BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	**167 of 2021**
First date of hearing:	**19.02.2021**
Date of decision:	**09.05.2023**

Carbyne Infratructure Private Limited (formerly known as Gattappu Chemicals Pvt. Ltd.)

R/o: - G2 & 29, Rasvilas Salcon, Saket District Centre, Saket, New Delhi-110017 **Complainant**

Versus

1. **M/s Agrante Realty Ltd.**
   Office address: DTJ-704, 7th floor, DLF Towers-B, Jasola, New Delhi-110025
2. **M/s Agrante Developers Private Limted.**
   Office address: 522-524, DLF Tower-A, Jasola, New Delhi-110025
3. **M/s RMS Estates Pvt. Ltd.**
   Office address: 513-516, Narayan Manzil, Barakhamba Road, New Delhi- 110001
4. **R. K Associates**
   Office address: Hemkunt Tower, 98, Nehru Place, New Delhi-110019
5. **Narendra Kumar Gupta**
   Office address: 522-524, DLF Tower A, Jasola, New Delhi-110025
6. **Yuvraj Singh**
   Office address: 522-524, DLF Tower A, Jasola, New Delhi-110025

Respondents

CORAM:

Shri Vijay Kumar Goyal — **Member**
Shri Ashok Sangwan — **Member**

APPEARANCE:

Shri Venkat Rao & Pankaj Chandola (Advocate) — Complainant
Shri. Sanjeev Sharma (Advocate) — Respondent

ORDER

1. The present complaint dated 15.01.2021 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. as per receipts	Symphony/J/D/902 [pg. 60 of complaint]
6.	Unit area admeasuring	2585 sq. ft. [pg. 60 of complaint]
7.	Allotment letter	17.10.2014 [pg. 60 of complaint]
8.	Date of builder buyer agreement	NOT PROVIDED
9.	Total sale consideration	CANNOT BE ASCERTAINED
10.	Amount paid by the complainant as per sum of receipts	₹ 44,19,122/-
11.	Possession clause	***Clause 19(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. *(Emphasis supplied)* *[taken from another complaint of same project]*
12.	Due date of possession	17.04.2018 [Due date calculated from date of allotment i.e., 17.10.2014]
13.	Delay in handing over possession till the date of filing of this complaint i.e., 15.01.2021	2 years 8 months 29 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: -

   a. The real estate project "BEETHOVEN'S 8" at Sector-107, Gurugram, Haryana (hereinafter referred to as "project") came to the knowledge of the complainant through Mr. Arvinder Singh Bagga, director of M/S Agrante Realty Ltd. and the other authorized representatives of the respondents and public advertisements. Mr. Arvinder Singh Bagga, director of M/S Agrante Realty Ltd. and authorised representative of the promotor allured the complainant with the brochure and special characteristics of the project speaking very high of the project in relation to its location, clarity of title documents, strict observance to scheduled timelines of completion and quality of construction and other amenities and similar claims being made in their public

advertisements also which subsequently turned out to be false claims and had deceived the complainant for booking a unit in the respective project of the respondents.

b. Believing on the assurance and representation of the respondent, the director of the complainant company executed the said application form and booked a flat bearing no. J/D/902 (4 BHK + 3 T + SQ + Parking Space) having super area admeasuring 2585 sq. ft. @ ₹ 5000/- per sq. ft. and a booking amount of ₹ 11,00,000/- was paid by the complainant to the respondent no. 1 vide cheque bearing no. 011908 dated 30.05.2013 drawn on axis bank and given along with the said application form and opted for a construction linked plan and the complainant among others as above, was also assured by the respondent no. 1 that the said project shall be completed within 03 from the date of signing the said application form and that the project, its developers and sales promoters do not lack in or violate any regulatory or legal compliances in any manner whatsoever.

c. That thereafter the respondent no. 1 issued first demand letter dated 16.07.2013 to the complainant thereby demanding a further amount of ₹ 17,55,692/- claiming it to be due and payable. Accordingly, a sum of ₹ 17,55,692/- was paid by the complainant to the respondent no. 1 vide cheque bearing no. 706249 dated 30.07.2013 drawn on axis bank. Thereafter, respondent no. 1 acknowledged receipt of the above payment of ₹ 17,55,692/- and accordingly issued an acknowledgement receipt dated 01.08.2013 in favor of the complainant.

d. That the respondent no. 1 thereafter issued a second demand letter dated 15.04.2014 demanding a further sum of ₹ 16,08,068/- claiming

it to be due and payable on 01.05.2014 and accordingly the complainant paid a sum of ₹ 15,63,430/- after deduction of TDS to the respondent no. 1 vide cheque bearing no. 060157 dated 30.04.2014 drawn on Axis Bank Ltd. GK II, New Delhi. That thereafter the respondent no. 1 acknowledged receipt of the above payment of ₹ 15,63,430/- after deduction of TDS and accordingly the respondents issued an acknowledgement receipt dated 02.05.2014 in favor of the complainant.

e. That the respondent no. 2 issued a third demand letter dated 01.12.2015 demanding a further sum of ₹ 18,41,300/-. The complainant was in utter shock after receiving the said demand letter from the respondent no. 2, to seek clarification on the same, the complainant through telecommunication raised his concern about receiving of demand letter through respondent no.2, a complete stranger to the sale transaction, and also asked the status of his flat as the due date of completion of such unit as per the promises of the respondent was a mere six month away. That the respondent no. 1 was supposed to handover the possession of the flat to the complainant i.e., after three years post submission of the application form but till the date of the above letter i.e., expiry of two and half years, neither the builder buyer agreement was delivered and/or executed by the respondents nor the possession of the said flat was offered to the complainant.

f. Without providing any satisfactory reply to the concerns raised by the complainant company, the respondent no. 2 again issued a fourth demand letter dated 05.08.2016 demanding a sum of ₹ 47,62,525/- from the complainant. It would be relevant to mention here that the

complainant had already paid an amount of ₹ 44,19,122/- to respondent no. 1 as above but the respondents had grossly failed to show their bonafides.

g. That the complainant, getting worried about the delay in the status of the project and the consistent demands raised by the respondents without showcasing any tenable progress sent an email dated 31.08.2016 to the respondents in response to the said demand made by them of a sum of ₹ 47,62,525/- reminding them that respondent no. 1 had assured the complainant at the time of booking of the flat i.e., on 30.05.2013 that the said project shall be completed within three years from the date of application from and possession of the said flat shall be handed over to the complainant. Further, the complainant also raised his concern that even after expiry of three years, the respondents have claimed to only reach to two floors and the pace of the construction and development work is very lethargic and far behind the targeted schedule. Moreover, the complainant requested the respondents to provide an update about the construction progress and photographs of the current construction stage in order to enable the complainant to make the payment to respondent no. 2.

h. That the respondent no. 2 instead of providing the status of the development and construction work of the project and photographs of the current construction stage as requested by the complainant through earlier mail, raised another demand letter to the complainant dated 14.09.2016 titled as reminder-3 and requested the complainant to pay a sum of ₹ 47,62,625/-.

C. Relief sought by the complainant: -

4. The complainant has sought following relief(s)

a. Direct the respondents to refund the entire amount paid by the complainants on account of withdrawal from the project along with prescribed interest from the date of respective deposits till its actual realisation, in accordance with the provisions of the Act and Rules.
b. Cost of litigation-₹ 5,00,000/-.
c. Compensation for mental agony and harassment-₹ 20,00,000/-
d. To impose penalty upon the respondent as per the provisions of section 61 of the Act for contravention of section 12, 13, 14 and 16 of the Act.
e. To recommend criminal action against the respondent for the criminal offence of cheating, fraud and criminal breach of trust under section 420, 406 and 409 of the IPC.
f. To conduct enquiry under section 35 of the Act against the respondents.

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 respondents.

6. The respondents have contested the complaint on the following grounds:
   a. It is humbly submitted that the present complaint is not in the prescribed "CAO" form, and it should have been returned to be filed in proper form at the first instance by this Hon'ble Forum. Therefore, at the threshold the complaint ought to be sent back and complainant be directed to file the amended complaint in CAO Form to which the respondent reserves his right to file amended reply.

b. The term 'consumer'- as the said Act has not defined the term consumer, therefore, the definition of the term 'consumer' as defined under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. It is submitted that the complainant herein are speculative investors and do not fall under the purview of the consumers and nowhere in the present complaint the complainant has pleaded that she booked the said unit for her residential purposes. On the contrary it is submitted that the complainant is a speculative investor not genuinely interested in purchasing a flat. The legislators have in the preamble of the Act has also used the term ***"consumer"*** categorically to the exclusion of such speculative investors. Therefore, the intent was to keep the speculative investors from misusing such coercive measures which were framed for the consumers only. It is pertinent to mention here that the present complaint is with respect to only one unit i.e., J/D-903 however, the complainant has failed to disclose that they have booked several units in the project, and it has time and again held that a person having more than one unit in a project cannot be said to have the same for residential purpose.

c. The complainant has asserted in his pleadings categorically that the respondent had promised offer for possession in 3 years from the date of execution of application for allotment in the project i.e., May 2013. It is submitted that 3 years from May 2013 finishes in May 2016 and

all this while the complainant was silent on it and has only filed the present complaint only after more than three years have elapsed since the cause of action arose in his favour. There is not a single whisper that the complainant took steps to invoke his rights available in law. On the contrary it is submitted that it the respondent who is a defaulter. The complainant has himself annexed all the reminder demand letters dispatched to him for remittance of his dues which was as per the construction linked plan opted by the complainant himself out of free volition. It is submitted that the complainant is a defaulter and on the pretext of misguided excuses he abstained to adhere to the payment plan causing wrongful loss to respondent and the fate of the project ultimately. The respondent as a good gesture did not terminate his allotment and still ready to offer him possession subject to clearance of his dues. Therefore, the complaint be kindly considered as barred by limitation.

d. That delayed possession hurts and damages the respondent more than it does the complainant. It is submitted that any additional one-year delay increases the cost of project by 20%. It is further submitted that the respondent 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 respondent is taking all measures to complete the project with procuring necessary approvals from the competent authority.

e. That the tower-H of the project is almost ready and the construction of building structure comprising of fourteen floors is completed. The necessary electrical wiring and works pertaining to plumbing and sanitation are also ready. It is submitted that the respondent would be in a position in all probability to offer possession of the flats in tower-H in 5-6 months from the date of filing of the present reply. The respondent has incurred and utilised his 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 project. The respondent 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 respondent will offer possession in tower-H to the complainant.

f. That M/s RMS Estate Pvt Ltd was granted development licence 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. That subsequent to grant of the above licence the respondent had executed a development/collaboration agreement dated 23.05.2013 with M/s Sarvaram Infrastructure Pvt Ltd ("Collaborator"). An area admeasuring 10.218 acre 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 respondent 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 towards 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 respondent 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

respondent had taken every step to ensure compliance of statutory obligations as non-compliance by M/s Sarvaram Infrastructure Pvt Ltd would directly prejudice the respondent'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 respondent and M/s Sarvaram Infrastructure Pvt Ltd in proportion to their respective projects. Needless to mention here that the respondent is ready and willing to pay its share of EDC and IDC charges for the purposes of renewal of license.

i. That the bona-fide of the respondent can be further gathered by the fact that the respondent 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 respondent will be competent to obtain RERA registration. The respondent has undertaken every possible measure in his armoury to salvage the project and complete the same. The process for bifurcation of license is still under consideration.

j. It is submitted that the respondent 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 not existing 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 the Sarvarm Infrastructure Pvt Ltd are lodged in jail presently. The respondent is crippled in the sense that he is unable to correspond with them which could perhaps lead to any fruitful results.

k. It is submitted that due to non-registration with HRERA the respondent 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 respondent from its existing members. It is to be kindly considered by this Hon'ble Court that the respondent 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 respondent 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 respondent plays a vital part in deciding the complaint such as the present one. The respondent is faced with peculiar circumstances which would require mutual co-operation of its members.

l. 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 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 land 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 more particularly the recommendation to Town and Country Planning Department, Haryana stressing the grave importance that DTCP must divide license in five parts (As there were Five assignee developers) and **determine liabilities of each party individually and separately.** 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.

m. That lastly it is submitted that the crisis of COVID-19 pandemic has also given a blow to smooth working of the respondent. 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 respondent that the workforce could be again mobilised and presently the works are being carried out at the site.

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 submission made by the parties.

8. 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.

9. 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.

E. Jurisdiction of the authority

10. 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.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

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

13. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

14. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (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 outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

15. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the 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 relief sought by the complainant.

F.I Direct the respondents to refund the entire amount paid by the complainants on account of withdrawal from the project along with prescribed interest from the date of respective deposits till its actual realisation, in accordance with the provisions of the Act and Rules.

16. In the present complaints, the complainant intends 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 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)*

17. Clause 19(a) of the agreement provides for handing over of possession and is reproduced below:

> ***"19(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."*

18. 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.

19. **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.

20. 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.

21. 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%.**

22. 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;"

23. 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. In the present case as per the copy of the agreement placed on record by the complainants, it is evident that the agreement to sell does not bear any date nor it has been signed by the respondent/promoter. In such an eventuality, the said agreement to sell cannot be treated as executed. However, had this agreement was executed by both the parties, the respondent was liable to handover the possession of the subject unit within the time period stipulated in clause 19(a) of the said agreement. By virtue of clause 19 of the agreement 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., 17.10.2014. Accordingly, the due date of possession comes out to be 17.04.2018.

24. 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.
25. The due date of possession as per agreement for sale as mentioned in the table above is **17.04.2018.**
26. 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....."*

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

28. 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.

29. The complainant in its complaint has stated that the respondent no. 1 and 2 are the promoters and respondent no. 3-6 are the authorised sales promoters. The respondents in their reply have alleged that DTCP has granted licence to respondent no. 2 and respondent no.2-5 are the joint owners of the said project and vide collaboration agreement all rights to develop the said plot of land for the purposes of group housing were assigned in favour of respondent no. 2 exclusively and as such it is respondent no. 2 who can be alone considered to be the promoter of the said project.

30. It is pertinent to note respondent no. 2 does not allotted the unit to the complainant according to the allotment letter. Moreover, the payment from the complainant has also been taken by the M/s Agrente realty Ltd. i.e., respondent no.1. But since the respondent in its reply clearly stated that the sole responsibility of promoter as per the RERA, Act 2016 lies with respondent no.2 accordingly the authority hereby fixes joint and several liability of both respondent no.1 and 2 to refund the amount paid by the complainants.

31. 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 no. 1 & 2 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.

F.II. To impose penalty upon the respondent as per the provisions of section 61 of the Act for contravention of section 12, 13, 14 and 16 of the Act.

F.III. To recommend criminal action against the respondent for the criminal offence of cheating, fraud and criminal breach of trust under section 420, 406 and 409 of the IPC.

F.IV. To conduct enquiry under section 35 of the Act against the respondents.

32. The said relief stands redundant since the refund has been allowed by the authority along with the interest to the complainant.

F.V. Cost of litigation-₹ 5,00,000/-.

F.VI. Compensation for mental agony and harassment-₹ 20,00,000/-.

33. The complainant in the aforesaid relief is 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.

G. 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 no.1 & 2 are 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 till its realization.

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 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