

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

Complaint no.:	3595 of 2020
First date of hearing:	08.12.2020
Date of decision:	09.05.2023

Dr. Dinesh Chandra Nautiyal

R/o: - RZ-J-118-J, Flat no. 402, Gali No. 7, Puran Nagar,
Palam Colony, Delhi- 110045

Complainant

Versus

1. M/s Agrante Developers Private Limited.

Office address: 522-524, DLF Tower-A, Jasola, New
Delhi-110044

2. Housing Development Finance Corporation Limited

Office address: The Capita Court, Munirka, Outer Ring
Road, Old Palme Marg, New Delhi- 110067

Respondent

CORAM:

Shri Vijay Kumar Goyal

Shri Ashok Sangwan

Member

Member

APPEARANCE:

Shri Vikas Deep (Advocate)

Shri. Tarun Biswas (Advocate)

Shri Virender Singh (Advocate)

Complainant

Respondent no. 1

Respondent no. 2

ORDER

1. The present complaint dated 21.10.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana



Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Project and unit related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), 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	"Beethoven's 8", Sector- 107, Gurgaon
2.	Nature of project	Group housing complex
3.	RERA registered/not registered	Not Registered
4.	DTPC License no.	23 of 2012 dated 23.03.2012
	Validity status	Not available on record
	Name of licensee	Narendra Kumar Gupta & others
	Licensed area	18.0625 acres
5.	Unit no.	Minor-H/A/1105 [pg. 26 of complaint]
6.	Unit area admeasuring	1300 sq. ft. [pg. 27 of complaint]
7.	Allotment letter	19.06.2014



		[pg. 24 of complaint]
8.	Date of builder buyer agreement	19.06.2014 [pg. 25 of complaint]
9.	Total sale consideration	₹ 89,13,450/- [pg. 34 of complaint]
10.	Amount paid by the complainant	CANNOT BE ASCERTAINED
11.	Possession clause	Clause 18(a) <i>Subject to other terms of this Agreement/Agreement, including but not limited to timely payment of the Total Price, stamp duty and other charges by the Vendee(s), the Company shall endeavor to complete the construction of the Said Apartment within 42 (Forty-two) months from the date of Allotment, which is not the same as date of this Agreement. The Company will offer possession of the Said Apartment to the Vendee(s) as and when the Company receives the occupation certificate from the competent authority(ies). Any delay by the Vendee(s) in taking possession of the Said Apartment from the date of offer of possession, would attract holding charges @Rs. 05 (Five) per sq. ft. per month for any delay of full one month or any part thereof.</i> <i>(Emphasis supplied)</i> [pg. 41 of complaint]
12.	Due date of possession	19.12.2017 [Due date calculated from date of allotment i.e., 19.06.2014]

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13.	Delay in handing over possession till the date of filing of this complaint i.e., 21.10.2020	2 years 10 months 2 days
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint: -
- That the respondent is a private colonizer. it started developing the residential project i.e., "Beethoven's 8, Gurgaon, Haryana, in accordance with the provisions of the Haryana Development and Regulation of Urban Areas Act, 1975 and Rules 1976.
 - That the respondent no. 2, through its agents and representatives, approached the complainant and represented itself as the financier of the project, launched by the respondent no,1 and introduced the subvention scheme plan to the complainant, for the unit to be booked with respondent no.1. On such representations, the respondent no. 1 invited the complainant for booking of an apartment in the project of respondent no. 1 i.e., "Beethoven's 8, Gurgaon, Haryana.
 - That during the whole process as well as at the time of booking, it was represented and strongly assured by the respondent no.1 & 2, that the respondent no.1 is entitlement to develop the property/land measuring 18.0625 acres falling in Sector-107, Gurgaon under the Revenue Estate of Village Dharampur, Tehsil and District Gurgaon, Haryana, the said land is earmarked for the purpose of building a group housing scheme, the Director General Town and Country



Planning, Haryana, Chandigarh has granted a license to develop housing project vide license no. 23 of 2012 and the company i.e., respondent no. 2 has obtained the final layout plan approvals for Beethoven's 8 from DTCP.

- d. That in persuasion to such representations, made by both the respondents, the respondent no.2 vide letter dated 03.05.2014 approved a housing loan amounting to ₹ 55,00,000/- which was subject to legal and technical clearance of the property being financed, including valuation of the property as assessed by respondent no.2.
- e. That thereafter relying upon the representations of respondents, the complainant along with his wife i.e., Smt. Anju Nautiyal, applied for an apartment no. "Minor-H/A/1105 measuring 1300 sq. ft." in the aforesaid project of the respondent no.1, by depositing an earnest money of ₹ 9,00,000/- vide cheque Nos. 128789 and 128790 dated 04.06.2014 and 14.06.2014 respectively.
- f. That soon after the booking, the respondent started committing unfair trade practices by serving a demand letter dated 11.06.2014 for depositing the amount of ₹ 26,43,275/-, payable until 30.06.2014, on account of start of pilling work, while even the allotment was not done to the complainant and no buyers agreement was offered.
- g. That after raising such demands from the complainant, the respondent no.1 vide allotment letter dated 19.06.2014, allotted a residential unit/ flat bearing no. Minor-H/A/1105 measuring 1300 sq. ft. in the said project of the respondent.
- h. That on the same date and day, both the parties i.e., complainant and respondent no.1, vide agreement to sell dated 19.06.2014 entered into an agreement in respect of the said unit mentioned here- in-above. In



the agreement to sell, it was strongly and specifically assured of handing over of the possession within 42 months from the date of allotment.

- i. That thereafter a quadripartite agreement dated 19.06.2014 was also entered amongst the complainant, respondent no.1 & 2 and Sh. Yuvraj Singh, R/o H. No. 253, Janakpuri, Bareilly, U.P. and Sh. Narender Kumar Gupta, R/o 146-R, Model Town, Karnal, Haryana (hereinafter referred to as parties) wherein it was specifically stipulated that the payment of instalments in respect of the booking shall be made by the respondent no.2 and not by the complainant. The respondent no.1 vide such agreement has assumed the liability to make payments as payable by the complainant to the respondent no.2. The specific authorization was given to issue disbursement cheques in favour of the respondent no.1.
- j. That in pursuance to the subvention scheme and loan agreement dated 30.06.2014, sanctioned for an amount of ₹ 52,00,000/-, entered between the complainant, his wife and the respondent no.2, an amount of ₹ 5,79,523/- by way of adjustments against loan processing and an amount of ₹ 15,92,933/- by cheque no. 452391 dated 30.06.2014 drawn on HDFC Bank favouring respondent no.1, totalling the amount to ₹ 21,72,456/- was made to the respondent no.1 vide receipt duly annexed with the schedule to the agreement.
- k. That the respondent no.1 changed its name from "M/S RMS Estates Pvt. Ltd." to "M/S Agrante Developers Pvt. Ltd.". The change in name was informed vide letter dated 03.06.2015.
- l. That after the serving of such letter, no letter whatsoever for the intimation of development/ construction activity at the project in

question was received to the complainant and despite the lapse of more than 6 years from the date of booking and lapse of nearly 3 years from the deemed date of possession. Hence, the respondents themselves miserably failed to abide by the terms and conditions set out in the agreements and even at present are not in a condition to hand over the actual physical possession of the unit in question.

- m. That the inability of development of project by respondent no.1 is also evident from the fact that the payment in respect of the unit was as per subvention scheme plan and the respondent no.2, after giving only one instalment, itself stopped making payments because no construction activity was carried out at the location by the respondent no.1. The complainant has a strong apprehension that the project has been left mid-way without completion of construction. As also evident from the in-completed structures lying at the project.
- n. That there is huge delay in handing over the unit in question which was booked by the complainant relying upon the false representations of respondent no.1 & 2, due to which the complainant has suffered and is suffering till date. Despite after committing illegalities by not completing the construction within time, the respondent no.2 has served a legal notice dated 01.08.2020 for repayment of arrears amounting to ₹ 82,389/- which the complainant is not entitled to pay because of the wrongs committed by the respondents and are subject to waiver due to no fault whatsoever of the complainant.
- o. That it is pertinent to take note of the fact that under the subvention scheme plan, the respondent no.1 i.e., the developer was bound to make payments of the instalments whatsoever accrued or accrues and is also under liability to do the same as per the terms of the

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quadripartite agreement dated 19.06.2014. In the presence of such liability, the complainant cannot be made liable to make payment of aforesaid arrears as alleged in the legal notice dated 01.08.2020 in absence of physical possession of the unit in question to the complainant. This act of the respondent no.2 highlights its unfair trade practices as such demand is to be raised with the respondent no.1 and not with the complainant.

- p. That after this huge delay in handing over of possession, the unit in question is left to be of no use to the complainant and the same is no longer required. Hence, in view of the facts and circumstances as stated hereinabove, the complainant seeks refund of the amount from the respondent no.1 along with statutory interest from the date of deposit till realization and settlement of loan amount of ₹ 21,72,456/- as well as another due amount with the respondent no.2.
- q. That the fact that the project could not be completed in the stipulated time was either within their contemplation or it was reasonably foreseeable by the respondent from the very threshold stage. The Act of respondent in concealing this fact amounts to "suppresio-veri". From the very beginning it was in its knowledge that the project has been inordinately delayed, yet they never informed the complainant about the factum of delay till date and rather extracted huge payment from complainant.

C. Relief sought by the complainant: -

4. The complainant has sought following relief(s)
- a. Direct R1 to refund the amount paid by complainant and R2 along with interest.



- b. R2 be restrained to raise claims as no amount remains payable under subvention scheme plan and to raise the claims with the respondent no. 1.
 - c. R2 be restrained from initiating any legal proceedings against complainant.
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 no. 1.

6. The respondent no. 1 has contested the complaint on the following grounds:
- a. That it is pertinent to mention here that delayed possession hurts and damages the promoter more than it does the complainant. It is submitted that any additional one-year delay increases the cost of the project by 20%. It is further submitted that the promoter has not demanded or is in receipt of more than 40% of the total sale consideration of the proposed apartment from any allottee and is undertaking the cost of construction from its own pocket. The promoter is taking all measures to complete the project while procuring necessary approvals from the competent authority.
 - b. That the respondent, as per the mutual understanding with the complainant, has been duly complying and paying the Pre-EMI to the complainants which is charged and deducted monthly by respondent no.2 towards the customer's loan account. It is submitted that there is no default in payment of the said Pre-EMI/Interest till date and the

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respondent undertakes to remit the same till possession is offered to the complainant.

- c. That tower-H is ready and the construction of a building structure comprising fourteen floors is completed. The necessary electrical wiring and works pertaining to plumbing and sanitation are also ready. It is submitted that the promoter would be in a position in all probability to offer possession of the flats in tower-H in 4-5 months from the date of filing of the present reply. The promoter has incurred and utilized his own funds and loans towards construction of the project and if the complaints pertaining to refunds are entertained at this stage it would jeopardize the fate of the project which would consequently hamper the valuable rights of the other allottees of the project. The promoter is in the process of applying for occupation certificate for tower- H. The promoter is willing to adjust for the interest components as computed for delay in offering possession towards the balance sale consideration of the complainant as the promoter will offer possession in tower-H to the complainant.
- d. That the statement of objects, reasons and preamble of the Act makes it manifestly clear that it is not only the interest of the consumers of the real estate sector which the Act seeks to protect and safeguard but also the promotion of the real estate with a view to ensure sale of plot, apartment etc. The Hon'ble Authority is empowered not only to monitor the projects but also to ensure their timely completion where projects are held up or stopped and to take steps so the same are completed in time and in the interest of the allottees who are awaiting possessions of the units in the project. It is not out of place to mention here that due to pending registration of the project with the Hon'ble

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Authority the promoter since the implementation of the Act was unable to raise funds from its existing customers nor it could raise finance by selling unsold inventory. The shortage of funds to enable rapid construction had been a determining factor for the delay as it slowed down the pace of construction considerably. It is reiterated that the promoter is undertaking costs of constructions from its own pockets and is not demanding anything from the allottees, an act which is unprecedented by any other real estate company, and it is now for this Authority to balance the interest of the consumers and the promoters harmoniously to achieve the maximum good and benefits.

- e. That M/s RMS Estate Pvt. Ltd. now known as "Agrante Developers Pvt Ltd" was granted development license from Director Town and Country Planning, Haryana ("DTCP") for development of land spread over a total area of 18.0625 acre of land on which the present project is being developed. The said license was granted on 27.03.2012 and was valid for 4 years.
- f. That subsequent to grant of the above license the promoter had executed a development/collaboration agreement dated 23.05.2013 with M/s Sarvaram Infrastructure Pvt. Ltd. ("collaborator"). An area measuring 10.218 acres out of the aforesaid total land was handed to the collaborator with absolute and exclusive rights for the purposes of developing the same. It is pertinent to mention here that M/s Sarvaram Infrastructure Pvt. Ltd. himself or through his nominee had proposed to build a separate project namely "ELACASSA" on that parcel of land with which the promoter has no association whatsoever. Thus, resultantly there were two projects being developed under the



same license by two distinct colonizers with rights and liabilities strictly framed under the said collaboration agreement. It would not be out of place to mention here that such agreements were in common practice then.

- g. The development/collaboration agreement dated 23.05.2013 stipulated strict liability on M/s Sarvaram Infrastructure Pvt. Ltd. or his appointed nominee to be in compliance of all statutory compliances, bye-laws applicable as per HUDA, DTCP etc. as applicable for his parcel of land. M/s Sarvaram Infrastructure Pvt. Ltd. was further under the obligation to remit all the dues accrued to governmental authorities arising under the agreement for the portion of land with the collaborator under the agreement.
- h. That M/s Sarvaram Infrastructure Pvt. Ltd., however, started defaulting in his compliance of statutory duties and contractual obligations. The promoter had on several occasions issued written requests and even served legal notices to M/s Sarvaram Infrastructure Pvt. Ltd. to rectify the said defaults *inter-alia* payment of EDC and IDC charges. The promoter had taken every step to ensure compliance of statutory obligations as non-compliance by M/s Sarvaram Infrastructure Pvt. Ltd. would directly prejudice the promoter's project completion having the common license. It is submitted that the license for the land lapsed due to non-renewal, and it cannot be renewed until outstanding EDC & IDC charges along with penalty is not cleared for the total land jointly by the promoter and M/s Sarvaram Infrastructure Pvt. Ltd. in proportion to their respective projects. Needless to mention here that the promoter is ready and

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willing to pay its share of EDC and IDC charges for the purposes of renewal of license.

- i. That the bona-fides of the promoter can be further gathered by the fact that the promoter is running post to pillar and has filed a representation before financial commissioner (Haryana) seeking a bifurcation of the license in two parts for two projects respectively and pursuing the same sincerely. It is pertinent to mention that only after renewal of license the promoter will be competent to obtain RERA registration. The promoter has undertaken every possible measure in his armory to salvage the project and complete the same. The process for bifurcation of license is still under consideration.
- j. It is submitted that the promoter has filed for HRERA registration vide order letter dated 09.08.2018 of its project on the said land which was to be with the applicant as per the agreement. The fate of the application is dubious and is still pending as the aforesaid license has lapsed and does not exist anymore as on date and further, EDC and IDC charges are unpaid which were to be paid by the M/s Sarvarm Infrastructure Pvt. Ltd. It is pertinent to mention here that the directors of M/s Sarvarm Infrastructure Pvt. Ltd. are lodged in jail presently. The promoter is crippled in the sense that he is unable to correspond with them, which could perhaps lead to some fruitful results. Moreover, insolvency proceedings are pending against them before the Hon'ble National Company Law Tribunal.
- k. It is submitted that due to non-registration with HRERA the promoter is unable to sell its proposed units in its project. More particularly the applicant is crippled financially as no demand can be raised by the promoter from its existing members. It is to be kindly considered by

this Hon'ble Court that the promoter has accordingly not raised a single demand from its members and has not collected more than 40% of total sale consideration of a unit from any of its members. On the contrary the promoter has undertaken the tedious task of completing the construction of the project from its own finances and loans so as to offer possession and is also remitting the interests on subvention scheme on behalf of customers so as to protect them from further loss. The overall conduct of the promoter plays a vital part in deciding the complaint such as the present one. The promoter is faced with peculiar circumstances which would require mutual co-operation from its members.

1. That, it would be of high importance to mention one similar complaint filed with this Hon'ble Authority wherein similar issues were being adjudicated. The Hon'ble Authority under HARERA had the opportunity to deal with similar complex issued faced by developers in respect of the licensed land wherein the original licensee had further sub-divided the land for development purposes on the basis of collaboration agreements. This Hon'ble Authority in complaint no. 826/2018, 1402/2018, 1343/2018, 1344/2018 had passed common orders. The issues in these complaints were similar to the applicant's issues. In this case also the original licensee M/s Triveni Ferrous Infrastructure Pvt. Ltd. a joint venture comprising of two groups Seth and Mittal Group who had subsequently divided/assigned development/marketing rights into five separate lands holding to be developed separately pursuant to which similar issues arose which are being faced by the applicant. This Hon'ble Authority in that complaint had passed its conclusions and recommendations,

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particularly the recommendation to Town and Country Planning Department, Haryana stressing the grave importance that DTCP must divide license into five parts. Once the license is bifurcated separate RERA registration would be permissible besides this Hon'ble Authority had also pertinently recommended that DTCP should defer recovery of their overdue EDC so as to leave some cash flow in the hands of the developers for investing in the project. Therefore, the promoter prays with folded hands to refer the present matter to the Hon'ble Authority in light of the aforementioned case law as cited so that similar recommendations can be issued on behalf of the promoter to Town and Country Planning Department, Haryana. It is submitted that such recommendations would be in parlance with the statutory duty of the Hon'ble Authority in section 32 of the Act which states the functions of the Hon'ble Authority for promotion of the Real Estate Sector.

- m. That lastly it is submitted that the crisis of COVID-19 pandemic has also given a blow to smooth working of the promoter. It is pertinent to mention here that during the lockdown imposed by the Central Government, the workforce at the project site left for their homes and there was a complete halt in the work which added to further delay. It was after sincere efforts of the promoter that the workforce could be again mobilized and presently the works are being carried out at the site.

E. Reply by respondent no. 2.

7. The respondent no. 2 has contested the complaint on the following grounds:
- a. That it is humbly submitted that the mandate of Real Estate (Regulatory and Development) Act of 2016 is to protect the interest of



homebuyers from the delays and defaults on part of the errant developers. The subject matter of the present complaint has arisen due to the alleged default on the part of respondent no. 1 in timely construction and handover of the project.

- b. The complainant has chosen to ignore the fact that the relationship of HDFC and the complainant has arisen out a Loan agreement which has no correlation whatsoever with the builder. In the humble submission of the answering respondent, this Hon'ble Authority lacks jurisdiction to issue any directions or orders to any other person or entity who is not a *promoter, real estate agent or allottee* and respondent no. 2 being the lender, does not fall under any of the aforementioned categories. The instant complaint is liable to be dismissed on account of misjoinder of parties. The domain of services provided by respondent no. 2 is completely separate and independent of respondent no. 1 and hence the complainant ought to be dismissed as against respondent no.2 on account of lack of jurisdiction.
- c. Also, the scope of services/ functioning of the respondent no. 2 falls outside the domain of this hon'ble Authority. In addition to this the complainant has failed to disclose any separate cause of action against the respondent no. 2. On the grounds as stated, the hon'ble Authority may be pleased to delete respondent no. 2 from array of parties and/or dismiss the instant complaint as against respondent no.2.

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- d. It is respectfully submitted that the answering respondent no. 2 i.e., HDFC Ltd is no way concerned with the present complaint except that it has sanctioned and disbursed a home loan in terms and conditions of the home loan agreement dated 30.06.2014 under loan A/c no. 611577613. The said loan has been sanctioned and disbursed to the complainant (borrower) along with Mrs. Anju Bhardwaj (co-borrower) based on their repayment capacity, their interest shown in the property and their irrevocable undertaking to make regular repayments as agreed under the schedule to the loan agreement, till the time of full and final closure of their loan account along with all costs and interests.
- e. Also, at the relevant time of obtaining the loan, the borrower/complainant has shown his satisfaction as to the builder, has made unequivocal assurances and representations for regular repayment of the loan to the answering respondent and has assured the respondent no. 2 that their repayment obligations shall be completely independent of any disputes/ dissatisfactions with the builder (respondent no. 1).
- f. Hence, regular repayment of the loan is a condition precedent to the sanction and disbursement of the loan. However, the complainant has failed to disclose these facts in front of this Hon'ble Authority. The reliefs claimed by the complainant are contrary to the agreed terms of

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the loan agreement and the quadripartite agreement. On these grounds alone, the present complaint is liable to be dismissed.

8. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.
9. The application filed in the form CAO with the adjudicating officer and on being transferred to the authority in view of the judgement ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. SLP(Civil) No(s). 3711-3715 OF 2021***, 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 10.5.2022 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.
10. Keeping in view the judgement of Hon'ble Supreme Court in the case titled as ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. (Supra)*** 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 pleading and submissions made by both the parties during the proceedings.

F. Jurisdiction of the authority

11. The application of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F. I Territorial jurisdiction

12. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

F. II Subject matter jurisdiction

13. 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.

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

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the

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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."

16. 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.

G. Findings on the relief sought by the complainant

G.I Refund entire amount paid by the complainant and respondent no. 2 along with the interest.

G.II. Respondent no. 2 be restrained to raise claims as no amount remains payable under subvention scheme plan and to raise the claims with the respondent no. 1

17. In the present complaints, the complainants intend to withdraw from the project and is seeking return of the amount paid by him 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

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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)

18. Clause 18(a) of the agreement provides for handing over of possession and is reproduced below:

“18(a).

Subject to other terms of this agreement/agreement, including but not limited to timely payment of the total price, stamp duty and other charges by the vendee(s), the company shall endeavour to complete the construction of the said apartment within 42 (forty-two) months from the date of allotment, which is not the same as date of this agreement. The company will offer possession of the said apartment to the vendee(s) as and when the company receives the occupation certificate from the competent authority(ies). Any delay by the vendee(s) in taking possession of the said apartment from the date of offer of possession, would attract holding charges @Rs. 05 (Five) per sq. ft. per month for any delay of full one month or any part thereof.”

19. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. 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 fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement 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 mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

20. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by them at the prescribed rate of interest. However, the allottee intend to withdraw from the project and is seeking refund of the amount paid by him 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.

21. 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.
22. 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., 09.05.2023 is **8.70%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%**.

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

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

Explanation. —For the purpose of this clause—

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

24. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 18 of the agreement dated 19.06.2014, the possession of the subject apartment was to be delivered within a period of 42 months from the date allotment which is not the same as date of this agreement. The due date is calculated 42 months from date of allotment letter i.e., 19.06.2014. Accordingly, the due date of possession comes out to be 19.12.2017.

25. Keeping in view the fact that the allottee/complainant wish to withdraw from the project and is 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 unit 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.

26. The due date of possession as per agreement for sale as mentioned in the table above is **19.12.2017**.
27. 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 allottees 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....."

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

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

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the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

29. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees 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 allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
30. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is 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 deposit till its realization and the amount paid by the respondent towards Pre-EMI shall be adjusted in above refundable amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.
31. Out of total amount so assessed, the amount paid by the bank i.e., respondent no. 2 be refunded first in the bank and the balance amount along with interest if any will be refunded to the complainants.

G.III. Respondent no. 2 be restrained from initiating any legal proceedings against complainant.

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32. The said relief stands redundant since the refund has been allowed by the authority along with the interest to be first paid to the bank and the remaining to the complainant.

G.IV. Direct the respondent to pay a sum of Rs. 5,00,000/- as cost of litigation & compensation for mental agony to the tune of ₹ 20,00,000/-.

33. The complainants in the aforesaid relief are seeking relief w.r.t compensation *Hon'ble Supreme Court of India in civil appeal titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021)*, has held that an allottee is entitled to claim compensation 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 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. Therefore, the complainant may approach the adjudicating officer for seeking the relief of compensation.

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 received by it from the complainant 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 deposit

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- till its realization and the amount paid by the respondent towards Pre-EMI shall be adjusted in above refundable amount.
- ii. Out of total amount so assessed, the amount paid by the bank i.e., respondent no. 2 be refunded first in the bank and the balance amount along with interest if any will be refunded to the complainants.
 - iii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
 - iv. The respondent builder is directed not to create third party right against the unit before full realization of the amount paid by the complainant. If any transfer is initiated with respect to the subject unit, the receivable from that property shall be first utilized for clearing dues of the complainant-allottee.
35. The complaint stands disposed of.
36. File be consigned to registry.


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.05.2023