

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

Complaint no.	:	3351 of 2021
Date of filing complaint:		23.08.2021
Date of decision		21.11.2023

<b>NAME OF THE BUILDER</b>		Blackberry Realcon Pvt Ltd	
<b>PROJECT NAME</b>		Paras Square	
<b>S. No.</b>	<b>Case No.</b>	<b>Case title</b>	<b>APPEARANCE</b>
1	CR/3351/2021	Joginder V/S Blackberry Realcon Pvt Ltd	Sh. Vivesh Garg Sh. Pardeep Garg
2	CR/3352/2021	Rita V/S Blackberry Realcon Pvt Ltd	Sh. Vivesh Garg Sh. Pardeep Garg

<b>CORAM:</b>	
Vijay Kumar Goyal	<b>Member</b>
Ashok Sangwan	<b>Member</b>
Sanjeev Kumar Arora	<b>Member</b>

**ORDER**

- This order shall dispose of both the complaints titled as above filed before this authority in form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
- The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project,

namely, Paras Square being developed by the same respondent/promoter i.e., Blackberry Realcon Pvt Ltd. The terms and conditions of the buyer's agreements fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of Refund the entire amount along with interest and the compensation.

3. The details of the complaints, reply to status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

<b>Project Name and Location</b>		<b>Blackberry Realcon Pvt Ltd. Paras Square Sector 63 A, Gurugram, Haryana</b>					
<b>Possession Clause: - 7. (a)(i)</b> <i>The date of completion of the Project shall be Thirty Six (36) months from the start of construction hereof, subject to force majeure or/and any other reason beyond the control of Developer, subject to all Allottee(s) having strictly complied with all the terms and conditions of this Buyer's Agreement and not being in default under any provisions of the same and all amounts due and payable by the Allottee(s) under this Buyer's Agreement having been paid in time to the Developer, The Developer immediately upon the receipt of OC/CC shall give notice to the Allottee(s), in writing to take possession of the Unit for his/its fit-outs and occupation and use ("Notice of Possession"), on furnishing certain documents by the Allottee(s).</i> <i>(Emphasis supplied)</i>							
<b>Occupation certificate: -</b> ➤ OC obtained on <b>23.07.2018</b>							
Sr. no.	Complaint no. Title, and Date of filing of complaint	Reply status	Unit No.	Date of apartment buyer agreement	Due date of possession	Total Consideration / Total Amount paid by the complainant(s)	Relief Sought
1.	CR/3351/2021  Date of filing complaint 23.08.2021	Reply received on 12.10.2021	60, 1 <sup>st</sup> floor  (Page no. 24 of the complaint, BBA)	12.12.2013  (Page no. 21 of the complaint)	13.02.2017  (Calculated from the date of excavation i.e. 13.02.2014)	TSC: - Rs.47,63,340/-  AP: - Rs.43,55,820/- (Inadvertently mentioned as Rs. 47,63,000/- in POD dated 03.10.2023)	-Refund the entire amount along with interest
2.	CR/3352/2021	Reply received on	Type gold 702	12.12.2013	13.02.2017  (Calculated from the	TSC: - Rs.47,63,340/-	Refund the entire amount

	Date of filing complaint 23.08.2021	12.10.2021	tower C 7 <sup>th</sup> floor  (Page no. 22 of the complaint, BBA)	(Page no. 19 of the complaint)	date of excavation i.e 13.02.2014)	AP: - Rs.43,55,820/- (Inadvertently mentioned as Rs. 47,63,000/- in POD dated 03.10.2023	along with interest
<p><b>Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:</b></p> <p><b>Abbreviation Full form</b></p> <p>TSC : Total Sale consideration</p> <p>AP : Amount paid by the allottee(s)</p> <p>POD : Proceedings of the day</p>							

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the apartment buyer's agreement executed between the parties in respect of said unit for not handing over the possession by the due date, seeking award of refund the entire amount along with interest.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case **CR/3351/2021 Joginder V/S Blackberry Realcon Pvt. Ltd.** are being taken into consideration for determining the rights of the allottee(s) qua refund the entire amount along with interest.

#### A. Project and unit related details

7. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

**CR/3351/2021**
**Joginder V/S Blackberry Realcon Pvt. Ltd.**

Sr. No.	Particulars	Details
1.	Name of the project	Paras Square, Sector 63 A, Gurugram, Haryana
2.	Project area	2.20 acres
3.	Nature of the project	Commercial Unit
4.	DTCP License no. & validity status	23 of 2013 dated 17.05.2013 Valid upto 16.05.2017
5.	Name of Licensee	Yule Propbuild Pvt. Ltd.
6.	RERA Registered / not registered	Registered bearing no. 13 of 2018 dated 06.09.2018 upto 31.12.2018
7.	Unit no.	FF 60, 1 <sup>st</sup> floor (Page no. 17 of the complaint, BBA)
8.	Unit admeasuring	420 sq. ft. (Page no. 17 of the complaint, BBA)
9.	Date of excavation	13.02.2014 (As per promoter information)
10.	Allotment Letter	30.08.2013 (Page 17 of the complaint)
11.	Date of execution of bullder buyer agreement	12.12.2013 (Page no. 21 of the complaint)
12.	Possession clause	<b>Clause 7.(a)(i)</b> <i>The date of completion of the Project shall be Thirty Six (36) months from the start of construction hereof, subject to force majeure or/and any other reason beyond the control of Developer, subject to all Allottee(s) having strictly complied with all the terms and conditions of this Buyer's Agreement and not being in default under any provisions of the same and all amounts due and payable by the</i>

		<p><i>Allottee(s) under this Buyer's Agreement having been paid in time to the Developer, The Developer immediately upon the receipt of OC/CC shall give notice to the Allottee(s), in writing to take possession of the Unit for his/its fit-outs and occupation and use ("Notice of Possession"), on furnishing certain documents by the Allottee(s).</i></p> <p><b>(Emphasis supplied)</b></p> <p>(Page no. 30 of the complaint, BBA)</p>
13.	Due date of delivery of possession	13.02.2017 (Calculated from date of from the date of excavation i.e 13.02.2014)
14.	Total sale consideration	Rs 47,63,340/- (Page no. 17 of the complaint)
15.	Total amount paid by the complainant	Rs 43,55,820/- (As per provisional receipt dated 30.08.2013 at page no. 16 of the complaint)
16.	Occupation certificate	23.07.2018 (Annexure R-5 at page no. 44 of the reply)
17.	Offer of possession	23.07.2018 (Annexure R-3 at page no. 32 of the reply)
18.	Fixed Monthly Income Plan as per letter by the respondent dated 30.09.2013	Rs. 46,200/- p.m. <p><i>"The developer shall pay a monthly income INR 46,200/- per month subject to deductions of taxes as applicable, which shall be payable on or before 10<sup>th</sup> day of each calendar month.</i></p> <p><i>The developer shall commence paying this fixed monthly income from the date 100% of the consideration for the subject unit is paid to the developer. The fixed monthly income shall be stopped immediately with the offer of possession given by the seller/developer to the intending Allottee(s)/buyer(s)"</i></p>
19.	Fixed Monthly Income Paid	Rs. 23,94,203/- towards Fixed Monthly Income

(From August, 2013 till May, 2018)	Rs. 2,70,643/- towards TDS on Fixed Monthly Income  (Page no. 19 and 60 of application dated 28.03.2023)
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**B. Facts of the complaint**

The complainant has made the following submissions in the complaint: -

8. That the complainant in the month of May 2013, along with his other family members was searching a commercial property in order to increase their family income. Some brokers relating to the real estate along with officials/executives of the respondent namely Mr. Vikas Verma and Mr. Umesh Arora, contacted the complainant for the investment in a project of the respondent.
9. That they assured the complainant that the project in question would be constructed as a residential project consisting of studio apartment and service apartment with perfect combination of contemporary architecture and features to provide comfortable living, over a total area of 2.2 acres of land which consists of only one tower and the same would be of 14 floors along with lifts, car parking and shopping centre, 24 x 7 security, gated community, security cabin, paved compound and fire fighting systems. The sales executives of the respondent further told the complainant that the project in question is situated on the main sector road of 90 mtr. in width, having 15 mtr. service road and 60 mtr. metaled road which would have access to national highways leading to Delhi, Jaipur and Faridabad and since the project in question is situated on the main road of 90 mtr., the surrounding areas would also be developed by various builders.
10. That the total area of a retail shop was 420 sq. ft. @ Rs.10,000/- per sq. ft. totaling to Rs.42,00,000/-and a payment schedule was handed over to

them, according to which they had to pay Rs.5 lacs at the time of booking of the shop in question and the balance amount of Rs.37 lacs was to be paid within 60 days of the said booking. In addition to this, the required EDC/IDC, car parking and IFMSD (Interest Free Maintenance Security Deposit) amounting to Rs.5,63,000/- approx. would be extra. The said officials of the respondent assured the complainant and his family members that the respondent will accept the amount of Rs.42 lacs and service tax through bank transfer and the remaining amount of Rs.5,63,000/- can be paid in cash however they told that no receipt of any kind in respect of the cash amount would be issued by the respondent to them. After the receipt of the whole amount of Rs.47,63,000/-, they were left to pay only the amount of the execution and registration charges/expenses of the conveyance deed of the shops in question.

11. That the said sales executives further assured them that if they pay the whole amount of Rs.47,63,000/- including service tax etc. of each of the shops, in one shot at the time of booking of the shops in question, the monthly income of Rs.46,200/- subject to the deductions of applicable taxes would be payable to them separately.
12. That on the said assurances and commitments of the officials of the respondent, the complainant along with his sister-in-law Smt. Rita w/o Sunder Singh, booked 2 shops admeasuring 420 sq. ft. each and paid Rs.43,55,820/- each through cheques (i.e. Rs.42,00,000/- towards the 5 costing of one shop and Rs.1,55,820/- towards service tax) and Rs.5,63,000/- each were paid by both the allottees in cash to the respondent but the respondent didn't issue any receipt in lieu thereof and thus the total price of the shops in question have been paid by the complainant and the other two allottees in respect of their shops and a receipt of Rs.43,55,820/- was issued by it on 30.08.2013 to the

complainant and similarly the other allottee paid the total price of their respective shops to the respondent and both the allottees including the complainant were left to pay the stamp and registration charges only for the execution of the conveyance deeds of their respective shops.

13. That after the receipt of the whole price of the shop in question, the respondent issued an allotment letter dated 30.08.2013 itself vide which his booking was confirmed and he was allotted retail/commercial unit no. FF-60 in Paras Square, Sector 63A, Gurgaon admeasuring 420 sq. ft. whereas the other allottee was allotted Unit no. FF-58.
14. That thereafter, the respondent issued a letter dated 30.9.2013 with regard to fixed monthly income plan for the unit in question amounting to Rs.46,200/-. It was mentioned in the said letter that the said monthly income shall be stopped immediately with the offer of possession given by it to the complainant.
15. That at the time of booking of the shop in question, the respondent assured the complainant that since he had already paid the total cost of the shop in question, the said unit would be let out to a tenant by the respondent itself so that the monthly income could be earned by the complainant.
16. That the builder buyer agreement was executed between the parties on 12.12.2013 vide which the respondent was required to complete the project in question within a period of 36 months from the date of construction and it was also entitled to a grace period of 180 days thereafter and thus it was bound to complete the constructions of the project in question and to handover possession of the unit in question to the complainant but more than 4 years stood expired even after the said



period but the respondent neither completed the project nor delivered the possession.

17. That the said fixed monthly income in respect of the shop in question was paid by the respondent to the complainant till June 2018 @ Rs.41,580/- after deducting the required TDS but thereafter it stopped the same and upon inquiry by the complainant, the respondent told him that the project in question is about to complete and the interested tenant is being searched for leasing out the shop in question and assured him that the subsequent payments of the said fixed monthly income would be paid in a very near future and after the receipt of the occupation certificate, the same would be let out to a tenant so that a handsome monthly amount in the shape of rent would be fetched by him in respect of the shop in question and he was requested to wait for some time.
18. That in the month of November 2018, when the respondent didn't complete the project in question, the complainant went to the office of the respondent and inquired about the balance monthly income/rent in respect of the shop in question but the respondent kept the matter lingering on one pretext or the other or for the best reasons known to it.
19. That all of a sudden, the complainant received a demand letter/reminder dated 12.2.2019 by which he was asked to clear the outstanding dues and also advised to get the registration of the property in question in his name and he was also asked to pay holding charges @ Rs.30/- sq. ft. p.m. on super area basis and till then the unit in question shall remain in the custody of the respondent. Thereupon the complainant went to the office of the respondent and complained about the said reminder whereupon he was told to ignore the said letter as the same might have been issued in a routine manner and he was given an assurance that the subsequent

monthly payments in respect of the unit in question would be released in his favor in a very near future.

20. That another reminder dated 07.03.2020 was received by the complainant to clear the pending dues of Rs.8,58,244/- and Rs.2,32,680/- towards holding charges despite the fact that the complainant had already paid the total price of the shop in question to the respondent in one go on 30.08.2013 and he was left to pay the registration charges only. The possession of the same was not at all delivered to him by the respondent till date and thus complainant along with his sister-in-law Rita jointly moved a complaint in that regard to the respondent on 16.3.2020 and requested for a refund after the cancellation of their units and their complaint was kept by the respondent in its record but the same was not acknowledged by it. However, he was given an assurance that the matter would be resolved sooner and he would be informed accordingly.
21. That immediately after that, complete lockdown was imposed by the govt. of India, w.e.f., 25.03.2020 due to corona virus and the whole country had to stand still then and there and the said lockdown continued for more than 3 months due to which no correspondence or personal meet took place between the parties in that regard.
22. That thereafter, the complainant made regular visits to the office of the respondent for the release of his monthly income amount in respect of the shop in question but no satisfactory reply was given by the respondent to him. Another final reminder dated 11.02.2021 was issued by the respondent by which the complainant was again asked to clear the pending dues of Rs.8,04,720/- along with Rs.1,24,876/- towards interest and Rs.6,29,300/- towards holding charges @ Rs.50/- sq. ft. per month on super area basis totaling to Rs.15,58,896/- more and till the clearance of the above amount, the possession of the property in question shall remain

in the custody of the respondent and he was also asked to pay the maintenance charges of the property in question.

23. That the respondent has not given a single penny to the complainant towards his monthly income after June 2018 and the respondent is still retaining the said amount along with the total sales consideration, i.e., Rs.47,63,000/-. Thus, the complainant has been left with no alternative but to withdraw from the allotment of the unit in question. Also, it is a settled law that non-completion of the project and non-delivery of possession in stipulated period, the complainant can't be made to wait for an unreasonably long time and in the present case, a period of more than 4 years has stood expired after the grace period of 180 days and thus it is a case fit for refund.

**C. Relief sought by the complainant: -**

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

1. To direct the respondent to refund the entire amount with interest.

**D. Reply by the respondent**

The respondent by way of written reply made following submissions:

25. That the instant complaint is not maintainable before the Id. Adjudicating officer in terms of decision of the Hon'ble Apex Court in *IREO Grace Realtech Pvt Ltd vs Abhishek Khanna & Ors (2021) 3 SCC 241* wherein it was specifically held that in cases where the respondent/builder is already in receipt of occupancy certificate pursuant to which the respondent/builder has even offered possession of unit to an allottee that too before institution of the case, the allottees in such cases are bound to take possession of their unit with DPC, if any, and no order of refund is warranted in such cases. Relevant para of aforesaid Judgement is as follows:-

*"21.1 The issue which now arises is whether the Apartment Buyers are bound to accept the offer of possession made by the Developer where the Occupation Certificate has been issued, alongwith the payment of Delay Compensation, or are entitled to terminate the Agreement.*

...  
**21.2** ...

*i) Apartment Buyers whose allotment fall in Phase 1 of the Project comprised in Towers A6 to A10, B1 to B4 and C3 to C7, where the Developer has been granted occupation certificate, and offer of possession has been made are enlisted in Chart A;*

....

*1. Chart A allottees*

*(i) We are of the view that allottees in Sl. No.1 and 2 in Chart A are obligated to take possession of the apartments, since the construction was completed, and possession offered on 28.06.2019 after the issuance of Occupation Certificate on 31.05.2019. The developer is however obligated to pay Delay Compensation for the period of delay which has occurred from 27.11.2018 till the date of offer of possession was made to the allottees.*

... "

The ratio of aforesaid judgement is very well applicable to the facts and circumstances of the instant case. Herein, the respondent has already obtained occupancy certificate for the project on 23.07.2018 itself pursuant to which complainant has also been offered with possession of his shop on 28.07.2018 itself but it is the complainant who is not ready & willing of taking over possession of his shop by clearing his outstanding dues. As such, in terms of **IREO GRACE (Supra)**, complainant be directed to take possession of his shop with DPC if any but subject to clearance of its entire dues.

26. That the complainant has not approached this Hon'ble Authority with clean hands and suppressed vital fact of non-payment of his pending instalment. The complainant in order to hide his said loophole has even spun a false story that he had paid his entire dues at time of booking itself which also includes the amount towards EDC/IDC, car parking & IFMSD (Interest Free Maintenance Security Deposit). The complainant further claims that despite entire payment made by him, the respondent has not issued the receipt of the entire amount. There is no substance of truth in

such allegations in as much like any other allottee the complainant has also been issued with the payment slip of the amount paid by him towards price consideration of him shop. Moreover. under the payment plan opted by complainant, i.e., 'MONTHLY INCOME PLAN' the entire sale consideration was to be paid in two stages, i.e., Towards Booking- minimum 95% of BSP, & At the Time of Offer of Possession- balance along with EDC/IDC/Car Parking/IFMS/PLC & other charges.

27. That the second stage commences at the time of offer of possession and respondent raises demand in terms of payment plan opted by the complainant. Therefore, at the time of booking only the amount due and payable at first stage is demanded and not the entire amount. It is submitted that the complainant is levying unjust acquisition upon the respondent that too without any proof.
28. That the complainant himself had admitted the fact that respondent had paid to her a sum of Rs. 46,200/- p.m. under monthly income plan of Rs. 46,200/- p.m. till July 2018. It is submitted that respondent by its letter dated 30.09.2013 has agreed to pay the same till possession of the shop is offered to the complainant. The possession was offered on 28.07.2018 thus, this liability of the respondent to pay monthly fixed amount lapsed on that very day. It is submitted that as the complainant is a co-signatory to letter dated 30.09.2013, he is bound by the content made there under.
29. That the complainant herein himself has been guilty of not adhering the payment schedule, as complainant himself has defaulted in paying his complete instalment in terms of agreement. The same is not permissible in terms of RERA Act, 2016 as such, the complaint merits outright dismissal.
30. That the present complaint is infructuous and not maintainable since construction of the project is already complete and the respondent has received occupation certificate of the project on 23.07.2018. Possession

was also offered to the complainant on 28.07.2018. As such, there no delay at all on the part of the respondent in completing the construction of the shop. The project is fully in habitable condition and many allottees are already residing in the said project.

31. That the respondent had issued several demand letters, reminder letters, final reminder letters, pre- cancellation letter, etc. on the complainant for payment of instalment. However, the complainant has not only failed to make the payment of the due amount, but has also filed the present complaint just to harass the respondent.
32. That on account of failure of the complainant to take possession of the shop within 30 days of such offer the Respondent is entitled to holding charges in terms of Clause 10.1 of the BBA. The possession of the shop was offered on 28.07.2018 therefore as per Clause 10.1 of BBA respondent is entitled to holding charges after 30 days from the date of such offer and till the date complainant takes over possession of its shop by clearing its dues. Moreover, the respondent is also entailed to delay interest on account of failure on the part of the complainant to takeover possession of its shop despite the same being offered on 28.07.2018 itself.
33. That the Hon'ble Supreme Court of India, in the case of **Saradmani Kandappan and Ors. Vs. S. Rajalakshmi and Ors.**, decided on 04.07.2011 having citation **(2011) 12 SCC 18 in para 33 and 34**, while interpreting similar contracts involving performance of reciprocal promises in respect of immovable properties has interpreted sections 52, 53 and 54 of the Indian Contract Act, 1872, to hold that in case of a contract wherein payments are to be paid by the purchaser in a time bound manner as per the agreed payment plan and he fails to do so then the seller shall not be obligated to perform its reciprocal obligations and the contract shall be voidable at the option of the seller alone and not the purchaser. The said

dictum is applicable in the present case as well since the order of performance of reciprocal performances as per the agreement mandate timely payments by the complainant but the complainant has not paid its complete instalment hence respondent is also not obliged to deliver possession of the shop till entire dues are paid. Moreover, the complainant also cannot seek interest or damages since it is he who is in default and it is the respondent who has completed the construction and can exercise his right to cancel the agreement or claim damages from the complainant for the default on its part.

34. That the Hon'ble National Consumer Disputes Redressal Commission in the case of **Manas Developers vs. Madhur Arjun Bhabal**, bearing Revision Petition No. 1563 of 2011 decided on 09.03.2015, has held that in cases where the complainants have failed to pay the amounts in accordance with the agreement and are defaulters then the builder cannot be held liable for delayed possession since the builder is not obligated to give possession without getting the entire payment with interest. It is further held that defaulters should not be rewarded for their own wrongs.

The said judgment is squarely applicable to the facts of the case and the present complaint merits dismissal with costs, in view of the same.

35. That further, Hon'ble Supreme Court of India in the case of **Supertech vs. Rajni Goyal**, decided on 23.10.2018, reported as **2018 (14) SCALE 187**, has held that consumers cannot be allowed to reap the benefits of their own wrong by not taking possession when the same has been offered by the builder and the computation of interest also closes on the said date.

*"Furthermore, the period of Interest should close on April 2016 when the Full Occupancy Certificate was obtained as per the admission of the Respondent-Purchaser herself in para 4(j) of the Consumer Complaint, wherein she has admitted that the Appellant-Builder had obtained the Completion Certificate as late as April 2016. The Respondent - Purchaser could not have any further grievance after April 2016 with respect to delay in handing over possession. The Respondent-Purchaser ought not to be allowed to reap the benefits of her own delay in taking possession."*

36. That it is also pertinent to mention here that in the present complaint under reply the complainant has not been able to point out a single provision of either the Real Estate Regulatory Authority Act, 2016 or the Haryana Real Estate (Regulation and Development) Rules, 2017 which has been violated by the respondent. Thus, this complaint is not entitled to any relief at all.

### **E. Jurisdiction of the authority**

37. The application 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**

38. 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**

39. 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.*

40. 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.
41. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Supra)*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

*"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

42. 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. Objections raised by the respondent

##### F.I. Objection regarding holding charges.

43. The Hon'ble NCDRC in its order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015** held as under:

*"36. It transpired during the course of arguments that the OP has demanded holding charges and maintenance charges from the allottees. As far as maintenance charges are concerned, the same should be paid by the allottee from the date the possession is offered to him unless he was prevented from taking possession solely on account of the OP insisting upon execution of the Indemnity-cum-Undertaking in the format prescribed by it for the purpose. If maintenance charges for a particular period have been waived by the developer, the allottee shall also be entitled to such a waiver. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. **Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.**"* (Emphasis supplied)

44. The said judgment of Hon'ble NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal filed by DLF against the order of Hon'ble NCDRC (supra). The authority earlier, in view of the provisions of the rules in a lot of **complaints** decided in favour of promoters that holding charges are payable by the allottee. However, in the light of the recent judgement of the Hon'ble NCDRC and Hon'ble Apex Court (supra), the authority concurring with the view taken therein decides that a developer/

promoter/ builder cannot levy holding charges on a homebuyer/ allottee as it does not suffer any loss on account of the allottee taking possession at a later date even due to an ongoing court case.

45. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.

#### **G. Findings on the relief sought by the complainants**

##### **G.I Direct the respondent to refund the paid-up amount with interest.**

46. In the present case the complainant was allotted the unit vide allotment letter dated 30.08.2013. The buyer's agreement was executed between the parties on 12.12.2013. The total sales consideration of the unit is Rs. 47,63,340/-. The complainant claims to have paid Rs.43,55,820/- through cheques and Rs.5,63,000/- in cash. However, there is dispute as to total amount paid by the complainant by way of cash. Authority is of the view that since there exist no receipt/any other documentary proof with respect to payment of Rs. 5,63,000/- being made in cash, therefore, the total amount paid by complainant is taken to be Rs.43,55,820/-.
47. 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. The due date of possession as per buyer's agreement was 13.02.2017 and the allottees in this case have filed this complaint on 23.08.2021 after possession of the unit was offered to him after obtaining

occupation certificate by the promoter. The OC was received on 23.07.2018 and the offer of possession was made on the same day, i.e., 23.07.2018. The complainant through filing of complaint dated 23.08.2021 wish to withdraw from the project and seek refund of the paid-up amount along with interest due to failure of respondent/promoter to provide timely possession of the subject unit in accordance with the terms of buyer's agreement.

48. The right under section 18(1) and 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 allottees interest for the money they have paid to the promoter is protected accordingly.
49. The legislature in its wisdom in the subordinate legislation under the 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.
50. 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., 21.11.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.

51. However, if it is pertinent to mention here that offer of possession with respect to unit in question has been made by the respondent on 23.07.2018, i.e., after receiving occupation certificate on 23.07.2018. Thereafter, the present complaint has been filed on 23.08.2021 seeking relief of refund. Since the complainant has approached the Authority after occupation certificate has been received and offer of possession has been made by respondent promoter, therefore, regulation 11(5) of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram providing deduction of 10% of total sale consideration as earnest money and sending the remaining amount to the allottee immediately becomes applicable here. The Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

***“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.”*

52. 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 and

when the 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 allottee in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.

53. This view is supported by the judgement of Hon'ble Supreme Court of India in case of *Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Civil appeal no. 5785 of 2019)*, wherein the Hon'ble Apex court took a view that those allottees obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate. It was specifically held that in cases where the respondent/builder is already in receipt of occupancy certificate pursuant to which the respondent/builder has even offered possession of unit to an allottee that too before institution of the case, the allottees in such cases are bound to take possession of their unit with delay possession charges, if any, and no order of refund is warranted in such cases. Relevant para of aforesaid judgement is as follows:-

*"21.1 The issue which now arises is whether the Apartment Buyers are bound to accept the offer of possession made by the Developer where the Occupation Certificate has been issued, along with the payment of Delay Compensation, or are entitled to terminate the Agreement.*

...  
**21.2 ...**

*i) Apartment Buyers whose allotment fall in Phase 1 of the Project comprised in Towers A6 to A10, B1 to B4 and C3 to C7, where the Developer has been granted occupation certificate, and offer of possession has been made are enlisted in Chart A;*

...  
**2. Chart A allottees**

*(i) We are of the view that allottees in Sl. No.1 and 2 in Chart A are obligated to take possession of the apartments, since the construction was completed, and possession offered on 28.06.2019 after the issuance of Occupation Certificate on 31.05.2019. The developer is however obligated to pay Delay Compensation for the period of delay*

*which has occurred from 27.11.2018 till the date of offer of possession was made to the allottees.*

The aforesaid judgement is very well applicable to the facts and circumstances of the instant case. Herein, the respondent has already obtained occupancy certificate for the project on 23.07.2018 itself pursuant to which complainant has also been offered with possession of his unit on 28.07.2018 itself.

54. In the present case, said unit was allotted to complainant on 30.08.2013. There is a delay in handing over the possession as due date of possession was 13.02.2017 whereas, the offer of possession was made on 23.07.2018 and thus, becomes a case to grant delay possession charges. The allottee is obligated to take possession of the unit since the construction is completed and possession has been offered after obtaining an occupation certificate from the competent authority. However, the developer is obligated to pay delay charges for the period of delay occurred from the due date till the date of offer of possession was made to the allottees plus two months @ 10.75% pa. The respondent shall issue a revised account statement within 15 days of this order after adjustment of delayed possession charges at the rate of 10.75% on the paid-up amount by the complainant from due date of handing over possession, i.e., 13.02.2017 till offer of possession plus two months which comes out to be 23.09.2018. The holding charges being demanded at the time of offer of possession are also not leviable and to be excluded from the payable amount while issuing above revised statement of accounts.

55. That as per section 19(6) & 19(7) of the Act every allottee shall be responsible to make necessary payments as per agreement for sale along with prescribed interest on outstanding payments, if any from the allottee and to take physical possession of the apartment as per section 19(10) of the Act. In view of the same, complainant/allottees shall make the

requisite payments at the prescribed rate of interest i.e., 10.75% and take possession of the subject unit as per the provisions of sections 19(6), (7), and (10) of the Act of 2016.

56. Thereafter, if the complainant fails to pay outstanding amount as per revised statement of accounts as detailed above within 30 days along with interest at equitable rate, i.e., 10.75% p.a. on such outstanding amount, the respondent promoter shall refund the paid-up amount of Rs.43,55,820/- after deducting the earnest money which shall not exceed the 10% of the sale consideration and amount already paid against fixed monthly income plan. Also, the interest at the prescribed rate i.e., 10.75% is allowed on the balance amount from the date of filing of this complaint, i.e., 23.08.2021 till the actual realization of the amount within the timelines provided in rule 16 of the rules, 2017.

#### H. Directions of the authority

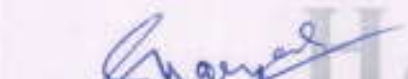
57. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- The respondents are directed to issue fresh statement of accounts within 15 days of this order after adjustment of delayed possession charges at the rate of 10.75% on the paid-up amount by the complainant from due date of handing over possession, i.e., 13.02.2017 till offer of possession plus two months which comes out to be 23.09.2018. The holding charges being demanded at the time of offer of possession are also not leviable and to be excluded from the payable amount while issuing above revised statement of accounts.
  - The complainants may take the possession within next 30 days on payment of outstanding amount, if any remains, failing which




respondent shall refund the paid-up amount of Rs.43,55,820/- after deducting the earnest money which shall not exceed the 10% of the sale consideration and amount already paid against fixed monthly income plan. Also, the interest at the prescribed rate i.e., 10.75% is allowed on such balance amount from the date of filing of this complaint seeking refund, i.e., 23.08.2021 till the actual realization of the amount within the timelines provided in rule 16 of the rules, 2017.

iii. 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.

58. This decision shall mutatis mutandis apply to both the cases mentioned in para 3 of this order.
59. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter.
60. Files be consigned to registry.

  
(Sanjeev Kumar Arora)

Member

  
(Ashok Sangwan)

Member

  
(Vijay Kumar Goyal)

Member

**Haryana Real Estate Regulatory Authority, Gurugram**

**Dated : 21.11.2023**