

ORDER (DR. GEETA RATHEE SINGH - MEMBER)

1. Initially present complaint has been filed on 10.10.2022 by complainant under Section 31 of The Real Estate (Regulation & Development) Act, 2016 (for short Act of 2016) read with Rule 28 of The Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

A. UNIT AND PROJECT RELATED DETAILS

2. The particulars of the project, the details of 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 table:

| S.No. | Particulars | Details |
|-------|--------------------------------|--|
| 1. | Name of the project | Tuscan Heights in Tuscan City, Kundli, Sonipat |
| 2. | RERA registered/not registered | Unregistered. |
| 3. | DTCP License no. | 177 of 2007, |
| | Licensed Area | 22.864 acres |
| 4. | Unit no. | T-4-1303 |
| 5. | Unit area | 2935 sq. ft. |
| 6. | Date of allotment | 04.05.2012 |



| | | |
|-----|---|---|
| 7. | Date of builder buyer agreement | 04.05.2012 |
| 8. | Due date of offer of possession (30 months) | 04.11.2014 |
| 9. | Possession clause in BBA (clause 30) |However, if the possession of the apartment is delayed beyond a period of 30 months from the date of execution hereof and the reasons of delay are solely attributable to the wilful neglect or default of the Company then for every month of delay, the buyer shall be entitled to a fixed monthly compensation/damages/ penalty quantified @ Rs.5 per square foot of the total super area of the independent floor/apartment. The purchaser agrees that he shall neither claim nor be entitled for any further sums on account of such delay in handing over the possession of the apartment. |
| 10. | Total sale consideration | 53,80,368 |
| 11. | Amount paid by complainants | ₹ 77,51,531/- |
| 12. | Offer of possession (fit-out) | 27.12.2017 alongwith demand of Rs 15,59,027/-. |

B. FACTS OF THE COMPLAINT

3. Facts of complaint are that complainants had booked a flat in the project-TDI Tuscan Heights developed by the respondent by making payment of Rs 6,00,000/- on 11.09.2011, following which allotment letter dated 04.05.2012 was issued in favor of complainants and flat no. T-4-1303 having area 2395 sq ft was allotted to them.

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4. Thereafter, builder buyer agreement was executed between the parties on 04.05.2012 and as per clause 30 of said agreement, the possession was supposed to be delivered upto 04.11.2014. Complainants has paid total amount of Rs 77,51,531/- against sale price of Rs 53,80,368/-
5. That after a lapse of more than 3 years from the deemed date of possession, the respondent issued offer of possession for fit-out on 27.12.2017 alongwith demand of Rs 15,59,027/-. Complainants did not accept said possession as neither it was supported with occupation certificate nor the development works stand completed at site as per agreement.
6. That due to consistent threat of cancellation of allotment and forfeiture of paid amount, the complainants had paid the final installment by depositing an amount of Rs 12,75,000/- in May,2018, following which the respondent had issued 'No Dues Certificate' dated 26.05.2018. But the complainants have not taken actual possession of the unit/flat as respondent has never offered a valid and legal possession of the flat.
7. That respondent has miserably failed to fulfill its obligations by not offering possession of the unit in question within the specific timeline agreed as per buyer' agreement. Therefore, complainants are left with no other option but to approach this Authority. Hence the present complaint has been filed.


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C. RELIEF SOUGHT

8. Complainants in their complaint have sought following reliefs:
 - i. The respondent be directed to refund an amount of Rs 77,51,531/- paid by the complainants alongwith interest as per Rule 15 of RERA Rules,2017.
 - ii. To grant litigation expenses of Rs 1,50,000/- to the complainants.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

Learned counsel for the respondent filed detailed reply on 01.08.2023 pleading therein:

9. That due to the reputation of the respondent company, the complainants had voluntarily invested in the project of the respondent company namely-Tuscan Floors, TDI Tuscan City,Kundli, Sonipat, Haryana.
10. That the builder buyer agreement between the complainants and respondent has been executed on 04.05.2012 which is much prior from the date when the RERA Act, 2016 came into existence. Therefore, the present complaint is not maintainable and falls outside the purview of provisions of RERA Act.
11. That complainants herein as an investor has accordingly invested in the project of the Respondent Company for the sole reason of investing, earning profits and speculative gains, therefore, the captioned complaint is liable to be dismissed in limine.

12. That respondent had vide letter dated 09.05.2014 applied for grant of occupation certificate before the Director, Town & Country Planning Department, Haryana.
13. That vide letter dated 27.12.2017 respondent has already offered possession of the booked flat and complainants have already taken the possession of the unit way back in year 2018 vide NOC/letter dated 26.05.2018. Copy of NOC is annexed as Annexure R-4.
14. That handing over of possession has always been tentative and subject to force majeure conditions and the complainants have been well aware about the same.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANTS AND RESPONDENT

15. During oral arguments learned counsel for the complainants submitted that the possession of the unit was supposed to be delivered by November, 2014. However, respondent has offered fit-out possession to the complainants on 27.12.2017 that too without obtaining occupation certificate and accompanied with illegal demands. A valid offer of possession is yet to be made to the complainants. Even in its reply respondent has failed to provide surety in regard to the grant of occupation certificate. Complainants who have already waited for so many years do not wish to wait endlessly for delivery of possession of flat. In regard to NOC, it has been stated that said document was signed



by the complainants under threat of forfeiture of paid amount and said NOC cannot be relied upon as the actual possession has not been yet delivered by the respondent to the complainants. In view of the constraining circumstances, complainants are willing to surrender the possession of the flat and seek original relief which is refund of the paid amount along with interest. On the other hand, Learned counsel for the respondent reiterated arguments as were submitted in written statement and further stated that application for grant of occupation certificate is still pending with the DTCP. It is the complainants who are at fault by not coming forward to accept actual possession of the flat even after signing of NOC dated 26.05.2018.

F. FINDINGS ON THE OBJECTIONS RAISED BY THE RESPONDENT.

F.I Objection regarding execution of BBA prior to the coming into force of RERA Act,2016.

One of the averments of respondent is that provisions of the RERA Act of 2016 will not apply on the agreements executed prior to coming into force of RERA Act,2016. Accordingly, respondent has argued that relationship of builder and buyer in this case will be regulated by the agreement previously executed between them and the same cannot be examined under the provisions of RERA Act. In this regard, Authority observes that after coming into force the RERA Act, 2016,

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jurisdiction of the civil court is barred by Section 79 of the Act. Authority, however, is deciding disputes between builders and buyers strictly in accordance with terms of the provisions of flat-buyer agreements. After RERA Act of 2016 coming into force the terms of agreement are not re-written, the Act of 2016 only ensure that whatever were the obligations of the promoter as per agreement for sale, same may be fulfilled by the promoter within the stipulated time agreed upon between the parties. Issue regarding opening of agreements executed prior to coming into force of the RERA Act, 2016 was already dealt in detail by this Authority in *complaint no. 113 of 2018 titled as Madhu Sareen v/s BPTP Ltd* decided on 16.07.2018. Relevant part of the order is being reproduced below:

“The RERA Act nowhere provides, nor can it be so construed, that all previous agreements will be re-written after coming into force of RERA. Therefore, the provisions of the Act, the Rules and the Agreements have to be interpreted harmoniously. However, if the Act or the Rules provides for dealing with certain specific situation in a 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. However, before the date of coming into force of the Act and the Rules, the provisions of the agreement shall remain applicable. Numerous provisions of the Act saves the provisions of the agreements made between the buyers and seller.”



Further, as per recent judgement of Hon'ble Supreme court in **Newtech Promoters and Developers Pvt. Ltd Civil Appeal no. 6745-6749 of 2021** it has already been held that the projects in which completion certificate has not been granted by the competent Authority, such projects are within the ambit of the definition of on-going projects and the provisions of the RERA Act,2016 shall be applicable to such real estate projects, furthermore, as per section 34(e) it is the function of the Authority to ensure compliance of obligation cast upon the promoters, the allottees and the real estate agents under this Act, and the rules and regulations made thereunder, therefore this Authority has complete jurisdiction to entertain the captioned complaint.

Execution of builder buyer agreement is admitted by the respondent. Said builder buyer agreement is binding upon both the parties. As such, the respondent is under an obligation to hand over possession on the deemed date of possession as per agreement and in case, the respondent failed to offer possession on the deemed date of possession, the complainants are entitled to delay interest at prescribed rate u/s 18(1) of RERA Act or for refund of paid amount till actual realization. Therefore,


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obligation raised by the respondent with regard to maintainability of the present complaint is rejected.

F.II Objections raised by the respondent stating that complainants herein are an investor and have invested in the project of the Respondent Company for the sole reason of investing, earning profits and speculative gains.

The complainants herein are the allottees/homebuyers who have made a substantial investment from their hard earned savings alongwith borrowing of money from bank under the belief that the promoter/real estate developer will handover possession of the booked unit within 3-4 years of execution of builder buyer agreement but their bonafide belief stood shaken when the promoter failed to offer a valid possession of the booked unit till date without any reasonable cause. At that stage, complainants have approached this Authority for seeking refund of paid amount with interest in terms of provisions of RERA Act,2016 being allottee of respondent-promoter. As per definition of allottee provided in clause 2(d) of RERA Act,2016, present complainants are duly covered in it and are entitled to file present complaint for seeking the relief claimed by him. Clause 2(d) of RERA Act,2016 is reproduced for reference:-

“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”.

Complainants have been allotted flat in the project of respondent by the respondent/promoter itself and said fact is duly admitted by the respondent in the allotment letter dated 04.05.2012. Also, the definition of allottee as provided under Section 2 (d) does not distinguish between an allottee who has been allotted a unit for consumption/self utilization or investment purpose. So, the plea of respondent to dismiss the complaint on the ground that complainants herein are investor does not hold merit and same is rejected.

G. ISSUES FOR ADJUDICATION

16. Whether the complainants are entitled to refund of amount deposited by them along with interest in terms of Section 18 of Act of 2016?

H. OBSERVATIONS AND DECISION OF THE AUTHORITY

17. The Authority has gone through the rival contentions. In light of the background of the matter as captured in this order and also the arguments submitted by both parties, Authority observes as follows:

- (i) Admittedly, complainants in this case had purchased the flat in the project of the respondent in the year 2011 against

which an amount of Rs 77,51,531/- has been paid by the complainants. Out of said paid amount, last payment of Rs 6,25,000/- was made to respondent on 19.05.2018 which implies that respondent is in receipt of total paid amount since year 2018 whereas fact remains that no valid offer of possession duly supported with occupation certificate of the booked flat has been made till date.

(ii) Authority observes that the flat in question was booked in September, 2011 by the complainants. Allotment letter dated 04.05.2012 was issued in their favour, thereafter, builder buyer agreement got executed between the complainants and respondent on 04.05.2012 and as per clause 30 of it, the possession was supposed to be delivered within 30 months which works out to 04.11.2014. In present situation, respondent failed to honour its contractual obligations without any reasonable justification.

(iii) Respondent vide letter dated 27.12.2017 had offered possession for fit-out to the complainants alongwith demand of Rs 15,59,027/- but said offer of possession was issued without obtaining occupation certificate. Complainants have filed present complaint seeking refund of paid amount along with interest, as the respondent failed in its obligation to deliver

possession as per the terms of buyers agreement. Complainants under the apprehension of losing their hard earned money accepted the offer of possession issued by the respondent and deposited a further payment of ₹ 12.75 Lakh in September, 2018 to the respondent as full and final payment for taking possession of flat. An NOC for handing over of possession was issued to the complainants on 26.05.2018.

(iv) Despite making a full and final payment towards booking of flat complainants have sought relief of refund of paid amount for the reason that respondent is not in a position to deliver a valid possession of the flat. Though respondent in its reply has submitted that possession of the unit has been handed over to the complainants on 26.05.2018, however respondent has only attached a copy of NOC for handing over possession. No possession certificate, issued after handing over of possession has been attached by the respondent. The complainants have denied accepting the actual possession or signing any possession certificate (which is a proof of the fact that the complainants have not taken the actual physical possession). Complainants had invested their hard earned money in the project with hopes of timely delivery of possession. However, possession of flat was offered to the complainants after a delay



of more than three years. Fact remains that respondent is yet to receive occupation certificate meaning thereby that a valid possession is yet to be offered to the complainants.

(v) When an allottee becomes a part of the project it is with hopes that he will be able to enjoy the fruits of his hard earned money in terms of safety and security of his own home. However, in this case due to peculiar circumstances complainants have not been able to enjoy the fruits of their labour as the possession of the flat in question is shrouded by a veil of uncertainty. Complainants had invested a huge amount of ₹ 77 Lakh with the respondent by the year 2018 to gain possession of a residential flat. However, respondent is not in a position to offer a valid offer to the complainants since the project is yet to receive occupation certificate. Further, no specific timeline for grant of occupation certificate which has been applied since year 2014 has been committed by the respondent in its reply. Since respondent is not in a position to offer a valid offer of possession in foreseeable future, complainants who have already waited for more than eight years do not wish to wait for a further uncertain amount of time or a valid possession. Complainants are at liberty to exercise their rights to withdraw from the project on account of default

on the part of respondent to deliver possession and seek refund of the paid amount.

(vi) Further, Hon'ble Supreme Court in the matter of "*Newtech Promoters and Developers Pvt. Ltd. versus State of Uttar Pradesh and others* " in Civil Appeal no. 6745-6749 of 2021 has highlighted that the allottee has an unqualified right to seek refund of the deposited amount if delivery of possession is not done as per terms agreed between them. Para 25 of this judgement is reproduced below:

"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."



18. The decision of the Supreme Court settles the issue regarding the right of an aggrieved allottee such as in the present case seeking refund of the paid amount along with interest on account of delayed delivery of possession. The complainants wish to withdraw from the project of the respondent, therefore, Authority finds it to be fit case for allowing refund in favour of complainants.
19. The definition of term 'interest' is defined under Section 2(za) of the Act which is as under:
- (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;
20. The legislature in its wisdom in the subordinate legislation under the provisions 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.

21. Consequently, as per website of the state Bank of India i.e., <https://sbi.co.in>, the highest marginal cost of lending rate (in short MCLR) as on date i.e. 02.08.2023 is 8.75%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e., 10.75%.

22. Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is 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. In view of the above discussion, it is observed that the respondent has failed to fulfill its obligations cast upon them as per agreement and as mentioned in the RERA Act,2016. Therefore, the complainants are entitled for refund of deposited amount with interest. Thus, respondent will be liable to pay the complainants interest from the date amounts were paid till the actual realization of the amount. Authority directs respondent to refund to



the complainants the paid amount of Rs 77,51,531/- along with interest at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development) Rules, 2017 i.e. at the rate of SBI highest marginal cost of lending rate (MCLR)+ 2 % which as on date works out to 10.75% (8.75% + 2.00%) from the date amounts were paid till the actual realization of the amount. Authority has got calculated the total amount along with interest calculated at the rate of 10.75% till the date of this order and total amount works out to Rs 77,71,868/- as per detail given in the table below:

| Sr. No. | Principal Amount in ₹ | Date of payment | Interest Accrued till 02.08.2023 |
|---------|-----------------------|-----------------|----------------------------------|
| 1. | 6,00,000 | 07.10.2011 | 7,63,044 |
| 2. | 3,81,499 | 18.10.2011 | 4,83,931 |
| 3. | 18,501 | 18.10.2011 | 23,469 |
| 4. | 4,62,000 | 14.01.2012 | 5,74,073 |
| 5. | 2,58,000 | 24.02.2012 | 3,17,471 |
| 6. | 5,90,368 | 05.03.2012 | 7,24,713 |
| 7. | 6,25,574 | 12.06.2012 | 7,49,690 |
| 8. | 1,47,456.01 | 06.11.2012 | 1,70,328 |
| 9. | 2,46,486 | 20.12.2012 | 2,81,524 |
| 10. | 2,46,901 | 13.04.2013 | 2,73,708 |
| 11. | 2,46,901 | 07.06.2013 | 2,69,709 |
| 12. | 2,46,901 | 31.07.2013 | 2,65,782 |
| 13. | 2,46,901 | 02.12.2013 | 2,56,765 |
| 14. | 2,46,901 | 08.01.2014 | 2,54,075 |
| 15. | 2,46,901 | 29.01.2014 | 2,52,548 |
| 16. | 6,05,480 | 08.09.2014 | 5,79,739 |
| 17. | 2,46,901 | 24.12.2014 | 2,28,624 |
| 18. | 2,46,901.51 | 13.03.2015 | 2,22,879 |
| 19. | 1,82,613 | 03.06.2016 | 1,40,751 |

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|-----|---------------------------------|--------------------------|-----------------------|
| 20. | 49,319 | 28.04.2017 | 33,234 |
| 21. | 6,00,000 | 02.05.2018 | 3,39,111 |
| 22. | 2,23,150 | 02.05.2018 | 1,26,121 |
| 23. | 50,000 | 02.05.2018 | 28,259 |
| 24. | 1,10,877 | 16.05.2018 | 62,209 |
| 25. | 6,25,000 | 19.05.2018 | 3,50,111 |
| 26. | Total= 77,51,531.51/- | | Total= 77,71,868/- |
| 27. | Total Payable to complainant | 77,51,531.51 +77,71,868= | 1,55,23,399.5/- |

As per statement of accounts attached by both parties, i.e., complainant at page no. 53 of complaint and respondent at page no. 24 of reply, the total paid amount is mentioned as Rs 77,57,382/-. At this stage, it is worthwhile to mention here that complainants in the relief sought in their complaint have specifically claimed refund of Rs 77,51,531.51/- only [77,57,382 - 5850.49 (interest)] with interest. The complainants cannot be said to be entitled to more than the relief claimed. Therefore, the refund of paid amount of Rs 77,51,531.51/- with interest is awarded to the complainants.

24. The complainants are seeking cost of litigation to the tune of Rs 1,50,000/-. It is observed that Hon'ble Supreme Court of India in Civil Appeal Nos. 6745-6749 of 2027 titled as "*M/s Newtech Promoters and Developers Pvt Ltd. V/s State of U.P. & 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 learned Adjudicating Officer as per section 71 and the quantum of compensation & litigation

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expense shall be adjudged by the learned 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

25. Hence, the Authority hereby passes this order and issues 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) Respondent is directed to refund the entire amount of ₹1,55,23,399.5/- to the complainants in equal share.
 - (ii) A period of 90 days is given to the respondent to comply with the directions given in this order as provided in Rule 16 of Haryana Real Estate (Regulation & Development) Rules, 2017 failing which legal consequences would follow.
26. **Disposed of.** File be consigned to record room after uploading of order on the website of the Authority.


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NADIM AKHTAR
MEMBER]


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DR. GEETA RATHEE SINGH
[MEMBER]