BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**794 of 2021**
Date of complaint	:	**17.02.2021**
Date of order	:	**27.09.2023**

Mahesh Kumar, S/o Tej Bhan,
R/o: - H. No. 53, 8 Marla, Model Town,
Gurugram, Haryana-122001. **Complainant**

Versus

M/s Landmark Apartments Pvt. Ltd.
Through its Directors,
Regd. Office at: - Landmark House,
65, Sector-44, Gurugram-122021. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Sh. Mukul Kumar Sanwariya (Advocate) Complainant
Sh. Akshay Sharma (Advocate) Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 provision 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	Landmark The Residency, Sector – 103, Gurugram
2.	Project area	10.868 acres
3.	Nature of the project	Group Housing Complex
4.	DTCP license no. and validity status	33 of 2011 dated 19.04.2011 valid upto 15.04.2021
5.	Name of licensee	Basic Developers Pvt. Ltd. and Ors.
6.	RERA Registered/ not registered	Not Registered
7.	Unit no.	B-155, 15TH floor (Page no. 62 of complaint)
8.	Unit area admeasuring	1350 sq. ft. (Page no. 62 of complaint)
9.	Date of provisional allotment letter	24.03.2012 (As per on page 44 of complaint)
10.	Date of allotment	19.05.2014 (As per on page 98 of complaint)
11.	Date of buyer agreement	01.08.2014 (As per page 35 of reply)
12.	Date of transfer of provisional allotment	28.08.2014 (As per on page 101 of complaint)
13.	Date of execution of agreement to sell	31.05.2013 (As per on page 46 of complaint)
14.	Date of endorsement	04.09.2014 (As per on page 45 of complaint) (From original allottee i.e., Sudipto Chakravorti to present complainant i.e., Mahesh Kumar)

15.	Possession clause	**10.1 Possession** The developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said building /apartment **within a period of 4 years from the date of execution of this agreement unless there shall be delay...** (Emphasis supplied) (As per page 73 of complaint)
16.	Due date of possession	01.08.2019 (Calculated from the date of signing of this agreement) Along with grace period of 12 months
17.	Total sale consideration	Rs.59,40,500/- (As per on page 45 of reply)
18.	Amount paid by the complainant	Rs. 45,14,250/- (As per page 85 of reply)
19.	Occupation certificate /Completion certificate	25.09.2020 (page 89 of reply)
20.	Final reminder to clear dues and to takeover of possession	10.12.2020 (As per page 94 of reply)
21.	Reminder for taking offer of possession	15.03.2021 (As per page 95 of reply)

B. Facts of the complaint:

3. The complainant has made the following submissions: -

I. That one Sudipto Chakravorti and Debjani Chakraborti i.e., original allottees were provisionally allotted an apartment bearing no. B -155, admeasuring 1350 sq.ft. on 15th floor in the project named 'Landmark The Residency' in Sector-103, Gurugram vide allotment letter dated 19.04.2014. Thereafter, an apartment buyer agreement was executed

between the original allottees and the respondent on 01.08.2014 for a total sale consideration of Rs.59,40,500/-.

II. That the complainant on 28.08.2014, requested the respondent to transfer the ownership of the apartment in dispute in his name from the names of the original allottees and the said request was accepted by the respondent vide letter dated 04.09.2014. Thereafter, the respondent endorsed every document pertaining to the booking and payments along with the apartment buyer's agreement dated 01.08.2014 in favour of the complainant.

III. That as per clause 10.1 of the buyer's agreement the respondent contemplates to complete construction of the said tower/apartment by 01.08.2019.

IV. That it was in the year 2018 somewhere in November when the complainant visited the project site to check the status of his tower, he was left in utter shock when he saw that the construction of the said tower has not been started till that day. Therefore, the complainant approached the office of the respondent, but he was not allowed to meet any of the officials of it and was sent back in shock and agony.

V. That it has been more than 9 years from the date of signing of the buyer's agreement, but the construction of the project has not been completed till date despite receiving a total sum of Rs.46,33,103 i.e., 80% of the hard-earned money from the complainant which was duly paid to the respondent without any delay.

VI. That several calls, messages and personal visits were made by the complainant requesting the respondent to refund the amount paid by him on account of the delay in delivery of the unit, but no satisfactory response has been made on the concerned issue.

VII. That the complainant fell in the shoes of the original allottees the moment the transfer of ownership of the apartment in dispute was confirmed transferred in his favor by the respondent and hence, all the terms and conditions of the buyer's agreement which was duly endorsed in his favor shall apply as it was binding upon the original allottee. Hence, any relief from breach of any terms and conditions of the agreement shall be entitled to the complainant.

VIII. That the respondent failed to comply with the law laid down in the RERA Act and is liable to adhere to the apartment buyer agreement and allotment letter and in case of contravention of the same, the Act empowers the complainant to withdraw from the project and to seek a refund along with compensation for the amount paid till date.

C. Relief sought by the complainant:

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

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

   II. Direct the respondent to not to charge holding charges till the present complaint is decided.

   III. Direct the respondent to pay cost of litigation.

   IV. Direct the respondent from raising any fresh demands and liability on the complainant.

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/builder.

6. The respondent contested the complaint by filing reply dated 03.08.2021 on the following grounds: -

i. That the original allottee applied for the allotment of a 2BHK apartment having an approximate super area admeasuring 1350 sq. ft. in its project named "Landmark the Residency" at Sector-103, Gurugram. A provisional allotment letter dated 24.03.2012 was issued to the original allottee i.e Sudipto Chakravorti by the respondent. Thereafter, an apartment buyer agreement dated 01.08.2014 was executed between the respondent and the original allottee.

ii. That since the original allottee was unable to adhere to the due payment on account of the financial crunch, sold the allotted unit to the complainant and thereafter the complainant requested for the transfer of the ownership in his name vide letter dated 28.08.2014 on the basis of agreement to sell dated 31.05.2013 and the same was transferred in the name of the complainant by the respondent on 04.09.2014.

iii. That the respondent vide letter dated 16.12.2017 issued a final reminder cum cancellation letter to the complainant on account of non-payment of dues and requested for payment of Rs.11,05,702/- within a period of 15 days to avoid cancellation. Thereafter, the complainant approached the respondent and requested to not to cancel the allotment and seeks some time for making payment on account of financial crunch and consequently the respondent considering the said request withdrew the said cancellation letter.

iv. That after completion of the project, the respondent vide letter dated 2204.2019 applied for the grant of occupation certificate. However, the Director Town and Country Planning Department, Haryana granted

the occupation certificate to the respondent vide its letter dated 25.09.2020. Thereafter vide letter dated 30.06.2020 an intimation regarding the possession of the unit was issued to the complainant wherein the respondent requested him to come forward and clear the dues of the unit to enable the respondent to handover the possession of the unit. Further, the respondent also conveyed the complainant to visit the unit in the project to get satisfied regarding the construction and finishing work of the unit. However, the complainant did not come forward to make any further payment or to take possession of the unit.

v. That the demand notice dated 30.09.2020, raising a demand of Rs.19,53,034/- was issued by the respondent to the complainant, but no payment was forthcoming from the complainant against various pending dues and charges. Further, the respondent vide letter dated 10.12.2020, 15.03.2021 and email dated 13.01.2021 issued reminders to the complainant for taking over of the possession. However, the complainant instead of taking the possession and making the payment of remaining dues, filed a case for refund apparently with an intention to enrich himself in an unjust manner.

vi. That the complainant is seeking refund of the amount deposited along with interest and other reliefs and filed the present complaint under Rule-29 of the said Rules. However, as per the reliefs claimed the complaint is required to be filed before the Authority under Rule-28 of the said Rules. Hence, the complaint is liable to be rejected on this ground alone.

vii. That as per clause10.1 of the buyer's agreement possession of the unit was agreed to be handed over within a period of 48 months in addition to a grace period of one year i.e. total 60 months from the date of

execution of the agreement. However, the burden of delay caused in the grant of the occupation certificate cannot be placed on the respondent. Despite force majeure conditions the respondent has completed the construction of the project within the agreed time limit. Further as per clause 11.1 of the buyer's agreement, the respondent is entitled to the extension of time in the instant case as the delay of more than one year in the grant of occupation certificate is not attributable to the respondent. Also, in the year 2020 due to spread of coronavirus a nationwide lockdown was imposed in the country and several orders/directions were passed by the Hon'ble Supreme Court/High Court as well as authorities impacting the construction of the project. Therefore, the respondent in no case can be held responsible/accountable for the delay.

viii. That the complainant has committed various defaults in the making of the payment in terms of the buyer's agreement. On many occasions repeated demand letters and reminders were issued to the complainant for payment. Even after repeated demands, the complainant did not make the payments on time. Hence, the complainant is not entitled to get any relief.

ix. That the complainant is not a consumer as he had booked the service apartment in question purely for commercial purposes as a speculative investor and to make profits and gains.

x. That the complainant cannot be permitted to raise these issues before this Authority in view of the arbitration clause 52 as agreed vide buyer's agreement between the parties.

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 submission made by the parties.

E. Jurisdiction of the authority

8. The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee 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 complainant at a later stage.

12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(C), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** and wherein it has been laid down as under:

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

judgement titled as ***M/s Newtech Promoters and Developers Pvt Ltd. Vs State of UP & Ors. (supra),*** the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case the allottee wishes to withdraw from the project on failure of the promoter to give possession as per agreement for sale irrespective of the fact whether application has been made in form CAO/CRA. It has been deliberated in the proceedings dated 10.5.2022 in CR No. 3688/2021 titled Harish Goel Versus Adani M2K Projects LLP and observed that there is no material difference in the contents of the forms and the different headings whether it is filed before the adjudicating officer or the authority.

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

F. Findings on the objections raised by the respondent.

F.I Objection regarding the complainant being investor.

15. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and 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 respondents 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 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 it 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 a buyer and paid total price of Rs.45,14,250/- to the promoter towards purchase of an apartment 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;"*

16. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is allottee as the subject unit was allotted to him 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 allottee being an investor is 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.

17. The agreement to sell dated 01.08.2014 contains a clause 52 relating to dispute resolution between the parties. The clause reads as under: -

52. ARBITRATION

"All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the, interpretation and validity of the terms here and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate: location in Gurgaon by a Sole Arbitrator who shall be the appointed by the Developer/Company.

The Intending Allottee(s) hereby confirms that lie / she shall have no objection to this appointment. The Courts at Gurgaon alone stall have the jurisdiction in all matters arising out of / touching and/or concerning this Agreement regardless of the place of execution of this Agreement which is deemed to be at Gurgaon."

18. 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.

19. 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."*

20. 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."*

21. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within his rights 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 the delay in payments.

22. The objection raised by the respondent regarding delay in payment by allottee is totally invalid as he has already paid the amount of Rs.45,14,250/- against the total sale consideration of Rs.59,40,500/- to the respondent as and when demanded by the respondent. The balance amount is payable on intimation of offer of possession. The fact cannot be ignored that there might be certain group of allottees who defaulted in making payments. But upon perusal of documents on record, it is observed that no default has been made by the complainant in the instant case. Hence, the plea advanced by the respondent is rejected.

G. Findings on the relief sought by the complainant.

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

23. The complainant is a subsequent allottee. The subject unit was originally allotted to Sudipto Chakravorti and Debjani Chakraborti. An allotment letter was issued in this regard on 19.05.2014. The authority has decided this issue in the complaint bearing no. ***4031 of 2019 titled as Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that in cases where subsequent allottee has stepped into the shoes of original allottee after the expiry of due date of handing over possession and before the coming into force of the Act, the subsequent allottee shall be entitled to refund of the entire amount paid by him from the date of each payment paid by the allottee (either original or subsequent) till the actual date of refund of the amount.

24. The authority has observed that the apartment buyer agreement was executed on 01.08.2014 and the due date of possession was 01.08.2019. Though, the original allottee has been paying for the said apartment

since 21.12.2010 and the complainant has been paying the installments from the date of endorsement i.e., 28.04.2014 before the expiry of the due date of possession accordingly, the subsequent allottee is entitled for refund.

25. In the present complaint, 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)*

26. As per clause 10.1 of the agreement to sell dated 01.08.2014 provides for handing over of possession and is reproduced below:

> ***10.1 SCHEDULE FOR POSSESSION OF THE SAID APARTMENT***
> *The Developer/Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/said Apartment within a period of Four years (48 Months) from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in Clauses 11.1, 11.2, 11.3 and Clause 41 or due to failure of Intending Allottee(s) to pay in time the price of the said Apartment along with other charges and dues in accordance with the schedule of payments given in Annexure F or as per*

the demands raised by the Developer/Company from time to time or any failure on the part of the Intending Allottee(s) to abide by all or any of the terms or conditions of this Agreement. The Intending Allottee(s) agrees and undertakes that the company shall be entitled for a period of six months for the purpose of fit outs and a further period of six months on account of grace over and above the period more particularly specified here-in-above.

27. At the outset, it is relevant to comment on the present 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 the allottee 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 allottee is left with no option but to sign on the dotted lines.

28. **Due date of handing over possession and admissibility of grace period:** As per clause 10.1 of the buyer's agreement, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 48 months plus 12 months of grace period, in case the construction is not complete within the time frame specified. It is a matter of fact that the respondent has not completed the project in

which the allotted unit is situated and has not obtained the occupation certificate by August 2018. However, the fact cannot be ignored that there were circumstances beyond the control of the respondent which led to delay incompletion of the project. Accordingly, in the present case the grace period of 12 months is allowed. Therefore, the due date of possession comes out to be 01.08.2019.

29. The Section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.

30. The counsel for respondent vide proceeding dated 28.07.2022 stated at bar that the occupation certificate for tower/block of the project where the unit of the allottee is situated has been obtained by it from DTCP on 25.09.2020. However, it was vehemently denied by the counsel for the complainant that OC received from DTCP is only in respect of Tower-A, while the unit of the complainant is situated in Tower-B. Therefore, the respondent was directed to submit list of allottees tower-wise and unit wise. Thereafter, the respondent vide application dated 23.05.2023, placed on record list of allottees as directed above alongwith affidavit stating that *"As a culture in real estate industry number 13 is considered as unfortunate number that is why unit of 13th floor has number as 14 as there initial digits and units on floor has number 15 as there initial digits.*

That is why by mistake at the time of allotment 15th floor was mentioned as the unit number as well in BBA also. But, the unit of complainant falls on 14th floor, block-B of Tower-A for which OC has already been obtained. Further, the aforesaid Tower-A for the convenience purpose has been further sub-divided into Block A and B as would be clear from the approved site plan."

31. After considering the documents available on record as well as submissions made by the respondent on affidavit, it is concluded that the OC of the Tower in which the unit of complainant is situated has been obtained by it. The due date of possession as per buyer's agreement was 01.08.2019 and complaint has been received on 17.02.2021 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The OC was received on 25.09.2020 whereas, offer of possession was made on 10.12.2020. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made and demand for due payment was raised, then only, he filed a complaint before the authority.

32. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the allottee tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due

date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money they have paid to the promoter is protected accordingly and the same was upheld by in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022; that: -

> *25. The unqualified right of the allottees to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottees, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottees/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottees does not wish to withdraw from 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 allottee as per agreement for sale. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. But the complainant-allottee failed to exercise his right although it is unqualified one. Complainant has to

demand and make his intentions clear that he wishes to withdraw from the project. Rather tacitly wished to continue with the project and thus made himself entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

34. In case the allottee wishes to withdraw from the project, the promoter is liable on demand to return the amount received by it with interest at the prescribed rate if it fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that the allottee has to make intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready then he impliedly agreed to continue with the project i.e. he do not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and the allottee shall be paid interest at the prescribed rate for every month of delay by the promoter.

35. The unit of the complainant was booked vide allotment letter dated 19.05.2014. The buyer's agreement was executed on 01.08.2014. There is a delay in handing over the possession as due date of possession was 01.08.2019 whereas the offer of possession was made on 10.12.2020 and the complainant has filed the present complaint seeking refund on 17.02.2021.

15. Keeping in view of the aforesaid circumstances and judgment 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*** it is concluded that if allottee still wants to withdraw from the project, the paid-up amount shall be refunded after deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under: -

> ***"5. AMOUNT OF EARNEST MONEY***
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"*

36. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.45,14,250/- after deducting 10% of the basic sale consideration of Rs.47,55,000/- being earnest money along with an interest @10.75% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable

as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of filing of this complaint i.e., 17.02.2021 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G.II Direct the respondent to not to charge holding charges till the present complaint is decided.

37. The holding charges shall not be charged by the promoter at any point of time even after being part of the agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

G.III Direct the respondent to pay cost of litigation.

38. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)***, has held that an allottee is entitled to claim compensation and litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation and litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation and legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

G.IV Direct the respondent from raising any fresh demands and liability on the complainant.

39. In view of the findings detailed above on issues no. 1, the above said relief become redundant.

H. Directions of the authority

40. 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/builder is directed to refund the paid-up amount of Rs.45,14,250/- after deducting 10% of the basic sale consideration of Rs.47,55,000/- being earnest money along with an interest @10.75% p.a. on the refundable amount, from the date of filing of this complaint i.e., 17.02.2021 till its realization.

    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.

41. Complaint stands disposed of.

42. File be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 27.09.2023

HARERA
GURUGRAM