



terms and conditions of the agreement, and not being in default of the same, possession of the unit would be handed over within 36 months plus grace period of 5 months, from the date of start of construction. It is further provided in the buyer's agreement that time period for delivery of possession shall stand extended on the occurrence of delay for reasons beyond the control and power of the respondent. Furthermore, it is categorically expressed in clause 14(b)(v) of the buyer's agreement that in the event of any default or delay in payment of instalments as per the schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. It is submitted that the complainants have defaulted in timely remittance of the instalments and hence the date of delivery is not liable to be determined in the manner sought to be done by the complainants.

- h. That the project of the respondent is no longer an "ongoing project" under the Act. The project had been registered under the Act and the rules. Registration certificate was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-139/2017/2294 dated 05.12.2017. It is pertinent to mention that the respondent had applied for extension of validity of registration of the project and the same had been granted by the competent authority on 02.08.2019 vide extension no. 3 of 2019. However, the extension of the validity has expired on 31.12.2019 and the respondent had already received occupation certificate on 30.05.2019. Without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainants



and without prejudice to the contentions of the respondent, it is respectfully submitted that the complaint preferred by the complainants is devoid of any cause of action. It is submitted that this hon'ble authority had granted 31.12.2019 as the date of completion of the project and the respondent had offered possession of the unit in question to the complainants vide letter dated 31.05.2019. Therefore, no lapse or fault can be attributed to the respondent in the facts and circumstances of the case. The instant complaint is nothing but a gross misuse of process of law.

i. That the respondent has already remitted an amount of Rs.3,77,963/-. It is pertinent to mention that the respondent was under no obligation to remit any amount to the complainants in the facts and circumstances of the case however the respondent had remitted the aforementioned amount to the complainants as a gesture of goodwill. The complainants have not challenged the tender of the aforesaid amount at any time and have duly accepted the same as a settlement of all the obligations and rights as per the buyer's agreement. The present complaint filed by the complainants is nothing but an abuse of process of law. The complainants by way of the instant complaint are trying to unjustly enrich themselves. Statement of account dated 13.02.2021 maintained by the respondent in due course of its business reflecting the tender of the aforesaid amount to the account of the complainants.

j. That the complainants were offered possession of the unit in question through letter of offer of possession dated 31.05.2019.



The complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to the complainants. However, instead of doing the needful the complainants have preferred the instant complaint on absolutely false and frivolous grounds in order to needlessly blackmail the respondent and mount undue pressure upon it. It is submitted that the complainants do not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the buyer's agreement and consequently in order to needlessly linger on the matter, the complainants are refraining from obtaining possession of the unit in question. The complainants are needlessly avoiding the completion of the transaction with the intent of evading the consequences enumerated in the buyer's agreement. Therefore, there is no equity in favour of the complainants.

- k. That without admitting or acknowledging in any manner the truth or correctness of the frivolous allegations leveled by the complainants and without prejudice to the contentions of the respondent, it is submitted that the alleged compensation/ interest frivolously and falsely sought by the complainants have to be construed for the alleged delay in delivery of possession. It is pertinent to note that an offer for possession marks termination of the period of delay, if any. The complainants are not entitled to contend that the alleged period of delay continued even after receipt of offer for possession. The complainants have consciously



and maliciously refrained from obtaining possession of the unit in question. Consequently, the complainants are liable for the consequences including holding charges, as enumerated in the buyer's agreement, for not obtaining possession.

1. That several allottees, including the complainants, have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualization and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is submitted that the construction of the tower in which the unit in question is situated is complete and the respondent has already obtained occupation certificate to the concerned statutory authority. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainants. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless and do not merit any consideration by this hon'ble authority. The present application is nothing but an abuse of the process of law. Thus, it is most



respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

7. An application for impleading the legal heirs of Smt. Menka Radhu complaint no.1 had been moved on 18.11.2022. The same is allowed. Copies of all the documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

E. Jurisdiction of the authority

8. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I. Territorial jurisdiction

9. 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

10. 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.

11. 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*** SCC Online SC 1044 decided on 11.11.2021 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."

13. Furthermore, the said view has been reiterated by the Division Bench of Hon'ble Punjab and Haryana High Court in "**Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021.**" The relevant paras of the above said judgment reads as under:

"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court, the Rules have to be in tandem with the substantive Act.

25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."

14. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)**, and the Division Bench of Hon'ble Punjab and Haryana High Court in "**Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of**



India and others. (supra), the authority has the jurisdiction to entertain a complaint seeking refund of the amount paid by allottee alongwith interest at the prescribed rate.

F. Findings on the objections raised by the respondent

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act and provisions of the Act are not retrospective in nature

15. The respondent contended that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement 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 respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.
16. 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)* 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 buyer's 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 the Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature.

F.II Objection regarding exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

19. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 31.12.2018 and thereafter vide memo no. ZP-835-AD(RA)/2018/13010 dated 30.05.2019, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 30.05.2019 that an incomplete application for grant of OC was applied on 31.12.2018 as fire NOC from the competent authority was granted only on 19.03.2019 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 22.03.2019. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 19.04.2019 and 22.04.2019 respectively. As such, the application



submitted on 31.12.2018 was incomplete and an incomplete application is no application in the eyes of law.

20. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. In the present case, the respondent has completed its application for occupation certificate only on 22.04.2019 and consequently the concerned authority has granted occupation certificate on 30.05.2019. Therefore, in view of the deficiency in the said application dated 31.12.2018 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

F.III Objection regarding entitlement of DPC on ground of complainants being investor

21. The respondent contended that the complainants are the investors and have booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. Therefore, the complainants are not "allottee" or home buyer under the Act but "investors" and thus the present complaint is not maintainable.
22. The authority observed 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 preamble cannot be used to defeat the enacting provisions of the Act.



Furthermore, it is pertinent to note that under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are allottees/buyers and they have paid total price of Rs. 1,26,51,435/- to the promoter towards purchase of the said unit 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;"

23. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainants, it is crystal clear that the complainants are allottee(s) 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. 000600000010557 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 an investor is not entitled to protection of this Act stands rejected.

G. Findings on the relief sought by the complainants

G.I Refund entire amount paid by the complainants along with the interest.

24. The counsel for the complainants' states that the due date for handing over of possession was 14.06.2016 excluding grace period. The OC for the unit was received on 30.05.2019. The complainants chose to withdraw from the project on 16.04.2019 i.e. after the due date of possession and before the OC. Therefore, full refund of the amount deposited may be allowed alongwith interest.
25. The counsel for the respondent states that the complainants are defaulters and the due charges outstanding may be deducted from the refund amount in case allowed. Interest, if any, may be allowed from the date of legal notice.
26. In the present complaint, 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 prescribed rate as per provisions of section 18 of the Act. Section 18(1) of the Act is reproduced below for ready reference:

"Section 18: - Return of amount and compensation

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

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

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

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest



at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

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

(Emphasis supplied)

27. Clause 14 of the buyer's agreement provides for the handing over of possession and is reproduced below for the reference:

"14. POSSESSION

(a) Time of handing over the possession

*Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee(s) having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit **within 36 (Thirty Six) months from the date of start of construction**; subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of **5 (five) for applying and obtaining the completion certificate/occupation certificate** in respect of the Unit and/or the Project. *(Emphasis supplied)"**

28. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 5 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 14.06.2013 as per statement of account dated 13.02.2021. The period of 36 months expired on 14.06.2016. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the time limit (36 months) prescribed by the promoter in the buyer's agreement. The promoter has moved the application for issuance of



occupation certificate only on 31.12.2018 when the period of 36 months has already expired. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, the benefit of grace period of 5 months cannot be allowed to the promoter at this stage. Therefore, the due date of handing over possession of the subject unit comes out to be 14.06.2016.

29. Section 18(1) of the Act is applicable only in the eventuality where the promoter fails to complete or is unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate but the complainants-allottees have been requesting the promoter for refund of their amount even before the OC was obtained as unit was not ready at that time when they sought refund. The due date of possession as per the agreement for sale as mentioned in the table above is 14.06.2016 and there is a delay of 3 years 2 months 12 days on the date of filing of the complaint. Although the complainants-allottees in this case have filed the present complaint on 26.08.2019 after possession of the unit was offered to them after obtaining occupation certificate by the promoter but the allottee has earlier opted/wished to withdraw from the project vide letter dated 16.04.2019 [enclosure C4, page 72 of complaint] which is after the lapse of due date of possession. The request of the complainants-allottees met with deaf ears and promoter failed to refund the amount along with interest even after the right of allottee to claim such refund of an amount paid with interest at prescribed rate from the promoter under section 19(4) of the Act and



the promoter was obligated under section 18(1) to return the amount along with interest at prescribed rate on demand to the allottee and allottee having clearly wished to withdraw from the project on account of promoter's failure to complete and unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein.

30. Keeping in view the fact that the 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.
31. 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....."

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

33. The promoter is 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 agreement for sale under section 11(4)(a) of the Act. 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.
34. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
35. **Admissibility of refund at prescribed rate of interest:** Section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the respondent shall refund of the



amount paid by the allottee 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."

36. 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.
37. 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., **14.02.2023** is 8.60%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.60%.
38. The authority hereby directs the promoter to return the amount received by it i.e., Rs. 1,26,51,435/- with interest at the rate of 10.60% (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 rules ibid.

G.II Compensation of an amount of ₹ 4,50,000/-



39. The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled to claim compensation 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 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. Therefore, the complainants are advised to approach the adjudicating officer seeking the relief of compensation.

H. Directions of the authority

40. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoter as per the functions entrusted to the authority under section 34(f):
- i. The respondent/promoter is directed to refund the entire amount of Rs. 1,26,51,435/- paid by the complainants along with prescribed rate of interest @ 10.60% p.a. as prescribed under rule 15 of the rules from the date of each payment till the 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 the full realization of paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottees-complainants.

41. Complaint stands disposed of.

42. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.02.2023


HARERA
GURUGRAM