

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

Complaint no. : 4061 of 2023
Date of complaint : 06.09.2023
Date of order : 20.03.2024

1. Uddipta Bimal Borah,
2. Bhavana Gupta
Both R/o: - I 119 Ivory Ground Floor,
Emaar Emerald Hills, Sector-65,
Gurugram, Haryana-122018.

Complainants

Versus

1.M/s Ramprashtha Promoters and Developers Pvt. Ltd.
2.Blue Bell Proptech Pvt. Ltd.
Both having Regd. office: Plot no. 114, Sector-44,
Gurugram, Haryana-122002.

Respondents

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Nilotpall Shyam and Shivali (Advocates)
R. Gayatri Mansa and Navneet Kumar (Advocates)

Complainants
Respondents

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of the act or the



rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project details

2. The particulars of unit, 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	"Rise", Sector 37D, Village Gadauli Kalan, Gurugram
2.	Project area	60.5112 acres
3.	Registered area	48364 sq. mt.
4.	Nature of the project	Group housing colony
5.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid upto 18.02.2025
6.	Name of licensee	Ramprastha Builders Pvt Ltd and 11 others
7.	Date of approval of building plans	12.04.2012 [As per information obtained by planning branch]
8.	Date of environment clearances	21.01.2010 [As per information obtained by planning branch]
9.	RERA Registered/ not registered and validity status	Registered vide no. 278 of 2017 dated 09.10.2017 Valid upto 31.12.2023
10.	Unit no.	403, 4 th floor, tower/block- A (Page 31 of the complaint)
11.	Unit area admeasuring	1765 sq. ft. (Page 31 of the complaint)
12.	Date of execution of apartment buyer agreement	28.07.2012 (Page 26 of the complaint)
13.	Possession clause	15. POSSESSION



		<p>(a) Time of handing over the Possession</p> <p>Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Developers. The Developers proposed to hand over <i>the possession of the Apartment by September, 2015. The Allottee agrees and understands that the Developers shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.</i></p> <p>(Emphasis supplied) (Page 41 of the complaint)</p>
14.	Due date of possession	30.09.2015 [As mentioned in the buyer's agreement]
15.	Grace period	Not utilized
16.	Total sale consideration	Rs.82,16,026/- (as per SOA on page 57 of complaint)
17.	Amount paid by the complainant	Rs.74,39,605/- (as per SOA on page 57 of complaint)



18.	Occupation certificate /Completion certificate	Not received
19.	Offer of possession	Not offered

B. Fact of the complaint

3. The complainants have made the following submissions: -

- I. That the complainants were allotted a flat bearing no. A-403, 4th Floor, Block-A in project of the respondent named "RISE" located at Ramprastha City, Sector-37D, Gurugram vide builder buyer agreement dated 28.07.2012 for a total sale consideration of Rs.76,85,168/- and the complainants have paid a sum of Rs.77,70,287/- against the same in all.
- II. That as per clause 15(a) of the BBA, the possession of the said unit was agreed to be handed over by September 2015 with grace period of 120 days for applying and obtaining the occupancy certificate.
- III. That clause 14 of said BBA also stipulates a penal interest @ 1.5% per month (18% per annum compounded) for any delay in payment of installments made by the complainants whereas clause 17 of the agreement provides that the if the respondents failed to deliver the possession of the impugned unit within 6 months from the date of intimation of possession (it may further extended to grace period of 120 days) and subject to the force majeure conditions shall pay compensation @ Rs.5/- per sq.ft. of the super area per month for the entire period till the date of handing over the possession. The said compensation clause is ex facie discriminatory in comparison to clause 14(a) of the BBA and amounts to unfair trade practices.



- IV. That the respondents with malafide intent gave false assurances to the complainants regarding the new dates of handing over the possession without assigning any reason whatsoever for such a prolonged delay.
- V. That as per registration certificate, a new date of completion of the project was 30.06.2019 subject to the right of the to withdraw from the project or to remain in the project in accordance with Section 18 of the RERA Act, 2016. However, the said date has already elapsed by now.
- VI. That the respondents have also not obtained necessary environment clearance from the concerned authority for all the projects located in Sector-37D, Gurugram being developed by them. Therefore, under such circumstances, the completion of the impugned project seems to be only a distant dream in view of such serious lapses on the part of respondents.
- VII. That the respondent has failed to handover the possession to the complainants on the agreed date (September, 2015) or even after the elapse of the grace period of 120 days (January, 2016) as provided under BBA. The reason for the delay in handing over the possession despite payment of 95% of the total consideration is only best known to it. Therefore, the respondent is liable to refund the amount paid by the complainants along with interest from each date of payment till the actual transfer of the amount in accordance with Section 18 of the RERA Act.
- VIII. That the complainants were forced to sign letter dated 26.11.2020 postponing their right of initiating litigation including seeking refund against the respondents for 18 months in the guise of swamih funding which has now already elapsed. The said letter is not only one-sided,



arbitrary and signed by the complainants wherein the respondents abused their dominant position representing that the non-signing of the said letter shall result in non-completion of the allotted unit ever. Thus, the said letter is not binding on the complainants. Even otherwise, such one-sided letter cannot eclipse the statutory right of the complainants flowing from RERA Act, as there is no waiver of statutory right. The said letter cannot act as eclipse to the statutory right of the complainants.

- IX. That the complainants have also paid service tax for the impugned unit. However, the complainants are not liable to pay GST for the period since the proposed date for handing over the possession was well before the GST came into force.
- X. That there is almost 7 years of unexplained and inordinate delay in handing over the possession of the unit by the respondents without any sign of them meeting the future deadline. Therefore, the complainants have genuine grievances which require the intervention of the Authority in order to do justice with them.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):
- I. Direct the respondent to refund the entire amount deposited by the complainants along with prescribed rate of interest.
 - II. Cost of litigation.
5. Despite due service of notice through speed post and specific direction vide order dated 13.12.2023, no reply has been received from respondent no.2 with regard to the present complaint and also none has put in appearance on its behalf before the Authority. Therefore, the respondent no.2 is hereby proceeded ex-parte and the complaint will



be decided as per documents available on record and submission made by the parties.

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

D. Reply by the respondent no. 1

7. The respondent has contested the complaint on the following grounds.
 - I. That the present complaint has been filed by the complainants in complaint no. 3566 of 2023 before this authority inter alia praying for refund of amount paid to the tune of Rs.77,70,287/- towards sale consideration of an apartment bearing no. A-403, 4th floor in project "The Rise" of the respondent along with interest.
 - II. That filing such a complaint after a lapse of such a long time made crystal clear the status of the complainants as an investor who merely invested in the present project with an intention to draw back the amount as an escalated and exaggerated amount later.
 - III. That the delay in delivering the possession of the apartment to the complainants has attributed solely because of the reasons beyond control of the respondent.
 - IV. Further as per clause 15 (a) of the agreement shall not be read in isolation but have to be read in light of other clauses of the agreement. Clause 15(a) of the agreement is subject to clause 31 of the agreement. Clause 15(a) stipulates the time for handing over of the possession which is subject to Force Majeure circumstances which clearly indicate the nature of agreement entered into between the parties, whereby,

the stipulated date of delivery is not a strict and final date but merely a tentative date which is further subject to several factors involved.

- V. That the date of possession shall get extended automatically on account of delay caused due to reasons which are beyond the control of the developers/respondent. Further, the contingency of delay in handing over the apartment within the stipulated time was within the contemplation of the parties at the time of executing the agreement as the parties had agreed vide clause 17(a) that in the eventuality of delay in handing over possession beyond the period stipulated in clause 15(a) of the agreement, the allottee will be compensated with Rs 5/- per sq. ft. per month of super area. This part of compensation was specifically consented to and was never objected at any earlier stage, not while signing the agreement or any time after that.
- VI. That the delay has occurred only due to unforeseeable and uncontrollable circumstances which despite of best efforts of the respondents hindered the progress of construction, meeting the agreed construction schedule resulting into unintended delay in timely delivery of possession of the apartment for which the respondent cannot be held accountable. However, the complainant despite having knowledge of happening of such force majeure eventualities and despite agreeing to extension of time in case the delay has occurred as a result of such eventualities has filed this frivolous, tainted and misconceived complaint in order to harass it with a wrongful intention to extract monies.
- VII. That the said terms and conditions of the agreement were executed only after mutual discussion and decision and agreement of both the parties and in such a case, one party cannot withdraw itself from the



boundation of the agreement. That once the said agreement was duly signed and accepted by the both the parties which contains detailed terms and conditions the parties are obligated to abide by it and either of parties cannot divert itself from the obligation of performance of their parts manifested in the agreement on it owns whims and fancies and as per their own convenience. It is to be noted that performance and non -performance of the agreement affects both the parties equally and sometimes one party is at a greater disadvantage when one party abstains from performance of its part.

- VIII. That the respondent who is incurring higher expenses due to escalation in the cost of project due to time overrun. The respondents have utilized all the resources towards completion of the project and no monies were diverted by it towards any other project as falsely alleged by him. That the respondents have strived at its best to battle the obstacles so that the delivery of the possession be made as sooner as possible despite of the several unforeseeable hindrances mentioned herein below posed, since customer satisfaction has always been pivotal and a priority to the respondents. It is pertinent to note here that despite the best efforts by the respondent to hand over timely possession of the said flat booked by the complainants, the respondents could not do so due to reasons and circumstances beyond its control. It was only on account of the following reasons/circumstances that the project got delayed and timely possession could not be handed over to the complainants.
- IX. The project faced various roadblocks and hindrances including approvals from different authorities which were beyond the control of the respondent and which in turn lead to unforeseeable delay in the



construction/completion of the project and hence handing over of the possession of the flat to the complainants.

- X. In addition to the above, active implementation by the Government of alluring and promising social schemes like National Rural Employment Guarantee Act ("NREGA") and Jawaharlal Nehru National Urban Renewal Mission ("JNNURM"), further led to sudden shortage of labour/ workforce in the real estate market as the available labour were tempted to return to their respective states due to the guaranteed employment under the said NREGA and JNNURM Schemes. The said factor further created a vacuum and shortage of labour force in the NCR region. Large numbers of real estate projects, including the present project of the opposite party herein, were struggling hard to cope with their construction schedules, but all in vain.
- XI. The respondents faced extreme water shortage, which was completely unforeseen by any of the Real Estate Companies, including the respondent, in the NCR region. The respondent, who was already trying hard to cope up with the shortage of labour, as mentioned above, was now also faced with the acute shortage of water in the NCR region. The said factor of shortage of water directly affected the construction of the project at the site. To make the conditions worse, the Hon'ble High Court of Punjab and Haryana vide Order dated 16.07.2012 restrained the usage of ground water and directed to use only treated water from available Sewerage Treatment Plants (hereinafter referred to as "STP"). As the availability of STP, basic infrastructure and availability of water from STP was very limited in comparison to the requirement of water in the ongoing constructions activities in Gurugram District, it became difficult to timely complete



the construction activities as per the schedule. The availability of treated water to be used at construction site was very limited and against the total requirement of water only 10-15% of required quantity was available at construction sites. In furtherance to the directions of Hon'ble High Court of Punjab and Haryana, the Opposite Party received a Letter bearing memo no 2524 dated 01.09.2012 from the Deputy Commissioner, Gurugram, Haryana, informing to it about the complete ban on the use of underground water for construction purposes and use of only recycled water being permitted for the said purposes.

- XII. That the respondent neither had any control over the said directions/orders from the Hon'ble High Court nor had any control over the shortage of water in the NCR region, which in turn led to the delay in the completion and hence the handing over of the possession of the flat to the complainants.
- XIII. In addition to the above, there has been a heavy shortage of supply of construction material i.e. river sand and bricks etc. through out of Haryana, pursuant to order of Hon'ble Supreme Court of India in the case Deepak Kumar etc. v. State of Haryana (I.A. No. 12-13 of 2011 in SLPs (C) nos. 19628-29 of 2009 with SLPs (C) No. 729-731/2011, 21833/2009, 12498-499/2010, SLP(C) CC... 16157/2011 & CC 18235/2011 dated 27 February 2012) and correspondingly, the construction progress slackened. This also caused considerable increase in cost of materials. It is noteworthy that while multiple project developers passed on such incremental costs attributable to the above reasons to the buyers, the management of the respondent



assured its customers that it will not and has held fast on its promise by not passing on any of such costs to the buyers.

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

E. Jurisdiction of the authority

9. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

11. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the

allottees, or the common areas to the association of allottees or the competent authority, as the case may be.

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

12. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
13. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Supra)*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

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



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

F. Findings on the objections raised by the respondent.

F. I Objection regarding complainants being investor.

15. The respondent has taken a stand that the complainants are investor and not consumer. Therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and they have paid total price of Rs.74,39,605/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been



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

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investor are not entitled to protection of this Act stands rejected.

F.II Objection regarding force majeure conditions.

16. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as delay on part of govt. authorities in granting approvals and other formalities, shortage of labour force in the NCR region, ban on the use of underground water for construction purposes, heavy shortage of supply of construction material etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 30.09.2015. Hence, events alleged by the respondent do not have any impact on the project being developed by



the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Further, time taken in governmental clearances cannot be attributed as reason for delay in project. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainants

G. I Direct the respondent to refund the entire amount deposited by the complainants along with prescribed rate of interest.

17. The complainants intends 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:

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

(Emphasis supplied).

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

“15. POSSESSION

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



*“Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Developers. The Developers proposed to hand over **the possession of the Apartment by September, 2015. The Allottee agrees and understands that the Developers shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.”***

19. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.
20. **Due date of possession:** The promoter has proposed to hand over the possession of the apartment by 30.09.2015 and further provided in



agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by it in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.

21. **Admissibility of refund along with prescribed rate of interest:** The complainant/allottees 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.

22. 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.
23. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 20.03.2024 is **8.85%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.85%**.

24. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*
25. On proceedings dated 20.03.2024, the counsel for the respondent stated that due allowance may be made for the covid period while granting the relief of refund. However, on consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 15(a) of the agreement executed between the parties on 28.07.2012, the possession of the subject apartment was to be delivered by 30.09.2015, whereas the same has not been offered till date. Therefore, in view of the above, the authority is of view that the respondent cannot take benefit of his own wrongs.
26. Keeping in view the fact that the complainant/allottees wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on failure



of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein, the matter is covered under section 18(1) of the Act of 2016.

27. The authority has further, observes that even after a passage of more than 8.5 years till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottees by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the unit which is allotted to them and for which they have paid a considerable amount of money towards the sale consideration. It is also pertinent to mention that complainants have paid more than 90% of total consideration till 2016. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottees intend 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.
28. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

"... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

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

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

30. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as they wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.



31. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @10.85% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

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

- i. The respondents/promoter are directed to refund the entire amount received by it from the complainants i.e., Rs.74,39,605/- along with interest at the rate of 10.85% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
- iii. The respondents are further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants, and even



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if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of complainant/allotees.

33. Complaint stands disposed of.
34. File be consigned to registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 20.03.2024



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