

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

Complaint no. : 230 of 2020
First date of hearing: 20.02.2020
Date of decision : 23.02.2023

1. Mr. Gunjan Chawla
2. Mrs. Esha Chawla

R/o: - H. No. 43, First Floor, Residency Green, Sector- 46,
Gurugram- 122001

Complainants

Versus

1. M/s Lotus Green Developers Private Limited.
Regd. office: Lotus Business Park, Level-7, Tower- B, Plot
No. 8, Sector- 127, Noida, U.P. – 201304
2. M/s Bright Buildtech Private Limited.
Regd. office: D-107, Panchsheel Enclave- 1, New Delhi-
110017

Respondents

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Sh. Shiv Mishra (Advocate)
Sh. Deeptanshu Jain (Advocate)

Complainants
Respondents

ORDER

1. The present complaint dated 29.01.2020 has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations,

responsibilities and functions under the provisions of the act or the rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project details

2. The particulars of unit, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"Woodview Residences", Sector 89-90, Gurugram, Haryana
2.	Nature of the project	Plotted Colony
3.	Area of the project	101.081 acres
4.	DTCP License	59 of 2013 dated 16.07.2013
	valid up to	15.07.2021
	Licensee name	Orris Land & Housing Pvt. Ltd. and 42 others
5.	RERA registered/ not registered	Registered vide no. 34 of 2020 dated 16.10.2020
	Valid up to	15.07.2023
6.	Unit no.	C-40, First floor, pocket-2, (Page no. 61 of the complaint)
7.	Total area admeasuring	1740 sq. ft. (Page no. 61 of the complaint)
8.	Allotment Letter	21.05.2015 (Page no. 56 of the complaint)

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9.	Date of execution of buyer's agreement	12.09.2015 (Page no. 59 of the complaint)
10.	Possession clause	5. POSSESSION OF DWELLING UNIT 5.1 Subject to Clause 5.2 and subject to the Buyer Making timely payments, 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 6 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"
11.	Due date of delivery of possession	25.11.2018 (Calculated from date of allotment letter dated 25.05.2015 + 6 months) (Grace-period allowed)
12.	Total consideration	Rs.1,18,15,702/- (Page no. 57 of the complaint)
13.	Total amount paid by the complainants	Rs.39,46,172/ (As per on Information regarding complaint on page 20 of complaint)

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14.	Date of offer of possession	Not offered
15.	Occupation certificate	Not obtained
16.	Legal notice send by the allottee	12.11.2019 (Page no. 104 of the complaint)
17.	Delay in handing over the possession till date of filing complaint i.e., 29.01.2020	1 year 2 months and 4 days

B. Fact of the complaint

3. The complainants have made the following submissions: -

- I. This complaint is preferred under section 31 read with section 18 of the Act, 2016 for the benefit of the complainants, who are buyers in a residential real estate project. By way of this complaint, the complainants seek the relief of refund contemplated under section 18 i.e., the refund of the entire amount of Rs.39,46,172/- along with Interest on EMI loan default deposited towards the total consideration of Rs.1,18,15,702.13/-, the units "C-40-FF" with interest of 12% p.a. in the project 'Wood view Residences' sector 89 & 90, Gurgaon (Haryana).
- II. That as per clause 5.1 of the builder buyer's agreement, possession of the dwelling unit was to be delivered by the respondent/promoter within thirty-six months (36) (including a further six (6) months grace period) from the date of issuance of the allotment letter.

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- III. That the date for giving possession has expired for the complainants in dwelling unit and the project is still at the stage of skeletal structure even after expiration of 6 years of the launch of the project. The complainants have paid allotment money of Rs.8,00,000/- towards the price of the dwelling unit pursuant to the representations made by the respondents and in total Rs.52,68,687/- including interest on EMI loan default by them. The entire episode and dealings with the respondents have caused much anguish and frustration to the complainants and can no longer afford to wait and are forced to seek a refunded of the entire principal amount paid along with 12% interest p.a. compounded annually.
- IV. That the balance of convenience lies in favour of the complainants who invested his hard-earned savings with the respondents. Thus, the complainants humbly request this authority to allow the complaint.
- V. That the complainants are aggrieved by the deficiency of service and unfair trade practices adopted by the respondents. They have grossly aggrieved by the act of the respondents of not starting with the construction of the property/dwelling units even after expiration of the time for delivering such possession.
- VI. They have invested life savings to make payments to the respondents. The failure of the respondents to deliver possession of the units (which are currently languishing at the stage of incomplete skeletal

12

structures) has caused immense pressure and financial burden on the complainants.

VII. That the unfair trade practices of the respondents are evident from the fact that if allottees defaulted in making payments of any installments, the same would have invited forfeiture and cancellation at the option of respondent/promoter.

VIII. That the facts which make the filing of the present complaint necessary are enumerated herein below.

- That the respondents launched the project in the name of 'Wood view Residence' in 2013-14 and offered to public at large to apply for residential units.
- That the complainants and the other allottees were influenced by the advertisement and assurance regarding the delivery period and quality of the project were allured by the respondents to apply for the units in the project of the respondents.
- That the complainants had applied for booking an independent floor measuring 239.20 sq. yards. /200 sq. mts. bearing unit no. C-40-FF vide allotment letter dated 21.05.2015.
- That the builder buyer's agreement dated 12.09.2015 was executed between the parties with respect to said unit. In terms of clause 5.1 of the builder buyer agreement, the respondents were to deliver possession of the aforesaid unit within a period of

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36 months with a grace period of 6 months from the date of issuance of the allotment letter i.e., 21.05.2015.

- That the complainants made timely payment perfectly in accordance with the payment plan. In total a sum of Rs.39,46,172/- out of the total sale price of Rs.1,18,15,702/- has already been paid. This amount includes a payment of Rs.10,00,000/- made at the time of booking on 09.04.2014.
- That aggrieved by the lack of progress in the project even after the due date of the completion of the project, the complainants sent legal notices to both the respondents.
- That the respondents have grossly failed to deliver possession to the complainants. The dwelling units in the project are languishing at the stage of skeletal structures, and that the non-completion of the project is not attributable to any circumstance provided for the force majeure clause of the builder buyer's agreement.
- That the respondents have breached the terms of the agreement entered into with the complainants and failed to deliver the unit by the agreed possession date. The conduct, deficiency of service and unfair trade practices employed by the respondents have caused harassment and immense mental agony to the complainants and they are entitled to refund of the total amount

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deposited including interest On EMI Loan Default by them. along with an interest of 12% p.a. from the date of deposits/payments.

IX. That the respondents being the builder and marketer respectively are enjoying the substantial amount of consideration paid by the complainants and other allottees of the project. On the other hand, they after having paid substantial amount of consideration towards the unit are still empty handed. They have wasted several years in attempting to purchase a home and has also lost out on other interest yielding investments.

X. That the cause of action arose when the respondents failed to handover the possession of the unit as agreed upon. The cause of action is a continuous one and continues to subsist as the respondents have not redressed the grievances of the complainants.

C. Relief sought by the complainant:

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

I. Direct the respondent to refund Rs.39,46,172/ paid by the complainants along with interest @ 12% and excluding amount EMI loan defaulted.

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 on the following grounds.



- I. That the respondent no.1, i.e., Lotus Greens Developers Pvt. Ltd. (presently. known as "Broad Homes Private Limited") is only the group company of the respondent no. 2 and has initially marketed the project which is being developed by the respondent No. 2. It is pertinent to mention that there is no privity of contract between the respondent no. 1 and the complainants, and it does not owe any responsibility whether contractual or otherwise, so far as the completion and delivery of the units in the project is concerned. Hence, the name of the respondent no.1 be deleted from the array of parties.
- II. That the respondent No.2 (Bright Buildtech Pvt. Ltd.) which is a group company of the respondent no.1 is developing the project namely "Wood view Residences" on its share in the project land admeasuring 101.081 acres situated at revenue estate of village Hayatpur, Sector 89 and 90, Gurugram. It is pertinent to mention that the respondent no.2 has appointed M/s. Ace Mega Structures Private Limited (hereinafter referred as "Ace") as development manager for development, construction, sales and marketing of the project vide development management agreement' dated 23.05.2019 with the objective of ensuring expeditious development of the project and to provide professionally proficient customer-care interaction. The role and responsibility of 'Ace' was restricted to manage and supervise the construction and development of the said project and to ensure



timely completion. The status of 'Ace' is purely that of a service provider who shall receive a fee as consideration for providing project management and development services to the respondent.

- III. That at the time of submitting the application, they were provisionally allotted 'dwelling unit no. C-40, FF, at the basic sale price plus EDC, IDC charges plus club members fee plus interest free maintenance security totalling to Rs.1,18,15,702.13/-.
- IV. That the complainants at the time of submission of the application form opted for 'construction linked payment plan' and the detailed payment plan in respect of the said dwelling unit was sent to them along with allotment letter dated 21.05.2015. At the time of booking of the said dwelling unit, they had also paid the booking amount of Rs.10,00,000/-. Accordingly, the respondent /promoter had issued a payment acknowledgment receipt in respect of the receipt of the booking amount.
- V. That the complainants were required to pay the due installments as per the payment schedule, in respect of the said unit, however, the payment schedule was never adhered to by the complainants. Pertinently, the respondent/promoter issued demand notices and reminder letters to the complainants on several occasions calling upon them to make the timely payment of the due installments. Later, on 12.09.2015, builder buyer agreement was executed and copy of the said agreement was sent to the complainants for their record.



VI. However, to the shock and surprise of the respondents, the complainants sent a legal notice dated 12.11.2019, calling upon the respondents to refund the complete amount along with interest @12% p.a. The respondent/promoter has duly informed the complainants that such arbitrary demands cannot be entertained, and the allotment cannot be cancelled, as the amount paid has already been utilized in the construction of the said project. Furthermore, the said aspect was duly discussed with the complainants, and it was informed that the respondent/promoter is not in a position to entertain the request of cancellation and refund and therefore, they should make the timely payment of the installments overdue. Even then, the complainants remained negligent and neither fulfilled their part of contract nor paid the instalment, as per the agreed payment plan.

VII. That the complainants are at fault in not making timely payment of due instalments and the construction of the said project became delayed. Non- payment of the instalments by the allottees is a force majeure' circumstance. Furthermore, the other reasons for delay in project are stoppage of construction activities in NCR region by the orders of Court, non-availability of construction material and labour, implementation of nationwide lockdown' to contain the spread of 'Covid-19', etc. Moreover, all these situations and adverse conditions





are 'force majeure' circumstance beyond the control of the respondents.

- VIII. That the complainants are well aware of the fact that the respondent /promoter has appointed the development manager 'Ace Mega Structures Pvt. Ltd.' for construction and completion of the said project. The respondent/promoter vide letter dated 03.10.2019 informed them about the appointment of the "development manager" who are responsible for all activities including the construction and sales of the project as per the development management agreement (DMA) dated 23.05.2019.
- IX. That the said project was reasonably delayed because of 'force majeure' situation beyond the control of the respondent/promoter. The respondent/promoter has filed the application for change of developer (COD) with the concerned authority i.e., 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/ promoter along with development manager 'Ace' is making all efforts to complete the construction work at project site at full pace and is expecting to handover the possession very soon, once the present situation of pandemic 'Covid-19' gets over and situation normalizes.

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X. That due to the exponential increase in the cases of 'Covid-19', the Central Government imposed nationwide lockdown' w.e.f. 25.03.2020 which was extended till 30.06.2020, and resultantly the same is causing serious impact on the economy posing difficult challenges for everyone. It is pertinent to mention that prior, to this unprecedented situation of pandemic Covid-19', the respondent no.2 along with the development manager had been carrying out the construction of the project at full pace and was expecting to deliver the units to the buyers by the end of year 2020. However, due to the sudden outbreak of the pandemic and closure of economic activities, the respondents too were experiencing the liquidity crunch, as such, amid, this difficult situation of 'force majeure' they were not in a position to adhere to the arbitrary demands of the complainants for cancellation of the allotment and refund of the monies along with interest due the reasons mentioned hereinabove. Although, considering the seriousness of the situation and prevailing circumstances caused due to implementation nationwide lockdown, the Government of India has already extended the project completion deadlines by 6 months from the commencement of lockdown period. Therefore, it was expected to complete the entire project within the extended time period and deliver the flat/ unit to the complainants very soon.



- XI. That the natural life cycle was about to come back on track which was derailed in March 2020 and the sudden outbreak of second wave of pandemic of COVID in April 2021 in the nation made the situation worst from worse and the country once again was under the grip of COVID and subsequently. lockdown was imposed in the country all over once again. It is further submitted that the second wave caused severe damage to the economy and real estate sector being no exception was hit the worst.
- XII. That other than the above reasons, there was delay in handing over of the possession of the allotted unit due to the various reasons which were beyond the control of the respondent no. 2. Following important aspects are relevant submitted for the kind consideration of this authority: -
- a) Non-booking of all apartments seriously affected the construction: - It is submitted that the global recession badly hit the economy and particularly the real estate sector. The construction of project is dependent on the amount of monies received from the bookings made and monies received henceforth, in form of instalments paid by the allottees. However, it is submitted that during the prolonged effect of the global recession, the number of bookings made by the prospective purchasers reduced drastically in comparison to the expected bookings as anticipated by the respondent no.2 at the time of



launch of the project. The reduced number of bookings along with the fact that 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.2, 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.
- f) There was extreme shortage of water in the region which affected the construction works.
- g) There was shortage of bricks due to restrictions imposed by Ministry of Environment and Forest on bricks kiln,
- h) Unexpected sudden declaration of demonetization policy by the Central Government, affected the construction works of the respondent in a serious way for many months. Non-availability of cash-in-hand affected the availability of labours.
- i) Recession in economy also resulted in availability of labour and raw materials becoming scarce.
- j) There was shortage of labour due to implementation of social schemes like National Rural Employment Guarantee Act (NREGA) and Jawaharlal Nehru Urban Renewal Mission (JNNURM).

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k) Direction by the Hon'ble National Green Tribunal & Environmental authorities to stop the construction activities for some time on regular intervals to reduce air pollution in NCR region.

l) Due to the increase in pollution in National Capital Region, the Hon'ble Supreme Court of India vide Order dated 04.11.2019 passed in **Writ Petition (Civil) No. 13029 of 1985 titled as "M.C. Mehta-Versus- Union of India & Ors"** had put restrictions on various construction activities. It is reiterated herein that the company was attempting to make its best efforts to complete the construction works and to give possession of the flat to the allottees as soon as possible. It is submitted that the 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 respondent no.2. Therefore, the unfair and unreasonable demands of the complainants be not entertained. It is submitted herein that the respondent no.2 is attempting to make its best efforts to complete the construction work and to give possession of the unit' to the allottees as soon as possible.

XIII. That the project. is at advanced stage of construction and is complete to the extent of 70%. Therefore, in view of the same, the complainants should not be allotted to raise unreasonable demands which can



materially affect the entire project. It is submitted that the respondent no.2/ Bright Buildtech Pvt. Ltd. has launched 420 numbers of independent floors to be constructed on 140 plots. Out of the total units 258 floors/units were sold by the company till date and the company is expecting to handover the possession of sold units on or before June 2022.

- XIV. That the complainants had applied for the allotment of the unit as investment and not for personal use, which fact is abundantly clear and evident from their conduct. The complainants invested in the unit with intent to have monetary gains by way of reselling the unit to a higher bidder at an appreciated value.
- XV. That on 03.02.2021, Secretary RERA, Haryana has filed an affidavit before **Hon'ble Supreme Court of India in SLP (Civil) No. 13005/2020 titled as "M/s. Sana Realtors Pvt. Ltd. vs. Union of India & Ors."**, wherein, at Para Nos. 43 to 46 of the Counter Affidavit, it was submitted that:

In the cases where the projects are delayed inordinately i.e. delay ranging from 2 to 10 years, the RERA Act and RERA Rules provide that in the event of delay, compensation shall be paid @SBI-MCLR +2% per year, which usually works out to simple interest@ of about 10%. It is further submitted by RERA, that keeping in view the overall interest of parties and in exercise of the regulatory functions the Authority can come to the finding that the compensation for the entire period of delay for entire period prior to enactment of RERA Act, 2016 be paid at the rate provided in Rule 15 of the RERA Rules and this provision can be made applicable on all the previous agreement also delay irrespective of period"



In view of the above stand before the Hon'ble Supreme Court in the cases of delay in completion of projects, the HRERA provides for compensation, keeping in view the overall interest of the parties. As such, this authority should take into account the adverse circumstances which were beyond the control of the respondents, and which has led to the delay in completion of project. However, the respondents are endeavourings to finish the project on or before June 2022. Therefore, this authority should not consider the prayer of refund of monies.

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

8. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

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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

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(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 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***

12

Private Limited Vs State of U.P. and Ors. (Supra) and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022 wherein it has been laid down as under:

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

13. 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. Objections regarding the complainants being investors.

14. The respondent has taken a stand that the complainants are investors and not consumers and therefore, are not entitled to the protection of the Act and to file the complaint under section 31 of the Act. The respondent also



submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if 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 complainants are buyers and paid a total price of **Rs.39,46,172/-** towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

15. 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 complainants, it is crystal clear that they



are allottee(s) as the subject unit allotted to them by the promoter. The concept of investors 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 "investors". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

F. II Objection regarding force majeure conditions:

16. The respondent/promoters have raised the contention that the construction of the tower in which the unit of the complainants is situated, has been delayed due to force majeure circumstances such as delay on part of the developer M/s. Ace Mega Structures Private Limited, shortage of labour, implementation of various social schemes by Government of India, demonetisation, lockdown due to covid-19 various orders passed by NGT, weather conditions in Gurugram and non-payment of instalment by different allottees of the project. But all the pleas advanced in this regard are devoid of merit. The plea advanced that the developer has failed to handover the possession of project on time as per 'development management agreement' entered between them on dated 23.05.2019. It is observed the plea advanced cannot be taken as the complainant was never

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a party to said contract and thus, there was no privity of contract. Further, the respondent has taken a plea that there was a delay in construction of the project on account of NGT orders, orders by EPCA, orders by Hon'ble Supreme Court of India, etc but did not particularly specified that for which period such orders has been made operative for. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter respondents cannot be given any leniency on based of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.

F.III. Objection regarding delay in completion of construction of project due to outbreak of Covid-19.

17. The Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020*** dated 29.05.2020 has observed that:

69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

18. In the present complaint also, the respondents were liable to complete the construction of the project in question and handover the possession of the said unit by 25.11.2018. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore,

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the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period cannot be excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainants

G.1 Direct the respondent to refund Rs.39,46,172/ paid by the complainant along with interest @ 12% and excluding amount EMI loan defaulted.

19. The complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

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

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

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

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

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

(Emphasis supplied).

20. As per clause 5.1 of the buyer's agreement provides for handing over of possession and is reproduced below: -



5. POSSESSION OF DWELLING UNIT

5.1 *Subject to Clause 5.2 and subject to the Buyer Making timely payments, 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 6 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"*

21. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 36 months (excluding a grace period of 6 months) from the date of issuance of allotment letter. The period of 36 months with a grace period of 6 months expired on 25.11.2018. Since in the present matter, the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage.

22. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the rate of 12% interest. However, the allottees intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such



benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

23. 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.

24. 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., 23.02.2023 is **8.70%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%**.

25. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

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

26. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is



in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5.1 of the apartment buyer's agreement, the possession of the subject apartment was to be delivered within a period of 36 months with a grace period of 6 months from the date of issuance of allotment letter i.e., 21.05.2015 which comes out to be 21.11.2018. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 21.11.2018. It is pertinent to mention over here that even after a passage of more than 7.9 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 allottees by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to him and for which he has paid a considerable amount of money towards the sale consideration. It is also to mention that complainants have paid almost 33% of total consideration till 2016. Further, the authority observes that there is no document placed on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned facts, the allottee intends to withdraw from the project and are well within the right to do the same in view of section 18(1) of the Act, 2016.

27. Moreover, occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent /promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have 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....."

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

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

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interest for the period of delay till handing over possession at the rate prescribed."

29. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as they wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

30. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondents is established. As such, the complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 10.70% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

31. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations

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cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondents are directed to refund the amount i.e., Rs.39,46,172/- received by it from the complainants along with interest at the rate of 10.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.
 - ii. Out of total amount so assessed, the amount paid by the bank/payee be refunded first in the account of bank and the balance amount along with interest if any will be refunded to the complainants.
 - iii. 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.
32. Complaint stands disposed of.
33. File be consigned to registry.

Dated: 23.02.2023

V.I - 3
(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram