

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

Complaint no.	4634 of 2022
Date of filing complaint:	04.07.2022
Date of order:	13.02.2024

Neena Rai R/O: B 94 3rd Floor Sarvodaya Enclave Oppo Mothers International School New Delhi	Complainant
Versus	
M/S Advance India Projects Limited Regd. Office: 232B, 4th Floor, Okhla Industrial Estate, Phase-III, New Delhi-110020	Respondent

CORAM:	
Shri Arun Kumar	Chairman
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. Geetansh Nagpal (Advocate)	Complainant
Sh. Dhruv Rohatgi (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 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the

allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. n.	Particulars	Details	
1.	Name of the project	"AIPL Joy Street", Sector-66, Gurgaon	
2.	Nature of project	Commercial colony	
3.	RERA registered/not registered	157 of 2017 dated 28.08.2017	
		Valid up to	31.12.2020
4.	DTPC License no.	7 of 2008 dated 21.01.2008	152 of 2008 dated 30.07.2008
	Validity status	20.01.2022	01.08.2016
	Licensed area	2.8875 acres	13.55
	Name of licensee	Landmark Apartments Private Limited	Ananya Land Holdings
5.	Application dated	05.06.2018 [As per page no. 64 of the reply]	
6.	Allotment letter dated	22.06.2018 [As per page no. 86 of complaint]	
7.	Unit no.	Service apartment no. 1221 on 12 th floor [As per page no. 86 of complaint]	
8.	Unit area	672 sq. ft. (Super area) [As per page no. 86 of complaint]	

9.	Revised unit area	686.74 sq. ft. [Super area] [As per offer of possession on page no. 104 of complaint]
10.	Date of builder buyer agreement	Annexed but not executed
11.	Sale consideration	Rs. 67,64,389 (BSP) Rs. 72,45,107 (TSC) [As per SOA dated 11.10.2022 on page no. 89 of reply]
12.	Amount paid by the complainant	Rs. 40,37,538/- [As per SOA dated 11.10.2022 on page no. 90 of reply]
13.	Possession clause	Clause j of application form <i>The company shall subject to force majeure conditions proposes to handover possession of the unit on or before December 2022 notified by the Promoter to the Authority at the time of registration of the project under the Real estate (Regulation & Development) Act, 2016 and the Haryana Real Estate (Regulations & Developments Rules), 2017 and regulations made thereunder for completion of the Project or as may be further revised/approved by the Authorities.</i> (Page no. 70 of reply)
14.	Possession clause of unexcuted bba	Clause 5 of sample agreement <i>The Promoter shall abide by the time schedule for completing the project, handing over the possession of the unit to the allottee and the common areas to the association of allottees or the governmental authority, as the case may be ,as provided under rule 2(1)(f) of Rules 2017 by 31st December 2020 as disclosed at the time of registration of the project with the authority or such extended. As may be</i>

		<i>intimated and approved by authority from time to time the completion of the project shall mean grant of occupation certificate for the project.</i> And stated that possession shall always mean constructive possession. <i>(Page 118 of complaint)</i>	
15.	Due date of possession	December 2022 The due date of handing over of possession is calculated as per clause j of application form as the same is duly signed by both the parties.	
16.	Demand letter & their reminder letter dated	Before pre-termination letter dated	After pre-termination letter dated
		23.10.2020, 13.01.2021 [As per page no: 82 & 81 of reply]	18.03.2021, 06.05.2021, 21.05.2021 [As per page no. 83 , 85 & 86 of reply]
17.	Occupation certificate	28.09.2020 [As per page no. 96 of reply]	
18.	Offer of constructive possession	05.10.2020 [As per page no. 104 of complaint]	
19.	Assured return paid by the respondent	Rs. 2,15,726/- [As per assured return calculation sheet on page no. 112 of reply]	
20.	Pre-termination letter dated	16.01.2021 [As per page no. 102 of reply]	

B. Facts of the complaint:

3. That the complainant on various representations and assurances made by the respondent filled in the requisite booking application form for the unit in the project of the respondent on 06.06.2018. . The respondent raised a

demand for the booking of the unit, which was paid by the complainant subsequently, amounting to Rs. 5,00,000.00/- vide cheque no. 000056 dated 05.06.2018 of the said unit bearing no 1221 at "AIPL Joy Street" in Sector 66, Gurugram having super area measuring 686.74 sq. ft. to the respondent.

4. That the respondent illegally extracted money amounting to Rs. 40,37,537.00/- against a the total sale consideration of Rs. 81,06,278.00/- as per the payment plan given at the time of the allotment from the complainant by making false promises and statements in connection with the status of the construction. The complainant has made a payment of approximately 50% of the total consideration towards the total basic sale price, external development charges /infrastructure development charges, ibms/ifms, power backup, plc of the unit. The complainant opted for lump sum payment plan.
5. That the respondent issued a notice of offer of possession dated 05.10.2020 intimating the complainant to take constructive possession of unit no. 1221 admeasuring 686.74 sq. ft. (super built-up area) in the aforesaid project for a total sale consideration of Rs. 89,51,535.96/- including basic sale price, development charges etc. In the offer for possession, the respondent has mentioned that they will handover constructive possession and never physical possession and the respondent is asking the complainant to sign an indemnity bond stating that the complainant shall never seek physical possession of the unit and the respondent raised various demands that the complainant was not legally bound to pay.
6. That the complainant lost hope of getting physical possession of the unit and also her hard-earned money, as neither the agents of the respondent

nor the company itself were responding about the status or the date of the physical possession of the unit. The complainant contacted the respondent on several occasions and were regularly in touch with the respondent. The respondent was never able to give any satisfactory response to the complainant regarding the physical possession.

- a. That despite regular requests from the complainant the respondent has failed to execute the unit buyer's agreement. During the period, whenever the complainant went to the office of the respondent and requested the respondent to allow them to visit the site, they were denied saying that they do not permit any buyer/allottee to visit the site during construction period.
- b. That the respondent took an amount of Rs. 1,003/- for executing the buyer's agreement through cheque no. 202553 dated 07.11.2020 through the Agent Mr. Gajanand Bhardwaj. Thereafter, the respondent company, after such assurances, refused to execute the the buyer's agreement. The complainant visited the office of the respondent company again and again for execution of bba but to no avail. Further, the

respondent company sent a pre-termination letter dated 16.01.2021 regarding termination of the unit allotted to the complainant.

- c. That upon visiting the site, three months post the issuance of the offer of possession to the utter shock of the complainant the unit was in an inhabitable condition, and the basic layout had not been completed. The basic outer structure of the unit had been completed; however, the electricity and plumbing connections hadn't been put in place, the flooring and furnishing of the service apartment as per the brochure had not even begun. The subject unit was in a devastating condition.
- d. That the respondent agreed to pay an amount of Rs. 30,338.00 including all relevant taxes per month by the way of assured return to the Allottee from 26.06.2018 for the unit. However, the company has failed to make these payments on timely basis and on a myriad occasion citing frivolous reasons has simply not paid the complainant.

7. That the respondent issued a letter dated 30.01.2020 offering the complainant to enter into a special pre-payment incentive plan wherein against a total demand of Rs. 39,32,544.00/- by the complainant on partial or full payment would receive an incentive of 15% p.a on the pre-paid amount.
8. That the complainant contacted the respondent on several occasions and were regularly in touch with the respondent. The respondent was never able to give any satisfactory response to the complainant regarding the status of the signing of the buyers' agreement and the construction. However the respondent was never definite about the delivery of the possession. After months of endless visits, the respondent issues a letter intimating the complainant that the occupation certificate dated 28.09.2020 had been received for the project.
9. That the said offer of possession sent by the respondent to the complainant includes many demands which are not payable and the same are mentioned hereunder apart from the demand which has been raised which are illegal and unjustified.
10. The respondent has demanded a labor cess of Rs. 14,252.00 from the complainant. It is pertinent to note that this amount is unjustified and illegal and therefore not payable by the complainant to the respondent. The respondent has stated in annexure 8 of the respondent's offer of possession that, 12 months of common area maintenance charges amounting to Rs. 82,655.00/- is not payable by the complainant, which ought to be removed from the offer of possession. The respondent has raised an unjust and illegal demand of the sinking fund amounting to Rs. 1,21,553.00/- against the complainant, which the company has no legal right to ask for.

11. That the respondent has asked unfair and unjust demands of funds made in additional charges on offer of possession. Apart from the above, the following charges levied by you are not a part of the original agreement as provided to the allottees placed in similar conditions and hence were not payable at all, and the same must be remitted to the complainant

- Electrical Switch in Charges Station and Deposit Charges- Rs. 86,761.00
- Sewage/Storm Water/Water Connection-Rs.9,724.00
- Infrastructure Augmentation Charge of Rs. 12,537.00
- Electrical Meter Charges- Rs 9,440.00
- Registration charge of Rs.8,103.00
- Multi Dwelling Unit Charges: Rs.1440.00
- Access Control Charges: Rs.10,883,00
- Software Installation Charges: 8103.00
- Working Capital : Rs. 1,71,685.00

12. That the complainant challenges the imposition of electrical switch in charges station and deposit charges, sewage/storm water/ water connection, electrical meter charges, infrastructure augmentation charges, registration charges and others as the same do not form a part of the total price as per the initial price agreed upon by the complainant at the time of paying the initial deposit for booking the unit. The company shall be entitled to charge the actual charges levied from the concerned departments and remove such charges from the "offer of possession".

13. That the complainant refuses to sign an indemnity bond which is purely one sided and is with the sole intention of taking all the rights away of the complainant. the complainant even sent the registration amount for registering the agreement to sell through Real Estate Agent of the complainant namely Gajanand Bhardwaj to the office of the respondent builder, but to no avail .It is further submitted that when the respondent builder was neither executing nor determining the date for execution of agreement to sell , then the complainant cannot be forced to pay the further consideration amount as per the payment plan.
14. That M/s Landmark Apartments Pvt. Ltd. filed a case under section 9 of the Arbitration and Conciliation Act, 1996 against M/s Advance India Projects Limited (hereinafter referred to as 'the respondent') on 08.10.2020, pertaining to which, M/s Landmark Apartments Pvt. Ltd. got a stay over the project namely AIPL Joy Street vide Order dated 08.10.2020 by the Hon'ble Court of Ms. Alka Malik, ADJ, Gurgaon District Court. It is further submitted that the said Hon'ble Court upon granting a stay to M/s Landmark Apartments Pvt. Ltd. against the respondent herein, bannered up a Court Order/Public Notice for the said stay on the project.
15. That It is further submitted that when there was a stay over the project of the respondent builder, then how can the complainant make the payment of hard earned money for rest of the sale consideration in the particular project, thereafter, the said order was further appealed before the Hon'ble High Court of Punjab and Haryana and the decision by the Hon'ble High Court of Punjab and Haryana was passed on 25.05.2021, due to which there were no further constructions were going on in the project of the respondent builder and the respondent was not able to handover

constructive possession of the said unit in question, in lieu of which, the complainant never paid any further amount towards the sale consideration as per the payment plan.

16. That it is further submitted the respondent builder not being in state of asking for more money from any of the allottees as the project in question was on stay by the Hon'ble High Court of Punjab and Haryana, but the respondent was regularly sending demand letters and reminders to the complainant asking for payment of further dues towards the total sale consideration. It is further submitted that the respondent sent a Pre-Termination Letter dated 16.01.2021, which was a threat for the complainant herein to cancel the allotment of the said unit in question and deduct the earnest money of the complainant. It is pertinent to note here that the respondent was not in a position to demand further sale consideration as the respondent's project was having a stay over the property and the complainant, being a layman, never had the intention to delay the payment towards the sale consideration, but seeing the present scenario of the respondent at that point of time, the complainant was never assured for getting execution of the agreement or the conveyance deed in her favor.
17. That the complainant filed a complaint before the Hon'ble Haryana Real Estate Regulatory Authority in June, 2021 asking for assured return of the amount not paid, which was further withdrawn by the said complainant on 29.09.2021 analysing the present scenario of the project of the respondent company. It is further submitted that when there was a stay going on against the project of the respondent builder, thereafter, the respondent did

not have the power to handover the constructive possession of the unit or execute conveyance deed of the unit in favor of the complainant.

18. That the present complaint sets out the various deficiencies in services unfair and/or restrictive trade practices adopted by the respondent in sale of their units and the provisions allied to it.
19. That the deceptive practice of claiming the completion of superstructure by the respondent amounts to deficiency in service, and further, the said is expected to delay the ultimate construction and completion of the present unit which is an additional reason why the complainant seeks to get refund of the amount paid to the respondent along with interest.
20. Written submission have been filed to prove the contention and the same have been taken on record and perused.

C. Relief sought by the complainant:

21. The complainant has sought following relief(s):
 - a) Direct the respondent to refund the total amount paid to them to Rs. 40,37,538/- along with interest.

D. Reply by respondent:

The respondent by way of written reply made the following submissions:

22. That the complainant is not an "Allottee" but an investor who has booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. The complainant had approached the respondent and expressed an interest in booking an apartment in the commercial colony developed by the respondent and booked the unit in question, bearing number 1221, 12th floor admeasuring 672 sq. ft. situated

in the project developed by the respondent, known as "AIPL Joy Street" at Sector 65, Gurugram, Haryana. Thereafter the complainant vide application form applied to the respondent for provisional form applied to the respondent for provisional allotment of a unit bearing number 1221, 12th floor in the project.

23. That in the present case, the complainant purchased the unit only on the categorical understanding that the unit shall not be for physical possession and the unit in question was not for self-occupation and only for leasing to third parties, which was made clear to the complainant at the time of booking itself and the same is mentioned in clause k of the application form. Pursuant to the execution of the application form, the respondent had no reason to suspect the bonafide of the complainant and the allotment letter dated 22.06.2018 was issued to the complainant.
24. That thereafter, the respondent shared the agreement to sell to be executed by the complainant, which was not signed by the complainant, a copy of which is annexed by the complainant himself. It is relevant to submit that as per Clause 7.1 of the agreement to sell, states the allottee agrees that wherever the reference is made for possession of the said unit in this agreement, it shall always mean constructive/symbolic/notional possession of the said unit and not the physical possession of the said unit to the allottee. It is relevant to submit that as per RERA Rules, the said agreement to sell was to be registered and accordingly, the respondent had called upon the complainant to submit the registration charges and come forward for the execution of the agreement to sell, however, after remitting the cheque for the registration, the complainant never came forward for the execution of the agreement to sell.

25. That it is pertinent to note that as per clause h of the application form, if there is any delay in payment of outstanding dues to the company, then the delay may result in levy of interest or cancellation/termination of allotment letter and forfeiture of the earnest money. That in the present case, the complainant failed to abide by the terms and conditions of the agreement and defaulted in remitting timely installments. The respondent was constrained to issue payment reminder letters to the complainant. The respondent had categorically notified the complainant that she had defaulted in remittance of the amounts due and payable by her. It was further conveyed by the respondent to the complainant that in the event of failure to remit the amounts mentioned in the said notice, the respondent would be constrained to cancel the provisional allotment of the unit in question.
26. That as per clause J of the application form, the company shall subject to force majeure conditions proposes to handover possession of the unit on or before December, 2022 notified by the promoter to the Authority at the time of registration of the project. The project underwent a change/modification and upon the same being done, objections/suggestions for approval of building plans were invited from the complainant on 16.11.2019, to which the complainant had given his consent and no objection. The respondent was miserably affected by the ban on construction activities, orders by the NGT and EPCA, demobilization of labour, etc being circumstances beyond the control of the respondent and force majeure circumstances, that the construction was severely affected during this period and the same was rightfully intimated to the complainant by the letter dated 30.11.2019.

27. That it is pertinent to highlight that the arrangement between the parties was to transfer the constructive possession of the unit and the same was categorically agreed between the parties in the application form and the no protest in this regard had ever been raised by the complainant and the same was willingly and voluntarily accepted by the complainant. That the leasing arrangement furthers the constructive possession of the unit. The respondent vide its letter dated 27.08.2019, intimated the complainant that it had entered into a cooperative agreement dated 25.05.2016 with JNB Management and Bridgestreet Accommodation London Limited for operation and management of serviced apartments. It may be necessary to point out that due to the lapses on the part of the complainant to make the outstanding dues towards the possession, has caused severe prejudice to the respondent as, the unit in question could have generated valuable returns not only for the respondent but for the complainant as well.
28. That it is further submitted that despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. The respondent had applied for occupation certificate on 16.07.2020 and was thereafter issued in favour of the respondent dated 28.09.2020.
29. That the complainant was offered possession of the unit in question through letter of offer of possession dated 05.10.2020. The complainant was called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to the complainant. The respondent earnestly requested the complainant to obtain possession of the unit in question and to further complete all the formalities regarding

delivery of possession. However, the complainant did not pay any heed to the legitimate, just and fair requests of the respondent and threatened the respondent with institution of unwarranted litigation. The complainant has consciously and maliciously refrained from obtaining possession of the unit in question.

30. That it is the obligation of the complainant under the Act to take the constructive possession of the allotment within two months of occupancy certificate after completion of all formalities including the payment of outstanding dues, as per the notice of offer of possession. It is submitted that despite giving numerous opportunities to the complainant, it as a last resort, once again issued a pre-termination letter dated 16.01.2021 thereby requesting the complainant to clear her outstanding dues and complete all necessary formalities as per the terms and conditions of the buyer's agreement, but on the contrary, the complainant evidently ignored all the requests of the respondent and continued to be in default of payment of dues and taking possession. On the contrary, it is the complainant who is in clear breach of the terms of the application form by not remitting the outstanding amount of the said unit in question within the stipulated time and by not coming forward to take the possession of the said unit in question. The respondent has duly fulfilled its obligations.
31. That the demands made by the respondent were all according to the buyer's agreement. The complainant never made a request for cancellation ever prior to the filing of the present complaint. If in the present case the refund is allowed, the assured returns as paid by the respondent are liable to be adjusted against the refund amount.
32. Written submission have been filed to prove the contention and the same

have been taken on record and perused.

33. 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 those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

34. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the

allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

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

36. 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.
37. 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."

38. 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. Objection regarding maintainability of complaint on account of complainant being investor.

39. The respondent took a stand that the complainant is investor and not consumers and therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. However, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the allotment letter, it is revealed that the complainant is buyer's, and he has paid a total price of Rs.40,37,538/- to the promoter towards purchase of a unit in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the

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

40. In view of the above-mentioned definition of "allottee" it is crystal clear that the complainant are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred to in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of the "investor". Thus, the contention of the promoter that the allottee being investor are not entitled to protection of this Act also stands rejected.

G. Entitlement of the complainant for refund:

G.I Direct the respondent to refund the total amount paid to them to Rs. 40,37,538/- along with interest.

41. The complainant booked a unit in the project of the respondent for a basic price of Rs. 67,64,389/- against which the complainant paid sum of Rs. 40,37,538/-. No buyer's agreement was executed between the parties. An application form was placed on record dated 05.06.2018. As per clause j of the application form the respondent has to handover the possession of the unit on or before December 2022. Therefore the due date as per clause j of the application form comes out to be December 2022.
42. The occupation certificate was obtained by the respondent on 28.09.2020. The respondent has offered the possession on 05.10.2020 to the complainant. The complainant stated that the respondent has offered constructive possession. The respondent stated that the complainant purchased the unit which shall not be for physical possession and the unit in question was not for self-occupation and only for leasing to third parties

, which was made clear to the complainant at the time of booking itself and the same is mentioned in clause k of the application form..

43. The respondent has also sent numerous reminder letter and pre termination letter to the complainant for the amount due on the part of the complainant. However no cancellation was done by the respondent. The respondent has also paid assured return to the complainant of Rs. 2, 15,726 which is evident from page no. 112 of reply.
44. The section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and, the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.
45. The due date of possession as per application form is December 2022. The allottee in this case has filed this application/complaint on 04.07.2022 after constructive possession of the unit was offered to them on 05.10.2020. As per the section 19(10) every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building , as the case may be. In the present case, the complainants did not take the possession as they had objection to completion of the unit as well as demands which were raised by the respondent. It is pertinent to mention here that the allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made and demand for due payment was raised, then only ,

he filed a complaint before the authority.

46. The right under section 18(1)/19(4) accrues to the allottees on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottees have not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to them, it impliedly means that the allottees tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money they have paid to the promoter is protected accordingly and the same was upheld by in the judgement of the Hon'ble Supreme Court of India in the cases of *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*

(supra) reiterated in case of *M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*, it was observed:

"25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the

agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed"

47. 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. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure 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. But the complainant-allottee failed to exercise his right although it is unqualified one. The complainant has to demand and make his intentions clear that he wishes to withdraw from the project. Rather tacitly wished to continue with the project and thus made himself entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund

if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

48. The authority has observed that the respondent-builder has intimated for the possession of the unit on 05.10.2020 respectively, after obtaining occupation certificate on 28.09.2020 but the complainant wants to surrender the unit and refund the amount paid by him . Keeping in view the aforesaid circumstances, that the respondent builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, and judgment of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.202***, it is concluded that if allottees still want to withdraw from the project, the paid-up amount shall be refunded after deduction as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral

manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer”

49. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.40,37,538/- after deducting 10% of the sale consideration being earnest money along with an interest @ 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 on the refundable amount, from the date of filing of this complaint i.e., 04.07.2022 till its realization.

50. The amount paid on account of assured return shall be adjusted from the amount to be paid to the complainant.

G. Directions of the Authority:


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


- i) The respondent is directed to refund the paid-up amount of Rs.40,37,538/- after deducting 10% of the sale consideration being earnest money along with an interest @ 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 on the refundable amount, from the date of filing of this complaint i.e., 04.07.2022 till its realization.

- ii) The amount paid on account of assured return shall be adjusted from the amount to be paid to the complainant.
- 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.

52. Complaint stands disposed of.

53. File be consigned to the registry.


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member


(Arun Kumar)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.02.2024