



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

Complaint no. : 6498 of 2022
Date of complaint : 28.09.2022
Date of order : 20.09.2023

Akhilesh Nand
R/o: - 68E, Pocket- K, Sheikh Sarai-2,
New Delhi- 110017.

Complainant

Versus

1.M/s Ramprashtha Promoters and Developers Pvt. Ltd.
2.Blue Bell Proptech Pvt. Ltd.
Both having Regd. office: C-10, C Block Market,
Vasant Vihar, New Delhi- 110057.

Respondents

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Venket Rao (Advocate)
R. Gayatri Mansa (Advocate)

Complainant
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 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 under the provisions of the act or the rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

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A. Unit and project details

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

S. N.	Particulars	Details	
1.	Name of the project	"Rise", Sector 37D, Village Gadauli Kalan, Gurugram	
2.	Project area	60.5112 acres	
3.	Registered area	48364 sq. mt.	
4.	Nature of the project	Group housing colony	
5.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid upto 18.02.2025	
6.	Name of licensee	Ramprastha Builders Pvt Ltd and 11 others	
7.	Date of approval of building plans	12.04.2012 [As per information obtained by planning branch]	
8.	Date of environment clearances	21.01.2010 [As per information obtained by planning branch]	
9.	RERA Registered/ not registered	Registered vide no. 278 of 2017 dated 09.10.2017	
10.	RERA registration valid up to	30.06.2019	
11.	HARERA extension certificate no.	08 of 2020	
12.	Extension certificate detail	Date	
		Validity	
		In principal approval on 17.06.2020	30.12.2020
13.	Unit no.	E-801, 8 th floor, tower/block- E (Page no. 37 of the complaint)	
14.	Unit area admeasuring	1825 sq. ft. (Page no. 37 of the complaint)	
15.	Date of booking application form	25.10.2011 (Page no. 27 of the complaint)	

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16.	Welcome letter	07.11.2011 (Page no. 30 of the complaint)
17.	Allotment letter	18.05.2012 (Page no. 32 of the complaint)
18.	Date of execution of apartment buyer agreement	24.09.2012 (Page no. 34 of the complaint)
19.	Possession clause	15. POSSESSION (a) Time of handing over the Possession Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over <i>the possession of the Apartment by September 2015 the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.</i> (Emphasis supplied) (Page no. 42 of the complaint)
20.	Due date of possession	30.09.2015 [As per mentioned in the buyer's agreement]



21.	Grace period	Not utilized
22.	Total sale consideration	Rs.84,32,922/- (As per schedule of payment page 49 of the complaint)
23.	Amount paid by the complainant	Rs.67,09,059/- [As alleged by the complainant at page no. 12 of complaint]
24.	Occupation certificate /Completion certificate	Not received
25.	Offer of possession	Not offered
26.	Delay in handing over the possession till date of filing complaint i.e., 28.09.2022	6 years 11 months and 29 days

B. Fact of the complaint

3. The complainant has made the following submissions: -

- I. That the real estate project i.e., "RISE" situated at Sector 37-D, Gurugram, Haryana came to the knowledge of complainant, who are residents of Gurugram, through the authorized marketing representatives of the respondents. The marketing representatives approached the complainant, for and on behalf of respondents, making tall claims in regard to the project and the respondents lured the complainant to book a unit in the aforesaid project. further, That the complainant based on representations and warranties made by respondents booked a unit bearing no. E-801, Type 3BHK, Block-E on 8th Floor admeasuring super area of 1825 sq. ft. for total sale consideration at Rs.84,32,922/- in the project of respondent by paying a booking amount of Rs.7,01,998/- vide cheque no. 623478 dated 25.10.2011 drawn on HDFC Bank.



- II. That the respondents issued a welcome letter dated 07.11.2011 to the complainant in the project "Rise" wherein the respondent claimed to provide the complainant with comfortable living, ready to meet with everyday needs and requirements alongside the Dwarka Expressway and opposite to the Proposed Reliance SEZ, and further claimed through the above said welcome letter that project "Rise" is strategically located to be the next growth centre of Gurgaon, which came out to be a false and concocted narration at the end of the respondent.
- III. That the respondents issued an allotment letter dated 18.05.2012 to the complainant allotting unit bearing no. E-801 in the above-mentioned project.
- IV. That the apartment buyer agreement was executed between both the parties on 24.09.2012. As per Clause 15 of BBA, the respondents were under obligation to complete the construction of the apartment by September 2015. It was further agreed that the respondents will be entitled to a maximum of grace period of 120 days for applying and obtaining the occupation certificate. However, since the respondents failed to apply for occupation certificate within the prescribed time period, the respondents are not entitled for the aforesaid grace period too. Accordingly, the unit should have been handed over by the respondents by September 2015, however the respondents failed to do so.
- V. That the total consideration of the booked unit of complainant was agreed to be Rs.84,32,922/-. That it was assured on the part of the respondents that the complainant would provide with exclusive right to use the dedicated car parking space. Further, as per the agreed



terms and conditions of the buyer's agreement, the complainant has paid an amount of Rs.67,09,059/- against the total sale consideration as and when demanded by the respondents.

- VI. That despite of making huge payment which amounts to approximately 90% of the total sale consideration, the respondents have failed to handover the unit of complainant within stipulated time period as enumerated under clause 15 of the buyer's agreement. Thus, it clearly shows that the respondents have no intention to complete the aforesaid project and fraudulently siphoned off the huge amount collected from the complainant.
- VII. That the respondents vide email dated 28.02.2017, once again promised false assurances and commitments of handing over the possession of the aforesaid unit and also falsely stated that the overall development of the unit is being reviewed and considered by it. Further vide email dated 05.12.2018, the respondents gravely manipulated the complainant by stating that the pace of construction of the unit has increased considerably and that the respondents shall be updating the complainant regarding the status of construction through pictures and reports at regular intervals to which the respondents never complied.
- VIII. Therefore, in view of the above, the complainant being aggrieved by the unfair trade practice of the respondents wanted to cancel the allotted unit and further made request to the respondents to refund the entire money i.e., Rs.67,09,059/- so far deposited to respondents in regard to allotted unit along with interest @18% from the date of each respective payments till actual realization. Whereas the respondents did not even bother to refund the principal money along

with interest to the complainant even after huge delay of more than 7 years from the due date of possession i.e., September 2015.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):

I. Direct the respondent to refund the entire amount deposited by the complainant along with interest @18% p.a. from the date of respective payment till its actual realization.

5. No reply has been received from respondent no.2 with regard to the present complaint. Therefore, the defence of the respondent no.2 is hereby struck off and the complaint will be decided as per documents available on record and submission made by the parties.

6. On the date of hearing, the authority explained to the respondent/promoters about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent no. 1

7. The respondent has contested the complaint on the following grounds.

I. That the present complaint has been filed by the complainant in complaint no. 6498 of 2022 before this authority *inter alia* praying for refund of amount paid against the booking of a unit no. E-801, 8th floor admeasuring 1825 sq. ft. in project "The Rise" i.e., Rs 67,09,059/- along with interest @ 18% and litigation costs in favour of complainant and against respondents.

II. That the delay in delivering the possession of the apartment to the complainant has attributed solely because of the reasons beyond control of the respondents.



- III. Further as per clause 15 (a) of the agreement shall not be read in isolation but have to be read in light of other clauses of the agreement. Clause 15(a) of the agreement is subject to clause 31 of the agreement. Clause 15(a) stipulates the time for handing over of the possession which is subject to Force Majeure circumstances which clearly indicate the nature of agreement entered into between the parties, whereby, the stipulated date of delivery is not a strict and final date but merely a tentative date which is further subject to several factors involved.
- IV. That it was agreed between the parties vide clause 15(a) of the agreement that the apartment is reasonably expected to be delivered by the developer/respondent by September 2015 from the date of signing the apartment buyer's agreement subject to clause 31 of the said agreement in which case the date of possession shall get extended automatically.
- V. That the date of possession shall get extended automatically on account of delay caused due to reasons which are beyond the control of the developers/respondent. Further, the contingency of delay in handing over the apartment within the stipulated time was within the contemplation of the parties at the time of executing the agreement as the parties had agreed vide clause 17(a) that in the eventuality of delay in handing over possession beyond the period stipulated in clause 15(a) of the agreement, the allottee will be compensated with Rs 5/- per sq. ft. per month of super area. This part of compensation was specifically consented to and was never objected at any earlier stage, not while signing the agreement or any time after that.



- VI. That the delay has occurred only due to unforeseeable and uncontrollable circumstances which despite of best efforts of the respondents hindered the progress of construction, meeting the agreed construction schedule resulting into unintended delay in timely delivery of possession of the apartment for which the respondent cannot be held accountable. However, the complainant despite having knowledge of happening of such force majeure eventualities and despite agreeing to extension of time in case the delay has occurred as a result of such eventualities has filed this frivolous, tainted and misconceived complaint in order to harass it with a wrongful intention to extract monies.
- VII. That the said terms and conditions of the agreement were executed only after mutual discussion and decision and agreement of both the parties and in such a case, one party cannot withdraw itself from the foundation of the agreement. That once the said agreement was duly signed and accepted by the both the parties which contains detailed terms and conditions the parties are obligated to abide by it and either of parties cannot divert itself from the obligation of performance of their parts manifested in the agreement on its own whims and fancies and as per their own convenience. It is to be noted that performance and non-performance of the agreement affects both the parties equally and sometimes one party is at a greater disadvantage when one party abstains from performance of its part.
- VIII. That the respondent who is incurring higher expenses due to escalation in the cost of project due to time overrun. The



respondents have utilized all the resources towards completion of the project and no monies were diverted by it towards any other project as falsely alleged by him. That the respondents have strived at its best to battle the obstacles so that the delivery of the possession be made as soon as possible despite of the several unforeseeable hindrances mentioned herein below posed, since customer satisfaction has always been pivotal and a priority to the respondents. It is pertinent to note here that despite the best efforts by the respondent to hand over timely possession of the said flat booked by the complainant, the respondents could not do so due to reasons and circumstances beyond its control. It was only on account of the following reasons/circumstances that the project got delayed and timely possession could not be handed over to the complainant.

- IX. The project faced various roadblocks and hindrances including approvals from different authorities which were beyond the control of the respondent and which in turn lead to unforeseeable delay in the construction/completion of the project and hence handing over of the possession of the flat to the complainant.
- X. In addition to the above, active implementation by the Government of alluring and promising social schemes like National Rural Employment Guarantee Act ("NREGA") and Jawaharlal Nehru National Urban Renewal Mission ("JNNURM"), further led to sudden shortage of labour/ workforce in the real estate market as the available labour were tempted to return to their respective States due to the guaranteed employment under the said NREGA and JNNURM Schemes. The said factor further



created a vacuum and shortage of labour force in the NCR region. Large numbers of real estate projects, including the present project of the opposite party herein, were struggling hard to cope with their construction schedules, but all in vain.

- XI. The respondents faced extreme water shortage, which was completely unforeseen by any of the Real Estate Companies, including the respondent, in the NCR region. The respondent, who was already trying hard to cope up with the shortage of labour, as mentioned above, was now also faced with the acute shortage of water in the NCR region. The said factor of shortage of water directly affected the construction of the project at the site. To make the conditions worse, the Hon'ble High Court of Punjab and Haryana vide Order dated 16.07.2012 restrained the usage of ground water and directed to use only treated water from available Sewerage Treatment Plants (hereinafter referred to as "STP"). As the availability of STP, basic infrastructure and availability of water from STP was very limited in comparison to the requirement of water in the ongoing constructions activities in Gurugram District, it became difficult to timely complete the construction activities as per the schedule. The availability of treated water to be used at construction site was very limited and against the total requirement of water only 10-15% of required quantity was available at construction sites. In furtherance to the directions of Hon'ble High Court of Punjab and Haryana, the Opposite Party received a Letter bearing memo no 2524 dated 01.09.2012 from the Deputy Commissioner, Gurugram, Haryana, informing to it about the complete ban on the use of underground

water for construction purposes and use of only recycled water being permitted for the said purposes.

- XII. That the respondent neither had any control over the said directions/orders from the Hon'ble High Court nor had any control over the shortage of water in the NCR region, which in turn led to the delay in the completion and hence the handing over of the possession of the Flat to the complainant.
- XIII. In addition to the above, there has been a heavy shortage of supply of construction material i.e. river sand and bricks etc. through out of Haryana, pursuant to order of Hon'ble Supreme Court of India in the case Deepak Kumar etc. v. State of Haryana (I.A. No. 12-13 of 2011 in SLPs (C) nos. 19628-29 of 2009 with SLPs (C) No. 729-731/2011, 21833/2009, 12498-499/2010, SLP(C) CC... 16157/2011 & CC 18235/2011 dated 27 February 2012) and correspondingly, the construction progress slackened. This also caused considerable increase in cost of materials. It is noteworthy that while multiple project developers passed on such incremental costs attributable to the above reasons to the buyers, the management of the Opposite Party assured its customers that it will not and has held fast on its promise by not passing on any of such costs to the buyers.
- XIV. Without prejudice to the above, it is further submitted that the complainant is not "Consumers" within the meaning of the Consumer Protection Act, 2019 since the sole intention of the complainant was to make investment in a futuristic project of the respondent only to reap profits at a later stage when there is increase in the value of flat at a future date which was not certain



and fixed and neither there was any agreement with respect to any date in existence of which any date or default on such date could have been reckoned due to delay in handover of possession.

- XV. That the complainant has approached the respondents' office in 2011 and have communicated that the complainant is interested in a project which is "not ready to move" and expressed their interest in a futuristic project. It is submitted that the complainant was not interested in any of the ready to move in/near completion project. It is submitted that on the specific request of the complainant, the investment was accepted towards a futuristic project. Now the complainant is trying to shift the burden on the respondent as the real estate market is facing rough weather.
- XVI. Statement of objects and reasons as well as the preamble of the said Act clearly state that the RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of "Consumer" as provided under the Consumer Protection Act, 2019 has to be referred for adjudication of the present complaint. The complainant is investor and not consumer and nowhere in the present complaint have the complainant pleaded as to how the complainant is consumer as defined in the Consumer Protection Act, 2019 qua the respondent. The complainant has deliberately not pleaded the purpose for which the complainant entered into an agreement with the respondent to purchase the apartment in question. The



complainant is an investor, who never had any intention to buy the apartment for their own personal use and have now filed the present complaint on false and frivolous grounds. It is most respectfully submitted that the authority has no jurisdiction howsoever to entertain the present complaint as the Complainant have not come to the authority with clean hands and have concealed the material fact that they have invested in the apartment for earning profits and the transaction therefore is relatable to commercial purpose and the complainant not being a 'consumers' within the meaning of Section 2(7) of the Consumer Protection Act, 2019, the complaint itself is not maintainable under the said Act. This has been the consistent view of the Hon'ble National Consumer Disputes Redressal Commission.

- XVII. That further the reasons for delay are solely attributable to the regulatory process for approval of layout which is within the purview of the Town and Country Planning Department. The complaint is liable to be rejected on the ground that the complainant had indirectly raised the question of approval of zoning plans which is beyond the control of the respondent and outside the purview of consumer courts and in further view of the fact the complainant had knowingly made an investment in a future potential project of the respondent. The reliefs claimed would require an adjudication of the reasons for delay in approval of the layout plans which is beyond the jurisdiction of this authority and hence the complaint is liable to be dismissed on this ground as well.

XVIII. That the complainant primary prayer for refund of the amount paid against the booking of the said unit is entirely based on imaginary and concocted facts by the complainant and the contention that the respondent was obliged to hand over possession within any fixed time period from the date of issue of provisional allotment letter is completely false, baseless and without any substantiation; whereas in reality the complainant had complete knowledge of the fact that the zoning plans of the layout were yet to be approved and the initial booking dated 24.09.2012 was made by the complainants towards a future potential project of the respondent and hence there was no question of handover of possession within any fixed time period as falsely claimed by the complainants; hence the complaint does not hold any ground on merits as well.

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 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 complainant 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 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. I Objection regarding complainants being investor.

15. The respondent has taken a stand that the complainant is the investor and not consumer. Therefore, she is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is buyers and they have paid total price of Rs.67,09,059/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"



In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is allottee(s) as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 000600000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

F.II Objection regarding force majeure conditions.

16. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders/restrictions of the NGT as well as competent authorities, High Court and Supreme Court orders, spread of Covid-19 across worldwide etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 30.09.2015. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter

respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainants

G. I Direct the respondent to refund the entire amount deposited by the complainant along with interest @18% p.a. from the date of respective payment till its actual realization.

17. The complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

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

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

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

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

(Emphasis supplied).

18. Clause 15(a) of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

"15. POSSESSION

- (a) Time of handing over the possession**

Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over the possession of the



Apartment by September 2015 the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.”

19. The authority has gone through the possession clause of the agreement and observes that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of apartment buyer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.
20. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee 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

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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.

21. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 30.09.2015 and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by it in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.
22. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him at the rate of 18% interest. However, the allottee intend to withdraw from the project and is seeking refund of the amount paid by her 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.

23. 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.

24. 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., 20.09.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.
25. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

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

26. 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 15(a) of the agreement executed between the parties on 24.09.2012, the possession of the subject apartment was to be delivered within stipulated time i.e., by September 2015. As far as grace period is concerned, the same is

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disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 30.09.2015.

27. Keeping in view the fact that the allottee/complainant wishes to withdraw from the project and is demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein, the matter is covered under section 18(1) of the Act of 2016.
28. The due date of possession as per agreement for sale as mentioned in the table above is 30.09.2015 and there is delay of 6 years 11 months 29 days on the date of filing of the complaint.
29. The authority has further, observes that even after a passage of more than 7.11 years 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 them and for which they have paid a considerable amount of money towards the sale consideration. It is also pertinent to mention that complainants have paid almost 90% of total consideration till 2016. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottee intends to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016



30. 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 they have 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....."

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

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

32. 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



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 she 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.

33. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @10.75% 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

34. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondents/promoter are directed to refund the amount i.e., Rs.67,09,059/- received by it from the complainant along with 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 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 receivable shall be first utilized for clearing dues of allottee/ complainant.
35. Complaint stands disposed of.
36. File be consigned to registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 20.09.2023