

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

Complaint no.: 4203 of 2022
First date of hearing: 22.09.2022
Date of decision: 25.04.2024

1. Rohini Mohandas
2. Raghu Menon

Both RR/o: - A-3/99, Sector- 8, Rohini, New Delhi

Complainants

Versus

1. M/s Agrante Developers Private Limited
2. M/s Agrante Reality Limited

Both Having registered office at: - DTJ-704, 7th Floor,
DLF Tower-B, Jasola, New Delhi - 110025

Also at: - 522-524, 5th Floor, DLF Tower-A, Jasola, New
Delhi

3. ICICI Bank limited

Office at: - Plot no. 7, community centre, S.D., Tower,
Sector-8, Rohini, New Delhi- 110085

Also At: - Landmark, Race Course Circle, Vadodara -
390007

Respondents

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Vipul Vijay Lamba (Advocate)

Complainants

Shri. Tarun Biswas (Advocate) along with

Shri Sanjeev Thakue (GM Legal of the company)

Respondent no. 1

None

Respondent no. 2 & 3

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 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. Project and unit related details

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

S. N.	Particulars	Details
1.	Name of the project	"Beethoven's 8", Sector- 107, Gurgaon
2.	Nature of project	Group housing complex
3.	RERA registered/not registered	Not Registered
4.	DTPC License no.	23 of 2012 dated 23.03.2012
	Validity status	Not available on record
	Name of licensee	Narendra Kumar Gupta & others
	Licensed area	18.0625 acres
5.	Unit no.	Harmony-II L/B/1805 [Page no. 59 of complaint]
6.	Unit area admeasuring	1702 sq. ft. [Page no. 59 of complaint]
7.	Allotment letter	Not provided
8.	Date of builder buyer agreement	17.09.2014 [Page no. 56 of complaint]
9.	Date of tripartite agreement	17.09.2014 [Page no. 12 of complaint]
10.	Possession clause	Clause 18(a) <i>Subject to other terms of this Agreement /Agreement, including but not limited to timely payment of the Total Price, stamp duty and other charges by the Vendee(s), the Company shall endeavor to complete the construction of the Said Apartment within 42 (Forty-two) months from the</i>

		<i>date of Allotment, which is not the same as date of this Agreement. The Company will offer possession of the Said Apartment to the Vendee(s) as and when the Company receives the occupation certificate from the competent authority(ies). Any delay by the Vendee(s) in taking possession of the Said Apartment from the date of offer of possession, would attract holding charges @ Rs.05(Five) per sq. ft. per month for any delay of full one month or any part thereof. (Emphasis supplied) [pg. 72 of complaint]</i>
11.	Due date of possession	17.03.2018 [Due date calculated from date of agreement i.e., 17.09.2014]
12.	Total sale consideration	Rs.98,23,944/- [Page no. 59 of complaint]
13.	Amount paid by the complainants	Rs.11,18,648/- (as booking amount) [Page no. 86 of complaint] Rs.33,18,183/- (Disbursed by the financial institution)
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered
16.	Legal notice send by the complainants w.r.t. refund the paid up amount	23.03.2021 [Page no. 142 of the complaint]

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -
 - a. That the complainants herein are the allottees of a residential unit, being Harmony-II L/B/1805, in a project being purportedly developed by the promoters by the name and style of "Beethoven's 8" at Sector - 107,

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Gurugram. The said project is an ongoing project and is covered within the provisions of the Act and the applicable rules.

- b. That the promoters had advertised the said project to be a fine art of green living. It was advertised that the said project is inspired by all the four elements of nature, ensuring a clean and healthy spirit of livelihood. It was further advertised that the private landscaped patios are one of the many surprises featured in the said project; offering space, perception and peace. It was also advertised that the said project would give the feeling of life in a bungalow within a house.
- c. That the respondent/promoter had represented that subvention scheme was the main highlight of the said project. The promoters lured the complainants with the said scheme, whereby, it was proffered by promoter that the complainants will not be required to make any payment until the delivery of possession of the said unit. The promoters assured that the complainants would only be required to pay 10% of the total amount at the time of booking and most of the payments until delivery of possession shall be made by respondent no. 3 to the promoters. The promoters had claimed that they had an arrangement with respondent no. 3 whereby respondent no. 3 would facilitate sanctioning and disbursement of a housing loan for payment of consideration amount towards the said unit. The promoters had further promised to the complainants that the EMI of the loan would start at the time of completion of loan disbursement. It was stated that until the loan is completely disbursed, pre-EMIs would be payable on the partially disbursed amount. The promoters represented that they shall pay all EMIs/pre-EMIs until offering possession of the said unit to the complainants. The promoters assured and promised that the complainant's liability towards payment of EMIs/pre-EMIs would begin



only after the promoters offer possession of the said unit to the complainants. They were thus lured in this manner on the pretext that the complainants will not be financially burdened till the offer of possession of the said unit.

- d. That relying upon the aforesaid assurances made by the promoters and allured by the rosy picture painted by them, the complainants proceeded to pay an amount of Rs.11,18,648/- vide cheques issued on 29.05.2014, 30.05.2014 and 06.06.2014 towards the booking of the said unit. The said payments were made to respondent no. 2 as it was authorized to promote, market and sell the units in the said project and was also entitled to collect sale proceeds in its own name and was also competent to execute documents on behalf of respondent no. 1.
- e. Thereafter, respondent/promoter provided to the complainants a pre-printed, arbitrary and one-sided agreement of sale, being agreement no. IN-DL96450435644313M, containing various prejudicial, whimsical, unilateral, unreasonable and unfavourable clauses. The complainants raised certain objections pertaining to the clauses incorporated in the aforesaid agreement of sale but respondent/promoter did not budge and threatened the complainants with cancellation of the allotment of the said unit in their favor if they fail to sign the agreement of sale. As a result, the complainants had no choice but to go ahead and execute the said agreement containing biased terms and conditions which had been unilaterally incorporated by developer. Respondent no. 1 acknowledged receipt of Rs.11,18,648/- and it was stated that the balance amount shall be paid by the complainants as per payment plan marked as subvention payment plan. Respondent/promoter further promised to offer possession of the said unit within 42 months i.e., by 17.03.2018.

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- f. That the complainants accordingly signed the agreement to sale, being agreement no. IN-DL96450435644313M dated 17.09.2014, with the respondent/promoter. The terms set out in the said agreement inter alia stated as follows:
- The unit admeasures 1702 sq. ft. free from all mortgage, charge, pledge, lien or any other encumbrance of any kind;
 - The total aggregate price payable for the unit is Rs.1,11,49,414/-;
 - That the sum of Rs.11,18,648/- amounting approximately 10% of the total aggregate price has been paid by the complainants and respondent no. 1 acknowledged the receipt thereof;
 - The balance amount shall be paid by the complainants as per payment plan marked as subvention payment plan;
 - That the respondent no. 1 shall endeavour to complete the construction within 42 months from the date of allotment;
 - In case of any delay in completion of construction, respondent No. 1 shall pay compensation at Rs.0.05 per sq. ft. of the super area of the unit.
- g. That the complainants also entered into a tripartite housing loan agreement dated 17.09.2014 with respondent no. 1 and respondent no. 3 which set out the terms of loan availed from the bank inter alia as follows:
- That the bank has sanctioned home loan of Rs.90,00,000/- to the complainants for purchase of unit in the said project;
 - That the unit has been provisionally allotted to the complainants and the respondent no. 1 undertakes to complete construction within 42 months from the date of provisional allotment dated 17.09.2014 and handover possession;
 - The complainants have already paid Rs.11,18,648/- in part payment of the consideration amount;
 - That the respondent no. 1 agreed to indemnify the complainants towards any compensation or loss if any paid to the bank due to non-adherence of construction schedule by respondent no. 1
- h. That the respondent no. 1 also wrote to the bank vide letter dated 17.09.2014 giving their no objection for mortgage of the unit in favour of the bank by way of security for repayment of the loan availed from the bank. Further, the respondent no. 2 had demanded Rs.33,55,945/- as per

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payment plan on purported start of piling work in the said project. The bank accordingly disbursed Rs.33,18,183/- towards the said demand. The balance amount of Rs.37,762/- was paid by the complainants to respondent no. 2.

- i. That upon partial disbursement of loan, the pre-EMIs became payable which the promoters had agreed to pay until offering possession of the unit. The promoters did make the payments of the pre-EMIs to the bank regularly until October, 2017, but thereafter, the promoters have illegally stopped making payments of the pre-EMI and have thereby imposed the burden of pre-EMIs on the complainants.
- j. That respondent no. 1 issued a letter dated 13.10.2017 to the complainants informing that the said project would be completed by the end of 2019. Respondent no. 1 acknowledged through the said letter that they are paying the interest on the disbursed amount and assured that the same will further be paid by them till offer of possession. Respondent no. 1 further requested the complainants to inform if any interest is paid by them so as to enable respondent no. 1 to release the due amount.
- k. That it needs to be highlighted that while on one hand respondent no. 1 acknowledged and admitted their liability of paying pre-EMIs; on the other hand, it has maliciously and deliberately failed in discharging its said financial and contractual liability. Respondent no. 1 has not paid any pre-EMIs since November, 2017, and the amounts towards the said pre-EMIs is being regularly deducted from complainant no. 2's bank account.
- l. That on 09.06.2018 respondent no. 1 paid an amount of Rs.2,02,469/- to the complainants reimbursing them for the pre-EMIs paid by them from November, 2017 to June, 2018. The said fact unambiguously establishes that the promoters have consciously and wilfully defaulted in timely



remittance of pre-EMIs and have caused unnecessary harassment, anguish and financial loss to the complainants. The promoters have further failed to deliver possession of the said unit to the complainants on time and have therefore aggravated and augmented the torment, distress and torture suffered by the complainants.

- m. That since July, 2018 till date, the complainants have been compelled to pay pre-EMI each month (except in April and May, 2020), which is being deducted from complainant no. 2's bank account. In aggregate, the complainants have paid an amount of Rs.10,30,805/- towards pre-EMIs since July, 2018 till April, 2022. They have been a victim of mental agony and harassment due to the promoters' breach in payment of pre-EMIs. The above deduction of pre-EMIs each month with no real hope of getting possession has severely caused and continues to cause trauma and agony to the complainants. The promoters are not only liable to refund the pre-EMI amounts deducted from the complainants but are also liable to compensate for the harassment and torment suffered by the complainants.
- n. That the complainants thereafter issued a legal notice dated 23.03.2021, calling upon respondent no. 1 to refund all amounts deposited towards purchase of the said unit, with applicable interest. The complainants simultaneously also issued a legal notice dated 23.03.2021 to the respondent no. 3 informing them that the complainants have sought refund of all amounts from respondent no. 1 and that the complainants are suspending the payment of pre-EMIs. However, neither respondent no. 1, nor respondent no. 3 gave any response to the said legal notices. The said legal notices were sent by e-mail, as well as speed post.
- o. Thus, in aggregate, the respondent no. 1 is liable to pay an amount of Rs.55,05,398/- along with interest calculated at the State Bank of India

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highest marginal cost of lending rate plus two percent as per Rule 15 of the Rules, 2017. Further, the respondent/promoter is further liable to pay compensation to the complainants for the mental agony, harassment and torment they have undergone due to the illegal acts of the promoters. They had paid their hard-earned money to the promoters with a dream of having their own abode in Gurugram. The complainants had believed that the promoters would honour their promises and offer possession of the said unit by March, 2018. The promoters however have consciously and wilfully defaulted in offering possession of the said unit within the stipulated time period. The same has not only caused huge monetary losses to the complainants but has also caused severe mental agony, anguish and trauma to the complainants for having been deprived of having their own home in Gurugram. That apart from the agony and anguish suffered due to the promoters default in offering possession on time, the complainants had been compelled to pay pre-EMIs which the promoters had assured to pay until offering possession. They were coerced to shell out hefty amounts of pre-EMIs on account of malicious and deliberate defaults of the promoters.

- p. That deduction of pre-EMIs each month by respondent no. 3 is causing grave irretrievable injury to the complainants who are being deprived of their money for the promoters' failure to abide by their commitment. The balance of convenience also lies in favour of the complainants in as much as it is respondent no. 1 who is contractually obligated to pay pre-EMIs to respondent no. 3. In the interest of justice and to protect the rights of the complainants, it is essential that the respondent no. 3 is directed to not recover or deduct any pre-EMIs from the complainants during the pendency of the present complaint. It is also essential that the respondent

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no. 1 is directed to abide by its commitments and timely pay the pre-EMIs to respondent no. 3 during pendency of the present complaint.

- q. That the complainants crave liberty to amend the present complaint to seek further relief for seeking compensation or refund of such amounts as they may have to pay in future to the respondent no. 3/ Bank towards pre-EMIs/EMIs or pre-closure charges.

C. Relief sought by the complainants: -

4. The complainants have sought following relief(s)
- Direct the respondent no. 1 to refund a sum of Rs.11,18,648/- along with interest along with interest calculated as per Rule 15 of Rules, 2017.
 - Direct the respondent no. 1 to refund a sum of Rs.37,762/- upon the purported start of piling work along with interest calculated at the prescribed rate.
 - Direct the respondent no.1 to refund Rs.33,18,183/- disbursed by the respondent no. 3/bank along with interest calculated at the prescribed rate.
 - Direct the respondent no.1 to refund Rs.10,30,805/- comprising of the pre-EMIs directly paid by the complainants to the respondent no. 3/bank along with interest calculated at the prescribed rate.
 - Direct the respondent no. 3 to restrain from deducting or recovering any pre-EMIs from the complainants as the promoters had promised to pay the said pre-EMIs.
 - Direct respondent no. 3 to restrain from deducting or recovering any pre closure charges from the complainants.
 - Direct respondent no. 1 to pay interest at the State Bank of India highest marginal cost of lending rate plus two percent on the amount directed to be refunded from the date of respective payments.



- h. Direct respondent no. 1 to pay compensation to the complainants for a lump-sum amount of Rs.10,00,000/- as the complainants have suffered monetary loss as well as mental agony, trauma, harassment and torment.
5. The present complaint was filed on 21.06.2022 in the authority. Despite proper service of notice, the respondent no. 2 and 3, failed to put in appearance before the authority and has also failed to file reply. In view of the same, vide order dated 25.04.2024, the matter was proceeded ex-parte against respondent no. 2 and 3.
6. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondent no. 1.

7. The respondent has contested the complaint on the following grounds:
- a. That at the outset the answering respondent submits that it has not demanded or is in receipt of more than 40% of the total sale consideration of the proposed apartment from any allottee and is undertaking the cost of construction from its own pocket. The promoter is taking all measures to complete the project with procuring necessary approvals from the competent authority.
- b. That the complainant has filed the present complaint seeking refund of amount deposited with M/s Agrante Developers Pvt. Ltd. in lieu of unit booked in "Beethoven's 8" project. That the complainant has availed subvention scheme and financed the consideration amount from ICICI Bank and an amount of Rs.33,18,183 /- was disbursed by ICICI bank to M/s Agrante Developers Pvt. Ltd. on behalf of the complainants.
- c. That the respondent/promoter, as per the mutual understanding with the complainant, has been duly complying and paying the pre-EMI on the



disbursed amount to the bank regularly. There is a slight default in payment of the said pre-EMI/Interest till date and the respondent /promoter undertakes to remit the same till possession is offered to the complainants.

- d. That the tower in which the complainant had booked the unit is owing to certain force majeure circumstances not ready however, Tower-H & J are ready and the construction of a building structure comprising fourteen floors is completed. The necessary electrical wiring and works pertaining to plumbing and sanitation are also ready. The promoter would be in a position in all probability to offer possession of the flats in tower-H in 4-5 months from the date of filing of the present reply. The promoter has incurred and utilized his own funds and loans towards construction of the project and if the complaints pertaining to refunds are entertained at this stage it would jeopardize the fate of the project which would consequently hamper the valuable rights of the other allottee(s) of the project. The promoter is in the process of applying for occupation certificate for tower-H. The promoter is willing to adjust for the interest components as computed for delay in offering possession towards the balance sale consideration of the complainant as the promoter will offer possession in tower-H to the complainant.
- e. That the promoter is willing to adjust and give allotment and possession of the unit to the complainants in the said H or J towers where the construction is now 90% completed and the promoter would be able to deliver the unit in 8-9 months from the date of filing of the present reply.
- f. That the statement of objects, reasons and preamble of the Act makes it manifestly clear that it is not only the interest of the consumers of the real estate sector which the Act seeks to protect and safeguard but also the



promotion of the real estate with a view to ensure sale of plot, apartment etc. The Authority is empowered not only to monitor the projects but also to ensure their timely completion where projects are held up or stopped and to take steps so the same are completed in time and in the interest of the allottees who are awaiting possessions of the units in the project. It is not out of place to mention here that due to pending registration of the project with the Authority the promoter since the implementation of the Act was unable to raise funds from its existing customers nor could it raise finance by selling unsold inventory. The shortage of funds to enable rapid construction had been a determining factor for the delay as it slowed down the pace of construction considerably. It is reiterated that the promoter is undertaking costs of constructions from its own pockets and is not demanding anything from the allottees, an act which is unprecedented by any other real estate company, and it is now for this Authority to balance the interest of the consumers and the promoters harmoniously to achieve the maximum good and benefits.

- g. That M/s RMS Estate Pvt. Ltd. now known as "Agrante Developers Private Limited" was granted development license from Director Town and Country Planning, Haryana ("DTCP") for development of land spread over a total area of 18.0625 acre of land on which the present project is being developed. The said license was granted on 27.03.2012 and was valid for 4 years.
- h. That subsequent to grant of the above license the promoter had executed a development/collaboration agreement dated 23.05.2013 with M/s Sarvaram Infrastructure Pvt. Ltd. ("collaborator"). An area measuring 10.218 acres out of the aforesaid total land was handed to the collaborator with absolute and exclusive rights for the purposes of developing the same.



It is pertinent to mention here that M/s Sarvaram Infrastructure Pvt. Ltd. himself or through his nominee had proposed to build a separate project namely "ELACASSA" on that parcel of land with which the promoter has no association whatsoever. Thus, resultantly there were two projects being developed under the same license by two distinct colonizers with rights and liabilities strictly framed under the said collaboration agreement. It would not be out of place to mention here that such agreements were in common practice then.

- i. The development/collaboration agreement dated 23.05.2013 stipulated strict liability on M/s Sarvaram Infrastructure Pvt. Ltd. or his appointed nominee to be in compliance of all statutory compliances, bye-laws applicable as per HUDA, DTCP etc. as applicable for his parcel of land. M/s Sarvaram Infrastructure Pvt. Ltd. was further under the obligation to remit all the dues accrued to governmental authorities arising under the agreement for the portion of land with the collaborator under the agreement.
- j. That M/s Sarvaram Infrastructure Pvt. Ltd., however, started defaulting in his compliance of statutory duties and contractual obligations. The promoter had on several occasions issued written requests and even served legal notices to M/s Sarvaram Infrastructure Pvt. Ltd. to rectify the said defaults *inter-alia* payment of EDC and IDC charges. The promoter had taken every step to ensure compliance of statutory obligations as non-compliance by M/s Sarvaram Infrastructure Pvt. Ltd. would directly prejudice the promoter's project completion having the common license. It is submitted that the license for the land lapsed due to non-renewal, and it cannot be renewed until outstanding EDC & IDC charges along with penalty is not cleared for the total land jointly by the promoter and M/s

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Sarvaram Infrastructure Pvt. Ltd. in proportion to their respective projects. Needless to mention here that the promoter is ready and willing to pay its share of EDC and IDC charges for the purposes of renewal of license.

- k. That the bona-fides of the promoter can be further gathered by the fact that the promoter is running post to pillar and has filed a representation before financial commissioner (Haryana) seeking a bifurcation of the license in two parts for two projects respectively and pursuing the same sincerely. It is pertinent to mention that only after renewal of license the promoter will be competent to obtain RERA registration. The promoter has undertaken every possible measure in his armory to salvage the project and complete the same.
- l. That the promoter has filed for HRERA registration vide order letter dated 09.08.2018 of its project on the said land which was to be with the applicant as per the agreement. The fate of the application is dubious and is still pending as the aforesaid license has lapsed and does not exist anymore as on date and further, EDC and IDC charges are unpaid which were to be paid by the M/s Sarvaram Infrastructure Pvt. Ltd. It is pertinent to mention here that the directors of M/s Sarvaram Infrastructure Pvt. Ltd. are lodged in jail presently. The promoter is crippled in the sense that he is unable to correspond with them, which could perhaps lead to some fruitful results. Moreover, insolvency proceedings are pending against them before the Hon'ble National Company Law Tribunal.
- m. That due to non-registration with HRERA the promoter is unable to sell its proposed units in its project. More particularly the applicant is crippled financially as no demand can be raised by the promoter from its existing members. It is to be kindly considered by this Court that the promoter has

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accordingly not raised a single demand from its members and has not collected more than 40% of total sale consideration of a unit from any of its members. On the contrary the promoter has undertaken the tedious task of completing the construction of the project from its own finances and loans so as to offer possession and is also remitting the interests on subvention scheme on behalf of customers so as to protect them from further loss. The overall conduct of the promoter plays a vital part in deciding the complaint such as the present one. The promoter is faced with peculiar circumstances which would require mutual co-operation from its members.

- n. That, it would be of high importance to mention one similar complaint filed with this Authority wherein similar issues were being adjudicated. The Authority under HARERA had the opportunity to deal with similar complex issues faced by developers in respect of the licensed land wherein the original licensee had further sub-divided the land for development purposes on the basis of collaboration agreements. This Authority in complaint no. 826/2018, 1402/2018, 1343/2018, 1344/2018 had passed common orders. The issues in these complaints were similar to the applicant's issues. In this case also the original licensee M/s Triveni Ferrous Infrastructure Pvt. Ltd. a joint venture comprising of two groups Seth and Mittal Group who had subsequently divided/assigned development /marketing rights into five separate lands holding to be developed separately pursuant to which similar issues arose which are being faced by the applicant. This Authority in that complaint had passed its conclusions and recommendations, particularly the recommendation to Town and Country Planning Department, Haryana stressing the grave importance that DTCP must divide license into five parts. Once the license

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is bifurcated separate RERA registration would be permissible besides this Authority had also pertinently recommended that DTCP should defer recovery of their overdue EDC so as to leave some cash flow in the hands of the developers for investing in the project. Therefore, the promoter prays with folded hands to refer the present matter to the Authority in light of the aforementioned case law as cited so that similar recommendations can be issued on behalf of the promoter to Town and Country Planning Department, Haryana. It is submitted that such recommendations would be in parlance with the statutory duty of the Authority in section 32 of the Act which states the functions of the Authority for promotion of the Real Estate Sector.

- o. That lastly it is submitted that the crisis of COVID-19 pandemic has also given a blow to smooth working of the promoter. It is pertinent to mention here that during the lockdown imposed by the Central Government, the workforce at the project site left for their homes and there was a complete halt in the work which added to further delay. It was after sincere efforts of the promoter that the workforce could be again mobilized and presently the works are being carried out at the site.
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 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



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

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(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 delay in completion of construction of project due to outbreak of Covid-19.

15. The Hon'ble Delhi High Court in case titled as **M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020** dated 29.05.2020 has observed as under:

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

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excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

16. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 17.03.2018. It 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 cannot be excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant

- G.I Direct the respondent no. 1 to refund a sum of Rs.11,18,648/- along with interest along with interest calculated as per Rule 15 of Rules, 2017.**
- G.II Direct the respondent no. 1 to refund a sum of Rs.37,762/- upon the purported start of piling work along with interest calculated at the prescribed rate.**
- G.III Direct the respondent no.1 to refund Rs.33,18,183/- disbursed by the respondent no. 3/bank along with interest calculated at the prescribed rate.**
- G.IV Direct the respondent no.1 to refund Rs.10,30,805/- comprising of the pre-EMIs directly paid by the complainants to the respondent no. 3/ bank along with interest calculated at the prescribed rate.**
- G.V Direct respondent no. 1 to pay interest at the State Bank of India highest marginal cost of lending rate plus two percent on the amount directed to be refunded from the date of respective payments.**
- G.VI Direct the respondent no. 3 to restrain from deducting or recovering any pre-EMIs from the Complainants as the promoters had promised to pay the said pre-EMIs.**
17. The above-mentioned reliefs sought by the complainants are being taken tighter as the findings in one relief will definitely affect the result of the other relief and the same being interconnected.
18. In the present case, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit



along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

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

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

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

(Emphasis supplied)

19. As per clause 18(a) of the agreement provides for handing over of possession and is reproduced below:

"18(a).

Subject to other terms of this Agreement/Agreement, including but not limited to timely payment of the Total Price, stamp duty and other charges by the Vendee(s), the Company shall endeavour **to complete the construction of the Said Apartment within 42 (Forty-two) months from the date of Allotment, which is not the same as date of this Agreement.** The Company will offer possession of the Said Apartment to the Vendee(s) as and when the Company receives the occupation certificate from the competent authority(ies). Any delay by the Vendee(s) in taking possession of the Said Apartment from the date of offer of possession, would attract holding charges @ Rs.05 (Five) per sq. ft. per month for any delay of full one month or any part thereof."

20. 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

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by the promoter may make the possession clause irrelevant for the purpose of allottees 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 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.

21. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the prescribed rate of interest. However, the allottee intends to withdraw from the project and is seeking refund of the amount paid by him 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., 25.04.2024

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 allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

25. 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 18 of the agreement dated 17.09.2014, the possession of the subject apartment was to be delivered within a period of 42 months from the date allotment which is not the same as date of this agreement. The due date is calculated 42 months from date of buyer's agreement i.e., 17.09.2014. Accordingly, the due date of possession comes out to be 17.03.2018.
26. It is pertinent to mention over here that even after a passage of more than 9.7 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 to mention that complainant has paid considerable amount of total consideration. 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.

27. Moreover, the authority 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....."

28. 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."

29. 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 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 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.
30. 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 deposit till its realization after adjustment of amount paid by the respondent on account of pre-EMI from the refundable amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.
31. Out of total amount so assessed, the amount paid by the bank i.e., respondent no. 3 be refunded first in the bank and the balance amount along with interest if any will be refunded to the complainants.

G.VII Direct respondent no. 3 to restrain from deducting or recovering any pre closure charges from the complainants.

32. Since, a tripartite agreement dated 17.09.2014, has been executed between the complainants, promoter and the financial institution, therefore the



respondent no. 3 is hereby directed to charge the pre closure charges as agreed between the parties in the tripartite agreement executed between them.

G.VII Direct respondent no. 1 to pay compensation to the complainants for a lump-sum amount of Rs.10,00,000/- as the complainants have suffered monetary loss as well as mental agony, trauma, harassment and torment.

33. The complainant in the aforesaid relief is seeking relief w.r.t compensation *Hon'ble Supreme Court of India in civil appeal titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021)*, has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant may approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority

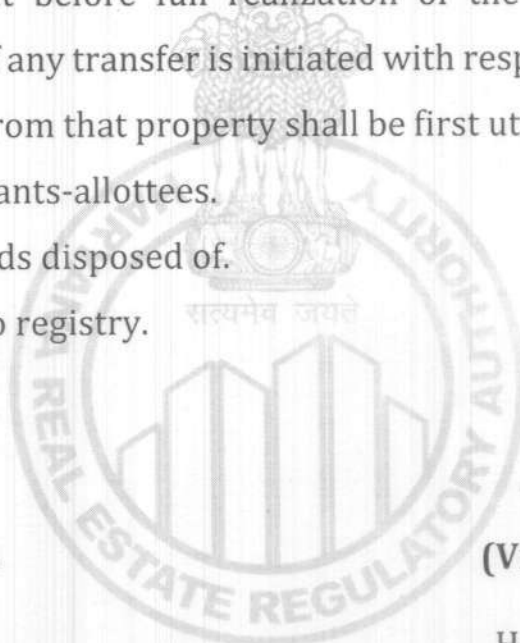
34. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent/promoter is directed to refund the paid-up amount received by it from the complainants 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 deposit till its realization and the amount paid by the respondent towards Pre-EMI shall be adjusted in the refundable amount.



- ii. Out of total amount so assessed, the amount paid by the bank i.e., respondent no. 3 be refunded first in the bank and the balance amount along with interest if any will be refunded to the complainants.
 - 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.
 - iv. The respondent/builder is directed not to create third party right against the unit before full realization of the amount paid by the complainants. If any transfer is initiated with respect to the subject unit, the receivable from that property shall be first utilized for clearing dues of the complainants-allottees.
35. The complaint stands disposed of.
36. File be consigned to registry.

Dated: 25.04.2024



v.1 - 3
(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram