

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

Complaint no. : 3855 of 2021
Date of filing of complaint: 24.09.2021
Order reserved on: 19.04.2023
Order pronounced on: 05.07.2023

1. Mr. Neeraj Gupta
2. Mrs. Juhi Gupta
Both RR/o: - 3A104, Nehru Nagar, Near Nasirpur Shiv
Mandir, Ghaziabad, Uttar Pradesh- 201001

Complainants

Versus

M/s Raheja Developers Limited.
Regd. Office at: W4D, 204/5, Keshav Kunj, Western
Avenue, Sainik Farms, New Delhi- 110062

Respondent

CORAM:
Shri Ashok SAngwan

Member

APPEARANCE:
Ms. Harshit Batra (Advocate)
Sh. Garvit Gupta (Advocate)

Complainants
Respondent

ORDER

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

thereunder or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the 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	"Raheja's Aranya City", Sectors 11&14, Sohna Gurugram
2.	Project area	107.85 acres
3.	Nature of the project	Residential plotted colony
4.	DTCP license no. and validity status	i. 25 of 2012 dated 29.03.2012 valid up to 28.03.2018 ii. 19 of 2014 dated 11.06.2014 valid up to 10.06.2019
5.	Name of licensee	Ajit Kumar and 22 Others
6.	RERA Registered/ not registered	Registered vide no. 93 of 2017 dated 28.08.2017
7.	RERA registration valid up to	27.02.2023 27.08.2022 + 6 months grace period in view of the Covid- 19
8.	Unit no.	Plot No. D-131 (Page no. 67 of the complaint)
9.	Unit area admeasuring	359.480 sq. yds. (Page no. 67 of the complaint)
10.	Allotment letter	05.07.2014



		(Page no. 62 of the complaint)
11.	Date of execution of agreement to sell	05.07.2014 (Page no. 64 of the complaint)
12.	Possession clause	4.2 Possession Time and Compensation <i>That the Seller shall sincerely endeavor to give possession of the plot to the purchaser within thirty-six (36) months from the date of the execution of the Agreement to sell and after providing of 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 reasons beyond the control of the Seller. However, the seller shall be entitled for compensation free grace period of six (6) months in case the development is not completed within the time period mentioned above. In the event of his failure to take over possession of the plot, provisionally and /or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be lie at his/her risk and cost the purchaser shall be liable to pay @ Rs.50/- per sq. Yds. of the plot area per month as cost</i>



		<p><i>and the purchaser shall be liable to pay @ Rs.50/- per sq. Yards. Of the plot area per month as holding charges for the entire period of such delay....."</i></p> <p>(Page no. 27 of the complaint).</p>
13.	Grace period	<p>Allowed</p> <p>As per clause 4.2 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 36 months plus 6 months of grace period. It is a matter of fact that the respondent has not completed the project in which the allotted unit is situated and has not obtained the part completion certificate by July 2017. As per agreement to sell, the construction and development work of the project is to be completed by July 2017 which is not completed till date. Accordingly, in the present case the grace period of 6 months is allowed.</p>
14.	Due date of possession	<p>05.01.2018</p> <p>[Note: 36 months form the date of agreement to sell i.e., 05.07.2014 + six months grace period]</p>
15.	Basic sale consideration as per BBA at page no. 82 of complaint	<p>Rs.1,07,57,439/-</p>



16	Amount paid by the complainant as per customer ledger dated 17.10.2016 page no. 39 of complaint	Rs.1,01,67,163/-
17	Payment plan	Installment payment plan (Page no. 82 of the complaint)
18	Occupation certificate /Completion certificate	Not received
19	Offer of possession	Not offered
20	Delay in handing over the possession till date of filing of this complaint i.e., 24.09.2021	3 years 8 months and 19 days

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -
- I. That as per clause 4.2 of the agreement, possession of the said plot is to be delivered by the respondents within thirty-six months (36 months) from the date of execution of the agreement. Clause 4.2 of the agreement also allows the promoter company a period of six (6) months over and above the period of 36 months as an outer limit (grace period) for the completion of the project. It was further agreed that if the respondents fail to complete the development of the said plot and handover its possession within the stipulated period, the seller shall be liable to pay to the purchaser a compensation at the rate of Rs.50/- per sq. yard of the plot area per month for the entire period

of such delay. Given the same, the possession of the said plot should have been handed over to the complainants by 05.01.2018.

- II. That the respondent has failed to deliver possession of the plot to the complainants, in violation of the terms of the builder-buyer agreement. The date for giving possession has expired and the development of the project site is still incomplete to a large extent even after the expiration of eight years (8 years) of the launch of the project. They have already paid up the entire price of the plot according to the representations made by the respondent. The entire episode and dealings with the respondent have caused much anguish and frustration to them, with the result that the complainants can no longer afford to wait and are forced to seek a refund of the entire principal amount paid along with interest compounded annually. That the balance of convenience lies in favour of them, who have invested their hard-earned savings with the respondents. Thus, the complainants humbly request the authority to allow the present complaint.
- III. That the complainants are aggrieved by the deficiency in services and unfair trade practices adopted by it. They were grossly aggrieved by the act of the respondent of not handing over the possession of their plot even after the expiration of the time for delivering such possession.
- IV. The unfair trade practices of the respondents are evident from the fact that if an allottee defaulted in making payments of any instalment, the same would have invited forfeiture and cancellation at the option of

the respondent. As per clause 3.6 of the agreement provides for payment of 18% interest on any delayed payment. These extortionate terms are not applied in the same manner to the respondent on account of the respondent delays. There are many such unfair clauses in the agreement. They reserve their right to refer to these clauses in the agreement during arguments and in any additional affidavit that may be filed at a later stage.

- V. That the deficiency in service of the respondent is evident from the failure to deliver the developed and properly marked plots within the time period specified in the agreement. The respondent failed to offer any revised timeline after persistent defaults on the originally stipulated timelines.
- VI. That the facts which make the filing of the present complaint necessary are enumerated herein below:
- That the respondent launched the project in the name and style "Raheja Aranya City" - the first smart green township project located south of Gurugram in sector 11 and 14 in Sohna, Haryana under the Sohna Development Plan 2031. A residential plotted and group housing colony that comprises plots and premium apartments amongst various other facilities wherein plots were being offered in various sizes. That none of the facilities like community center/club, dispensary, primary school, etc. provided for in this brochure have actually been provided by it on-site and no provision has been made in this regard to date for the future.

- That intrigued by the advertisements for the project, they approached the respondent for enquiring about the project to purchase a plot in the said project. The complainants, on being convinced with the representations made by it regarding the delivery period and quality of the project, submitted an application form for allotment of plot along with the below mentioned three (3) cheques of total amount Rs.26,77,500/- towards the booking of plot no. D-131 admeasuring 359.48 sq. yards, the receipt of which has been duly acknowledged by it.
- That pursuant to the submission of the application form for allotment referred above, the respondent provisionally allotted the said plot to them vide provisional allotment letters dated 12.06.2014 and 27.06.2014. Thereafter, the said plot was allotted to them vide allotment letter dated 05.07.2014. Thereafter, they entered into an agreement to sell with the respondent on 05.07.2014.
- That they have already made a payment of Rs.1,01,67,163/- till the last date of payment (on 21.09.2016) as per the payment schedule mentioned in the agreement and demands raised by it. The said fact can also be verified from the ledger issued by it to the complainants. Only one last instalment remains due to be paid as of the date which is liable to be waived off by the respondent as per the timely payment incentive of 5% on BSP offered by the respondent to the complainants vide the agreement to sell. Therefore, they have paid the respondent the entire amount due to be paid by them, however, the respondent has failed to provide the complainants with timely possession of their plot.

- That the complainants even after several inquiries through various modes have not received a single valid reason for the delay in getting the possession of their plot. They initially contacted the customer relations team of the respondent via telephonic means which kept on giving excuses for the delay in possession and as mentioned earlier did not provide any valid reasons for the said delay. Thereafter, they sent an email dated 28.04.2018 to respondent wherein they mentioned the poor condition of the project site along with his complaint regarding the delay in possession. It was specifically pointed out that none of the amenities for which money had been taken till that date (like construction of roads, demarcation of plot, etc.) were provided on-site along with the delay in handing over of possession of the actual plot. The only response the complainants received from respondent was that they are awaiting the completion certificate of "Ananya City - Phase 2" and will offer possession after receiving the same via email dated 09.05.2018. However, today, almost four years have passed since this communication, and the respondent keep repeating the same thing whenever the complainants approach the respondent concerning the same. There have been various communications between the complainants and respondents about this - both telephonically and on email - and they reserve their right to produce the same as and when required in any additional affidavit that may be filed at a later stage.
- That the same excuse of awaiting a completion certificate has been taken by it at all instances for more than three years as can be seen in their emails dated 07.09.2018, 01.03.2019, 31.08.2019,

17.01.2020, and many more. They have patiently waited for almost 4 years in hopes of getting possession of the said plot that has been paid for in full by them using their hard-earned money, however, the respondent has failed to fulfil their obligations towards the complainants as per the agreement to sell. Being aggrieved by the same, they requested the respondent to refund their money along with interest and relevant compensation as per the Act and the agreement to sell, however, the respondent have at all times failed to acknowledge their request and abide by the agreement.


C. Relief sought by the complainants:

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

- I. Direct the respondent to refund the entire amount deposited by the complainants towards the total consideration of their plot as has been provided under section 18(1) of the Act, 2016.
- II. Direct the respondent to pay an amount of Rs. 10,00,000/- as compensation for harassment and mental agony suffered by the complainants due to the mischievous conduct, unfair, unprofessional, and illegal act of the respondents and in lieu of the legal costs incurred by them and any such other reasonable and appropriate compensation in the facts and circumstances of the present case in addition to the refund and interest.

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: - 

- a) That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The agreement to sell was executed between both the parties prior to the enactment of the Act, 2016 and the provisions laid down in the said Act cannot be enforced retrospectively. Although, the provisions of the Act, 2016 are not applicable to the facts of the present case in hand yet without prejudice and in order to avoid complications later on, the respondent has registered the project with the authority. The said project is registered under the provision of the Act vide registration no. 93 of 2017 dated 28.08.2017.
- b) That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute as clause 13.2 of the buyer's agreement.
- c) That the complainants have not approached this authority with clean hands and have intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by them maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows: -
- That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as 'Raheja Atlantis', 'Raheja Atharva', 'Raheja Shilas' and 'Raheja Vedanta' and in most of these projects large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking

care of the day to day needs of the allottees of the respective projects.

- That the complainants, after checking the veracity of the project namely, 'Raheja's Aranya City- Phase 1', Sector 11 and 14, Sohna, Gurgaon had applied for allotment of a plot vide a booking application form. They agreed to be bound by the terms and conditions of the booking application form. The complainants were aware from the very inception that the plans as approved by the concerned authorities are tentative in nature and that the respondent might have to effect suitable and necessary alterations in the layout plans as and when required.
- That based on the application for booking, the respondent vide its offer letter dated 05.07.2014, allotted to the complainants plot no. D-131 admeasuring 359.480 sq. yard. The complainants signed and executed the agreement to sell on 05.07.2014 and the complainants agreed to be bound by the terms contained therein.
- That the respondent raised payment demands from the complainants in accordance with the mutually agreed terms and conditions of allotment as well as of the payment plan and the complainants made the payment of the earnest money and part amount of the total sale consideration and are bound to pay the remaining amount towards the total sale consideration of the plot along with applicable registration charges, stamp duty, service tax as well as other charges payable at the applicable stage.
- Despite the respondent fulfilling all its obligations as per the provisions laid down by law, the government agencies have failed miserably to provide essential basic infrastructure facilities such as

roads, sewerage line, water, and electricity supply in the sector where the said project is being developed. The development of roads, sewerage, laying down of water and electricity supply lines has to be undertaken by the concerned governmental authorities and is not within the power and control of the respondent. The respondent cannot be held liable on account of non-performance by the concerned governmental authorities. The respondent company has even paid all the requisite amounts including the external development charges (EDC) to the concerned authorities. However, yet, necessary infrastructure facilities like 60-meter sector roads including 24-meter-wide road connectivity, water and sewage which were supposed to be developed by HUDA parallelly have not been developed.

- That the time period for calculating the due date of possession shall start only when the necessary infrastructure facilities would be provided by the governmental authorities and the same was known to the complainants from the very inception. That non-availability of the infrastructure facilities is beyond the control of the respondent and the same also falls within the ambit of the definition of 'force majeure' condition as stipulated in Clause 4.4 of the agreement to sell.
- That development of the township in which the plot allotted to the complainants is located is 50% complete and the respondent shall hand over the possession of the same to them after its completion subject to their making the payment of the due installments amount and on availability of infrastructure facilities such as sector road and laying providing basic external infrastructure such as water, sewer,

electricity etc. as per terms of the application and agreement to sell. The photographs show the current status of the development of the plot in which the plot allotted to the complaint is located. Despite the occurrence of such force majeure events, the respondent has completed the development of the project and has already been granted part completion certificate on 11.11.2016. Under these circumstances, the passing any adverse order against the respondent at this stage would amount to complete travesty of justice.

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.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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

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

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers 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."

13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent

F.I. Objection regarding agreement contains an arbitration clause which refers to the dispute resolution system mentioned in agreement.

14. The agreement to sell entered into between both the parties on 05.07.2014 contains a clause 13.2 relating to dispute resolution between the parties. The clause reads as under: -

"All or any disputes arising out or touching upon in relation to the terms of this Application/Agreement to Sell/ Conveyance Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereof for the time being in force. The arbitration proceedings shall be held at the office of the seller in New

Delhi by a sole arbitrator who shall be appointed by mutual consent of the parties. If there is no consensus on appointment of the Arbitrator, the matter will be referred to the concerned court for the same. In case of any proceeding, reference etc. touching upon the arbitrator subject including any award, the territorial jurisdiction of the Courts shall be Gurgaon as well as of Punjab and Haryana High Court at Chandigarh".

15. 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 complainants, 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. Similarly, 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 forum.

16. 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."

17. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are 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 jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

18. The 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."
19. 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."
20. 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 complainant.

G.1 Direct the respondent to refund the entire amount deposited by the complainants towards the total consideration of their plot as has been provided under section 18(1) of the Act, 2016.

21. 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)

22. Article 4.2 of the agreement to sell provides for handing over of possession and is reproduced below:

4.2 Possession Time and Compensation

*That the Seller shall sincerely endeavor to give possession of the plot to the purchaser **within thirty-six (36) months from the date of the execution of the Agreement to sell** and after providing of 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 reasons beyond the control of the Seller. **However, the seller shall be entitled for compensation free grace period of six (6) months in case the development is not completed within the time period mentioned above.** In the event of his failure to take over possession of the plot, provisionally and /or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be lie at his/her risk and cost the purchaser shall be liable to pay @ Rs.50/- per sq. Yds. of the plot area per month as cost and the purchaser shall be liable to pay @ Rs.50/- per sq. Yards. Of the plot area per month as holding charges for the entire period of such delay....."*

23. 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 the 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.

24. **Due date of handing over possession and admissibility of grace period:** As per clause 4.2 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 36 months plus 6 months of grace period. It is a matter of fact that the respondent has not completed the project in which the allotted unit is situated and has not obtained the occupation certificate by July 2017. However, the fact cannot be ignored that there were circumstances beyond the control of the respondent which led to delay in completion of the project. Accordingly, in the present case, the grace period of 6 months is allowed.
25. **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 intends 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.

26. 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.
27. 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., 05.07.2023 is **8.70%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%**.
28. 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 4.2 of the agreement to sell executed between the parties on 05.07.2014, the possession of the subject unit was to be delivered within a period of 36 months from the date of execution of buyer's agreement which comes out to be 05.07.2017. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over of possession is 05.01.2018. 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 it right to do the same in view of section 18(1) of the Act, 2016.

29. The due date of possession as per agreement for sale as mentioned in the table above is 05.01.2018 and there is delay of 3 years 8 months and 19 days on the date of filing of the complaint. The authority has further, observes that even after a passage of more than 5.6 years till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/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 95% of total consideration till 2016. 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 completion certificate/part completion 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 is well within the right to do the same in view of section 18(1) of the Act, 2016.
30. 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 they have paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

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

31. 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."

32. 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 is unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the 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.

33. 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 an amount of Rs. 10,00,000/- as compensation for harassment and mental agony suffered by the complainants due to the mischievous conduct, unfair, unprofessional, and illegal act of the respondents and in lieu of the legal costs incurred by them and any such other reasonable and appropriate compensation in the facts and circumstances of the present case in addition to the refund and interest.

34. 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.

H. Directions of the authority

35. 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.1,01,67,163/- 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 date of actual realization 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 respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants. Even if, any

transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee/complainants.

36. Complaint stands disposed of.

37. File be consigned to registry.

Dated: 05.07.2023

(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram



HARERA
GURUGRAM