BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**3384 of 2019**
Complaint filed on	**:**	**19.08.2019**
First date of hearing:		**19.12.2019**
Date of decision	**:**	**03.03.2023**

1. Pardeep Verma
2. Sonia Verma

Both RR/o: - 131, Sector- 29, Faridabad Haryana- 121008 **Complainants**

Versus

M/s 1000 Trees Housing Private Limited.
Regd. Office at: A-793, First Floor, GD Colony, Mayur Vihar, Phase- III, Near Hanuman Mandir, Delhi Esat - 110096 **Respondent**

CORAM:
Shri Sanjeev Kumar Arora **Member**

APPEARANCE:
Sh. Ishwar Singh Sangwan (Advocate) Complainants
Sh. Vinayak Gupta and Sh. Vivek Sethi (Advocates) Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees in Form CRA 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 allottees as per the agreement for sale executed *inter se* them.

A. Unit and project related details

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

S.N.	Particulars	Details
1.	Name of the project	"1000 Trees" situated at Sector-105, Gurugram
2.	Project area	13.078 acres
3.	Nature of project	Group housing colony
4.	DTPC License no.	127 of 2012 dated 27.12.2012 valid up to 26.12.2022
5.	Name of licensee	Kanwar Singh, Rohtash, Krishan Pal Ss/o Jabar Singh, Narinder Pal S/o Sajjan Singh, Smt. Sharda Wd/o Dharampal, Ved and 3 others
6.	RERA registered/not registered	Not Registered
7.	Date of approval of building plans	15.07.2013
8.	Unit no.	I-804, 8th floor, Tower/block – I [Page no. 31 of the reply]
9.	Unit measuring	1383 sq. ft.

		[Page no. 31 of the reply]
10.	Allotment letter	09.10.2013 [Page no. 21 of the reply]
11.	Date of execution of tripartite agreement	23.06.2015 [Page no. 57 of the complaint]
12.	Date of execution of Builder buyer's agreement	30.05.2015 [Page no. 31 of the reply]
13.	Possession clause	**4.1 Delivery of possession** **i.** *Subject to the Apartment Allottee(s) complying with various terms and conditions of this Agreement and other requirements as indicated, by the Developer, the Developer proposes to issue offer/nodes of possession of the* ***Apartment within a period of 42 months from the date of signing of this Agreement*** *and upon execution and registration of Conveyance Deed in favour of the Apartment Allottee(s). It is understood, by the Allottee that the possession of various Towers/Blocks comprised in the Compried shall be ready and completed by the Developer in phases and handed over to the Allottee(s) of that Tower/Block accordingly.* [Page no. 40 of the reply]

14.	Due date of possession	30.11.2018 [Note: - calculated from the 42 months from the date of execution of agreement i.e., 30.05.2015]
15.	Total sale consideration	Rs.84,52,145/- [Page no. 51 of the reply]
16.	Total amount paid by the complainants	Rs.25,15,125/- [As alleged by the complainant at page no. 6 of the complaint]
17.	Payment plan	Construction linked payment plan [Page no. 51 of the reply]
18.	Offer of possession	Not offered
19.	Occupation certificate	Not obtained
20.	Delay in handing over the possession till date of filing complaint i.e., 19.08.2019	8 months and 20 days

B. Facts of the complaint

3. The complainants have made the following submissions: -

I. That the complainants were in dire need of a residential accommodation at Gurugram (Haryana) which may have good infrastructure and all basic facilities/amenities for residing therein with the family members for better future prospectus of the children. On respondent's representation and persuasion that it would provide state-of-the-art infrastructure with all basic

facilities/amenities in the residential apartment situated at Sector 105, Gurugram (Haryana) and further assured them that it would also complete the construction of the said project and deliver the physical possession of the individual units of the same within 36 months from the date booking of the unit.

II. That believing, trusting and on the basis of respondent's representation, persuasion, assurances, the complainants applied for booking/allotment of apartment/executive floor/flat in residential apartment situated at Sector-105, Gurugram (Haryana) and made payment of an amount of Rs. 25,15,125/-. The respondent issued receipts thereof on in favour of complainants. Further, the respondent executed builder buyer agreement dated 15.04.2014 with the complainants and mentioned the particulars of said apartment i.e., apartment no. I-804, block/tower I, 8th floor, super area 128.48 sq. Mtrs. Situated at Sector-105, Gurugram (Haryana).

III. That they have always paid installments in time to the respondent whenever demanded by it. But the respondent failed to handover the physical possession of the said unit till today. The last payment was made by the complainants in the month of June 2015 through AXIS Bank Home Loan to the respondent. But it failed to communicate about the possession of the said unit as promised at the time of booking.

IV. That a license was granted by the DTCP to the respondent to construct the said project was from 2012 to 2016. The license of the said project has been expired in the year of 2016 and the respondent has not renewed the said construction license from the DTPC. The DTCP department filed an FIR against the respondent to construct and booking the flats without license.

V. That they have visited the site several time, but no work is going on at the project site. The respondent had promised that the possession would be delivered by 2017. But till today, there has been no positive development at the project site and now, the respondent is offering alternative options at much higher price. The respondent has failed to deliver possession of the said apartment and FIR has been lodged against it. After lodging the FIR, the respondent has been lingering around this matter and its intention is not to deliver the possession of the said apartment or to refund the amount deposited by the complainants. There has been number of complaints against the respondent at EOW, DTCP and NCDRC.

VI. That on dated 31.05.2019, the complainants came to know that the respondent is intending to create a third-party interest with the company named ATS Infrastructure LTD, in the said property in which they had booked the flat.

VII. That the complainants kept on writing emails to the respondent to cancel the booking and refund the booking amount of them but it

never reverted the emails of them and kept on delaying the refund process just to grab their hard-earned money.

VIII. That the act and conduct of the respondent has caused a lot of physical harassment, mental agony, and huge financial loss to the complainants.

C. Relief sought by the complainants:

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

i. Direct the respondent to refund the aforesaid amount of Rs.25,15,125/- to the complainants along with interest at the prescribed rate since the booking of the apartment till its full final realization as the respondent has violated or contravened the provisions of the Act, rules and regulations made thereunder or aforesaid application or agreement dated 15.04.2014.

ii. Direct the respondent to pay a sum of Rs. 20 lacs as compensation to the complainants and their on account of mental harassment, agony, physical pain and mental loss.

5. On the date of hearing, the authority explained to the respondent /promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent contested the complaint on the following grounds: -

i. That the complainants applied for booking and provisional allotment of residential apartment/flat in the project namely "1000 Trees"at Sector-105, Gurugram, Haryana vide application

form in August 2013 agreeing on the terms and conditions mentioned therein including 4% discount. All the terms and conditions of the said application form were fully read and understood by them and also agreed to abide by the same. The complainants had opted construction linked payment plan.

ii. That the respondent company issued an allotment letter dated 09.10.2013 to complainants allotting residential flat no. I-804, 8th floor, tower-I admeasuring 128.48 sq. ft. in the said project. The allotment was made on the basis of terms and conditions contained in the application form. Thereafter, the respondent company vide letter dated 05.04.2014 asked the complainants to pay as per payment schedule.

iii. That the builder buyer agreement dated 15.04.2015 was forwarded to the complainants by the respondent after signing, but they chose to keep it with them for more than a year. A perusal of abovementioned agreement suggests that it is unilaterally signed by the complainants only and thus cannot be deemed to be a legal valid agreement. The law is well settled that agreement duly signed is binding on both the parties as held in "***Bhati Knitting Vs. DHL***" by Hon'ble Apex Court.

iv. That after lapse of more than a year, the complainants vide letter dated 30.05.2015 asked the respondent company to re-issue builder buyer agreement and on the same date, the respondent has

executed builder buyer agreement on 30.05.2015 with the complainants qua the apartment in question.

v. That the non-delivery of the flat/apartment to the complainants by the respondent was due to the reasons beyond its control and due to external factors, that lead to delay in offering possession.

vi. That all the contents of the complaint under reply are vehemently denied in them entirely except wherein the same are specifically admitted by it.

vii. That complainants have paid total amount of Rs. 25,15,125/- to the respondent company qua the booked unit.

viii. That the complainants had inspected the project site, seen the title documents of the land including the License No. 127 dated 27.12.2012, sanctioned building plan and all other relevant documents relating to the competency of the respondent including area calculation and after conducting due diligence pertaining to rights, interest, title, limitation and obligations had decided to purchase the purchase flat in question.

ix. That both the parties had agreed while executing buyer's agreement dated 30.05.2015 and undertaken to make the payment in a timely period as per the construction linked payment plan on the demand being raised by it. The complainants failed to make the payment of further instalment within due date and on account of non-payment of the said instalment by the complainants to the

respondent within due date, reminders were also sent to the complainants.

x. That over the years, the respondent has successfully developed various real estate projects. That due to its uncompromising work ethic, honesty, quality of construction and timely delivery of its projects to the utmost satisfaction of its customers, the respondent has established an impeccable reputation in real estate business circles. Due to the reputation and prestige of the respondent, the complainants had voluntarily invested in the project.

xi. That the complainants had purchased the flat/apartment in the concerned project merely for investment purposes and as such, they never intended to be an end user in the project. It is stated that the investment was purely an interest-bearing investment. The complaint is misconceived and an abuse of the processes of this authority as the complainants have admittedly no cause of action against the respondent and on this ground alone, the complaint is liable to be rejected

xii. That the Haryana Government through Town & Country Planning Department published the Master Plan/Final Development Plan – 2031 AD for Gurgaon-Manesar Urban Complex (GMUC), along with restrictions and conditions mentioned therein vide Notification dated 15.11.2012.

xiii. That the respondent entered into a development agreement with landowners of land situated at Village Gurgaon (Hadbast No. 55),

Tehsil & District Gurugram (presently falling under Sector 105, Gurugram) for the development of their land for which a license No. 127 of 2012 has been granted by the Department of Town & Country Planning Haryana on dated 27.12.2012 for development of a group housing colony on an area measuring 13.078 acres. Further, the Zoning plan of the above said project was granted by the Town & Country Planning Department on 28.12.2012 and the building plans were approved by the Town & Country Planning Department on 15.07.2013.

xiv. That the respondent launched their project in the year 2013 having approach road as per the master plan and the sanctioned plan of the project from the road dividing sector 104 & 105 which leads to Daulatabad Flyover.

xv. That an inspection of the site and the perusal of the site plan would show that apart from the proposed 24 Mtrs wide road on one side, there is presently "Rajendra Park Main Road". On the other side, there is Daulatabad Flyover and just adjacent thereto, there is a constructed service road alongside the flyover, and which is presently being used by the respondent for their access to their licenced colony area from Dwarka Expressway through the dividing road of sector 104 & 105.

xvi. That since the Municipal Corporation, Gurugram started the work at the site in complete violation, thereby completely blocking the access to the group housing colony area of the respondent from

Dwarka Expressway through the dividing road of sector 104 & 105; which is the entry to the project site as per the duly sanctioned plans.; the respondent again submitted representations dated 01.06.2018 & 05.06.2018; requesting the Authorities not to construct the "Ramp Like inclined road", as the same had completely blocked the access to the group housing colony area of the respondent from Dwarka Expressway through the dividing road of sector 104 & 105 thereby denying any access to the respondent to carry out the material required for carrying out construction at the site and also committing violation of the Master Plan (FDP – 2031); however of no avail.

xvii. That being aggrieved, the respondent/promoter approached the Hon'ble Punjab & Haryana High Court by instituting C.W.P. No. 17920 of 2018 inter alia praying for following relief(s):

- Issue an appropriate writ, order or direction; especially, a writ in the nature of Mandamus directing the respondent to adhere to the Master Plan/Final Development Plan – 2031 AD for Gurgaon-Manesar Urban Complex (GMUC) and not to carry out any development which is in violation or is contrary to the Master Plans/sectoral Plans;
- Issue an appropriate writ, order or direction; especially, a writ in the nature of Mandamus, directing the respondent not to carry out any development which has the consequence of jeopardising the licensed project of the petitioners;

- Issue any other writ, order or direction as this Hon'ble Court deems fit in the peculiar facts and circumstances of the instant case;
- Ex-parte stay the construction of "Ramp Like inclined road" as duly reflected on the site plan (P-5) with a further direction to remove the blockade from the constructed service road alongside the Daulatabad Flyover, which road was/is presently being used by the petitioners for their access to their licenced colony area from Dwarka Expressway through the dividing road of sector 104 & 105 adjoining the Daulatabad Flyover; during the pendency of instant writ petition.

xviii. That C.W.P. No. 17920 of 2018 was eventually disposed of by the Hon'ble High Court vide order dated 23.07.2018 of with a direction to the Director General, Town and Country Planning Department, Haryana to ascertain the correct facts and if need be, hear the representatives of the respondent as well as Municipal Corporation, Gurugram and take an appropriate decision within a period of four months. Despite passing of order dated 23.07.2018, till date no decision has been taken by Director General, Town and Country Planning Department, Haryana towards the issue in question.

xix. That now vide order dated 02.04.2019, an order has been passed by Ld. DTCP, Haryana vide which direction has been issued to GMDA to redesign the junction leading to the licensed colony on

first priority to provide proper approach to the licensed land/project site in order to redress the grievance raised by the coloniser regarding movement of heavy vehicle for building material for construction of site.

xx. Moreover, there has been no deliberate or inordinate delay by the respondent in the completion of construction. The 42 months period provided for delivery of possession expired on 08.09.2017. After the execution of the apartment buyer's agreement on 08.03.2014, the respondent received a letter bearing no. HSPCB/GRN/2015/516 dated 01.05.2015 from the Regional Office North, Haryana State Pollution Control Board, informing the Respondent Company that "vide order dated 07.04.2015 and 10.04.2015 in Original Application No.21 of 2014 titled as *"Vardhaman Kaushik Vs. Union of India"*, the Hon'ble National Green Tribunal, New Delhi has taken very serious views regarding pollution resulting from construction and other allied activities emitting dust emission and directed to stoppage of construction activities of all construction sites .....". In pursuance/compliances thereto of said letter/order, the respondent had to stop all the construction activities between the period May 2015 to August, 2015. Thus, the construction could not be carried out for a period of about 4-6 months because of the order passed by the Hon'ble N.G.T. This period is also therefore to be excluded. In order to substantiate the abovementioned reasons of delay in handing over

possession of the flat in question, copies of order dated 07.04.2015 and 10.04.2015 passed by Hon'ble National Green Tribunal, New Delhi are being attached.

xxi. That Hon'ble National Green Tribunal while passing order dated 07.04.2015 stated that out of three serious pollutants of air, pollution resulting from construction and allied activities emitting very dust contain in the air is the second most serious reasons of air pollution in NCT, Delhi.

xxii. That, Deputy Commissioner, Gurugram vide order dated 09.11.2017 i.e., even after passing of 2 years of orders passed by Hon'ble National Green Tribunal, New Delhi while complying with directions of NGT appointed PWD, MCG, HUDA, NHAI, HSAMB, TCP, HSIIDC to prohibit construction activity of any kind in the entire NCR. In fact, only internal finishing and interior work was allowed to be undertaken where no construction material was to be used. Further a direction was given to Haryana State Pollution Control Board to maintain due records of air quality in the areas falling under their jurisdiction being part of NCR.

xxiii. That the agreement executed between the parties to the dispute was executed prior to the Act and Rules. The authority has not appreciated the fact that the builder buyer's agreement was executed between the parties on 30.05.2015 and which is prior to coming into effect of the said Act and the Rules. The determination of relationship between the respondent and the complainants is

governed by the terms and conditions of the said agreement including the payment of delay compensation and the same contention is supported on perusal of explanation 1 to the draft agreement for sale as provided under the said Rules.

xxiv. Thus, in view of above it is patent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the builder buyer's agreement signed between the parties. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of said Act or said Rules, has been executed between the parties. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the builder buyer agreement dated 30.05.2015, executed much prior to coming into force of said Act or said Rules.

xxv. Further, due to demonetization that took place in India in November 2016, a situation of financial crisis had arisen due to which not only the respondent suffered severely but in fact every person in the country did. The sudden scarcity of valid currency notes and consequent lack of funds affected the construction activities at site which only got resolved after a period of 2 (two) months.

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 submissions made by the parties.

8. The application for refund was filed in the form CAO with the adjudicating officer. After taking reply and presuming the case file, the application was allowed vide order dated 18.10.2021, with a direction to the respondent *"Considering facts stated above, complaint in hands is allowed and respondent is directed to refund Rs.25,15,125/- i.e., amount received from complainants to the latters within 90 days from today, with interest @ 9.3% p.a. from the date of each payment, till realization of the amount. A cost of litigation Rs.50,000/- is also imposed upon respondent to be paid to complainants."* Felling aggrieved with the same, the order was challenged by the complainants before the Haryana Real Estate Appellate Tribunal, Chandigarh and who vide order dated 21.12.2022, set aside the same with a direction to the authority for fresh decision of the compliant in accordance with law. So, in pursuant to those direction, both the parties put in appearance before the authority. Therefore, the complaint is being deal with the authority. Now, the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case allottee wishes to withdraw from the project on failure of the promoter to give possession as per agreement for sale. It has been deliberated in the proceedings dated 10.05.2022 in ***CR No. 3688/2021 titled Harish Goel Versus Adani M2K Projects LLP*** and was observed that there is no material difference in the contents of the

forms and the different headings whether it is filed before the adjudicating officer or the authority.

9. Keeping in view 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. (2021-2022 (1) RCR (C), 357,*** the authority is proceeding further in the matter where allottee wishes to withdraw from the project and the 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. Both the parties want to proceed further in the matter accordingly. 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 basis of proceedings and submissions made by both the parties

E. Jurisdiction of the authority

10. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

11. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

12. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11***
>
> .....
>
> *(4) The promoter shall-*
>
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

13. 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.

14. 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 (Civil), 357 *and reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

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

15. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case 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.

16. The respondent has taken a stand that the complainants are investors and not consumers therefore, it is not entitled to the protection of the Act and to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The

authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if 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 have paid total price of **Rs.25,15,125 /-** towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the 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 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 investors is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors is not entitled to protection of this Act also stands rejected.

F. II Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

17. Objection raised the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions /situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment

of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

18. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***,in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

19. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein.

Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the relief sought by the complainants.

G.I. Direct the respondent to refund the aforesaid amount of Rs.25,15,125/- to the complainants along with interest at the prescribed rate since the booking of the apartment till its full final realization as the respondent has violated or contravened the provisions of the Act, rules and regulations made thereunder or aforesaid application or agreement dated 15.04.2014.

20. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at 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)

21. As per clause 4.1 of the agreement to sell dated 30.05.2015 provides for handing over of possession and is reproduced below:

> **4.1 Delivery of possession**
> *Subject to the Apartment Allottee(s) complying with various terms and conditions of this Agreement and other requirements as indicated, by the Developer, the Developer proposes to issue offer/nodes of possession of the* ***Apartment within a period of 42 months from the date of signing of this Agreement*** *and upon execution and registration of Conveyance Deed in favour of the Apartment Allottee(s). It is understood, by the Allottee that the possession of various Towers/Blocks comprised in the Compried shall be ready and completed by the Developer in phases and handed over to the Allottee(s) of that Tower/Block accordingly ....."*

22. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. 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 making payment as per the plan 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 a clause in the agreement to sell 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 a mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

23. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the prescribed rate of 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.*

24. 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.

25. 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., 03.03.2023 is **8.70%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%.**

26. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule **28(1),** the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 4.1 of the agreement to sell dated form executed between the parties on 30.05.2015, the possession of the subject unit was to be delivered within a period of 42 months from the singing of this agreement which comes out to be 30.11.2018.

27. Keeping in view the fact that the allottee/complainants wish to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the plot in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.

28. The due date of possession as per agreement for sale as mentioned in the table above is **30.11.2018** and there is delay of 8 months and 30 days on the date of filing of the complaint. The authority observes that even after a passage of more than 7 years from the date of making payment 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 allottees

cannot be expected to wait endlessly for taking possession of the unit which is allotted to them and for which they have paid a considerable amount of money towards the sale consideration. It is also pertinent to mention that complainants have paid almost 29% of total consideration till 2019. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottees intend 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.

29. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent /promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

> *".... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."*

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

> 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."*

31. 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.

32. 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 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.

G. II Direct the respondent to pay a sum of Rs. 20 lacs as compensation to the complainants and their on account of mental harassment, agony, physical pain and mental loss.

33. The complainants are seeking above mentioned relief w.r.t. compensation. 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. (supra)***, 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, the complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses.

H. Directions of the authority

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

    i. The respondent/promoter is directed to refund the amount i.e., Rs.25,15,125/- 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. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

    iii. The project is not registered with the authority. The planning branch is directed to take necessary action as per the Act of 2016.

35. Complaint stands disposed of.

36. File be consigned to registry.

Dated: 03.03.2023

(Sanjeev Kumar Arora)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram