

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

Complaint no.	:	1094 of 2018
Date of complaint	:	24.09.2018
Date of order	:	28.09.2023

Sanwer Mal Kedia R/o: H.no: 940, Sector 9A, Tehsil & Distt. Gurugram, Haryana.	Complainant
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Versus

M/s Sana Realtors Pvt. Ltd. Regd. office: 12/15, East Patel Nagar, New Delhi. Corporate office: H-69, Upper Ground Floor, Connaught Circus, Connaught Place, New Delhi- 110001	Respondent
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CORAM:	
Sh. Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Ashok Kumar Sheekand (Advocate)	Complainant
Sh. Gaurav Raghav (Advocate)	Respondent

ORDER

1. The present complaint 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 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the

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. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	Precision Soho Tower
2.	Total project area	8.3125 acres
3.	Nature of the project	Cyber Park
4.	DTCP license no. and validity status	97 of 2008 dated 12.05.2008 valid up to 11.05.2020
5.	Name of licensee	M/s Landmark Apartments Pvt. Ltd.
6.	RERA Registered/ not registered	Registered vide no. 61 of 2019 dated 25.11.2019
7.	Unit no.	421, 4 th floor (Page 27 of complaint)
8.	Unit area admeasuring (Super area)	525 sq.ft. (Page 27 of complaint)
9.	Date of execution of buyer's agreement	07.07.2010 (Page 26 of complaint)
10.	Subsequent allottee	13.11.2010 (page 54 of complaint)
11.	Possession clause	15. Possession That the possession of the said premises is proposed to be delivered by the DEVELOPER to ALLOTTEE(S) within Three years from the date of this Agreement. If the completion of the said Building is delayed by reason of non-availability of steel and/or cement or other building materials, or water supply or electric power or slow down, strike or due to a dispute with the construction agency employed by the DEVELOPER, lock out or civil commotion or by reason of war of enemy action or terrorist action or earthquake or any act of God or non-delivery of possession is as a result of any Act, Notice, Order, Rule or Notification of

		the Government and/or any other Public or Competent Authority or due to delay in action of building / zoning plans/grant of completion occupation certificate by any Competent Authority or for any other reason beyond the control of the DEVELOPER, the DEVELOPER shall be entitled to extension of time for delivery of possession of the said premises. The DEVELOPER as a result of such a contingency arising, reserves the right to alter or vary the terms and conditions of this Agreement or if the circumstances beyond the control of the DEVELOPER so warrant, the DEVELOPER may suspend the Scheme for such period as it might consider expedient..... (emphasis supplied)
12.	Due date of possession	07.07.2013
13.	Sale consideration	Rs. 22,34,254/- (Page 14 of complaint)
14.	Amount paid by the complainant	Rs. 21,35,754/- (Page 14 of complaint)
15.	Occupation certificate	18.07.2017 (Page 14 of the reply)
16.	Offer of possession/ Possession Letter	24.07.2017 (Page 72 of reply)

B. Facts of the complaint:

3. The complainant has made the following submissions: -

- I. That on 07.07.2010, the original allottee has booked a unit no. 421, 4th floor admeasuring 525 sq.ft. in the respondent's project namely Precision SOHO Tower for a total sale consideration of Rs.22,34,254/- against which he paid an amount of Rs. 21,35,754/-. A buyer's agreement was executed on 07.07.2010 between the original allottee and the respondent.

- II. That on 13.11.2010, the complainant purchased the subject unit from the original allottee. As per clause 15 of the agreement, the possession of the said unit was proposed to be delivered within three years from the date of buyer agreement. But the respondent has failed to deliver the possession within stipulated time period.
- III. That, in the light of the aforementioned facts, the complainant seeks refund of the entire amount paid for the said unit along with the interest.
- IV. That vide proceeding dated 08.08.2022, the complainant submitted that the promoter is still not in a position as the project is not complete and the occupation certificate has been obtained fraudulently and no lifts are functional at site. Therefore, an executive engineer is appointed as local commissioner to check whether the allegations levelled by the complainant are correct or not.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
- a) Direct the respondent to refund the paid-up amount along with prescribed rate of interest.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by respondent:

6. The respondent vide reply dated 10.02.2023 contested the complaint on the following grounds:
- i. That the complaint filed by the complainant is liable to be dismissed as the complainant has made wrong averments in the complaint and had made wrong allegations against the respondent without any substantial evidence, hence the present complaint is not maintainable and is liable to be dismissed with heavy cost.

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- ii. That the complaint filed by the complainant is not maintainable as the occupancy certificate is already issued and even the complainant is offered the possession of the property in question. Further the complainant was also intimated that the sale deed of the property in question is ready for execution, but the complainant is deliberately not coming forward to take the possession and to get the conveyance deed executed.
- iii. That the complaint is not maintainable as the provision of section 19 (6) of Act 2016 was not complied by the complainant, which says every allottee, who has entered into an agreement to take or sale the apartment, plot or building would be responsible to pay the necessary payments including registration charges, municipal taxes water and electricity charges, maintenance charges, ground rent and other charges etc. But no necessary payments were made by the complainant after the completion of the project, hence the present complaint is not maintainable and is liable to be dismissed.
- iv. That as per the clauses 41 & 42 of the buyer agreement the complainant would be liable to pay as and when demanded by the respondent the stamp duty, registration charges and other legal and incidental charges for execution and registration of conveyance deed. The complainant is also liable to pay any loss or damages suffered by respondent for non-payment or delay in payment, non-performance of the terms and conditions of the agreement. Hence the present complaint is not maintainable and is liable to be dismissed.
- v. That it is further submitted that the delay in the handing over the possession of the project was beyond the control of the respondent. Clause 15 relied upon by the complainant also provide for the exemption if the delay, if any caused is beyond the control of the respondent, the

same would be excluded from the time period so calculated. It is not out of place to mention here that the respondent has been diligent in constructing the project and the delay, if any, is due to the authorities or government actions and the same is well documented. It is worth to note here that initially there were high tension wires passing through the project land and the work got delayed as the agencies did not remove the same within time promised and since the work was involving risk of life, even the respondent could not take any risk and waited for the cables to be removed by the electricity department and the project was delayed for almost two years at the start. Initially there was a 66 KV electricity line which was located in the land wherein the project was to be raised. Subsequently an application was moved with the HVPNL for shifting of the said electricity line. HVPNL subsequently demanded a sum of Rs. 46,21,000/- for shifting the said electricity line and lastly even after the deposit of the said amount HVPNL took about one and half years for shifting the said electricity line. It is pertinent to mention here that until the electricity Line was shifted the construction on the plots was not possible and hence the construction was delayed for about two years. The diligence of the respondent to timely complete the project and live upto its reputation can be seen from the fact that the respondent had applied for the removal of high tension wires in the year 2008 i.e. a year even before the license was granted to the respondent so that the time can be saved and project can be started on time. The contractor M/s Acme Techcon Private Limited was appointed on 08.07.2011 for development of the project and it started development on war scale footing. In the year 2012, pursuant to the Punjab and Haryana High Court order, the DC had ordered all the developers in the area for not using ground water and the ongoing projects in the entire area seized to





progress as water was an essential requirement for the construction activities and this problem was also beyond the control of the respondent, which further was duly noted by various media agencies and documented in the government department. Further since the development process was taking lot of time and the contractor had to spend more money and time for the same amount of work, which in normal course would have been completed in almost a year, due to the said problems and delay in the work, the contractor working at the site of the respondent also refused to work in December, 2012 and the dispute was settled by the respondent by paying more to the earlier contractor and thereafter appointing a new contractor M/s Sensys Infra Projects Pvt. Ltd. in January, 2013 immediately to resume the work at the site without delay. Further, the project is complete since 2015 and the respondent has also applied for the occupancy certificate in May 2015. Lastly in July 2017 occupancy certificate was issued and the delay of two years was on account of the delay in compliances by the authorities and as such the respondent is not responsible for any delay. The development and construction have been diligently done by the respondent and the obligations which the respondent was to discharge have been onerously discharged without fail and the reasons for delay are stated herein for the kind consideration of the Hon'ble Commission. The respondent has complied with its part of the obligation and the conditions aforesaid were not in control of the respondent. The respondent could diligently do his part, which has been done and requisite documents to prove its diligence are annexed herewith, therefore no illegality as being alleged can be attributed to the respondent in any manner whatsoever.

- vi. That as per the provisions of section 19(7) of the Act, 2016 the complaint is liable to pay the compensation and interest if any delay cause on the

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part of the complainant, whereas there is no delay on the part of the respondent.

- vii. That the present complaint filed by the complainant is nothing other than the abuse of process of law. Hence the complaint is liable to be dismissed.
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 those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

8. The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection 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

9. 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

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

Section 11(4)(a)

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

Section 34-Functions of the Authority:

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

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(C), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** and 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

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scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

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

F. Findings on the objections raised by the respondent:

F.I Objections regarding that the respondent has made an application for grant of occupation certificate before coming into force of RERA.

14. The respondent-promoter has raised the contention that the said project of the respondent is a pre-RERA project as the respondent has already applied for obtaining occupation certificate from the competent authority in the year 2015 i.e., before the coming into force of the Act and the rules made thereunder. As per proviso to section 3 of Act of 2016, ongoing projects on the date of commencement of this Act i.e., 01.05.2017 and for which completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three months from the date of commencement of this Act and the relevant part of the Act is reproduced hereunder:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act.....

15. The legislation is very clear in this aspect that a project shall be regarded as an "ongoing project" until receipt of completion certificate. Since, no completion certificate has yet been obtained by the promoter-builder with regards to the concerned project, the plea advanced by it is hereby rejected.

F.II Findings qua force majeure conditions as pleaded by the respondent.

16. While filing written reply, a specific plea was taken by the respondent that there was delay of about 2 years in completion of the project due to non-

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removal of cables of 66KV of the powerlines from the project land. Besides that, there were stay w.r.t. use of ground water for construction activities leading to escalation of cost and the contractor engaged earlier refusing to work at the previous rates and engaging a new one for further construction. Thirdly, after all its efforts, it was able to complete the construction of the project and applied for its occupation certificate in May 2015 but the same was issued only in the month of July 2017. Thus, all these factors were beyond the control of the respondent who complied with his obligations with due diligence. Thus, the time spent and detailed above be excluded while calculating the due date for completion of the project and offer of possession of the allotted unit. But all the pleas advanced in this regard are devoid of merit. No doubt, the respondent spent a considerable period in getting removed electric cables from the project land, a dispute with the contractor leading to escalation of project cost and non-issuance of occupancy certificate by the competent authority but no fault for the same can be found with the complainant who paid a substantial part of the sale consideration towards the allotted unit. Moreover, it was for the respondent to address all these issues and the complainants were not a party to either of the same transaction. Though there was a dispute of the respondent with the contractor, but it was for the former to settle the same and proceed with the construction of the project. There may be delay in issuances of occupation certificate of the project and the period obtained in this regard has been contended to be excluded and be treated as zero period. But again, the plea advanced in this regard is not tenable. It is for the competent authority to declare the period spent in obtaining occupation certificate as zero period and the authority cannot deliberate on that point.

F.III Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

17. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties.
18. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** which provides as under:

119. *Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter*

122. *We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports.*

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19. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored.

20. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plan/permissions approved by the respective departments /competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the relief sought by the complainant.

G.I To refund the entire amount deposited along with prescribed rate of interest.

21. The original allottee booked a unit bearing no. 421, 4th floor admeasuring 525 sq.ft. in the respondent's project for a total sale consideration of Rs. 22,34,254/- against which he paid an amount of Rs. 21,35,254/-. A buyer' agreement was executed between the original allottee and the respondent. Thereafter on 13.11.2010, the complainant purchased the subject unit from

the original allottee. As per the clause 15 of the buyer's agreement the unit would be handed over on or before 07.07.2013.

22. The Authority taking cognizance in the matter appointed a local commissioner to visit the site to check as to whether the unit is complete or not. The local commissioner visited the site on 23.11.2022 in the presence of Sh. Sanwar Mal Kedia (Complainant) and Mr. Ajay Vij (Marketing head) and Mr. Rattan Shaikh (Site in-charge) on behalf of M/s Sana Realtors Pvt. Ltd. (Respondent) and accordingly has submitted its detailed report along with the copy of the occupation certificate, photographs of the project taken from different angles. The excerpts of the report are reproduced as under:

"5. Conclusion:

The site o project named "Precision Soho Tower" being developed by m/s Sana Realtors Pvt. Ltd. has been inspected and it is found that:

- 1. The external finishing/repair work is steel continuing/in progress as on date, regarding obtaining OC fraudulently, this issue relates to DTCP, Haryana. During site visit in the tower A, 5 nos. lifts are provided/installed but out of them 2 nos. lifts are operational and 2 nos. lifts (East side) are not found operational presently.*
- 2. During site visit, it is observed that the quality of construction of the project is not proper. At many places steel reinforcement is clearly appearing in columns/beams/slabs and cracks are also appearing in some walls. Basement floor at 2nd level is not of good quality. So, the Authority is requested to may direct the respondent to get the structure audit of the project from any recognized Govt. Institute, if the Authority may agree.*

23. In view, the report of local commission detailed above, the respondent has filed the following objections:

- i. That since after 2017, number of conveyance deeds have been executed by the respondent and the possession is handed over to the customers.*
- ii. That various commercial activities are going the said tower of the commercial project namely "Precision SOHO Tower".*
- iii. That as the building/tower A was commercial project namely "Precision SOHO Tower" situated at Main Sohna Road, Sector 67, Gurugram, apparently there is normal wear and tear which happens with the passage of time and as the buyers are not paying for the maintenance charges, the upkeep of the said tower as if a new building is practically not possible.*

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iv. *That the complainant was offered possession but are deliberately not taking the possession of the unit since 2017 and have already delayed for 8 years. It was specifically requested to the local commissioner to consider the factum that the building is 8 years old and there is no contribution by the occupants for the maintenance of the building/tower A*

24. The view of the Authority is that after occupation certificate has been obtained by the promoter, it is the obligation of the allottee to take the possession of the subject unit in view of section 19(10) of Act. In the complaint in hand, the complainant has been offered the possession way back in 2017 and now has approached the authority seeking complete refund of the paid up amount as the quality of construction of the project is not proper. Thus, in the provisions of the section 18 are not attracted as the complainant has approached the Authority after offer of possession has been made. The only prospective that can be looked into is under section 14(3) of the Act that deals with structural defects and the same is reproduced hereunder:-

14 (3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

25. As submitted by the respondent that the handover/offer of the unit was made in 2017, and keeping in view the aforesaid provision of Act, the complainant-allottee must approach the promoter within five years of handing over of possession and thereafter, it is the obligation of the promoter to rectify such defects within 30 days.

26. The Authority observes that the aforesaid provision of Act not only includes structural defects but also any other defects. It has been more than 6 years since offer of possession and any structure is subject to normal wear and



tear in the said period. Moreover, the said provision provides relief of compensation. A separate complaint under w.r.t compensation can be initiated by the complainant as per judgment of Hon'ble Supreme Court of India in civil appeal nos. **6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.**, wherein it was held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72.

27. Further, the complainant raised an issue that the promoter is still not in a position as the project is not complete and the OC has been obtained fraudulently. On consideration of the documents and facts, the occupation certificate has been granted by DTCP in 2017. The grant of occupation certificate by the competent Authority establishes that the unit is in habitable condition after due inspection & site reports. However, if the complainant has any issue with regard to fraudulently grant of the occupation certificate then he may approach to the concerned Authority.
28. Section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. The due date of possession as per buyer's agreement was 07.07.2013 and the allottee in this case has filed this complaint on 24.09.2018 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The OC was received on 18.07.2017 whereas the offer of possession was made on 24.07.2017. The complainant by filing the complaint wishes to withdraw from the project and seeking refund



of the paid-up amount on its failure to give possession of the allotted unit in accordance with the terms of buyer's agreement.

29. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to them, it impliedly means that the allottee tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee interest for the money they have paid to the promoter is protected accordingly and the same was upheld by in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*** reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022; that:-

25. The unqualified right of the allottees 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 allottees, 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 allottees/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 allottees does not wish to withdraw from

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

30. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale. This judgement of the Supreme Court of India recognized unqualified right of the allottee and liability of the promoter in case of failure 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. But the complainant/allottee failed to exercise the right although it is unqualified one. The complainant has to demand and make their intention clear that he wishes to withdraw from the project. Rather, tacitly wished to continue with the project and thus made himself entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project and when the unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottee in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.
31. This view is supported by the judgement of Hon'ble Supreme Court of India in case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Civil appeal no. 5785 of 2019)*** wherein the Hon'ble Apex court took a view that those allottee are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate and also in consonance with

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the judgement of Hon'ble Supreme Court of India in case of ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors (Supra)***.

32. The above said unit was allotted to complainant vide buyer's agreement dated 07.07.2010. There is a delay in handing over the possession as due date of possession was 07.07.2013 whereas, the offer of possession was made on 24.07.2017 and thus, becomes a case to grant delay possession charges. The authority observes that interest of every month of delay at the prescribed rate of interest be granted to the complainant/allottee. But now, the peculiar situation is that the complainant want to surrender the unit and want refund. Keeping in view of the aforesaid circumstances that the respondent-builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, and judgment of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.2022***, it is concluded that if the complainant/allottee still want to withdraw from the project, the paid-up amount shall be refunded after deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018.

33. The Hon'ble Apex court of the land in cases of ***Maula Bux Vs. Union of India (1973) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136***, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as ***Jayant Singhal and Anr. Vs. M/s M3M India Ltd.*** decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held



that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under:

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"

34. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs. 21,35,754/- after deducting 10% of the sale consideration being earnest money along with an interest @10.75% 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 on the refundable amount, from the date of surrender i.e., 24.09.2018 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the Authority:

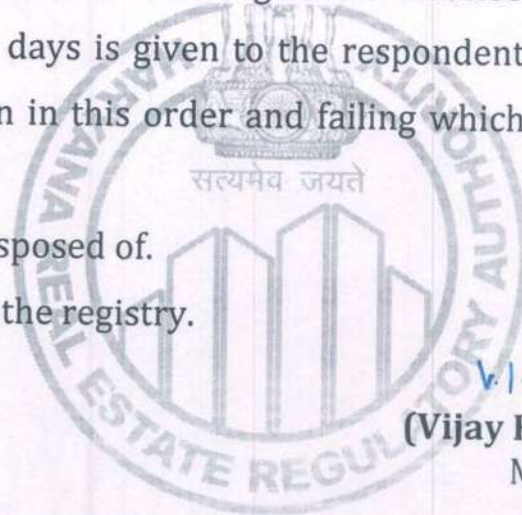
35. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:



- i. The respondent/promoter is directed to refund the paid-up amount of Rs.21,35,754/- after deducting 10% of the sale consideration being earnest money along with an interest @10.75% p.a. on the refundable amount, from the date of surrender i.e., 24.09.2018 till the date of its actual realization.
- ii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of paid-up amount along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainant.
- iii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

36. Complaint stands disposed of.

37. File be consigned to the registry.



V.K.G.
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 28.09.2023

HARERA
GURUGRAM