HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	**2773 of 2019**
Date of filing:	**15.11.2019**
Date of first hearing:	**17.12.2019**
Date of decision:	**12.07.2023**

1. Mr. Pratik Jain
   S/o Sh. Rajendera Kumar Jain
   R/o Manik Ratan Building , Bylane Kamal Service Centre,
   Machkhowa,Guwahati, Assam 781009.
2. Mrs. Suman Jain
   W/o Rajendera Kumar Jain
   R/o Manik Ratan Building , Bylane Kamal Service Centre,
   Machkhowa, Guwahati, Assam 781009.

....COMPLAINANT(S)

VERSUS

Rise Projects Pvt. Ltd. through its Director/Managing Director
Registered Office 195,Basement,Ram Vihar Delhi,
DL 110092

....RESPONDENT

CORAM: **Dr. Geeta Rathee Singh** **Member**
Nadim Akhtar **Member**

Present: Adv. Shweta Sanghi, counsel for respondent through V.C.

Adv. Ankita, proxy counsel for Adv. Venket Rao, counsel for respondent, through V.C.

ORDER(Dr. GEETA RATHEE SINGH - MEMBER)

1. Present complaint has been filed on 15.11.2019 by complainants under Section 31 of the Real Estate (Regulation & Development) Act, 2016 (for short Act of 2016) read with Rule 28 of the Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

A. UNIT AND PROJECT RELATED DETAILS

2. The particulars of the unit booked by complainants, the details of sale consideration, the amount paid by the complainants and details of project are detailed in following table:

S.No.	Particulars	Details
1.	Name of the project	Rise Sky Bungalows, MCF Land in Revnue Estate of Village Sarai Khawaja, Sector-41, Tehsil and District Faridabad, Haryana

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2.	RERA registered/not registered	Registered, vide no. 267/2017 dated 09.10.2017
3.	Unit no.	VS-8/Bungalow No. 13 PH on 13th Floor Tower VS-8
4	Unit area	2400 Sq.ft (including balcony area).
6.	Date of executing builder buyer agreement	09.12.2013
7.	Due date of possession (42 Months from flat buyer agreement-09.12.2013 /start of excavation-06.11.2013 whichever is later)	09.06.2017 [Clause (i) of 'Possession of Apartment' of allotment cum builder buyer agreement, possession was to be handed over within a period of 42 months from the date of flat buyer agreement/start of excavation, whichever is later subject to force majeure or circumstances beyond the control of the developer. It is however understood between the parties that various towers comprised in the Complex shall be ready and completed in phases and handed over accordingly. The developer shall be entitled to a grace period of 180 days after the expiry of 42 months for finishing construction work and applying the occupation certificate in respect of the project from the concerned Authority.]
8.	Total sales consideration	₹2,24,08,040/-
9.	Amount paid by Complainants	₹2,23,94,379/-
10.	Offer of possession	Not made

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B. FACTS OF THE COMPLAINT AS STATED IN THE COMPLAINT

3. Complainants had booked an apartment in the project advertised by the respondent promoter under the name and style of "Rise Sky Bungalows" situated at MCF land in Revenue Estate of Village Sarai Khawaja, Sector-41,Tehsil and District, Faridabad, Haryana by paying an initial booking amount of Rs.21,00,000/- by way of cheque no. 914117 dated 05.09.2013 i.e. 20% of the basic sale price to the respondent-promoter. On the payment of the booking amount, allotment letter cum agreement was executed on 09.12.2013 and apartment no. VS-8/Bungalow No-13 PH on 13th Floor Tower VS-8,bearing 2400 sq.ft. was allotted to the complainants in the respondent's project "Rise Sky Bungalows" Sector 41, Faridabad, Haryana. As per the agreement, total sale price of the apartment was ₹2,24,07,640/. Complainants have claimed to have paid Rs. 2,23,94,379/-. As per builder buyer agreement respondent was under a contractual obligation to deliver the possession of said apartment within a period of 42 months from the date of flat buyer agreement/start of excavation (whichever is later) and a grace period of 180 days was also provided to the developer for finishing construction work & applying the occupation certificate.

4. That the particulars of the apartment booked by the complainants as attached with the present complaint would show that 95.23% of the payment of the payment plan has already been made by the complainants. The complainants paid up to the respondent various amounts as demanded according to the schedule of payment plan provided to the complainants. The total amount which stands paid to the respondent is Rs.2,13,39,183/- along with service tax of Rs. 10,55,196/- hence total amount paid is Rs. 2,23,94,379/-.

5. That it is clearly evident that the complainants have complied with the obligations on their part under the flat buyer agreement and paid the amounts as demanded according to the schedule of payment plan provided to the complainants. However, despite promised period having lapsed, the respondent-developer has failed to adhere to the promised timelines and has failed to deliver the actual physical possession of the apartment in question, as assured.

6. That though the construction of the project was started in the year 2013 yet physical possession has not been handed over to the complainants till date despite the same being promised to have been done by 2016.

7. That a bare perusal of the terms and conditions of the flat buyer agreement would establish a fact that the respondent-developer was conscious that 'time' of performance of the obligations stipulated in

the agreements particularly time for handing over the possession of the developed flat was the essence of the allotment in question and therefore, after receiving considerable amount, the respondent-developer was legally bound to handover the actual physical possession of the flat in question free from all encumbrances whatsoever within a maximum period of 50 months.

8. That respondent developer possesses all the requisite approvals; however a perusal of some of the clauses of the agreement would suggest that some approvals were yet to be obtained at the time of the agreement.

9. That the complainants approached the officials after waiting for a considerable time for delivery of possession and contacted the respondent-developer through telephonic interactions followed by letters in order to seek clarification. Needless to mention herein that around 3 years have passed even after entering into the allotment letter cum agreement. However till date the possession has not been offered to the complainants.

10. That the complainants have personally visited the office of the respondent-developer on various occasions to verify about the status of the project, however every time it was assured by the official of the respondent, that the possession of the flat will be delivered very soon.

Thus the act of the respondent is illegal, arbitrary and not sustainable as the provisions enshrined in the RERA Act.

11. That even though the complainants have made all the due payments as demanded by the respondent developer and has already paid a considerable amount of money except the nominal amount which was to be paid at the time of delivery of possession but still the respondent-developer has failed to give possession within the promised period. In fact, on personal visit to the site of construction ,it is revealed that the respondent are far from completing the project and only a skeleton of the building is standing on the site of construction. The respondent developer has thus, not only committed breach of the agreed conditions but has also violated the provisions as enshrined under the Act. Thus, the complainants are left with no option but to ask for return of amount as well as compensation as envisaged under section 18 of the RERA Act.

12. That the complainants have not only suffered huge financial losses but have suffered mental stress as the complainants had bought the apartment for his personal and family reasons. Aggrieved by the same, complainants have filed the present complaint with the prayer of refund of paid amount along with interest and compensation as envisaged under section 18 and 19 of the RERA Act.

C. RELIEF SOUGHT

13. The complainants in their complaint have sought following reliefs.

a) Direct respondent to refund the amount of Rs. 2,23,94,379/- along with interest @ 24% per annum from the date of respective payments as envisaged in section 18 and 72 of the Act till the date of actual realization.

b) Direct respondent to pay a further compensation of Rs.10,00,000/- on account of harassment, mental agony and undue hardship caused to the complainants on account of unfair practices, deficiency in service and fraudulent misrepresentations.

c) The respondent developer be directed further to remit/ pay a sum of Rs.3,00,000/- towards the costs of litigation expenses.

d) To pay pendente lite and future interest @ 18% to the complainants on the relief prayed in the preceding paragraphs.

e) Any other relief which this Hon'ble Authority may deem fit to be granted in favor of the complainants and against the respondent.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

Learned counsel for the respondent filed detailed reply on 05.04.2022 pleading therein:

14. That, the present complaint is not maintainable as the relief prayed by the complainants does not fall within the jurisdiction of this Hon'ble

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Authority. Further as per clause- Applicable laws and Jurisdiction of the ' Allotment cum builder buyer agreement', any dispute arising out of the said agreement shall exclusively be resolved through Arbitration and the courts at New Delhi has got the exclusive jurisdiction to entertain any dispute arising out or in any way touching or concerning the said agreement, therefore on sole ground itself, the present complaint is not maintainable. It is only after deciding the question relating to maintainability of the complaint that the matter is to be proceeded with further.

15. That the complainants are not consumer and they had not booked the flat in question for their residential purpose but for investment purposes only. However, later the complainants realized that the real estate market came down, which persuaded the complainants to withdraw their investment.

16. That, the complainants vide application dated 05.09.2013 had applied for booking of a residential apartment in a residential group housing project of the respondent being developed on a plot of land numbered as GH-02 (on Municipal Corporation of Faridabad land in Revenue Estate of Village Sarai Khawaja), Sector-41, Faridabad, Haryana. Accordingly, the complainants had paid an amount of Rs. 21,00,000/- towards booking of the said apartment/ unit in the project developed by the respondent.

17. That thereafter, an allotment letter cum apartment buyer agreement dated 09.12.2013 (herein after referred to as "Buyers Agreement") was executed in favour of the complainants, thereby confirming the allotment of apartment bearing No. VS-8/Bungalow No.13PH, in Tower-VS-8 on the 13th floor admeasuring super areas 2400 sq. ft. (hereinafter referred to as ***"said flat"***) in the project being developed in the name and style of 'Rise Sky Bungalows' situated at Sector-41, Faridabad, Haryana. It is pertinent to mention that the total sale consideration of the said apartment is Rs. 2,24,08,040/- (Rupees Two Cores Twenty Four Lakhs Eight Thousand and Forty Only).

18. That the project of the respondent is at the final stage and ready for handing over for fit outs and is delayed because of 'force majeure' situation occasioned on account of non-action on the part of "Municipal Corporation of Faridabad". It is pertinent to mention that the Respondent has time and again approached the 'MCF' for resolution of 'force majeure 'situation but despite assurances, the 'MCF'authority has taken no action to resolve the existing situation.

19. That left with no option but to accept the dominant and one sided allotment letter by MCF, the respondent complied with the terms of the allotment letter by getting approvals/licenses/sanctions on time and thereby commencing the work at site. However, the MCF did not commence any development work/services at the project site as was

promised to the respondent. The respondent started to face severe hardships in developing the project due to lack of development work, which the respondent was supposed to provide within nine year of the date of allotment letter.

20. That the respondent has regularly followed up with the 'MCF' and has requested them to complete the development work in entirety, so that the project can be completed and the possession of the apartments/ units can be handed over to the allottees.

21. The respondent humbly submits that due to increasing levels of air pollution in the Delhi NCR region the National Green Tribunal (NGT) vide its various orders and notifications had completely banned any form of construction activity for varying periods each year since 2015. In addition to it movement of diesel vehicles including trucks carrying construction materials like cement, sand grit etc. was also banned thereby disrupting the supply chain of the raw material required for the construction of the project.

22. That it is pertinent to mention herein that ban on construction activities even for a few days completely derails the construction pace. Even though the ban is only for a few or weeks or couple of months, as the case may be, its takes double the time to mobilises the labour and material and recommence the construction activities.

23. A detailed chart showing the days of construction ban since 2015 till date, and its effect on time taken to mobilise the labour and resources and restart the construction activity.

S.No	Year	Order on construction ban	Order on construction restart	Days	No. of days to mobilise the resources and restart work
1	2016	08.11.2016	15.11.2016	8	30
2	2017	08.11.2017	17.11.2017	10	35
3	2018	31.10.2018	26.12.2018	56	76
4	2019	25.10.2019	14.02.2020	114	140
5	2021	15.11.2021	20.12.2021	36	30
TOTAL				224	310

It is evidently clear from the above chart that the respondent was unable to carry on any construction activities for almost a year. The respondent for no fault on its part had to stop the construction work resulting into a force majeure situation beyond the control of the developer/ respondent for which he is entitled to corresponding extension of time for the completion of project.

24. That the construction activities have been severely hit by Covid -19 pandemic. Above all the reverse migration of the labourers added to the vows of the real estate sector and severely affected construction and development of the ongoing projects. That this Hon'ble Authority vide its office orders dated 26.05.2020 and 02.08.2021 declared the period from 25.03.2020 till 24.09.2020, and from 01.04.2021 till 30.06.2021 as force majeure period.

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25. That the respondent most humbly submits that the delay has been due to delay caused by MCF, time to time construction ban by the Supreme Court and Pollution Control Authorities, NGT, and pandemic. The respondent despite its best efforts and endeavours could not overcome the force majeure conditions as stated above. It is submitted without admitting that, granting refund with interest without taking into consideration the " force majeure " situation due to MCF, Construction Ban and COVID -19 would cause miscarriage of justice to the respondent.

26. That it was specifically agreed in the agreement dated 09.12.2013 that the timely payment shall be the essence of the transaction and allotment. However, the complainants regularly defaulted in payment of installments. It is noteworthy to mention that there exists a huge outstanding amount to the tune of Rs. 12,41,551/- that stands due and payable on the part of the complainants.

27. That the respondent has issued several demand letters and reminder letter to the complainants, calling upon him to make the payments towards allotment, as per the opted payment plan i.e. 'construction linked payment plan' schedule. However, the complainants has been negligent throughout to adhere to the said conditions and is therefore, in material breach of the agreed terms of the said 'allotment letter cum agreement'.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANTS AND RESPONDENT

28. During oral arguments, ld. counsel for the complainants submitted that in the present matter, booking was done in the year 2013. Complainants opted for a construction linked plan but respondent failed to complete the unit within stipulated time. Therefore, complainant stopped making the payment towards the unit. Further, nothing has been mentioned in the reply about the current status of the project. He submitted that Complainants by virtue of Section 18 of the RERA Act, 2016 is pressing for refund of the amount paid by them. Complainants have till now paid a total amount of ₹ 2,23,94,379/- to the respondent on different dates. Receipts of payment has been attached in complaint file.

Ld. counsel for the respondent reiterated the averments made in the reply and further stated that refund at this stage when the project is near completion is not admissible as it will jeopardise the entire project

F. ISSUES FOR ADJUDICATION

29. (i) Whether the Authority has jurisdiction to entertain the said complaint?

(ii) Whether the Complainants are entitled to refund of the amount deposited by him along with interest in terms of Section 18 of Act of 2016?

G OBSERVATIONS AND FINDINGS OF THE AUTHORITY

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

31. Respondent has raised an objection that the Authority does not have jurisdiction to decide the complaint on two grounds:-

(i) Arbitration Clause in allotment letter cum agreement dated 09.12.2013.

(ii) Complainant is not an "allottee" but an "investor" thus complaint not maintainable under RERA Act, 2016.

With respect to the objection of the respondent that the complainant has not first invoked the provision/clause of the allotment letter cum agreement, which is contrary to provision regarding initiation of arbitration proceeding in case of breech of agreement. The relevant clause regarding arbitration incorporated in the allotment cum agreement is reproduced as below:

"APPLICABLE LAWS AND JURISDICTION:

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All or any dispute out of or touching upon or in relation to the terms of this Allotment Letter cum Agreement including the interpretation and validity thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion falling which the same shall be settled through Arbitration. The Arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments,modification thereof for the time being in force. The Arbitration proceedings shall be held in New Delhi by a sole Arbitrator to be appointed by the RPPL.The Allottee(s) hereby confirms that he she/they shall have no objection to this appointment even if the person so appointed as Arbitrator is an employee of advocate of RPPL or is otherwise connected to the RPPL and the Allottees) confirms that notwithstanding such relationship/connection, the Allottee(s) shall have no doubts as to the independence or impartiality of the said Arbitrator. The Courts at New Delhi shall alone have the jurisdiction in all matters arising out or/ touching and/or concerning this Agreement regardless of the place of execution of this agreement.

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, infact Section 79 of RERA Act bars the jurisdiction of civil courts with respect to any matter which is the subject matter under the Act and falls within the purview of the Authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such dispute as non-arbitral seems to be clear. Further Section 88 of the Act also provides that provision 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. The Authority place relevance on catena of judgements of Hon'ble Supreme Court, particularly in **National Seeds Corporation Ltd. vs. M. Madhusudan Reddy 2 An (2012) 2 SCC 506** wherein it has been held that remedies provided under Consumer Protection Act are in

addition to and not in derogation of any other law 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. Therefore applying the same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the Authority. Relevant paragraphs are reproduced below for reference:-

> *28. The consideration of this issue needs to be prefaced with an observation that the grievance of a farmer/grower who has suffered financially due to loss or failure of crop on account of use of defective seeds sold/supplied by the appellant or by an authorised person is not remedied by prosecuting the seller/supplier of the seeds. Even if such person is found guilty and sentenced to imprisonment, the aggrieved farmer/grower does not get anything. Therefore, the so called remedy available to an aggrieved farmer/grower to lodge a complaint with the concerned Seed Inspector for prosecution of the seller/supplier of the seed cannot but be treated as illusory and he cannot be denied relief under the Consumer Act on the ground of availability of an alternative remedy.*
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> *29.The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either 57 seek reference to an arbitrator or file a complaint under the Consumer Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996 Act. Moreover, the plain language of Section 3 of the Consumer Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force. In Fair Air Engineers (P) Ltd. v. N.K. Modi (supra), the 2-Judge Bench interpreted that section and held as under:*
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> *"the provisions of the Act are to be construed widely to give effect to the object and purpose of the Act. It is seen that Section 3 envisages that the provisions of the Act are in addition to and are not in derogation of any other law in force. It is true, as rightly contended*

by Shri Suri, that the words "in derogation of the provisions of any other law for the time being in force" would be given proper meaning and effect and if the complaint is not stayed and the parties are not relegated to the arbitration, 58 the Act purports to operate in derogation of the provisions of the Arbitration Act. Prima facie, the contention appears to be plausible but on construction and conspectus of the provisions of the Act we think that the contention is not well founded. Parliament is aware of the provisions of the Arbitration Act and the Contract Act, 1872 and the consequential remedy available under Section 9 of the Code of Civil Procedure, i.e., to avail of right of civil action in a competent court of civil jurisdiction. Nonetheless, the Act provides the additional remedy.

It would, therefore, be clear that the legislature intended to provide a remedy in addition to the consentient arbitration which could be enforced under the Arbitration Act or the civil action in a suit under the provisions of the Code of Civil Procedure. Thereby, as seen, Section 34 of the Act does not confer an automatic right nor create an automatic embargo on the exercise of the power by the judicial authority under the Act. It is a matter of discretion. Considered from this perspective, we hold that though the District Forum, State Commission and National Commission are judicial authorities, for the purpose of Section 34 of the Arbitration Act, in view of the object of the Act and by operation of Section 3 thereof, we are of the considered view that it would be appropriate that these forums created under the Act are at liberty to proceed with the matters in accordance with the provisions of the Act rather than relegating the parties to an arbitration proceedings pursuant to a contract entered into between the parties. The reason is that the Act intends to relieve 59 the consumers of the cumbersome arbitration proceedings or civil action unless the forums on their own and on the peculiar facts and circumstances of a particular case, come to the conclusion that the appropriate forum for adjudication of the disputes would be otherwise those given in the Act."

30.In Skypay Couriers Limited v. Tata Chemicals Limited (supra) this Court observed:

"Even if there exists an arbitration clause in an agreement and a complaint is made by the consumer, in relation to a certain deficiency of service, then the existence of an arbitration clause will not be a bar to the entertainment of the complaint by the Redressal Agency, constituted under the Consumer Protection Act, since the

remedy provided under the Act is in addition to the provisions of any other law for the time being in force."

Furthermore in **Aftab Singh and ors. Vs. Emaar MGF Land Ltd. and others, Consumer case no. 701 of 2015**, the National Consumer Dispute Redressal Forum, in its order dated 13.07.2017 has held that the arbitration clause in an agreement between the complainant and the builder could not circumscribe the jurisdiction of a consumer. Relevant paragraph is reproduced below for reference:-

"56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

32. While considering the issue of maintainability of a complaint before a consumer forum/ commission in the fact of an existing arbitration clause in the builder buyer agreement , the Hon'ble Supreme Court in **M/s Emaar MGF Land Ltd Vs. Aftab Singh in revision petition no. 2629-30/2018, in Civil appeal no. 23512-23513 of 2017** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the constitution of India, the ratio laid down by the Supreme Court shall be binding on all courts within the territory of India and accordingly Authority is bound by the aforesaid view of the Hon'ble Apex Court. Relevant paras 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 27 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."

Therefore, in view of the above judgements and considering the provision of the Act, the Authority is of the view that complainant is well within his right to seek a special remedy available in a beneficial Act such as consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration.

33. Further, the respondent promoter has raised an objection that the complainants are not an "allottee" but an investor, so provisions of RERA Act,2016 are not applicable and thus, complaint is not maintainable. In this regard it is noted that the concept/definition of investor is not provided or referred to in the RERA Act, 2016. As per the definitions provided under Section 2 of the RERA Act, 2016, there will be "promoter" and "allottee" and there cannot be a party having a status of an investor. Further, the

definition of "allottee" as provided under RERA Act, 2016 does not distinguish between an allottee who has been allotted a plot, apartment or building in a real estate project for self-consumption or for investment purpose. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled **as M/s Srushti Sangam Developers Ltd. Vs Sarvapriya Leasing (P)Ltd. And Anr.** had also held that the concept of investors not defined or referred to in the Act. Thus, the contention of promoter that allottees being investor are not entitled to protection of this Act also stands rejected. Hence, we have no hesitation in holding that the Authority has the requisite jurisdiction to entertain the complaint.

34. It is not disputed by any of the parties that the complainants had booked a apartment in respondent's project named ' Rise Sky Bungalows' at MCF Land , Sector- 42, Faridabad by paying an initial booking amount of Rs.21,00,000/-(20% of the Basic Sale Price) by way of cheque no. 914117 dated 05.09.2013 to the respondent-promoter. On payment of the booking amount "allotment letter cum agreement" was executed on 09.12.2013. As per clause (i) of "possession of apartment", possession was to be handed over within a period of 42 months from the date of flat buyer agreement or from the start of excavation, whichever is later subject to force majeure or circumstances beyond the control of the developer. Further, there shall be a

grace period of 180 days, after the expiry of 42 months for finishing construction work and applying the occupation certificate in offering the possession of the unit. The date of excavation as per demand letter dated 25.10.2013 was 06.11.2013.Thus, 42 months period from date of excavation works out to 06.05.2017, whereas as per allotment cum buyer agreement dated 09.12.2013, the period of 42 months works out to 09.06.2017 and it is the later date as per possession clause. The agreement further provides that promoter shall be entitled to a grace period of 180 days after expiry of 42 months for filling and pursuing the grant of occupation certificate with respect to the project from the concerned authority. However there is nothing on record to show that the respondent has applied for occupation certificate within the time limit prescribed by the respondent/promoter in the allotment cum apartment buyer agreement i.e immediately after completion of construction works within 42 months. Thus, the period of 42 months expired on 09.06.2017. As per the settled principle no one can be allowed to take advantage of its own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter.

35. Complainants have alleged that they have fulfilled their part of the contract by paying all amounts as and when demanded by the respondent and have so far, paid an amount of Rs. 2,23,94,379/-. Though, the respondent promoter had not disputed the amount of Rs 2,23,94,379/- paid by the complainants, it has rebutted the claim of the complainants that they have

made all payments. It is the stand of the respondent that it is the complainants who have defaulted in making timely payments, and there remains outstanding dues of Rs. 12,41,551/- against the complainants. To adjudicate this issue, the Authority has perused the demand letter placed on file issued by the respondent promoter. The last demands letter was issued by the respondent promoter on 04.12.2015 on account of 10th instalment " on start of initial finishing work" and the complainants have paid the amount on 19.12.2016. However, post the demand for 10th instalment there is nothing on record placed by the respondent to show that any further due demands were raised by the respondent and the complainants defaulted in paying the same.

36. Authority has also referred to the construction link payment plan for the unit. As per the plan, the complete payment of Rs. 2,24,08,040 was to be made in 12 instalments. Last two instalments were to be demanded at the time of start of the plaster work and at the time of offer of possession respectively. It is a matter of fact that the complainants have paid an amount of more than 95% of the total sales price by December, 2016 only. Thus, intention of the complainants who had paid the huge chunk of their payments, to make payments of above amount cannot be doubted. Since, the respondent itself never demanded the last two instalments, it would not be wrong to presume that such stages of construction/possession were never reached by the respondent promoter. Hence, for the payments which were

never demanded or become due, the complainants cannot be said or presumed to be at default. Default can only occur if something is legally due. Thus, the contention of the respondent promoter that there is delay/default in payment on part of the complainants and therefore, they cannot seek relief of refund is not tenable.

37. Further, respondent has stated that delay in completion of project has been caused due to reasons beyond control of the respondent. The reasons for delay as pleaded by the respondent promoter are:-

a) Default by the Municipal Corporation.

Respondent has averred that the project is at final stage and ready for handing over for fit outs but it is delayed because of non-action on the part 'Municipal Corporation Faridabad' i.e. development work not carried out by MCF. In this regard, Authority observes that present dispute/complaint is inter se between the allotee-complainants and promoter-respondent for violation of contractual obligations in terms of allotment letter cum agreement. Both parties were obligated to honor/ fulfill terms of said agreement. Complainants have fulfilled their part by making 95% payment of total sale consideration as demanded by the respondent, however the respondent failed to fulfill its obligations by delivering possession of apartment within stipulated time i.e. 09.12.2017. On account of said failure on part of respondent, the allotee is within his rights to invoke the provision of Section 18 of RERA Act,2016 which

provides that if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with terms of agreement then promoter shall be liable on demand to return the amount received by him in respect of that apartment, plot or building with interest as such rate as may be prescribed. Further, on perusal of allotment cum agreement, it is evident that the construction of the apartment was the obligation of the respondent, amount for said purpose was received by respondent not by MCF. Even if any dispute between the MCF and promoter has arisen, then allotee is not being affected for the reason that allotee has not entered into the agreement with the MCF. As per the allotment letter cum agreement the respondent was under obligation to construct the unit. In the present case, the question involved is completion and handing over of the apartments which is the sole obligator of the respondent. Here construction of the unit has not been completed itself by respondent as is evident from demand letters raised by respondent. Demand upto 10th installment only has been raised. 11TH installment pertaining to stage of plaster has not been raised by respondent. Then there lies no question of development work at this stage even when the plaster work has not even started/completed. Respondent has not carried out the construction of the unit to its complete extent/finishing extent without any detailed justification for it. Casting liability upon MCF for non-completion of project at this stage is not appropriate. Hence the plea

of the respondent promoter i.e. the project got delayed due to fault by MCF is rejected.

b) Ban imposed by the NGT on construction activities

Respondent has stated that the project got delayed due to ban imposed by NGT on any form of construction activities. On perusal of table reproduced in paragraph 24 of this order, it can be seen that the ban imposed by NGT before the deemed date of possession i.e. 09.06.2017 was for 8 days. On account of said 8 days, respondent has sought time period of 30 days as force majeure for again mobilizing the work. In this regard, Authority is of view that in the large projects like one in this case, majority of the labour is normally settled at the project site itself. So, ban of few days, like 8 is not a type of condition wherein the labour gets shifted/displaced to another place and then the developer again needs to invest time to relocate the labour required for construction at site. Even if we look at this case in different perspective, then ban of 8 delays particularly can be attributed towards delay in construction of project then deemed date of possession will work out to 17.12.2017. Further, the bans due to NGT orders mentioned in the table by respondent are pertaining to the period after expiry of deemed date of possession. So, said period is not accountable for the delay caused in present case. It will only be the period of 8 days ban which is to be considered towards delay in

completion of project. Factual position is that delay caused in completion of project in this case is in years ranging from year 2017 to till date and construction activity got stopped at site only for 8 days, thus delay of years in completing the project on the basis of said ban is not justified. Though Authority even if allows the grace period of 8 days even then the deemed date of possession has already passed and project is still not near completion. Hence, the plea of the respondent that the project got delayed due to bans imposed by NGT is rejected.

c) COVID- 19 Pandemic.

Respondent has raised a plea that construction activities got severely hampered by pandemic Covid-19 due to reverse migration of the labourers. As a matter of fact, Covid-19 pandemic had resulted into nation wide lockdowns w.e.f. March, 2020. In this case, the deemed date of possession was 09.06.2017, which was way before the outbreak of COVID-19 pandemic. Any circumstances or conditions which took place after expiry of period of deemed date of possession cannot be counted towards delay in project, therefore the respondent cannot take the plea that delay in handing over the possession is caused due to COVID- 19. As far as delay in construction, due to outbreak of Covid-19 is concerned Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. vs Vedanta Ltd &***

Anr. bearing OMP (1) (Comm.) No. 88/2020 and I.A.s 3696-3697/2020 dated 29.05.2020 has observed that:

> "69. *The past non-performance of the contractor cannot be condoned due to Covid-19 lockdown in March,2020 in India. The contractor was in breach since septemeber,2019. Opportunities were given to the contractor to cure the same repeatedly. Despite the same, the contractor could not complete the project. The outbreak of pandemic cannot be used as an excuse for non-performance of a contract for which the deadline was much before the outbreak itself.*
>
> *The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by September,2019 and is claiming the benefit of lockdown which came into effect on 23.03.2020, whereas the due date of handing over possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, Authority is of view that outbreak of pandemic cannot be used an excuse for non-performance of contract for which deadline was much before the outbreak itself.* "

So, the pleas of respondent to consider force majeure conditions discussed above towards delay caused in delivery of possession is without any basis and the same are rejected.

38. Respondent had filed an application on 08.05.2023 seeking impleadment of MCF as necessary party i.e. respondent no. 2 to complaint for effective adjudication of complaint on the ground that this Authority vide its order dated 24.11.2022 passed in ***Complaint no. 430 of 2020 titled as Rise Projects Pvt. Ltd. v. Municipal corporation Faridabad*** categorically

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held that MCF is a co-promoter with respect to the individual allottees of the respondent. In this regard, Authority observes that agreement for sale i.e. allotment letter cum agreement was entered into between the complainants-allotee and respondent wherein respondent itself specified time period for handing over possession of the unit. Said obligation pertaining to construction of the unit and handing over of possession was only upon the respondent, MCF was never involved towards the phase of construction of the unit/apartment. It is only for the developments works/amenities such as roads, sewage disposal line, water supply, storm water drainage etc. the MCF was under obligation to complete them. Authority in its order dated 24.11.2022 passed in complaint no. 430 of 2020 has stated that the development works in the project can only be undertaken by MCF when rise developers-respondent completes the construction of the project. In case of failure on part of respondent-promoter to deliver possession, Section 18 of the RERA Act,2016 comes into picture wherein it is stated that, *If the promoter fails to complete or is unable to give possession of an apartment, plot or building,in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein then respondent shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, 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. Looking to facts of this case in light of aforesaid section, it is apparent that respondent-Rise Projects Pvt Ltd failed to complete the construction of the unit which was a specific obligation cast upon it in terms of allotment cum agreement meaning thereby that respondent has failed to give possession of unit to complainant in terms of allotment letter cum agreement and therefore, respondent is under an obligation to return the paid amount with interest. The role of MCF vis-à-vis the construction part of the unit is not at all established, as obligation to undertake/carry out the construction of the unit was always entrusted upon the respondent and not the MCF. Scope of MCF was limited only purpose of developments works of the project which was to be carried out after completion of construction which in this case has not got completed to the extent of stage of plaster as 11th installment pertaining to stage of plaster was never raised by respondent. MCF has nothing to do with the obligations cast upon respondent in terms of allotment letter cum agreement specifically pertaining to construction and delivery of possession of unit/apartment. Respondent under the garb of external development works cannot be allowed to shirk the responsibilities cast upon it. Moreover, stage of external development works has not yet been arrived in this particular case as construction of the unit is still lying incomplete which is evident from the photographs of the project placed on record by complainant and fact that 11th installment pertaining to stage of plaster has not been raised till date.

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Accordingly, Authority decides that MCF was never entrusted upon the construction work of the unit as it was specific obligation upon respondent only, thus Authority is of the considered view that MCF is not a necessary party to the complaint and therefore, the application for impleadment of MCF as respondent no. 2 stands rejected.

39. Perusal of file reveals that today is the 12th hearing in the matter and adequate opportunities had already been granted to respondent to amicably settle the dispute, however despite several opportunities parties have failed to arrive at settlement. Further, factual position is that respondent failed to honor its obligations to deliver possession of booked apartment as per the time stipulated in the agreement for sale (allotment letter cum agreement) i.e. by 09.06.2017 without any valid/reasonable justification. Respondent is in receipt of total paid amount of Rs 2,23,94,379/- since 19.12.2016 but the unit is not yet ready for handing over of possession and there is no hope of its completion alongwith receipt of occupation certificate even in near future. In light of these facts, complainants have prayed for relief of refund of the amount paid by them along with interest @24% per annum from the date of respective payments for inordinate delay in completion of project.

40. With respect to the rights of the allotee to seek refund from the Authority, Hon'ble Supreme Court in the matter of "Newtech Promoters and Developers Pvt. Ltd. versus State of Uttar Pradesh and others " has highlighted that the allottee has an unqualified right to seek refund of the

deposited amount if delivery of possession is not done as per terms agreed between them. Para 25 of this judgement is reproduced below:

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

The decision of the Supreme Court settles the issue regarding the right of an aggrieved allottee such as in the present case seeking refund of the paid amount along with interest on account of delayed delivery of possession.

41. Keeping in view the aforesaid observations, Authority cannot force the complainants to endlessly wait for respondent to complete the project and deliver possession. Complainants are well within their rights to seek refund of the money paid by them by the virtue of Section 18 of the RERA Act, 2016. Thus, the Authority considers it a fit case for grant of refund along

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with interest at the prescribed rate. Therefore, as per provisions of Section18 of the Act, relief of refund as sought by the complainants deserve to be granted.

42. The definition of term 'interest' is defined under Section 2(za) of the Act which is as under:

> (za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
>
> Explanation.-For the purpose of this clause-
>
> (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
>
> (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

43. The legislature in its wisdom in the subordinate legislation under the provisions of Rule 15 of the Rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

44. Consequently, as per website of the state Bank of India i.e. https://sbi.co.in, the highest marginal cost of lending rate (in short MCLR)

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as on date i.e. 12.07.2023 is 8.70%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e. 10.70%.

45. Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is as under:

> *"Rule 15. Prescribed rate of interest- (Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19] (1) For the purpose of proviso to section 12; section 18, and sub sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%: Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public".*

46. Thus, respondent will be liable to pay the complainants interest from the date amounts were paid till the actual realization of the amount. Authority directs respondent to refund to the complainants the paid amount of Rs 2,23,94,379/- along with interest at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development) Rules, 2017 i.e. at the rate of SBI highest marginal cost of lending rate (MCLR)+ 2 % which as on date works out to 10.70% (8.70% + 2.00%) from the date amounts were paid till the actual realization of the amount. Authority has got calculated the total amount along with interest calculated at the rate of 10.70% till the date of this order and total amount of interest works out to Rs 2,05,61,620/- as per detail given in the table below:

Sr. No.	Principal Amount in ₹	Date of payment	Interest Accrued till 12.07.2023
1.	1700000	13.03.2014	1698896
2.	329237	02.05.2014	324197
3.	692802	30.12.2015	558918
4.	2905247	08.09.2015	2440049
5.	2100000	05.09.2013	2214988
6.	206425	01.09.2014	195883
7.	2429192	15.10.2014	2273797
8.	55594	30.06.2014	47833
9.	991555	19.12.2016	696748
10.	73003	30.06.2015	62812
11.	1775000	18.11.2013	1833687
12.	140734	16.08.2014	134207
13.	4212249	27.06.2015	3627912
14.	2218091	16.08.2014	2115214
15.	2565250	09.01.2015	2336479
16.	Total=2,23,94,379/-		Total= 2,05,61,620/-
17.	Total Payable to complainant	22394379+ 20561620=	4,29,55,999/-

47. The complainants are seeking compensation on account of mental agony, torture and undue hardship. It is observed that Hon'ble Supreme Court of lndia in Civil Appeal Nos. 6745-6749 of 2027 titled as "M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of U.P. & ors." (supra), has held that an allottee is entitled to claim compensation under Sections 12, 14, 18 and Section 19 which is to be decided by the learned Adjudicating Officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the learned Adjudicating Officer having due regard to the factors mentioned in Section 72. The adjudicating

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officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainants are advised to approach the Adjudicating Officer for seeking the relief of litigation expenses.

48. With respect to relief at serial no. (d) mentioned in paragraph 14 of this order, it is observed that refund of paid amount under provisions of Section 18 of RERA Act,2016 and Rule 15 of HRERA Rules,2017 is awarded with interest till the actual realization. So, there is no need to pass any specific directions w.r.t. pendent-lite interest and future interest as award of refund with interest it itself from date of deposit till actual realization. Complainant has prayed for interest @18%, however the legislature in RERA Act,2016 only provides for interest in terms of Rule 15 of HRERA Rules,2017 which is SBI MCLR+2%. Said rule is followed to ensure uniform practice in all cases.

H. DIRECTIONS OF THE AUTHORITY

49. Hence, the Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:

(i) Respondent is directed to refund the entire amount of Rs.2,23,94,379/- to the complainants along with interest of Rs. 2,05,61,620/- in equal share.

(ii) A period of 90 days is given to the respondent to comply with the directions given in this order as provided in Rule 16 of Haryana Real Estate (Regulation & Development) Rules, 2017 failing which legal consequences would follow.

50. The complaint is, accordingly, **disposed of.** File be consigned to the record room after uploading the order on the website of the Authority.

.....
NADIM AKHTAR
[MEMBER]

.....
DR. GEETA RATHEE SINGH
[MEMBER]