

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

Complaint no.	:	4390 of 2021
Date of filing complaint:		10.11.2021
Date of decision	:	12.12.2023

	Aneeta Singh R/O: D-92, Seema Apartments, Plt No. 7, Sector-11, Dwarka, New Delhi-110075	Complainant
Versus		
1.	Ansal housing and construction limited Regd.Office : 15, UGF, Indraprakash, 21, Barakhamba Road, New Delhi-110001	Respondents
2.	Samyak Projects Pvt Ltd Regd. office: 111, First Floor, Antriksh Bhawan, 22, K.G. Marg, New Delhi	

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Dagar Malhotra (Advocate)	Complainant
Sh. Amandeep Kadiyan (Advocate)	Respondent no. 1
None	Respondent no. 2

ORDER

- The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Name of the project	"Ansal Heights" Sector 92 , Gurugram
2.	Nature of the project	Residential
3.	DTCP License no. & validity status	76 of 2010 dated 01.10.2010
4.	Valid Upto	30.09.2020
5.	RERA Registered / not registered	Not Registered
6.	Allotment Letter	18.06.2012 (Page 35 of the complaint)
7.	Villa No.	V 023 , (Page no. 20 of complaint
8.	Unit admeasuring	5000 sq.ft.
9.	Date of execution of buyer's agreement	03.05.2012 (Page no. 18 of complaint)
10.	Possession clause	29. The developer shall offer possession of the unit any time , within a period

		of 36 months from the date of execution of agreement or within 36 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction , whichever is later subject to timey payment of all dues and subject to force majeure circumstances as described in clause 30. Further there shall be a grace period of 6 months allowed to the developer over and above the period of 36 months as above in offering the possession of the unit. (emphasis supplied)
11.	Due date of delivery of possession	03.11.2015 (Calculated from the date of agreement as the date of commencement of construction is not known. Grace period is allowed being unqualified)
12.	Total sale consideration	Rs. 1,09,62,500/- as per bba (Page no. 20 of complaint)
13.	Total amount paid by the complainant	Rs. 1,30,03,123/- (As alleged by the complainant)
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered

B. Facts of the complaint:

- That a project by the name of "Ansal Heights" situated in Sector 92, Gurugram was to be developed by the respondent no.1 and 2 jointly. Around that time, in the year 2012, complainant was looking for a residential unit at

that time and, in pursuance of the same, approached the respondent no.1 to understand the features and specifications of the residential units being offered by the respondent no.1 in its project- "Ansal Heights."


4. That the respondent no.1 shared the e-brochure of its project which included the layout plan as well, with the complainant. The complainant thoroughly read through the e-brochure and relying completely on the representations made by the said respondent in the said e -brochure, and believing the said representations to be true, decided to book a villa in the said project. Therefore, in furtherance of the same, a buyers' agreement dated 03.05.2012 was executed between the parties. The total sale price of the said villa (being Villa No: 023) was Rs.1,26,12,500/-, super area being 5000 sq.ft. and rate per being Rs.2192.50/-, the basic sales price totalling to Rs. 1,09,62,500/-. Further, the due date of possession as per clause 29 of the said agreement was 36 months plus 6 months grace period to be calculated from the date of execution of the said agreement or from the date of obtaining all the required sanctions and approvals necessary for the commencement of construction whichever is later. Thereby, the due date of possession being 03.11.2015. The payment was construction- linked and the respondent raised demands as per the stage of constructions as alleged in the demand letters. Believing the alleged demands to be accurate, the complainant complied with all such demands and made timely payments. The total amount paid by the complainant to the respondent no.1 till date is Rs. 1, 30, 03,123.89/- plus TDS of Rs. 70,659/-.

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5. That, the complainant visited the project site in October, 2021 and was utterly shocked to see that the respondent unilaterally changed the structural plan from basement, ground floor, first floor and second floor (as was mentioned and shown to the complainant in the respondent's brochure at the time of booking) to just ground floor, first floor and second floor. As per the e- brochure the basement was to consist of one home theatre, one lounge, one store room, one servant room with attached toilet, one pantry. The absence of the same not only considerably reduced the area by nearly 1000 sq ft (i.e., approx. 20% of the total sales area) but also led to lack of the necessary requisite amenities and features that the complainant had booked for. As per clause 4 of the buyers' agreement, the respondents were obligated to inform the complainant in writing of any modification resulting in more than 10% of addition/reduction in the area of the said unit. The same was never informed to the complainant and this was on account of there being no bonafide intention on the part of the respondents to ever construct a basement in the said unit.
6. That on enquiring from HUDA, the complainant got to know that the respondents has never received any approval for basement as a part of the structure. Therefore, the respondents, had deceitfully with malafide intentions made false statements and misrepresentations in its layout plan and e-brochure, on the basis of which the complainant paid the respondent her hard-earned money.

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7. That the complainant during his mentioned visit, captured some photographs of the site which point out that even though the respondent no.1 has deceitfully taken an amount more than the total sales price from the complainant under the alleged demands of electrical fittings, plumbing fitting, sanitary fittings, kitchen fittings, staircase railings etc. whereas in reality no such work has even been carried out by the respondents in the said villa. Various other misrepresentations and false depictions made by the respondent no.1 regarding the project land as well as the villa surfaced during such visit as follows : a)Entry point to the property has also been changed to back lane instead of internal road between towers and Villas, as given in the brochure and site plan given by the respondent and b)That when the complainant applied for the said property, according to the site plan given by the respondent, area in front of the property was shown as forest area which has now been made into concrete area and added two-storey structure of school building instead.
8. That, till date, even after lapse of almost 7 years from the due date of possession, the construction of the unit is not only incomplete but also hugely different from what was initially represented to the complainant at the time of booking.
9. That in the present case, there has not only failure on the part of the respondents to carry out its obligations but most importantly, there have been false representations, statements and depictions made by the respondents to the complainant at the time of booking of said villa and the



complainant, in good faith, relying on and believing those misrepresentations has been made to part away with a considerable amount of money, as mentioned above, by the respondents.

10. Thus, on account of failure of the respondents to carry out its obligations and in line with the proviso to Section 12, the complainant wishes to withdraw from the project and humbly prays for her hard earned to be returned to her with interest and reasonable amount of compensation in line .Lastly, both the respondent no.1 and 2 were jointly developing and promoting the said project. The same is mentioned in the buyer's agreement. The said agreement was entered among parties being JSG Builders Pvt. Ltd, NCC Urban Infrastructure (both called its land owners), Samyak Projects Private Ltd. (referred to as confirming party), Ansal Housing and Construction Ltd - (mentioned as developer) and the complainant. The agreement starts with words the project namely 'Ansal Heights' is being developed by developer i.e. Ansal Housing and Construction Ltd. The said developer i.e., respondent no.1 has entered into an agreement with the confirming party i.e., respondent no. 2 to jointly promote, develop market the proposed project. Accordingly, both, respondent no.1 and 2 can be termed its 'promoters' in view of section 18 of Act. Thus, both of the promoters i.e. respondent no.1 and 2 are jointly and severally responsible towards the complainant and the reliefs are being sought against both the respondents.

C. Relief sought by the complainant:

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

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- i. Direct the respondent to refund the entire amount of Rs.1,30,03,123.89/- paid by the complainant till date along with interest at the prescribed rate under Act of 2016.
- ii. Direct the respondent to pay Litigation cost of Rs. 1,00,000/- and Rs. 5,00,000/- on account of mental agony and harassment caused to the complainant.

D. Reply by respondent no. 1:

The respondent no. 1 by way of written reply made following submissions

12. That the answering respondent is a developer and has built multiple residential and commercial buildings within Delhi/NCR with a well-established reputation earned over years of consistent customer satisfaction.
13. That the complainants had approached the answering respondent for booking a villa in an upcoming project Ansal Heights, Sector 82, Gurugram. Upon the satisfaction of the complainant regarding inspection of the site, title, location plans, etc. an agreement to sell dated 03.05.2012 was signed on between the parties.
14. That the current dispute cannot be governed by the RERA Act, 2016 because of the fact that the builder buyer agreement signed between the complainant and the answering respondent was in the year 2012. It is submitted that the regulations at the concerned time period would regulate the project and not a subsequent legislation i.e. RERA Act, 2016. It is further submitted that Parliament would not make the operation of a statute retrospective in effect.

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15. That the complaint specifically admits to not paying the penal interest and the full payment as agreed upon under the builder buyer agreement. It is submitted that the complainant cannot be allowed to take advantage of his own wrong.
16. That even if for the sake of argument, the averments and the pleadings in the complaint are taken to be true, the said complaint has been preferred by the complainant belatedly. The complainant has admittedly filed the complaint in the year 2021 and the cause of action accrue on March 2016 as per the complaint itself. Therefore, it is submitted that the complaint cannot be filed before the HRERA Gurugram as the same is barred by limitation.
17. That even if the complaint is admitted to be true and correct, the agreement which was signed in the year 2012 without coercion or any duress cannot be called in question today. It is submitted that the builder buyer agreement provides for a penalty in the event of a delay in giving possession. It is submitted that clause 37 of the said agreement provides for Rs. 5/ sq. ft. per month on super area for any delay in offering possession of the unit as mentioned in Clause 31 of the agreement. Therefore, the complainant will be entitled to invoke the said clause and is barred from approaching the Hon'ble Commission in order to alter the penalty clause by virtue of this complaint more than 6 years after it was agreed upon by both parties.
18. That the complaint itself discloses that the said project does not have a RERA approval and is not registered. It is submitted that if the said averment in the

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complaint is taken to be true, the Hon'ble Authority does not have the jurisdiction to decide the complaint.

19. That the respondent had in due course of time obtained all necessary approvals from the concerned authorities. It is submitted the permit for grant of permissions for disposal of mineral extracted incidental to development activities was obtained on 14.04.2014. Similarly, the approval for obtaining firefighting scheme was obtained by the respondents on 24.11.2015. Thus, the respondents have in a timely and prompt manner ensured that the requisite compliances be obtained and cannot be faulted on giving delayed possession to the complainant.
20. That the answering respondent has adequately explained the delay and the same has been acknowledged by the complainant. It is submitted that the delay has been occasioned on account of things beyond the control of the answering respondent. It is further submitted that the builder buyer agreement provides for such eventualities and the cause for delay is completely covered in the said clause. The respondent ought to have complied with the orders of the Hon'ble High Court of Punjab and Haryana at Chandigarh in CWP No. 20032 of 2008, dated 16.07.2012, 31.07.2012, 21.08.2012. The said orders banned the extraction of water which is the backbone of the construction process. Similarly, the complaint itself reveals that the correspondence from the answering respondent specifies force majeure, demonetization and the orders of the Hon'ble NGT prohibiting construction in and around Delhi in addition to the covid 19 pandemic as the

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causes which contributed to the stalling of the project at crucial junctures for considerable spells.

21. That the answering respondent and the complainant admittedly have entered into a builder buyer agreement which provides for the event of delayed possession. It is submitted that clause 32 of the builder buyer agreement is clear that there is no compensation/interest to be sought by the complainant/prospective owner in the event of delay in possession.
22. That it is further submitted that the respondent no.2 has taken over the project from the respondent no.1 through Arbitration proceedings conducted in London. Therefore, the respondent no.1 is not a necessary and useful party in the present case and only respondent no.2 is responsible for the completion of the said project.
23. The Authority issued a notice dated 12.11.2021 to the respondent no. 2 in the above mentioned complaint was sent through speed post and through email address i.e samyakprojects@gmail.com and the delivery report of which shows that delivery was completed and the delivery reports have been placed in the file. Despite service of notice, the respondent no. 2 have preferred neither to put in appearance nor file reply to the complaint within the stipulated period. Accordingly, the Authority is left with no other option but to decide the complaint ex-parte against the respondent no. 2.
24. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on

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the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

25. The plea 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

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

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)(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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

26. 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.

F. Findings on the objections raised by the respondent:

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

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

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

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

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

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

29. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the

plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II Objection regarding maintainability of complaint.

30. The counsel for the respondent has raised an objection that the complaint is barred by limitation as the complainant has approached the respondent in the year 2012 to invest the projects of the respondent situated in Gurugram . The respondent also submitted that the complainant has admittedly filed the complaint in the year 2021 and the cause of action accrue on March 2016.
31. On consideration of the documents available on record and submissions made by the party, the authority observes that the buyer's agreement w.r.t. the villa was executed with the allottee on 05.06.2012. As per clause 29 of the buyer's agreement, the possession of the subject plot was to be offered with in a period of 36 months plus 6 months from date of agreement or the date of commencement of construction which whichever is later. The authority calculated due date of possession from the date of agreement i.e., 03.05.2012 as the date of construction is not known which comes out to be 03.11.2015.
32. However, the said project of the allotted plot is an ongoing project, and the respondent/promoter has failed to apply and obtaining the CC/part CC till date. As per proviso to section 3 of Act of 2016, ongoing projects on the date of this Act i.e., 28.07.2017 for which completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three months from the date of commencement of this Act and the relevant part of the Act is reproduced hereunder:



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

33. The legislation is very clear in this aspect that a project shall be regarded as an "ongoing project" until receipt of completion certificate. Since no completion certificate has yet been obtained by the promoter-builder with regards to the concerned project.
34. Moreover, it is observed that despite passing a benchmark of due date on 03.11.2015, till date it has failed to handover the possession of the allotted plot to the complainant and thus, the cause of action is continuing till date and recurring in nature. The authority relied upon the section 22 of the Limitation Act, 1963, Continuing breaches and torts and the relevant portion are reproduce as under for ready reference:

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

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

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

36. The respondent-promoter alleged that grace period on account of force majeure conditions be allowed to it. It raised the contention that the construction of the project was delayed due to force majeure conditions such as demonetization, and the orders of the Hon'ble NGT prohibiting

12

construction in and around Delhi and the Covid-19, pandemic among others, but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 03.05.2012 and as per terms and conditions of the said agreement the due date of handing over of possession comes out to be 03.11.2015. The events such as and various orders by NGT in view of weather condition of Delhi NCR region, were for a shorter duration of time and were not continuous as there is a delay of more than three years and even some happening after due date of handing over of possession. There is nothing on record that the respondent has even made an application for grant of occupation certificate. Hence, in view of aforesaid circumstances, no period grace period can be allowed to the respondent/builder. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter- respondent cannot be given any leniency on based of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.

37. As far as delay in construction due to outbreak of Covid-19 is concerned, Hon'ble Delhi High Court in case titled as **M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M. P (1) (Comm.) no. 88/ 2020 and LAs 3696-3697/2020** dated 29.05.2020 has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."

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38. The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by 03.11.2015 and is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief ought by the complainant:

G.I Direct the respondent to refund the entire amount of Rs.1,30,03,123.89/- paid by the complainant till date along with interest at the prescribed rate under Act of 2016.

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

Section 18: - Return of amount and compensation

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

(a). in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b). due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

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

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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."

40. Clause 29 of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

29 The developer shall offer possession of the unit any time , within a period of 36 months from the date of execution of agreement or within 36 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction , whichever is later subject to timely payment of all dues and subject to force majeure circumstances as described in clause 30. Further there shall be a grace period of 6 months allowed to the developer over and above the period of 36 months as above in offering the possession of the unit.

41. **Due date of handing over possession and admissibility of grace period:**

The promoter has proposed to handover the possession of the apartment within a period of 36 months plus 6 months from the date of agreement or the date of commencement of construction whichever is later. The authority calculated due date of possession from the date of agreement i.e 03.05.2012 as the date of construction is not known. The period of 36 months expired on 03.05.2015. Since in the present matter the buyer's agreement incorporates unqualified reason for grace period / extended period in the possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage.

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

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

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

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

43. 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.
44. 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., 12.12.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.
45. 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*

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the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

46. 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) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 29 of the agreement executed between the parties on 03.05.2012, the possession of the subject unit was to be delivered within stipulated time i.e by 03.05.2015. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over of possession is 03.11.2015. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to him and for which he has paid a good amount. 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 facts, the allottee intends to withdraw from the project and are well within the right to do the same in view of section 18(1) of the Act, 2016.
47. 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 allottee cannot be expected to wait endlessly for taking possession of the allotted unit 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....."

48. 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. (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. it was observed

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

49. 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

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promoter is liable to the allottee, as 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 the unit with interest at such rate as may be prescribed.

50. 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 deposited amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.II Direct the respondent to pay Litigation cost of Rs. 1,00,000/- and Rs. 5,00,000/- on account of mental agony and harassment caused to the complainant.

51. 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 & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

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H. Directions of the Authority:


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

- i) The respondent /promoter is directed to refund the amount i.e. Rs. 1,30,03,123/- 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 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 respondent is 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, thereceivable shall be first utilized for clearing dues of allottee-complainants.

53. Complaint stands disposed of.

54. File be consigned to the registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.12.2023