

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

Complaint no.	:	1154 of 2020
Date of filing	:	04.03.2020
First date of hearing:		19.03.2020
Date of decision	:	21.02.2022

Smt. Beena Dubey W/o Sh. B.K Dubey R/o: A/3, MIG Flat, Malkhan Nagar, Aligarh, Uttar Pradesh-202001		Complainant
Versus		
Almond Infrabuild Private Limited Regd. office: 711/92, Deepali, Nehru Place, New Delhi-110019		Respondent
CORAM:		
Shri Ashok Sangwan		Member
Shri Sanjeev Kumar Arora		Member
APPEARANCE:		
Shri V.K Bansal (Advocate)		Complainant
Shri Rahul Thareja (Advocate)		Respondent

ORDER

1. The present complaint 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 to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

2. The particulars of the project, the details of 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.no.	Particulars	Details
1.	Name of the project	"ATS Tourmaline", Sector- 109, Gurgaon
2.	Nature of project	Group housing project
3.	RERA registered/not registered	Registered vide registration no. 41 of 2017 dated 10.08.2017
	Validity status	10.08.2023
4.	DTPC License no.	250 of 2007 dated 02.11.2007
	Validity status	01.11.2019
	Licensed area	19.768 acres
	Name of licensee	Raj Kiran & 2 others
5.	Unit no.	5201 on 20 th floor of tower 5 [As per page no. 40 of complaint]
6.	Unit area admeasuring	1750 sq. ft. (Super built-up area) 1466 sq. ft. (Build up area) [As per page no. 40 of complaint]
7.	Date of apartment buyer agreement	17.01.2014 [As per page no. 11 of complaint]
8.	Payment plan	Construction linked payment plan



		[As per page no. 43 of complaint]
9.	Total sale consideration	Rs. 1,35,93,750/- (BSP) Rs. 1,44,00,000/- (TSC) [As per payment plan on page no. 42 of complaint]
10	Amount paid by the complainant	Rs. 1,18,12,531/- [As alleged by the complainant on page 05 of complaint]
11	Possession clause	Clause 6.2 <i>The Developer endeavour to complete the construction of the apartment <u>within 42 months from the date of this agreement (completion-date)</u>. The company will send possession notice and offer possession of the Apartment to the applicant as and when the company receives the occupation certificate from the competent authority.</i>
12	Due date of possession	17.07.2017 [Calculated from the date of agreement i.e., 17.01.2014]
13	Demand letter & Reminders dated	28.05.2016, 02.06.2016, 05.07.2017, 12.06.2018 Final Notice dated 01.08.2018 [As per para no. 76 of reply]



14	Termination letter dated	20.10.2018 [As per page no. 78 of reply] <i>(Allotment was later restored by the respondent on request of complainant- Para I. of reply)</i>
15	Request of the complainant withdrawal from the project after due date but before filing of present complaint	19.06.2019 [As per annexure A1 on page no. 08 of written submissions dated 01.08.2022 of complainant] <i>The respondent denies the fact that any such legal notice was ever sent to it (page no. 02-03 of written arguments dated 20.09.2022)</i>
16	Occupation certificate	09.08.2019 [As per page no. 94 of reply]
17	Offer of possession	09.08.2019 [As per page no. 96 of reply]

B. Facts of the complaint

3. That the complainant applied for booking in the project of the respondent on 25.04.2013 and in accordance of which she was allotted flat no. 5201 on 20th floor in tower 5 for a total sale consideration of Rs. 1,44,00,000/-.
4. That as per clause 6.2 of the said agreement, the respondent obliged to complete the construction of the apartment within 42 months from the date of signing of the agreement which comes out to be 17.02.2017. The

respondent has failed to deliver the possession of the said flat within the terms of the buyer's agreement.

5. That the respondent kept raising premature demand letters from the complainant towards payment of installments which were ought to be paid as per the construction linked payment plan of the buyer's agreement.
6. That the complainant made payment vide various cheques on various dates as demanded by the respondent from time to time. She has already paid an amount of Rs. 1,18,12,531/- (i.e. 82.03% pf total sale consideration) in terms of payment plan of the buyer's agreement dated 17.01.2014.
7. That the complainant paid number of visits to the office of the respondent inquiring about the reason of delay who in return make her run from post to pillar.
8. That the respondent-builder charged an extra amount of BSP at the time of booking. It is pertinent to note that after two years, the rate of the similar flat, builder offers the apartment at the BSP @6,500/- per sq. ft. where for the same flat, the complainant charged @7,767/- per sq. ft. though it presumes price rise.
9. That the complainant many times approached the respondent seeking refund of the amount paid against consideration of allotted unit, but it

has failed to refund the amount paid by her and kept harassing the innocent allottees.

10. That on 18.06.2019, the complainant sent legal demand notice to the respondent inter alia demanding the refund of the total amount paid by her in lieu of the said allotment along with interest @12% p.a. The said legal demand notice dated 18.06.2019 was duly served upon the respondent through speed post and registered post.
11. That despite receiving the set legal demand notice, it has not refunded the amount paid by the complainant in accordance to which a complaint was filed with this authority seeking refund along with interest and compensation including litigation cost and expenses
12. That along with the respondent has offered the possession to the complainant vide letter dated 09.08.2019, after a delay of 2 years and one month despite existence of the fact that she has already opted for cancellation of the allotment due to delay and also sought refund along with intrust as per the terms of buyer's agreement .

C. Relief sought by the complainant:

13. The complainant have sought following relief:
 - i. Direct to the respondent to refund the amount of Rs. 1,18,12,531/- paid by the complainant along with interest which is Rs. 36,61,884/-.
 - ii. Direct the respondent to compensation and litigation cost of Rs.1,00,000/- & Rs. 75,000/- respectively.

14. On the date of hearing, the authority explained to the respondent/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:

15. That the complaint is not maintainable for the reason that the agreement contains clause 21, an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.
16. That the complaint is not maintainable for the reason that the agreement contains clause 21, an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.
17. That the complainant, after checking the veracity of the project namely, 'Tourmaline', Sector 109, Gurugram applied for allotment of an apartment and was accordingly allotted apartment number 5201 in tower 5 having super built up area of 1750 square feet for a sale consideration of Rs. 1,44,00,000/-. The complainant agreed to be bound by the terms and conditions of the document executed by her with the respondent. Based on it, the respondent sent copies of the apartment buyer's agreement to the complainant which was signed and executed by her on 17.01.2014. It is pertinent to mention herein that when the complainant had booked the unit with the respondent, the Act of 2016

was not in force and the provisions of the same cannot be enforced retrospectively.

18. That the complainant was to make the payment towards the total sale consideration as per the terms of the apartment buyer's agreement. It is submitted that the complainant made payment towards certain installment demands on time and then she started committing defaults. The respondent sent a payment demand dated 24.02.2014 to the complainant as per the terms of the allotment. However, she remitted the due amount only after reminder dated 06.06.2014 and final notice dated 24.07.2014 was sent by the respondent to the complainant.
19. That the respondent vide payment demand dated 05.01.2015 raised payment demand after completion of the third roof slab for the total payable amount of Rs. 9,67,008/-. However, the due amount was not paid by the complainant and the same was adjusted in the next installment demand dated 16.03.2015. However, yet again, she failed to remit the due amount despite reminder dated 23.03.2015 and the due amount was again adjusted in the next installment demand dated 27.05.2015.
20. That the respondent raised the installment demand on 04.01.2016 for the total payable amount of Rs. 9,49,995/-. However, the complainant failed to make payment towards the demanded amount despite reminder dated 17.03.2016 and the same was adjusted in the next

installment demand. Vide payment demand dated 09.05.2016, the respondent raised the payment demand for total payable amount of Rs. 18,11,121/-. However, the complainant failed to adhere to her obligation in making payment towards the demanded amount despite reminders dated 04.06.2016, 02.07.2016, 05.11.2016, 13.01.2017, 05.07.2017, 05.09.2017, 04.12.2017, 12.06.2018 and final notice dated 01.08.2018.

21. That it is pertinent to mention here that according to agreed clauses of the apartment buyer's agreement, timely payment of installments within the agreed time schedule was the essence of allotment. The complainant is a real estate investor who had booked the unit with a view to earn quick profit in a short period. However, her calculations went wrong on account of slump in the real estate market and the complainant did not possess sufficient funds to honour her commitments. The complainant was never ready and willing to abide by her contractual obligations. On account of continuous defaults, the allotment made by the complainant was terminated by the respondent vide letter dated 20.10.2018 and all amount paid by the complainant towards the earnest money along with other requisite charges as per the terms were forfeited.
22. That the complainant on receiving the letter of termination approached the respondent company and requested its officials to restore the allotment made to her and assured the respondent company that she

will abide by the terms of the apartment buyer's agreement and make the payment towards the remaining due amount. The respondent being a customer-oriented company acceded to the request of the complainant and restored the allotment.

23. That from the terms of the apartment buyer's agreement, it is evident that only the construction was to be completed within a period of 42 months from the date of the agreement and the same would be extended on account of any force majeure condition, outside the control of the respondent as defined in the apartment buyer's agreement. The possession of the unit had to be offered to the complainant only after grant of occupation certificate from the concerned authorities.
24. That the respondent company has been constructing the project in a timely manner and as per the terms of the apartment buyer's agreement, no default whatsoever has been committed by it. It is pertinent to mention herein that the project was badly affected on account of a restraint order dated 23.04.2014 passed by the SDM Kapashera on the basis of a report submitted by Halka Patwari, Kapashera that the respondent was making encroachment on the Gram Sabha Land. In the restraint order dated 23.04.2014, it was stated that a case titled as Dilbagh Singh vs GNCT of Delhi pertaining to the land in dispute was pending before the Delhi High Court and SDM, Gurugram was requested to conduct joint demarcation. It is pertinent to mention herein that the order passed by the SDM Kapashera is covered under

the ambit of the definition of 'Force Majeure Event' as stipulated in the mutually agreed terms of the apartment buyer's agreement. Further, in the demarcation report dated 26.03.2015 and 27.03.2015 it was specifically mentioned that the respondent has not committed any encroachment.

25. That, furthermore, the case titled as *Dilbagh Singh vs GNCT of Delhi* was ultimately dismissed vide order dated 12.10.2017. Hence the respondent was prevented from completing its work as per the sanctioned plans, providing common services in the said affected area, raising boundary wall etc. due to circumstances absolutely beyond its power and control i.e. force majeure. In the meanwhile, the respondent kept on completing the remaining project which was not affected by the stay order failing which further delay would have occurred. However, obviously, the respondent could not have applied for occupation certificate for the project without providing the mandatory common services like storm water, sewerage line, irrigation and external fire hydrants, electrical works and roads.
26. That as soon as the restraint order dated 23.04.2014 was set aside, the respondent completed the construction of the project and an application was made to the concerned authorities for the grant of Occupation Certificate vide application dated 19.03.2018. It is submitted that there is no default on the part of the respondent to complete the project. As per Clause 6.2(d) of the apartment buyer's

agreement, the respondent was entitled to an extension of time from the expiry of the completion date if the construction was delayed on account of a force majeure event. The occupation certificate has been granted by the concerned authorities on 09.08.2019 and it has already offered the possession of the unit to the complainant vide Notice of Possession dated 09.08.2019.

27. That the complainant is now bound to take the physical possession of the unit by completing the documentation formalities and by making payment towards the remaining due amount. It is pertinent to mention herein that the holding charges are being accrued as per the terms of the apartment buyer's agreement on account of delay on the part of the complainant in taking the possession of the unit.
28. That the instant complaint filed by the complainant is nothing but a sheer abuse of the process of law. The present complaint was filed on 21.1.2020 much after the grant of occupation certificate on 09.08.2019. The possession of the unit has also been offered to the complainant vide notice of possession dated 09.08.2019.
29. That the unit of the complainant is complete in all respects as is clear from the photographs annexed. Even as per the registration certificate issued by Authority, the due date of handing over of the possession was 23.10.2019. Admittedly possession was offered to the complainant before that.

30. The fact of the matter is that the complainant is a wilful defaulter who deliberately did not paid the due installments without any sufficient ground despite several reminders and demands spanning over a period of more than 3 years. When the complainant failed to make payment, the allotment was cancelled vide letter dated 20.10.2018 and the amount paid by the complainant was forfeited. However, on the request of the complainant, the allotment was restored, and she continued to be an allottee.
31. That a bare reading of the complaint reveals that there is no ground whatsoever for ordering refund. A perusal of para 4 of the brief facts of the complaint reveals that she has falsely claimed that there are no demands left from the her side while in fact she has been a defaulter since long. Numerous defaults were committed by the complainant and as many as 15 reminders were sent to her.
32. That in clause 4 of brief facts, the sole reason mentioned by the complainant for seeking refund is that she lives most of the times outside India due to her professional work and the purpose of the flat is not required now, so she now needs the amount to be refunded with interest @12% per annum as para 6.3 mentioned in the builder buyer's agreement.
33. That a bare perusal of the complaint reveals that there is not a whisper in the entire complaint regarding alleged legal notice stated to be dated

18.6.2019 on which heavy reliance has been placed by the complainant now. It is submitted that no such notice was received by the respondent. A perusal of the postal receipt reveals that the same is illegible and does not contain the correct full address of the respondent. The alleged proof of service record given by the complainant also does not show any service on the correct address of the respondent. No presumption of service can be attached to such documents.

34. That the basic law that pleadings of a case i.e. complaint herein are the very foundation of the case set up by the complainant. The complainant cannot be allowed to go out of her pleadings and is bound by the same.
35. That rather as per Section 19 of the Act, the complainant is bound to take possession and make the outstanding payments. Hence the complainant is unnecessarily harassing the respondent by not discharging her obligations and not paying her dues. The complaint is an abuse of the process of law and deserves to be dismissed with heavy costs.
36. Both the parties filed written submissions and the same are taken on record.
37. 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 based on those undisputed documents.

E. Jurisdiction of the authority

38. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

E. I Territorial jurisdiction

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

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)(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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 allottee and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act of 2016 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.

F. Findings on the objections raised by the respondent:

F.I Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

39. The respondent has raised an objection that the complainant has not invoked arbitration proceedings as per the provisions of buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the apartment buyer's agreement:

"Clause 21: All or any disputes that may arise with respect to the terms and conditions of this Agreement, including the interpretation and validity of the provisions hereof and the respective rights and obligations of the parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 and any statutory amendments/modifications thereto by a sole arbitrator who shall be mutually appointed by the parties or if unable to be mutually appointed then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties"

40. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainant, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real

Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builder could not circumscribe the jurisdiction of a consumer.

41. While considering the issue of maintainability of a complaint before a consumer forum/commission in the face of an existing arbitration clause in the builder-buyer agreement, the Hon'ble Supreme Court in case titled as *M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018* has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the

aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

42. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within the right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

F.II Objection regarding force majeure conditions:

43. The respondent-promoter alleged that there was delay in handing over of possession on account of force majeure circumstances such as restraint order dated 23.4.2014 passed by the SDM, Kapashera in case titled '*Dilbagh Singh Vs. GNCT of Delhi*' which was ultimately dismissed vide order dated 12.10.2017 and further requested that it

was not allowed to complete the construction as per sanctioned plans, and providing common services in the said affected area and the said period is not to be considered while calculating any delay. The respondent took a plea that due restrain order passed by SDM, Kapashera in case titled '*Dilbagh Singh Vs. GNCT of Delhi*', it has failed to complete the construction on time. The Authority is of considered view that the project of the respondent might have delayed due to said restrain order passed by SDM, Kapashera in case titled '*Dilbagh Singh Vs. GNCT of Delhi*'. But the respondent may approach the competent Authority seeking that the said period may be declared as "zero-period". As of time being, the said period cannot be excluded for calculating any delay.

F.III Objection regarding non-payment by the allottee:

44. The respondent pleaded that the complainant-allottee herself is a defaulter and number of times failed to make payment towards consideration of allotted unit which also led to cancellation of the allotted unit on 20.10.2018. The Authority observes that there is no doubt that there was delay w.r.t payment towards consideration of allotted unit which led to issuance of demand letters and reminders letters dated 28.05.2016, 02.06.2016, 05.07.2017, 12.06.2018 followed by cancellation letter dated 20.10.2018. However, the said cancellation was set-aside by the respondent himself on a request of the complainant. Thus, keeping in view principle of *Doctrine of Waiver* which finds its place under Section 63 of the Contract Act, 1872 *qua* relinquishment of rights between the parties. The rights that may be relinquished include obligations as well as claims that had been earlier

consented to be performed and exercised by the parties. Thus, the waiver of right under Section 63 of the Contract Act has to be a matter of mutual consensus. It is an act of surrender of benefit or privilege. The waiver of right requires a prior knowledge of an existing right by the person who seeking waiver of such right. As decided in **Manak Lal v. Dr. Prem Chand Singhvi AIR 1957 SC 425**, a person is required to be fully cognizant of his rights before waiving off such rights. In the present case, the respondent himself has waived of its right w.r.t. to cancellation letter dated 20.10.2018 by setting aside the same. Now it cannot come and took a plea that since the complainant herself was a defaulter as, as per 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, the allottee reserves an unqualified right to seek refund. The relevant para of the same is reproduced hereunder:-

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

45. Keeping in view the aforesaid judgment and principle involved, the plea taken by the respondent is not maintainable.

G. Findings regarding relief sought by the complainant.

G.I Direct to the respondent to refund the amount of Rs. 1,18,12,531/- paid by the complainant along with interest which is Rs. 36,61,884/-.

46. It requires attention towards the fact that the said unit was booked by the complainant under construction linked plan. It is to be noted that as per section 19(6) and (7) of Act of 2016, the allottee is under an obligation to make timely payment as per payment plan towards consideration of the allotted unit. The complainant made various defaults in payments resulting in issuance of reminders as specified above in the table. After pre- termination letter dated 01.08.2018, the allotment of the complainant was terminated and the same is evident from letter dated 20.10.2018 on page 78 of reply. The respondent submitted that on termination of allotment, the complainant visited him and, on an assurance, made by her, it restored her allotment and the issue w.r.t. to cancellation and its restoration is not in dispute.
47. The complainant submitted that she sent a legal notice dated 19.06.2019 before obtaining occupation certificate dated 09.08.2019 and offer of possession by the respondent. However, the respondent-builder contested the complaint on the ground that the said legal notice was never received by it and tracking report placed of record by the complainant does not contain the complete address. It also submitted that the issue w.r.t. said legal notice seeking refund against consideration of allotted unit was raised while filing written arguments only at the later stage. The Authority observes that the tracking report

of legal notice attached as annexure A1 of complainant shows that the same is duly delivered on 21.06.2019.

48. The section 18(1) is applicable only in the eventuality where the promoter fails to complete or 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 allottee has been requesting the promoter for refund of his amount even before the OC was obtained as unit was not ready at that time when he sought refund. The request of the allottee 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.
49. The due date of possession as per apartment buyer's agreement as mentioned in the table above is 17.07.2017. Although the allottee in this case has filed this complaint on 04.03.2020 after possession of the unit was offered to her after obtaining occupation certificate by the

promoter but the allottee has earlier opted/wished to withdraw from the project after the due date of possession was over. However, the said relief seeking refund was sought by the complainant vide legal notice dated 19.06.2019, before obtaining occupation certificate from the competent Authority. Further in the judgements 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

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.

50. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 1,18,12,531/- with interest at the rate of 10.70% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of

each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.II Direct the respondent to compensation and litigation cost of Rs.1,00,000/- & Rs. 75,000/- respectively.

51. The complainant is seeking relief w.r.t. compensation in the above-mentioned reliefs. Hon'ble Supreme Court of India in *Civil Appeal nos. 6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the authority:

52. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the act of 2016:
- i. The respondent is directed to return to the complainant the amount received by him i.e., Rs. 1,18,12,531/- with interest at the rate of 10.70 % (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.

- ii. A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

53. Complaint stands disposed of.

54. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:21.02.2022

HARERA
GURUGRAM