BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2148 of 2022**
Date of complaint	:	**17.05.2022**
Date of decision		**27.09.2023**

1. Kumkum Gautam,
2. Gianendra Kumar Gautam,
Both R/o: - C-43, South City 1,
Sector 30, Gurugram, Haryana-122001. **Complainants**

Versus

M/s Raheja Developers Limited.
Regd. office at: W4D, 204/5, Keshav Kunj,
Cariappa Marg, Western Avenue, Sainik Farms,
New Delhi-110062. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Prashant Chaudhary (Advocate) Complainants
Garvit Gupta (Advocate) Respondent

ORDER

1. This 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 under the provisions of the Act or the

Rules and regulations made thereunder 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. N.	Particulars	Details
1.	Name of the project	"Raheja Trinity", Sector 84, Gurugram,
2.	Project area	2.281 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no. and validity status	26 of 2013 dated 17.05.2013 valid up to 16.05.2019
5.	Name of licensee	Sh. Bhoop Singh and Others
6	RERA Registered/ not registered	**Registered vide no. 24 of 2017 dated 25.07.2017**
7.	RERA registration valid up to	25.07.2022 For a period commencing from 25.07.2017 to 5 years from the date revised Environment Clearance
8.	Date of environment clearance	17.10.2014 [as per details obtained from planning branch]
9.	Shop no.	121, first floor (Page 29 of the complaint)
10.	Unit area admeasuring	551.10 sq. ft. (Page no. 29 of the complaint)
11.	Date of execution of agreement to sell	Not executed
12.	Date of execution of memorandum of understanding	13.09.2017 (Page 28 of the complaint)
13.	Possession clause	No possession clause in the MOU
14.	Due date of possession	13.09.2020 [Calculated as per ***Fortune Infrastructure and Ors. vs. Trevor***

		D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018]
15.	Total sale consideration	Rs.73,45,451/- (page 36 of complaint)
16.	Amount paid by the complainant	Rs.71,24,734/- (page 30 of complaint)
17.	Occupation certificate /Completion certificate	Not received
18.	Offer of possession	Not offered
19.	Surrender request	19.04.2022 (Page no. 68 of the complaint)
20.	Delay in handing over the possession till date of filing complaint i.e., 17.05.2022	1 year 8 months and 4 days

B. Facts of the complaint

3. The complainant has made the following submissions: -

I. That based on the representations made by the representatives of respondent, the complainants on 18.07.2017 agreed to purchase a unit in the project named "Raheja Trinity" at Sector-84, Gurugram. After filling an application for provisional allotment, they handed over cheques amounting to Rs.71,24,734/- to the respondent's employees who promised them that a formal MOU would be sent to them at the earliest.

II. That in furtherance of their maliciousness, the respondent's employees retained the entire amount of discount allegedly offered by them and promised to return/pay back the same in 47 equal monthly installments of Rs.57,062/-. The complainants due to their old age and lack of understanding did not realize that the respondent were playing a dirty trick on them by retaining a huge sum of their money and not even paying any interest on the same.

III. That after a delay of more than a month and persistent follow ups, an MOU dated 13.09.2017 was executed between the parties and a unit bearing no. 121 on the first floor was provisionally allotted to them having a tentative carpet area of 21.67 mtrs. in the said project.

IV. That the said MOU clearly stated that the allotment was only provisional in nature and a separate agreement of sale would be entered into between the parties at a subsequent stage. The respondent's employees further committed to the complainants that an agreement of sale as mentioned in the MOU would be signed within a month's period.

V. That the malevolent intent of the respondent is apparent from the fact that despite having passed of more than four and a half years, neither it has entered into a formal agreement of sale with the complainants till date nor have given them a formal allotment of the said unit in the project.

VI. That the complainants have been following up persistently with the respondent about the lack of proper documents, agreement of sale and the status of the project. However, its employees have mischievously been making false promises to them and not taking any concrete actions to resolve their grievances.

VII. That recently when the complainants went to the site to inspect the status of the project, they were shocked to see that the work was stalled and it would take several more years to complete the project. Thereafter, when they spoke to the respondent's customer care department regarding the said delay, they were distressed to learn that the access road to the project was still not sanctioned and because of that, the project will not be ready for a few years more and they were

told that their only option would be to take a booking in a different project launched by it and that too at a higher price.

VIII. That after weeks of regular follow ups with various people in the respondent company, they stopped answering the calls of the complainants and refused to meet up with them.

IX. That the complainants were cheated into entering the said MOU by way of false promises and representations of the respondent's agents and employees. Therefore, on 19.04.2022, the complainants sent a legal notice requesting the respondent to cancel the MOU and refund back the monies paid by them along with interest. However, till date neither the respondent has replied to the said legal notice nor has refunded the paid-up amount.

C. Relief sought by the complainant:

4. The complainants have sought following relief(s).

I. 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 the respondent

6. The respondent has contested the complaint on the following grounds:

i. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause i.e. clause 8 of the MOU and clause 62 of the application form which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.

ii. That the complainants, after checking the veracity of the project namely, 'Raheja's Trinity', Sector 84, Gurgaon had applied for allotment of a commercial shop vide booking application form and agreed to be bound by the terms and conditions of the booking application form.

iii. That the complainants are real estate investor who had booked the commercial unit in question with a view to earn quick profit in a short period. However, it appears that their calculations have gone wrong on account of severe slump in the real estate market and the complainants are now raising untenable and illegal pleas on highly flimsy and baseless grounds.

iv. That based on the application for booking, the respondent allotted to the complainants commercial shop bearing no. 121, admeasuring 551.18 sq.ft. The payment plan opted by the complainants with the respondent was the down payment plan wherein the majority of the payment towards the total sale consideration was made by the complainants. However, they are still liable to make payment towards the registration charges, stamp duty, service tax and other charges at the applicable stage and the same is known to them complainant from the very inception.

v. That an MOU was executed between the complainants and the respondent on 13.09.2017 wherein it was mutually decided that the complainants had given exclusive rights for facilitating the leasing of the allotted unit. Further, as per clause 3(a) of the said MOU, it was decided that the complainants had given the exclusive rights for leasing the commercial shop/unit to the respondent company. As per clause 3(c) of the said MOU, the complainants had authorized the

respondent company to grant to any person on lease the said unit. It was also decided that as per clause 3(d) of the said MOU, the respondent would endeavor to cause the unit to be leased out at the prevailing market rate. Furthermore, as per clause 3(f) of the said MOU, it was also decided that the complainants had consented for giving the unit on lease to a larger anchor stores, in case there was demand by a large anchor store/retail chain/food court operator or any other prospective tenant and as per clause 3(g) of the said MOU, the respondent had endeavored to lease out the said shop/commercial space to any third party for a period of minimum one year and for such a maximum period as per the requirement of the prospective lessee.

vi. That as per the clause 4 of the MOU, it was decided that the respondent would grant rebate/discount to the extent of a total sum of Rs.26,81,914/- payable in a period of 47 months from the date of execution of MOU with a monthly fixed amount of Rs.57,062/-. The respondent in adherence to the terms of the MOU credited the assured amount to the complainants and the same is evident from the ledger attached by the complainants along with the present complaint. The terms of the said MOU are to be read as a whole and cannot be read in piecemeal as sought to be done by the complainants in the present complaint.

vii. That on account of certain conditions which were beyond the reasonable control of the respondent, the construction of the project in question has not been completed and the respondent cannot be held liable for the same in accordance with clause 34 read with clause 52 of the application form.

viii. That despite the respondent fulfilling all its obligations as per the provisions laid down by law, the government agencies have failed to fully provide essential basic infrastructure facilities such as roads, sewerage line, water and electricity supply in the sector where the said project is being developed. Therefore, the respondent cannot be held liable on account of non-performance by the concerned governmental authorities. The respondent company has even paid all the requisite amounts including the External Development Charges (EDC) to the concerned authorities.

ix. That the present complaint has been filed with malafide motives and the same is liable to be dismissed with heavy costs payable to the respondent.

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

E. Jurisdiction of the authority

8. The authority has complete territorial and 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, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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 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.*

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 (Civil), 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*** 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."

13. 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. Objections regarding the complainant being investor.

14. The respondent has taken a stand that the complainants are investors and not consumer, therefore, they are 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 consumers of the real estate sector. The authority observes 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 preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time, 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 the promoter 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 complainants are buyers, and they have paid a total price of Rs.71,24,734/- to the promoter towards purchase of an unit in its project. 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;"*

15. 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 complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them 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. 0006000000010557 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 allottees being investors are not entitled to protection of this Act also stands rejected.

F.II Objection regarding agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement.

16. The memorandum of understanding entered into between both the parties on 13.09.2017 contains a clause 8 relating to dispute resolution between the parties. The clause reads as under: -

> ***"8. DISPUTE RESOLUTION:***
> *a. If any dispute, difference, claim or question arises between the Parties as to the construction, meaning, validity or effect and enforceability of this MOU or as to the rights and liabilities of the parties arising hereunder or as to any other matters or things or arising out of or in connection therewith, the same shall at the first instance be tried to be resolved amicably. If such dispute cannot be resolved amicably by granting opportunity of at least 3 meetings over a period of 90 days, the same shall be referred to Arbitration by a sole arbitrator. The said sole arbitrator shall be appointed by the Company only and the Allottee shall not have any objection of whatsoever nature in this regard. The arbitration shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996 or any statutory modification or re-enactment for the time being in force and conducted in fast-track mode as provided in the Arbitration & Conciliation Act, 1996.".*

17. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not

in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

18. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

19. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **in *case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018*** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

> *"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

20. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint

and that the dispute does not require to be referred to arbitration necessarily.

F.III Objection regarding force majeure conditions.

21. 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 and non-availability of necessary infrastructure facilities by government. 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 13.09.2020. 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 complainant.

G.I. Direct the respondent to refund the paid-up amount along with prescribed rate of interest.

22. 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. Section 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)

23. In the instant case, the complainants were provisionally allotted a unit bearing no. 121, first floor vide MOU dated 13.09.2017. No BBA has been executed between the parties.

24. That after the acceptance of the booking and issuing the allotment letter, the respondent should have handed over the possession of the apartment within the reasonable time period. It can be said that in the matter of the reasonable time for delivery of possession would be 3-4 years from the booking of apartment. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract. Since possession clause has not been annexed in the file, the due date would be calculated keeping in view the judgment of the Hon'ble Supreme Court in the case of **Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018** observed that:

> *"15. Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014."*

25. In view of the above-mentioned reasoning, the date of signing of MOU dated 13.09.2017, ought to be taken as the date for calculating due date of possession. Therefore, the due date of handing over of the possession of the unit comes out to be 13.09.2020.

26. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer and water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. 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 him in making payment as per the plan 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 a clause in the agreement to sell 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 a mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

27. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them along with prescribed rate of interest. However, the allottees intends 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.*

28. 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.

29. 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., 27.09.2023 is **8.75%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%.**

30. The authority observes that the complainants vide letter dated 19.04.2022 made a request to cancel their allotment and to refund the amount paid alongwith interest due to the contraventions of the terms of MOU executed between them. But on failure of the respondent to refund the same, they have filed the present complaint dated 17.05.2022 seeking refund. Further, even after a passage of more than 6 years (i.e., from the date of allotment till date) neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottees by the respondent/promoters. The authority is of the view that the allottees 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. 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 certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, if the allottees 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.

31. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondents/promoter. The authority is of the view that the allottee 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....."*

32. Further 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. reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others (Supra)***, it was 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."

33. 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 MOU under section 11(4)(a) of the Act. The promoter has failed to complete or is 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 allottees, as they wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by respondent/promoter in respect of the unit with interest at such rate as may be prescribed.

34. 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.

F. 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 function entrusted to the authority under section 34(f):

    i. The respondent/promoter is directed to refund the paid-up amount of Rs.71,24,734/- received by it from the complainants 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.

36. Complaint stands disposed of.

37. File be consigned to registry.

Dated: 27.09.2023

(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram