



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

Complaint no.: 5504 of 2022
Date of filing complaint: 16.08.2022
Date of decision: 16.11.2023

1. Mr. Rishi Jhamb
2. Mr. Suresh Bhatt

Both RR/o: - 1103, Tower-12, Royal heritage, Sector 70,
Faridabad, Haryana

Complainants

Versus

1. Ansal Housing Limited (Formerly Known as Ansal Housing and Construction Limited)
Registered Office at: - 606, 6th floor, Indraprakash, 21, Barakhamba Road, New Delhi- 110001
2. Samyak Projects Private Limited
Registered Office at: - 111, 1st Floor, Antriksh Bhavan, 22 K.G. Marg, New Delhi- 110001

Respondents

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Harshit Batra, Advocate
Shri. Amandeep Kadyan, Advocate
None

Complainants
Respondent no. 1
Respondents no. 2

ORDER

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

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under the provision of the Act or the Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	"Ansal Hub 83 Boulevard", Sector-83, Gurugram
2.	Project area	2.60 acres
3.	Nature of the project	Commercial complex part of residential colony
4.	DTCP license no. and validity status	113 of 2008 dated 01.06.2008 valid up to and 71 of 2010 dated 15.09.20210 valid up to
5.	Name of licensee	Buzz Estate Pvt. Ltd. & others.
6.	RERA registration details	Registered vide no. 09 of 2018 dated 08.01.2018 for 2.80 acres Valid up to 31.12.2020
7.	Unit no.	F-096 [pg. 30 of complaint]
8.	Unit measuring	170 sq. ft. [pg. 30 of complaint]
9.	Date of execution of flat buyer agreement	05.01.2015 [pg. 26 of complaint]
10.	Possession clause	30 <i>The developer shall offer possession of the unit any time, within a period of 42 months from the date of execution of the agreement or within 42 months</i>

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		<p><i>from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 31. Further, there shall be a grace period of 6 months allowed to the developer over and above the period of 42 months as above in offering the possession of the unit.(Emphasis supplied)</i></p> <p><i>[page 40 of complaint]</i></p>
11.	Due date of possession	<p>05.01.2019</p> <p>[Note: Due date calculated from date of agreement as date of commencement of construction is not known. Grace period allowed being unqualified]</p>
12.	Basic sale consideration as per BBA dated 05.01.2015	<p>Rs.17,43,693/-</p> <p><i>[pg. 46 of complaint]</i></p>
13.	Amount paid by the complainant	<p>Rs.14,62,511/-</p> <p><i>[as alleged by the complainant at page 16 of complaint]</i></p>
14.	Status of the project	On-going project
15.	Occupation certificate	Not yet obtained
16.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -
- a. That the RERA registration has been attained by respondent no. I and had been responsible for the development of the project. However, at the

present instance, the same is being carried out by the respondent no. 2 pursuant to a dispute between the respondent no. 1 and respondent no. 2. The Complainants were communicated of the same vide email dated 02.02.2022. The email dated 02.02.2022 from respondent no. 2 noting the further development of the project shall be carried out by it.

- b. That the real estate project "ANSAL HUB 83 BOULEVARD" at, Sector 83, Gurugram, Haryana came to the knowledge of the complainant by the shrewd marketing gimmick of the respondents. The complainants were lured into booking the unit on the representations made by respondents.
- c. That relying on the representations, warranties, and assurances of the respondent no. 1 and 2 about the timely delivery of possession, the complainants booked a shop no. F-096 admeasuring 185 sq. ft. in the project by executing an application form. A registration booking amount of Rs.2,60,000/- was paid vide cheque no 536090 dated 01.07.2013 at the time of execution of the Application Form.
- d. That thereafter, for a long period of time, the complainants kept paying the demanded installments while the respondents attempted to veil from their obligation of execution of the agreement.
- e. That thereafter, after a long delay of 1.5 years, the respondent unilaterally reduced the saleable area to 170 sq. ft. at the time of execution of the agreement dated 05.01.2015, this reduction in area was unilateral and arbitrary. That no prior information was given in this regard. This amounts to a change of almost 10% of area.
- f. That, the agreement was filled with one sided and arbitrary clauses. The clause 5 restricts the right of the complainant from raising any objection in case of increase in the number of floors. Clause 22 reserves 20% of earnest money, clause 23 takes 24% of interest from the allottee in case of delay in



payments. Clause 27 restricted the buyers from taking refund. The agreement is wholly one-sided and unfair to the complainants, it provides an unequal bargaining power in the favour of the respondents.

- g. That from the very beginning, the respondents have acted in utter malafide. A huge sum of money of Rs.7,58,234/- was taken from the complainants before the execution of the agreement. The complainants were coerced into executing the agreement containing such one-sided and arbitrary terms and after having paid a huge sum of Rs.7,58,234/- were left with no option but to execute the agreement. That the complainants have paid Rs.14,62,511/- out of the total sale price of Rs.17,43,693/- (almost 84% of the total sale price).
- h. That as per clause 30 of the agreement, the offer of possession was to be given within 42 months of the signing of the agreement or date of obtaining the sanctions, whichever is later. The building plan was approved on 25.07.2014 and the agreement was executed on 05.01.2015. Computing the due date of handing over of the possession from the date of agreement, the due date comes out to be 05.07.2018, however, in complete violation of the same, the complainants have not been given the offer of possession yet.
- i. That irrespective of having paid a substantial amount of money, the unit has not been handed over to the complainants even after almost 4 years from the due date.
- j. That the respondents has miserably failed to stand up to the duties and obligations casted upon it by the Act, the rules and regulations thereunder and the agreement. The complainants, after the investment of the money in the project of the respondent no. 1 and 2 realized that all the assurances and representations made by the respondent no. 1 and 2 were fraudulent. The complainants on investigating came to know that the project of the

respondents is at a halt and no tenable progress at the work site was observed which caused grave stress and mental agony to the complainant as the unprofessional work ethics of the respondent no. 1 and 2 had put the complainants in financial turmoil.

- k. That the complainant tried to contact the respondent no. 1 and 2 time and again to seek clarifications about the stage-wise construction and completion of the project but there was no response received from the side of the respondents.
- l. That the complainants have been writing e-mails to respondent no.1 from as early as May 2016 to inquire about the status of the project and unit, but to the complainants' utter dismay, they was never properly entertained or given a satisfactory reply to the e-mails. On 11.05.2016, the complainants requested the respondent no. 1 to provide the date of completion of the project. Thereafter, on 13.07.2021 the complainants stressed on their right to attain compensation for such huge delay. Thereafter again on 25.12.2021, the complainants requested the deadline for completion of the project. However, was not replied by the respondent no. 1.
- m. That the respondents paid absolutely no heed to the requests and inquires of the complainants, keeping the complainants in the dark and consequently caused the complainants to go through mental agony, harassment and financial distress.
- n. That neither the occupancy certificate has been attained by the respondents nor any intimation of offer of possession has been issued to the complainants, till date. In such a circumstance, the complainants cannot, wait and anticipate the delivery of the possession of the unit.
- o. That the complainants cannot in any manner foresee the delivery of possession and having waited for a substantial amount of time has lost faith

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in the bonafide conduct of the respondents. The complainant stands well within his rights in claiming the refund as it is a settled position of law that a purchaser cannot be expected to wait inordinately for the project to be completed and for possession to be handed over and the complainants cannot be made to take the possession at the present instance.

- p. That the mental agony and torture caused to the complainants is unquantifiable due to the deliberate illegal acts of the respondents carried with the sole intention to harass the complainant and to gain illegal monetary benefits over the wrongful loss of the complainant.
- q. That in view of the above facts the Authority is requested to direct the respondent to refund the money, on the grounds as mentioned in the complaint and due to the utter mental and financial harassment caused to the complainant by the illegal, wrongful and malafide acts of the respondent.

C. Relief sought by the complainants: -

4. The complainants have sought following relief(s)
- a. Direct the respondent parties to refund the paid amount with 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.
6. The present complaint was filed against the two respondent i.e. respondent no.1 (Ansal housing ltd.) and respondent no.2 (M/s Samayak projects pvt. ltd.) on 16.08.2022 in the authority. The respondent no.1 filed the reply on 28.08.2023 in the authority. On 28.03.2023 and 31.08.2023 the respondent no.2 was granted opportunity to put in appearance and file a reply. However, despite specific opportunities, respondent no.2 filed to put in appearance



before the authority and has also failed to file reply. In view of the same, the matter was proceeded ex-parte against the respondent no.2

D. Reply by the respondent no. 1

7. The respondent no. 1 has contested the complaint on the following grounds.
- That the respondent no.1 is a developer and has built multiple residential and commercial buildings within Delhi/NCR with a well-established reputation earned over years of consistent customer satisfaction.
 - That the complainants had approached the answering respondent for booking a shop no. F-096 in an upcoming project Ansal Boulevard, Sector 83, Gurugram. Upon the satisfaction of the complainants regarding inspection of the site, title, location plans, etc. an agreement to sell dated 05.01.2015 was signed between the parties.
 - That the current dispute cannot be governed by the RERA Act, 2016 because of the fact that the builder buyer agreement signed between the complainants and the answering respondent was in the year 2014. It is submitted that the regulations at the concerned time period would regulate the project and not a subsequent legislation i.e. RERA Act, 2016. It is further submitted that Parliament would not make the operation of a statute retrospective in effect.
 - That the complaint specifically admits to not paying necessary dues or the full payment as agreed upon under the builder buyer agreement. It is submitted that the complainants cannot be allowed to take advantage of his own wrong.
 - That even if for the sake of argument, the averments and the pleadings in the complaint are taken to be true, the said complaint has been preferred by the complainants belatedly. The complainants has admittedly filed the complaint in the year 2022 and the cause of action accrue on 05.01.2019 as

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per the complaint itself. Therefore, it is submitted that the complaint cannot be filed before the HRERA Gurugram as the same is barred by limitation.

- f. That even if the complaint is admitted to be true and correct, the agreement which was signed in the year 2015 without coercion or any duress cannot be called in question today. That the builder buyer agreement provides for a penalty in the event of a delay in giving possession. It is submitted that clause 34 of the said agreement provides for Rs.5/sq. foot per month on super area for any delay in offering possession of the unit as mentioned in clause 30 of the agreement. Therefore, the complainant will be entitled to invoke the said clause and is barred from approaching the Hon'ble Commission in order to alter the penalty clause by virtue of this complaint more than 8 years after it was agreed upon by both parties.
- g. That the respondent had in due course of time obtained all necessary approvals from the concerned authorities. That the permit for environmental clearances for proposed group housing project for sector 103, Gurugram, Haryana on 20.02.2015. Similarly, the approval for digging foundation and basement was obtained and sanctions from the department of mines and geology were obtained in 2012. The respondents have in a timely and prompt manner ensured that the requisite compliances be obtained and cannot be faulted on giving delayed possession to the complainant.

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- h. That the delay has been occasioned on account of things beyond the control of the respondent no.1. The builder buyer agreement provides for such eventualities and the cause for delay is completely covered in the said clause. The respondent ought to have complied with the orders of the Hon'ble High Court of Punjab and Haryana at Chandigarh in CWP No. 20032 of 2008, dated 16.07.2012, 31.07.2012, 21.08.2012. The said orders banned the extraction of water which is the backbone of the construction process. The complaint itself reveals that the correspondence from the answering respondent specifies force majeure, demonetization and the orders of the Hon'ble NGT prohibiting construction in and around Delhi and the COVID -19 pandemic among others as the causes which contributed to the stalling of the project at crucial junctures for considerable spells.
- i. That the respondent and the complainants admittedly have entered into a builder buyer agreement which provides for the event of delayed possession. The clause 31 of the builder buyer agreement is clear that there is no compensation to be sought by the complainant/prospective owner in the event of delay in possession.
- j. That the respondents have clearly provided in clause 34 the consequences that follow from delayed possession. The complainant cannot alter the terms of the contract by preferring a complaint before the Hon'ble HRERA Gurugram.

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- k. That the complainant had signed and agreed on builder buyer agreement dated 17.12.2014. That perusal of the said agreement would show that it is a Tripartite Agreement wherein M/s Samyak Projects Pvt. Ltd is also a party to the said agreement.
- l. That the perusal of the builder buyer agreement show that the proposed party to be impleaded i.e M/s Samyak Projects Pvt. Ltd. not only possesses all the rights and unfettered ownership of the said land whereupon the project namely Ansal boulevard, Sector 83 is being developed, but also is a developer in the said project.
- m. The said M/s Samyak Project Pvt. Ltd. in terms of its arrangement with the respondent could not develop the said project well within time as was agreed and given to the respondent, the delay, if any, is on the part of M/s Samyak Project Pvt. Ltd. not on the part of respondent, because the construction and development of the said project was undertaken by M/s Samyak Project Pvt. Ltd.
- n. The complainant is not entitled to have the refund or interest from the respondent no.1 as it does not have any locus in the present project and in case the Hon'ble Authority comes to conclusion with regard to the above relief, the entire project shall stand hampered. That any form of relief will amount to overriding the agreement clause that has been entered into by the complainant and the respondent.

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8. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

9. The respondent has raised a preliminary submission/objection 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

10. 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

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

Section 11

.....

(4) The promoter shall-

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

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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.

12. 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.
13. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Supra) and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating

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

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

F. Findings on the objections raised by the respondent

F.1 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

15. Another objection raised the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 which provides as under:

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"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."

16. 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."

The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under



various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F. II Objection regarding maintainability of complaint.

17. The counsel for the respondent has raised an objection that the complaint is barred by limitation as the complainants have approached the respondent in the year 2013 to invest in the project of the respondents situated in Gurugram. The respondent further submitted that the complainants has admittedly filed the complaint in the year 2022 and the cause of action accrued on 05.01.2019.
18. On consideration of the documents available on record and submissions made by the party, the authority observes that the buyer's agreement w.r.t. the villa was executed with the allottee on 05.01.2015. As per clause 30 of the buyer's agreement, the possession of the subject unit was to be offered with in a period of 42 months or within 42 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction which whichever is later plus 6 months from date of agreement. The authority calculated due date of possession from the date of agreement i.e., 05.01.2015 as the date of construction is not known which comes out to be 05.01.2019.

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19. However, the said project of the allotted unit is an ongoing project, and the respondent/promoter has failed to apply and obtaining the CC/part CC till date. As per proviso to section 3 of Act of 2016, ongoing projects on the date of this Act i.e., 28.07.2017 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:

20. 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.
21. Moreover, it is observed that despite passing a benchmark of due date on 05.01.2019, till date it has failed to handover the possession of the allotted unit to the complainants and thus, the cause of action is continuing till date and recurring in nature. The authority relied upon the section 22 of the Limitation Act, 1963, Continuing breaches and torts and the relevant portion are reproduce as under for ready reference: -

22. Continuing breaches and torts-

In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.

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22. Keeping in view the aforesaid facts and legal position, the objection with regard to the complaint barred by limitation is hereby rejected.

F. III Objection regarding delay in completion of construction of project due to force majeure conditions.

23. The respondent-promoter alleged that grace period on account of force majeure conditions be allowed to it. It raised the contention that the construction of the project was delayed due to force majeure conditions such as demonetization, and the orders of the Hon'ble NGT prohibiting construction in and around Delhi and the Covid-19, pandemic among others, but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 05.01.2015 and as per terms and conditions of the said agreement the due date of handing over of possession comes out to be 05.01.2019. The events such as and various orders by NGT in view of weather condition of Delhi NCR region, were for a shorter duration of time and were not continuous as there is a delay of more than three years and even some happening after due date of handing over of possession. There is nothing on record that the respondent has even made an application for grant of occupation certificate. Hence, in view of aforesaid circumstances, no further grace period can be allowed to the respondent/builder. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter-respondent cannot be given any leniency on basis of



aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.

24. 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. V/S Vedanta Ltd. & Anr. bearing no. O.M. P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020* dated 29.05.2020 has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 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 a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

25. The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by 05.01.2019 and is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant

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G.I Direct the respondent parties to refund the paid amount with interest.

26. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”

(Emphasis supplied)

27. Clause 30 of the builder buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

“30.

The developer shall offer possession of the unit any time, within a period of 42 months from the date of execution of the agreement or within 42 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 31. Further, there shall be a grace period of 6 months allowed to the developer over and above the period of 42 months as above in offering the possession of the unit.”

28. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of

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terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

29. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the unit within a period of 42 months plus 6 months from date of agreement or the date of commencement of construction which whichever is later. The authority calculated due date of possession from the date of agreement i.e., 05.01.2015 as the date of construction is not known. The period of 42 months expired on 05.07.2018. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage. That the due date of possession comes out to be 05.01.2019.

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30. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them along with interest prescribed rate of interest. However, the allottee intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

31. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
32. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 16.11.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.
33. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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"(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;"*

34. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 30 of the agreement executed between the parties on 05.01.2015, the possession of the subject apartment was to be delivered within stipulated time i.e., by 05.07.2018. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 05.01.2019. It is pertinent to mention over here that even after a passage of more than 8 years 10 months (i.e., from the date of BBA till date) neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to him and for which he has paid a considerable amount of money towards the sale consideration. It is also to mention that complainant has paid almost 84% of total sale consideration in the year 2018. Further, the authority observes that there is no document placed on record from which it can be ascertained that whether the respondent has applied for occupation

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certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned facts, the allottee intends to withdraw from the project and are well within the right to do the same in view of section 18(1) of the Act, 2016.

35. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

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

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

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

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

37. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
38. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 10.75% 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 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

39. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- The respondents/promoters are directed to refund the amount i.e., Rs.14,62,511/- received by it from the complainants along with

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interest at the rate of 10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.

- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
 - iii. The respondents are further directed to not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainant and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainant.
40. The complaint stand disposed of.
41. File be consigned to registry.

Dated: 16.11.2023


(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram

HARERA
GURUGRAM