

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

Complaint no. : 5977 of 2019

First date of hearing: 03.01.2020

Order pronounced on: 23.02.2023

Mr. Aniket Rohit,
R/o: - 730, First Floor,
Sector-21, Pocket E,
Gurugram, Haryana-122018.

Complainant

Versus

1. M/s Bright Buildtech Private Limited.

Regd. Office at: - Flat No. 14, Ground Floor,
Pul Pehlad Pur, DDA MIG Suraj Apartment,
New Delhi-110044.

2. M/s Lotus Green Developers Pvt. Ltd.

Regd. Office at: - Lotus Business Park,
Level 7, Tower-B, Plot No. 8, Sector-127,
Noida Expressway, Noida-201304(U.P).

Respondents

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Sh. Pravin Kumar (Advocate)

Complainant

Shri Deeptanshu Jain (Advocate)

Respondents





ORDER

1. The present complaint dated 11.12.2019 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 provision of the Act or the Rules and regulations made thereunder or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the 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	'Woodsvview Residencies', sector-89-90, Gurugram
2.	Nature of project	Residential plotted colony
3.	RERA registered/not registered	34 of 2020 dated 16.10.2020
4.	DTPC License no.	59 of 2013 dated 16.07.2013
5.	Validity status	15.07.2021



6.	Name of licensee	Orris Land & Housing Pvt. Ltd. & 42 Ors.
7.	Licensed area	100.081 Acres
8.	Unit no.	B-43, first floor [as per buyer's agreement on page no. 58 of complaint]
9.	Unit measuring	1090 sq. ft. [as per buyer's agreement on page no. 58 of complaint]
10.	Date of allotment	17.07.2015 (as per Annexure- P2 on page no. 55 of complaint)
11.	Possession clause in application form	5. Possession 5.1 Subject to Clause 5.2 and subject to buyers making timely payment, the company shall endeavor to complete the construction of the building block in which the dwelling unit is situated within 36 months with a grace period of 06 months from the date of issuance of allotment letter,

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		provided that all amounts due and payable by the buyer has been paid to the company in timely manner. The company shall be entitled to reasonable extension of time for the possession of the dwelling unit in the event of any default or negligence attributable to the buyer's fulfillment of terms & conditions of this agreement.
12.	Date of execution of Apartment agreement	02.09.2015 (as alleged by buyer's complainant and admitted by respondent)
13.	Due date of possession	17.01.2019 (as per allotment letter) (grace period of 6 months is allowed being unqualified)
14.	Total sale consideration	83,95,137/- (as per payment plan on page no. 103 of complaint)
15.	Basic Sale Price	Rs. 78,48,000/-

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		[as per payment plan on page no. 103 of complaint]
16.	Total amount paid by the complainant	Rs.17,30,760/- (as per applicant ledger on page no. 94 of complaint)
17.	Occupation certificate	Not Received
18.	Offer of possession	Not offered
19.	Delay in handing over the possession till date of filing of the complaint i.e., 11.12.2019	10months, 24 days

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That the respondents are engaged in the business of real estate development in the residential housing and commercial sector. The complainant vide application form dated 27.07.2015, applied for a residential flat in its project namely, "Woodview Residences", situated at Sectors - 89 and 90, Village- Hayatpur, Gurgaon, Haryana and paid a sum of Rs. 1,11,000/- (Rupees One Lakh Eleven Thousand only) vide cheque no. 222659, dated 27.06.2015 to the respondents and the same was duly acknowledged by them vide its receipt bearing No. 2100000701 dated 17.07.2015.

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- II. That thereafter, the complainant paid a sum of Rs. 6,89,000/- (Rupees Six Lakhs Eighty-Nine Thousand only) vide four separate cheques in respect of the said unit and the same was duly acknowledged by the respondents.
- III. That pursuant to the aforesaid application, the respondents, vide allotment letter bearing booking reference no. WR0277 dated 17.07.2015, allotted a residential flat bearing No. B-43, first floor, admeasuring 1090 sq. ft., in the said project, for a total consideration of Rs. 83,95,137/- including preferential location cost (PLC), Club Membership, and other charges on the terms and conditions as mentioned therein.
- IV. That thereafter, the respondents issued a letter dated 02.09.2015 for execution of buyer's agreement in respect of the said flat and in pursuant thereto a buyer's agreement dated 02.09.2015 was executed between the parties in respect of the said flat and on the terms and conditions contained therein.
- V. That the respondents also issued a letter bearing no. LG/GGN/CRM/WR0277-210191 dated 22.12.2016, whereby advised the complainant to avail the loan facility from HDFC Limited or any such housing finance company that has approved its project under subvention scheme and the respondents shall pay the Pre-EMI interest to such housing finance, during the subvention period of 24 months or offer of possession of the said flat for fit-out, whichever is earlier. In the said letter, it was also mentioned that, in the event the aforesaid offer of possession is delayed beyond 24 months, the respondents considering good relationship with the complainant, will extend its payment of Pre-

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EMI interest to housing finance till the date of offer of possession for fit-out to the complainant. But the said Pre-EMI payments were stopped by the respondents after August 2018 and there is no update on next payment schedule.

- VI. That the complainant has made a total payment of Rs. 17,30,760/- to the respondents against the allotment of the said flat, including other charges, as per payment plan and in compliance with the invoices raised by the respondents from time to time, and the payments were acknowledged by the respondents vide receipts.
- VII. That the complainant kept calling, time and again, the respondents on telephone and even visited personally for the clarifications and for taking over possession of the said flat, but the respondents kept on dilly delaying the matter without any fault of the complainant. Even he exchanged various communications with the respondents regarding handing over possession of the said flat. But on each and every occasion, the respondents failed to hand over the possession of the same to the complainant.
- VIII. That as per clause 5.1 of the said buyer's agreement, the respondents shall endeavour to complete the construction of the said flat within 36 months, with a grace period of 6 six months from the date of allotment of the said flat. As such, the complainant was entitled for possession of the said flat on or before 16.01.2019, including the grace period of 6 months.
- IX. That the complainant visited the said project to find out the status of the said flat, but to his utter surprise, he found that the construction of the said project still stopped. The complainant felt

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that the respondents are not in position to start construction of the said project. He applied to allotment of the said flat with his hard-earned money and from time to time requested the respondents to hand over possession of the said flat. But on each and every occasion, the respondents were silent and only grabbed the money from the complainant with the dishonest and malafide intention. Moreover, the construction work in the said project was stopped since 2017 and the said project is not even 30% complete till date.

- X. That it is evident from the above that the respondents have misappropriated and embezzled the complainant's hard-earned money of Rs. 17,30,760/- and has caused wrongful gain to themselves and thus have caused wrongful loss to the complainant. Thus, the respondents are liable to pay exemplary damages besides being prosecuted for offence of cheating being committed by them. Apart from the aforesaid amount, the respondents are liable to compensate for mental agony harassment and financial losses suffered by complainant on account of the aforesaid act.
- XI. That since the respondents have breached the terms of the allotment in handing over possession of the said flat, the complainant is no more interested in the said flat and to wait for the possession indefinitely. Hence, the complainant is entitled to seek refund of the amount paid to the respondents under sec 18(1) of the Act of 2016, subject to Rule 15 of the Haryana Real Estate (Regulation and Development) Rules 2017.

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C. Relief sought by the complainant:

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

I. To refund the entire amount of Rs. 17,30,760/- (Rupees Seventeen Lakhs Thirty Thousand Seven Hundred and Sixty only) along with prescribed rate of interest.

5. On the date of hearing, the authority explained to the respondent/promoters 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 respondents.

6. The respondents have contested the complaint by way of reply dated 23.08.2021 on the following grounds: -

(i) That the respondents are engaged in the business of construction and development of real estate projects and carved a niche in the real estate sector.

(ii) That the complaint filed is not maintainable in the present form, unless the complaint is modified to meet the required criteria as specified under the RERA rules & regulations. The same is also not filed in the correct prescribed form i.e. form 'CAO', before the Ld. Adjudicating Officer, HRERA. In view of these technical objections, the present complaint originally filed under the old format of form 'CRA' is not maintainable, unless the same is modified/amended/re-filed in 'Form-CAO' before the Ld. Adjudicating Officer to meet the requirements of the law.

(iii) That the present complaint is baseless and frivolous and the complainant is guilty of concealment of material facts and has approached this Hon'ble Court with unclean hands. It is

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the settled law that a party who approaches the court with unclean hands, disentitles itself from any relief whatsoever, as such the present complaint deserves dismissal with exemplary costs.

- (iv) That the captioned complaint pertains to refund alongwith interest for a grievance under section 12, 18 and 19 of the Act of which is required to be filed in Form-CAO' before the court of Ld. Adjudicating Officer under Rule-29 of the Haryana Real Estate (Regulation & Development) Rules, 2017 read with section 31 and section 71 of the said Act and not before this Hon'ble Regulatory Authority under Rule-28.
- (v) That the complainant had approached the respondents for allotment of 'dwelling unit' in the project named "Woodsvine Residencies", situated in sectors 89 & 90, Gurugram, Haryana and a dwelling unit was provisionally allotted to him bearing unit no. B-43, first floor in the said project against advance booking amount of Rs.8,00,000/- towards the total consideration of Rs.83,95,137/- including basic sale price plus EDC, IDC charges plus club members fee plus interest free maintenance security.
- (vi) That a buyer's agreement was executed between the parties on 02.09.2015, as per which the possession of the 'dwelling unit' was to be given in terms of Clause 5.1 & 5.2 of the said agreement.
- (vii) That the complainant was required to pay the due installments as per the payment schedule in respect of the said dwelling unit. However, the payment schedule was never adhered to by the complainant. Pertinently, the respondent no. 1 issued demand notes and reminder letters to the complainant on several occasions

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calling upon him to make the timely payment of the due installments.

(viii) That the respondent no. 1 i.e., Bright Buildtech Pvt. Ltd. has appointed M/s. Ace Mega Structures Private Limited as 'development manager' for development, construction, sales and marketing of the project vide 'development management agreement' dated 23.05.2019 only with the objective of ensuring expeditious development of the project and to provide professionally proficient customer-care interaction.

(ix) That the respondent no. 1 i.e. Bright Buildtech Pvt. Ltd. has launched 420 number of independent floors to be constructed on 140 plots. Out of which 258 floors/units were sold by the company till date. The chronology of the project is summarized hereinbelow as follows:

- a) M/s. Orris Infrastructure Private Limited ("Orris") in collaboration with M/s. Bright Buildtech Private Limited ("Bright") and other landowners had filed an application with the Director, Town and Country Planning Haryana ("DTCP") for issuance of a license in favour of Orris for development of a township of 101.081 acres in sector-89-90, Gurugram and the same was issued in favour of Orris bearing licence no. 59 of 2013 dated 16.07.2013. Thereafter, M/s. Bright Buildtech Private Limited and M/s. Orris Infrastructure Private Limited entered into an agreement dated 18.05.2013 whereby, Orris has transferred development rights of 50% in the subject land to Bright.

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- b) "Bright" has also applied for registration of the project under RERA on 28.11.2019 which is pending for approval and hearing for this application is fixed for 22.02.2021.
- c) State Environment Impact Assessment Authority, Haryana has issued environment clearance for above said township and separately a forest NoC has been issued by Dy. Conservator of Forests, Gurgaon, Haryana
- (x) That the respondent no. 2 i.e., Lotus Greens Developers Pvt. Ltd. now known as "Broad Homes Private Limited" is only the group company of the respondent no.1 and has initially marketed the project which is being developed by the respondent no. 1 and there is no privity of contract between the respondent no.2 and the complainant. The respondent no. 2 does not owe any responsibility whether contractual or otherwise, so far as the completion and delivery of the units in the project is concerned, as such, the name of the respondent no. 2 should be deleted from the array of parties.
- (xi) That the said project of respondent no. 1 was reasonably delayed because of 'force majeure' situation which is beyond the control of the respondent no. 2 as the respondent no. 2 has filed the application for change of developer ('COD') with the concerning Authority Director General, Town and Country Planning (DGTCP) for the inclusion of the name of the 'co-developer' i.e., 'Bright Buildtech Pvt. Ltd.', which is pending adjudication before the concerned authority. However, despite all odds, still, the respondent no. 2 alongwith development manager 'Ace' made all the efforts to complete the construction work at project site at full pace and is expecting to handover the possession very soon.

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(xii) That the delay in handing over the possession of the dwelling unit/ apartment has been caused due to the exponential increase in the cases of 'Covid-19', due to which the Central Govt. had imposed nationwide lockdown. However, due to the sudden outbreak of the pandemic and closure of economic activities, the respondent no. 2 had to stop the construction work during the lockdown. Other various challenges being faced by the respondents are submitted for the kind consideration of this Hon'ble Court;

- a) Non-booking of all apartments seriously affected the construction and several allottees of the project either defaulted in making payment of the instalment or cancelled booking in the project, resulted in less cash flow to the respondent no. 1, henceforth, causing delay in the construction work of the project.
- b) Lack of adequate sources of finance.
- c) Shortage of labour.
- d) Rising manpower and material costs.
- e) Approvals and procedural difficulties.

(xiii) The table concluding the time period for which the construction activities in the project was restrained by the orders of competent authority/court are produced herein below as follows:

S.No.	Court/Authority & Order Date	Title	Duration
1.	National Green Tribunal- 08.11.2016	Vardhman Kaushik vs Union of India	08.11.2016 to 16.11.2016



	10.11.2016		
2.	National Green Tribunal 09.11.2017	Vardhman Kaushik vs Union of India	Ban was lifted after 10 days
3.	Press Note by EPCA	Press Note- 31.10.2018	01.11.2018 to 10.11.2018
4.	Hon'ble Supreme Court- 23.12.2018	Three-day ban on industrial activities in pollution hotspots and construction work	23.12.2018 to 26.12.2018
5.	EPCA/Bhurelal Committee Order- 31.10.2018	Complete Ban	01.11.2019 to 05.11.2019
6.	Hon'ble Supreme Court 04.11.2019-14.02.2020	M.C Mehta vs Union of India, Writ Petition(c) no. 13029/1985	04.11.2019 to 14.02.2020
7.	Government of India	Lockdown due to Covid-19	24.03.2020 to 03.05.2020
8.	Government of India	Lockdown due to Covid-19	8 weeks in 2021
	Total		37 weeks (approximately)

(xiv) That in view of the above facts and circumstances the demands of the complainant for refund of the amount paid is baseless and the same cannot be allowed under any situation. It is respectfully submitted that whenever the construction activity has stopped at the project site, it is due to the above-said reasons of 'force-majeure' beyond the control of the respondents. If such prayers are allowed, the same will materially affect the construction works at site, besides the interests of all the other allottees who have booked flats in the said project. It is relevant to point out herein that at

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present, the respondents are focusing on the completion and delivery of the said project. The monies received from the allottees have been utilized in the construction activity and thus there is no justification in the demand for refund. It is noteworthy to mention that the project of the respondent no. 1 is at advance stage of construction and is completed to the extent of 70%.

(xv) That the complainant had applied for the allotment of the dwelling unit as investment and not for personal use, which fact is abundantly clear and evident from his conduct. It is submitted that the complainant has invested in the unit with intent to have monetary gains by way of reselling the unit to a higher bidder at an appreciated value. Thus, in view of the constant precedents upheld by various Real Estate Regulatory Authorities across the country, the present complaint is not maintainable wherein, it is held unanimously that the investors of real estate projects are not entitled to relief from Real Estate Regulatory Authority.

(xvi) That the instant complaint is not maintainable keeping in view the facts, circumstances and law relating thereto. It is further submitted that the complainant has failed to produce any evidence or specific averments worth its salt to prove its claims. Moreover, there is no quantification of claims as sought for by the complainant under prayer/compensation sought clause, and therefore, the instant complaint is liable to be dismissed at the threshold. It is further submitted that the complainant has filed the captioned frivolous complaint with false averments, only with a malafide intention to make illegal enrichment at the cost of the

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respondents. Since the captioned complaint is filed without any cause of action, the same is liable to be dismissed at the outset.

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 respondents have raised a preliminary submission/objection that 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-

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(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 complainant 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

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'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.I Objection regarding maintainability of complaint.

13. The objection of respondents that application regarding refund should be filed in the 'Form CAO' before the Adjudicating Officer and not before the Authority in 'Form CRA' stands rejected keeping in view of the judgement of Hon'ble Supreme Court in case titled as *M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. 2021-22(1) RCR (C), 357*, and the authority is proceeding further in the matter where allottee wishes to withdraw from the project and the

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promoter has failed to give possession of the unit as per agreement for sale irrespective of the fact whether application has been made in form CAO/ CRA. The Hon'ble Supreme Court in case of *Varun Pahwa v/s Renu Chaudhary, Civil appeal no. 2431 of 2019 decided on 01.03.2019* has ruled that procedures are hand made in the administration of justice and a party should not suffer injustice merely due to some mistake or negligence or technicalities. Accordingly, the authority is proceeding further to decide the matter based on the pleading mentioned in the complaint and the reply received from the respondents and submissions made by both the parties during the proceedings.

F.II Objections regarding the complainant being investor.

14. The respondents have taken a stand that the complainant is an investor and not consumer, therefore, is not entitled to the protection of the Act and thereby not entitled 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 consumer 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 consumer of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant

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is buyer and has paid total price of **Rs.17,30,760/-** to the promoter towards purchase of 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;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement cum provisional allotment letter executed between promoter and complainant, it is crystal clear that he is an allottee as the subject unit 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.

F.III Objections regarding the circumstances being 'force majeure'

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15. The respondents have taken an objection that the project was delayed because of the 'force majeure' situations like outbreak of Covid-19, ban on construction by competent authorities, delay on part of govt. authorities in granting approvals and other formalities, non-booking of apartments, lack of adequate source of finance, shortage of labour, shortage of bricks and water, demonetization policy by central govt. etc which were beyond the control of respondents. Therefore, as per the grounds mentioned above, the authority grants a grace period of 6 months to the respondents for handling over the possession of the said unit as per possession clause 5.1 of the buyer's agreement and which is allowed. Hence, the due date for handling over the possession of the said unit after granting a grace period of 6 months comes to 17.01.2019.

G. Findings on the relief sought by the complainant.

G.I To refund the entire amount of Rs. 17,30,760/- paid by the complainant with prescribed rate of interest.

16. 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

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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)

17. As per possession clause 5.1 of the apartment buyer's agreement annexed in complaint provides for handing over of the possession and the same is reproduced below:

"5. POSSESSION OF THE DWELLING UNIT

5.1 Subject to Clause 5.2 and subject to buyers making timely payment, the company shall endeavor to complete the construction of the building block in which the dwelling unit is situated within 36 months with a grace period of 06 months from the date of issuance of allotment letter, provided that all amounts due and payable by the buyer has been paid to the company in timely manner. The company shall be entitled to reasonable extension of time for the possession of the dwelling unit in the event of any default or negligence attributable to the buyer's fulfillment of terms & conditions of this agreement."

18. The authority has gone through the possession clause of the agreement and observations of the authority are given below.
19. 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

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of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

20. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 17.07.2018, alongwith a grace period of 6 months. On consideration of the circumstances, the documents, submissions and based on the findings of the authority, the authority allows the grace period of 6 months being unqualified. Therefore, the due date of handing over possession is 17.01.2019.
21. **Admissibility of refund along with interest 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

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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.

22. 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.
23. 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., 28.02.2023 is **08.70%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%**.
24. The authority has further, observes that even after a passage of more than 7 years (i.e., from the date of allotment till date) neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoters. 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

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consideration. Further, the authority observes that there is no document placed on record from which it can be ascertained that whether the respondents have 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.

25. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondents/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....."

26. 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."


27. 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 allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by respondents/promoter in respect of the unit with interest at such rate as may be prescribed.
28. 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 him 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*.

H. Directions of the authority

29. 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 respondents/promoter are directed to refund the amount received by them i.e., Rs.17,30,760/- from the complainant alongwith 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, after adjusting the amount paid by respondent under subvention scheme from the above refundable amount.
 - ii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.
30. Complaint stands disposed of.
31. File be consigned to registry.

v.l - 
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.02.2023