

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

Complaint no.: 1799 of 2023
Order reserved on: 15.02.2024
Order pronounced on: 04.04.2024

Mr. Sharad Kumar Agrawal

R/o: - Flat No. 601, Tower-10, Kalypso Court, Jaypee
Wish Town, Sector- 128, Noida (U.P)

Complainant

Versus

Ansal Housing Ltd.

Registered Office at: - 606, 6th floor, Indra Prakash 21,
Barakhamba Road, New Delhi - 110001

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Sh. Sanjeev Kumar Bhardwaj (Advocate)

Complainant

Sh. Amandeep Kadyan (Advocate)

Respondent

ORDER

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

2. The particulars of unit details, sale consideration, the amount paid by the complainant, 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	Ansal Heights, 86
2.	Project location	Sector 86, Gurugram, Haryana
3.	Project area	12.843 acres
4.	Nature of the project	Group housing colony
5.	DTCP license no. and validity status	48 of 2011 dated 29.05.2011 valid up to 28.05.2017
6.	Name of licensee	Resolve Estate Pvt. Ltd.
7.	RERA registration details	Not registered
8.	Unit no.	C-0201 [Page no. 29 of the complaint]
9.	Unit area admeasuring	1895 sq. ft. (super area)
10.	Date of execution of flat buyer agreement in the name of original allottee i.e., Mr. Sanjay Nagrare	07.09.2012 (Annexed but not executed) [Page no. 26 of complaint]
11.	Transfer letter in favour of the complainant herein	26.08.2015 (Page no. 44 of the complaint)
12.	Possession clause	31. <i>The developer shall offer possession of the unit any time, within a period of 42 months from the date of execution of the agreement or within 42 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 by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be a grace period of 6 months allowed to the developer over and above the</i>

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		<i>period of 42 months as above in offering the possession of the unit.” (Emphasis supplied) [Page no. 34 of complaint]</i>
13.	Date of commencement of construction as per customer ledger dated 26.05.2022 at pg. 60 of complaint	01.10.2013
14.	Due date of possession	01.10.2017 [Note: Due date calculated from date of commencement of construction i.e., 01.10.2013 being later. Grace period allowed being unqualified]
15.	Sale consideration as per payment annexed with the buyer's agreement at page no. 45 of the complaint	Rs.73,04,941/-
16.	Amount paid by the complainant as per SOA dated 29.05.2023 at pg. 49 of complaint	Rs.73,69,576/-
17.	Occupation certificate	Not yet obtained
18.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has pleaded the following facts:

- a. That a residential apartment was booked in an upcoming project viz. 'Ansal Heights 86' at Gurgaon, Haryana being developed by the respondent herein. On 15.11.2011 by Mr. Sanjay Nagrare (first buyer) booked a residential unit under the construction link plan, the first buyer was required to make periodical payment of the consideration for the flat on the basis of the stage of construction (i.e., milestone basis).

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- b. That on 07.09.2012, the respondent allotted an apartment measuring 1895 sq. ft. in favor of first buyer vide unit no. C-0201 for a sale consideration of Rs.73,62,560/- and executed a flat buyer agreement with first buyer. (Note: - the buyer's agreement annexed with the complaint is not executed inter-se). The complainant is subsequent allottee. Vide transfer letter dated 26.08.2015, the original allottees transferred all their rights and liabilities in relation to subject unit in the favour of present allottee i.e., Sharad Kumar Agrawal.
- c. That as per the flat buyer agreement, sale consideration of the flat was Rs.73,62,560/-. However, subsequently consideration for the flat was arbitrarily increased on account of addition of other charges which included labor cess etc. which was supposed to be borne by the respondent. The same was accepted by the complainant under protest. He has till date made a total payment of Rs.73,69,576/- to the respondent as basic and other various charges against the allotted unit.
- d. That the payments were stipulated in the agreement on milestone basis (i.e., upon completion of certain percentage of the construction). However, the respondent on various occasions raised demands for payment without completion of the milestone. Accordingly, the complainant paid the total consideration towards the flat, even before the completion of milestones as contemplated in the application.
- e. That the complainant has duly honored the demands raised by the respondent. The construction at the site of the project has not been progressed since the last demand was raised by the respondent and consequently the respondent has failed to offer the possession of the flat to the complainant till date.
- f. That as per the terms of the flat buyer agreement, the respondent was required to handover the possession of the flat to the complainant

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- within 42 months from the date of execution of the agreement with a further grace period of 6 months. Accordingly, after considering grace period also, physical possession of the flat must have been handed over on or before 07.09.2016. However, the project has not been constructed so far and also no occupancy certificate is received.
- g. That the respondent has failed to abide by the terms stipulated in the agreement. The cause of action to file the present complaint arose on the day respondent failed to give the possession on the given date as per flat buyer agreement and that still continuing as the respondent has not delivered the possession of the flat for occupancy till date. The complainant has diligently discharged all his obligations as per the application/agreement, whereas, the respondent has failed to perform its obligations.
- h. That the application/agreement stipulates for 24% interest p.a. compounded quarterly for the delay in payment/installments and therefore, in terms of section 2(za) of the Act, 2016 *ibid*, the complainant is also entitled to the same rate of interest for delay period in handing over of physical possession of the flat. Whereas as per terms of the application/agreement, in case the respondent is unable to develop the project within the agreed period of 48 months, it is liable to pay a nominal compensation of Rs.5/- per sq. ft. per month for the delayed period. The aforesaid condition is unilateral and arbitrary and provisions of the Act of 2016 should be read in the agreement.
- i. That the complainant has visited office of the respondent many times to complain about delay in the project, however no plausible reply has been received from the respondent. Since the respondent is



unable to develop the project and handover physical possession of the flat for occupancy, the complainant is entitled to get refund of the entire amount Rs.73,69,576/- paid by him along with interest as applicable in Act and regulation from the date of each payment.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:

- a. Direct the respondent to refund the entire amount of Rs.73,69,575/- along with interest.
- b. In exercise of power u/s 35 of the Act of 2016, direct the respondent placed on record all the statutory approvals and sanctions of the project.

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

D. Reply by the respondent.

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

- a. That the present complaint is not maintainable qua the answering respondent as the complaint is totally false, frivolous and devoid of any merits against the answering respondent. The complaint under reply is based on pure conjecture. Thus, the present complaint is liable to be dismissed on this ground alone.
- b. That the complainant had approached the answering respondent to book a flat no. C-0201 in an upcoming project Ansal Heights, Sector 86, Gurugram. Upon the satisfaction of the complainant after inspection of the site, title, location plans, etc. an agreement to sell dated 07.09.2012 was signed between the parties. (Note: - the



- buyer's agreement annexed with the complaint is not executed inter-se).
- c. 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 2013. 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 retrospectively.
- d. 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 2023 and the cause of action accrue on 07.09.2016 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.
- e. Even if the complaint is admitted being true and correct, the agreement which was signed in the year 2012 without coercion or any duress cannot be called into 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

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virtue of this complaint more than 10 years after it was agreed upon by both parties.

- f. That the respondent had in due course of time obtained all necessary approvals from the concerned authorities. It is submitted that the permit for environmental clearances for proposed group housing project for Sector 103, Gurugram, Haryana on 20.02.2015. Similarly, the approval for digging foundation and basement was obtained and sanctions from the department of mines and geology were obtained in 2012. 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.
- g. That without prejudice to the aforesaid and the rights of the respondent, it is submitted that the respondent would have handed over the possession to the complainant within time had there been no force majeure circumstances, beyond the control of the respondent, there had been several circumstances which were absolutely beyond and out of control of the respondent such as orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the Hon'ble Punjab & Haryana High Court duly passed in civil writ petition no. 20032 of 2008. The said orders banned the extraction of water, which is the backbone of the construction activities. 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 and the COVID -19 pandemic among others as the

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

- h. That the perusal of the builder buyer agreement at page 3 would show that the proposed party to be impleaded i.e., M/s Samyak Projects Pvt. Ltd not only possesses all the rights and unfettered ownership of the said land whereupon the project namely Ansal Heights, Sector 86 is being developed, but also is a developer in the said project. That the operating lines at page 3 of the builder buyer agreement are as follow: *"The developer has entered into an agreement with the confirming party 3 i.e., M/s Samyak Projects Pvt. Ltd to jointly promote, develop and market the proposed project being developed on the land as aforesaid."*

7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.

E. Jurisdiction of the authority

8. 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

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

E.II. Subject matter jurisdiction

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

Section 11

.....

(4) The promoter shall-

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

Section 34-Functions of the Authority:

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

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the **Hon'ble Apex Court in Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (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."

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

F. Findings on the objections raised by the respondent:

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

14. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be out rightly dismissed as the buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively. The authority is of the view 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. The Act nowhere provides, nor can be so construed, that all previous agreements would 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 would be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The 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) decided on 06.12.2017** which provides as under:

"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."

15. 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

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15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

16. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the 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.

17. The counsel for the respondent has raised an objection that the complaint is barred by limitation as the complainant has approached the complainant has admittedly filed the complaint in the year 2023 and the cause of action accrue on 07.09.2016 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.
18. 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 unit was executed with the allottee on 07.09.2012. (Note: - date mentioned in the buyer's agreement annexed with the complaint is not executed inter-se). As per clause 31 of the buyer's agreement, the possession of the subject plot was to be offered with in a period of 42 months from the date of execution of buyer's agreement and 42 months

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from the date of obtaining all the required sanctions and approval necessary for commencement of constructions whichever is later. The due date of possession can be calculated from the date of commencement of construction being later i.e., 01.10.2013, which comes out to be 01.10.2017.

19. However, the said project of the allotted unit 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

20. 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.
21. Moreover, it is observed that despite passing a benchmark of due date on 01.10.2017, till date it has failed to handover the possession of the allotted unit 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 reproduced 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.

22. 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.

23. 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 construction in and around Delhi and the Covid-19, pandemic among others, but all the pleas advanced in this regard are devoid of merit. As per terms and conditions of the said buyer's agreement the due date of handing over of possession comes out to be 01.10.2017. 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 some of the allottees. Thus, the promoter-respondent cannot be granted any leniency for aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.



24. 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 (I) (Comm.) no. 88/ 2020 and I.As 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."

25. The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by 01.10.2017 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 sought by the complainant.

G.I. Direct the respondent to refund the entire amount of Rs.73,69,575/- along with interest.

26. The complainant is subsequent allottee. The subject unit was originally allotted to Mr. Sanjay Nagare. The authority has decided this issue in the complaint bearing no. *4031 of 2019 titled as Varun Gupta V/s Emaar MGF Land Ltd.* wherein the authority has held that in cases where subsequent allottee has stepped into the shoes of original allottee before the expiry of due date of handing over possession and before the coming

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into force of the Act, the subsequent allottee shall be entitled to refund of the entire amount paid by him from the date of each payment paid by the allottee (either original or subsequent) till the actual date of refund of the amount

27. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with interest. 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)

28. Clause 31 of the buyer's agreement provides for the handing over of possession and is reproduced below for the reference:

"31. The developer shall offer possession of the unit any time, within a period of 42 months from the date of execution of the agreement or within 42 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 by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be a grace period of 6 months allowed to the developer over and above the period of 42 months as above in offering the possession of the unit."

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29. At the outset, it is relevant to comment on the pre-set 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 complainant not being in default under any provisions of this agreement 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 flat buyer's agreement by the promoter are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
30. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 42 months from date of agreement or from the date of approvals required for the commencement of construction which whichever is later. The due date of possession is calculated from the date of commencement of construction i.e., 01.10.2013 being later. The period of 42 months expired on 01.04.2017. Since in the present matter the BBA incorporates unqualified reason for grace period /extended period of 6

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months in the possession clause accordingly, the grace period of 6 months is allowed to the promoter being unqualified. Therefore, the due date of possession comes out to be 01.10.2017.

31. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him along with interest 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.

32. 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.
33. 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., 04.04.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
34. 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. In the present case both the parties have stated that the terms and conditions mentioned in the unexecuted buyer's agreement dated 07.09.2012 are binding upon them and the same may be treated as an executed documents. Therefore in view of the above, the buyer's agreement dated 07.09.2012 shall be deemed as executed and the terms and conditions mentioned therein shall be binding upon them. By virtue of clause 31 of the buyer's agreement (copy annexed but not executed), the possession of the subject unit was to be delivered within a period of 42 months from the date of execution of buyer's agreement or within 42 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later. Therefore, the due date of handing over possession is calculated from the date of commencement of construction i.e., 01.10.2013 being later. The period of 42 months expired on 01.04.2017. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 01.10.2017.

35. Further, the Authority relies upon the judgment passed by Hon'ble Supreme Court in the case of *Fortune Infrastructure and Ors. Vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU /SC /0253 /2018* observed that "a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. **Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into**

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consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract. The date of transfer letter dated 26.08.2015, ought to be taken as the date for calculating due date of possession. Therefore, in both the eventuality the due date of handing over of the possession of the unit at the most cannot be considered beyond 26.08.2018.

36. It is pertinent to mention over here that even after a passage of more than 11.6 years (i.e., from the date of BBA till date) neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. 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 considerable amount of money towards the sale consideration. It is also pertinent to mention that complainant has paid more than 100% of sale consideration till 2018. 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.
37. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondents /promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has 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....."

38. 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."

39. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale under section 11(4)(a). The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to pay the allottee, as he 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.

40. 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 complainant is 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*.

G.II In exercise of power u/s 35 of the Act of 2016, direct the respondent placed on record all the statutory approvals and sanctions of the project.

41. In view of the findings detailed above on issues no. 1, the above said relief become redundant as the complete amount paid by the complainants is being refunded back.

H. Directions of the authority

42. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoter as per the functions entrusted to the authority under section 34(f) of the Act:
- i. The respondent/promoter is directed to refund the amount of Rs.73,69,576/- paid by the complainant along with prescribed rate of interest @ 10.85% p.a. as prescribed under rule 15 of the rules from the date of each payment till the date of refund of the deposited amount.

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- ii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.
 - iii. The respondent/promoter is further directed not to create any third-party rights against the subject unit before the full realization of paid-up amount along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainant.
43. Complaint stands disposed of.
44. File be consigned to registry.

Date: 04.04.2024




(Vijay Kumar Goyal)
Member

Haryana Real Estate
Regulatory Authority,
Gurugram