

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

Complaint no.: 3329 of 2021
Date of filing: 18.08.2021
Order pronounced on: 24.10.2024

JYOTSNA KUMAR

R/o: - 251, Celestial Heights plot no.1A, Sector 2,
Dwarka

Complainant

Versus

M/s Ramprastha Promoters and Developers
Private Limited
Regd. Office at: C-10, C Block, Market, Vasant
Vihar, New Delhi- 110057

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Sanjeev Thakur (Advocate)

Shri Mohd. Imran (Advocate)

Complainant
Respondent

ORDER

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

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A. Unit and project related details

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

S. No.	Particulars	Details
1.	Name of the project	"Rise", Sector- 37 D, Gurugram.
2.	Project area	60.5112 acres
3.	Nature of the project	Group Housing
4.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid till 18.02.2025
5.	Name of licensee	Ramsprastha Builders Pvt. Ltd. and 13 others
6.	RERA Registered/ not registered	Registered vide no. 278 of 2017 dated 09.10.2017 valid up to 30.06.2019
7.	Unit no.	1602, 16 th Floor, Tower-C (As per page no. 18 of the complaint)
8.	Area admeasuring	1765 sq. ft. (Super Area) (As per page no. 18 of the complaint)
9.	Allotment letter in the name of original allottee	09.04.2012 (As per page no. 46 of the complaint)
10.	Builder buyer agreement b/w Dharam Vir Bharti and respondent	14.09.2012 (page 199 of complaint)
11.	Agreement to sell b/w Dharam Vir Bharti (original allottee) and Jyotsana Kumar (subsequent allottee)	10.08.2014 (As per page no. 18 of the complaint)
12.	No objection certificate by respondent to State Bank of India for transfer of unit in favor of the complainant i.e. Jyotsana Kumar	13.09.2014 (page no. 28 of the complaint)
13.	Possession clause	15. POSSESSION <i>Time of handing over the possession - Subject to terms of this clause and subject to the allottee having complied with all the terms and conditions of this agreement and the application, and not being in default under any of the provisions of this agreement and</i>

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		<i>compliance with all provisions, formalities, documentation etc. as prescribed by the developers, the developers propose to hand over the possession of the apartment by September 2015. The allottee shall agree and understands that the developers shall be entitled to a grace period of hundred and twenty (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.</i> (As per page no. 207 of the complaint)
14.	Due date of possession	30.09.2015 (As mentioned in the possession clause of agreement)
15.	Total sale consideration	Rs.83,21,925/- (page no. 89 of the complaint)
16.	Amount paid by the complainant	Rs.64,04,165/- (as per the demand letter cum invoice dated 08.07.2015 submitted by complainant page 80 of complaint)
17.	Occupation certificate /Completion certificate	Not obtained
18.	Offer of possession	Not offered

B. Facts of the complaint.

3. The complainant has made the following submissions: -

- a) That in 2013 the respondent advertised their project called Ramprastha Rise, Sector-37 D, Gurugram showing the construction, quality of the building and infrastructure to be a world class residential. Further, the respondent specifically stated that the possession of the unit will be delivered within the 36 months of signing of the builder buyer agreement along with the amenities, infrastructure complete in all respects.
- b) That the property dealer/agent hired by the respondent for marketing the project approached the complainants for booking a unit in the said project showing a rosy picture.
- c) That the complainant being lured by the advertisement and assurance of the respondent were induced to be a part of the respondent's project.

- d) That the complainant booked a unit on 09.04.2012 by making payment of Rs.60,04,165/- by way of cheques in favor of the respondent. Thereafter, a builder buyer agreement was executed between the parties on 09.04.2012 and were allotted a unit no. C-1602, tower-C with an assurance that the respondent will deliver the unit within a time.
- e) Thereafter, the complainant started paying the amount of instalments as per the demand of the respondent on time and the respondent received the same from to time accordingly while assuring the timely delivery of possession which fell due on 2017 but never delivered. The respondent had been miserably failed to handover the possession of the subject unit to the complainant despite there being inordinate delay of more than 8 years form the due date.
- f) That the complainant has come to know that the respondent has used an inferior quality of material in construction of the building /unit as against their agreement of providing a luxury product when they inspected the similar properties in the tower.
- g) That a letter dated 04.06.2019 was speed post to the respondent, but no response in any manner was received by the complainant till date. Further, when the complainant met with the officials of the respondent they instead of completing the project and unit of the complainant as per their promise started extending false assurances and without any basis despite knowing well that the project is not yet complete and the respondent are not in position to handover the unit of the complainant complete in all respects as per promises and builder buyer agreement.
- h) That the complainant has been punctual in making payment of the instalments in due time and the respondent continued to accept money from the complainant without any intention to deliver the possession from the beginning.

- i) That the respondent after receiving the substantial amount of Rs.60,04,165/- has failed to handover the possession of the unit in question which is yet not completed.
- j) That the complainant and many other people have invested their hard-earned money with hope of having a residential flat, which they could use for their personal use, but now they are left with nowhere to go except approaching the Authority.
- k) That the Act of the respondent in deliberately inducing complainant is part way with their life's saving and cheat them based upon false documents amount to an act of fraud and cheating. The modus operandi of the respondent has caused tremendous financial pressure upon the complainant herein for which the complainant is entitled to be reimbursed forthwith as well as for the mental agony caused to the complainant by the acts, omissions and mala fide conduct on the part of the respondent.
- l) That the act conduct of the respondent has resulted in wrongful loss to the complainant and wrongful gain to the respondent. Thae Act of taking hard earned money from the complainants and not making delivery of the aforesaid flat after passing of 3 years from the date of possession wilfully and knowingly amounts to an act of fraud and deliberate delay for which respondent is solely liable to pay damages also.

C. Relief sought by the complainants.

4. That the complainant filed an application for amendment in relief on 19.03.2024 seeking refund of the paid-up amount against the subject unit. The same was heard on 24.10.2024 and counsel for the respondent submitted that it has no objection towards amendment in relief. In view of above, said application was allowed vide proceedings dated 24.10.2024.
5. The complainant has sought following relief through application for amendment in relief dated 19.03.2024:

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- i. Direct the respondent to refund the total amount paid by the complainant along with the prescribed rate of interest.

D. Reply by the respondent.

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

- a) That the complaint filed by the complainant is not maintainable and the Authority has no jurisdiction whatsoever to entertain the present complaint due to lack of cause of action.
- b) That the present complaint has been filed by the complainant against booking of a 3 BHK Unit bearing Unit no. C-1602, 16th floor admeasuring 1765 sq. ft. in project "THE RISE".
- c) That there is no default on the part of the respondent since the date of possession stands extended till 31.12.2023 in accordance with the terms of the agreement.
- d) That the delay in delivering the possession of the apartment to the complainant has attributed solely because of the reasons beyond control of the respondent.
- e) Further as per clause 15 (a) of the agreement shall not be read in isolation but have to be read in light of other clauses of agreement. Clause 15(a) of the agreement is subject to clause 31 of the agreement. Clause 15(a) stipulates the time for handing over of the possession which is subject to force majeure circumstances which clearly indicate the nature of agreement entered into between the parties whereby, the stipulated date of delivery is not a strict and final date but merely a tentative date which is further subject to several factors involved.
- f) That the date of possession shall get extended automatically on account of delay caused due to reasons which are beyond the control of the developers/respondent. Further, the contingency of delay in handing over the apartment within the stipulated time was within the contemplation of the parties at the time of executing the agreement as the parties had

agreed vide clause 17(a) that in the eventuality of delay in handing over possession beyond the period stipulated in clause 15(a) of the agreement, the allottee will be compensated with Rs 5/- per sq. ft. per month of super area. This part of compensation was specifically consented to and was never objected at any earlier stage, not while signing the agreement or any time after that.

- g) That the delay has occurred only due to unforeseeable and uncontrollable circumstances which despite of best efforts of the respondent hindered the progress of construction, meeting the agreed construction schedule resulting into unintended delay in timely delivery of possession of the apartment for which the respondent cannot be held accountable. However, the complainant despite having knowledge of happening of such force majeure eventualities and despite agreeing to extension of time in case the delay has occurred as a result of such eventualities has filed this frivolous, tainted and misconceived complaint in order to harass it with a wrongful intention to extract monies.
- h) That the said terms and conditions of the agreement were executed only after mutual discussion and decision and agreement of both the parties and in such a case, one party cannot withdraw itself from the foundation of the agreement. That once the said agreement was duly signed and accepted by the both the parties which contains detailed terms and conditions the parties are obligated to abide by it and either of parties cannot divert itself from the obligation of performance of their parts manifested in the agreement on its own whims and fancies and as per their own convenience. The performance and non-performance of the agreement affects both the parties equally and sometimes one party is at a greater disadvantage when one party abstains from performance of its part.

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- i) That it is the respondent who is incurring higher expenses due to escalation in the cost of project due to time overrun. The respondent has utilized all the resources towards completion of the project and no monies were diverted by it towards any other project as falsely alleged by him. That the respondent has strived at its best to battle the obstacles so that the delivery of the possession be made as soon as possible despite of the several unforeseeable hindrances mentioned herein below posed, since customer satisfaction has always been pivotal and a priority to the respondents. Despite the best efforts by the respondent to hand over timely possession of the said flat booked by the complainant, the respondents could not do so due to reasons and circumstances beyond its control. It was only on account of the following reasons/circumstances that the project got delayed and timely possession could not be handed over to the complainants.
- j) That the project faced various roadblocks and hindrances including approvals from different authorities which were beyond the control of the respondent and which in turn lead to unforeseeable delay in the construction/completion of the project and hence handing over of the possession of the flat to the complainant.
- k) In addition to the above, active implementation by the Government of alluring and promising social schemes like National Rural Employment Guarantee Act ("NREGA") and Jawaharlal Nehru National Urban Renewal Mission ("JNNURM"), further led to sudden shortage of labour/ workforce in the real estate market as the available labour were tempted to return to their respective states due to the guaranteed employment under the said NREGA and JNNURM Schemes. The said factor further created a vacuum and shortage of labour force in the NCR region. Large numbers of real estate projects, including the present project of the opposite party herein,

were struggling hard to cope with their construction schedules, but all in vain.

- l) That the respondent faced extreme water shortage, which was completely unforeseen by any of the Real Estate Companies, including the respondent, in the NCR region. The respondent, who was already trying hard to cope up with the shortage of labour, as mentioned above, was now also faced with the acute shortage of water in the NCR region. The said factor of shortage of water directly affected the construction of the project at the site. To make the conditions worse, the Hon'ble High Court of Punjab and Haryana vide Order dated 16.07.2012 restrained the usage of ground water and directed to use only treated water from available Sewerage Treatment Plants (hereinafter referred to as "STP"). As the availability of STP, basic infrastructure and availability of water from STP was very limited in comparison to the requirement of water in the ongoing constructions activities in Gurugram District, it became difficult to timely complete the construction activities as per the schedule. The availability of treated water to be used at construction site was very limited and against the total requirement of water only 10-15% of required quantity was available at construction sites. In furtherance to the directions of Hon'ble High Court of Punjab and Haryana, the Opposite Party received a Letter bearing memo no 2524 dated 01.09.2012 from the Deputy Commissioner, Gurugram, Haryana, informing to it about the complete ban on the use of underground water for construction purposes and use of only recycled water being permitted for the said purposes.
- m) That the respondent neither had any control over the said directions/orders from the Hon'ble High Court nor had any control over the shortage of water in the NCR region, which in turn led to the delay in

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

- n) In addition to the above, there has been a heavy shortage of supply of construction material i.e. river sand and bricks etc. through out of Haryana, pursuant to order of Hon'ble Supreme Court of India in the case Deepak Kumar etc. v. State of Haryana (I.A. No. 12-13 of 2011 in SLPs (C) nos. 19628-29 of 2009 with SLPs (C) No. 729-731/2011, 21833/2009, 12498-499/2010, SLP(C) CC... 16157/2011 & CC 18235/2011 dated 27 February 2012) and correspondingly, the construction progress slackened. This also caused considerable increase in cost of materials. It is noteworthy that while multiple project developers passed on such incremental costs attributable to the above reasons to the buyers, the management of the respondent assured its customers that it will not and has held fast on its promise by not passing on any of such costs to the buyers.
- o) That the complainant does not qualify as a "Consumer" under the Consumer Protection Act, 2019, as their primary intention was to invest in a futuristic project of the respondent for potential future profits, rather than for personal use or residence. The uncertainties surrounding the project's completion date were known to the complainant, and there was no fixed date for possession. The complainant's objective was purely commercial, aiming to benefit from a rise in property value. Given the current downturn in the real estate market, the complainant is now attempting to exit the project by filing this complaint, which should be dismissed as it lacks merit.
- p) That the complainant, being fully aware of the speculative nature of their investment, chose to engage with a project that was not ready for immediate possession. The complainant never intended to use the

apartment for personal residence but solely for profit-making. The complainant's failure to disclose their property transactions further supports the claim that their motives were commercial. The investment was made at their request for a futuristic project, and now they are unfairly shifting the burden onto the Respondent due to unfavorable market conditions.

- q) That the Real Estate (Regulation and Development) Act aims to protect genuine consumers in the real estate sector, not investors. The complainant, being an investor, does not meet the criteria of a "Consumer" under the Consumer Protection Act, 1986, which should be referenced for clarity. The complainant has deliberately concealed their commercial intent and has not approached the Authority with clean hands. Thus, the complaint is not maintainable under RERA, as upheld by the Hon'ble National Consumer Disputes Redressal Commission. The complainant is an investor, not a genuine consumer, and the complaint should be dismissed.
- r) That the complainants' request for 18% p.a. interest on their deposits is not legally maintainable and should be dismissed. The Agreement specifies the compensation for delays, as well as penalties for the complainants if they fail to take possession after the offer. The complainants cannot exceed the terms of the agreement and demand inflated interest. The agreement binds both parties to act fairly, and the complainants' demand for exaggerated interest reflects an attempt to exploit the situation to the detriment of the respondent and other allottees.
- s) That despite the significant rise in property and construction costs, the respondent has not demanded additional payments from the complainant. The complainant is already benefiting from the appreciated value of the flat and cannot claim both this benefit and 18% p.a. interest. The compensation due to the complainant, if any, must be in line with the

agreement, and they have failed to provide evidence of any hardships caused by the delay.

- t) That, in practice, few allottees pay 18% p.a. interest, as most follow a construction-linked payment plan. The rate mentioned is intended to ensure timely payments, though often waived, as in this case. Additionally, home loans typically have interest rates of 10-12% p.a., making it unreasonable for builders to charge equivalent or lower rates, which would otherwise incentivize delayed payments.
- u) The delay in possession is solely attributable to regulatory hurdles, including delays in layout approvals by the Town and Country Planning Department, which are beyond the respondent's control. The complaint should be dismissed as it raises issues outside the Tribunal's jurisdiction, such as zoning plan approvals. The complainants were aware of the investment's speculative nature and associated risks. Additionally, delays in project registration under RERA were due to governmental processes, such as zoning approvals and other unforeseen circumstances, including force majeure events like the COVID-19 pandemic, further hindering timely project completion. Moreover, the complainants' demand for excessive interest is unfounded and contradicts Section 74 of the Indian Contract Act, 1872, which limits compensation to the amount stipulated in the contract.
- v) That on 06.11.2019, the Honourable Finance Minister announced the establishment of the SWAMIH (Special Window for Funding Stalled Affordable and Middle-Income Housing Project) Investment Fund to provide priority debt financing for completing stalled housing projects. This initiative is designed for brownfield, RERA-registered residential developments that are net-worth positive and require last-mile funding to complete construction. The Union Cabinet approved an Alternative

Investment Fund (AIF) of Rs. 25,000 Crores, sponsored by the Department of Economic Affairs, Ministry of Finance, with a corpus of Rs. 12,500 Crores and a green-shoe option of another Rs. 12,500 Crores. The fund is managed by SBI Caps Ventures, with contributions from the Ministry of Finance, LIC, and SBI, among others.

- w) The SWAMIH Fund aims to address the risks associated with stalled projects by providing necessary funding without imposing additional financial burdens on homebuyers. This initiative benefits developers, homebuyers, and financial institutions by ensuring project completion and minimizing economic risks. The respondent has applied for and been deemed eligible for funding under the SWAMIH Fund after meeting the required criteria, promising significant relief and project completion support for all stakeholders involved.
- x) That the respondent has been sanctioned a funding facility of approximately Rs. 296 Crores under the SWAMIH Fund for the completion of its stalled projects. Disbursement for the PRIMERA project was received in January 2021, and final disbursement for the RISE project is in progress. The SWAMIH Fund aims to ensure liquidity for completing construction, thus allowing homebuyers to receive their homes with all amenities, instead of projects falling into insolvency. However, any unplanned cash outflows, such as refunds or delay penalties to a small group of homebuyers, could significantly disrupt the liquidity and jeopardize the progress of these projects. The respondent has emphasized that maintaining continuous construction operations is crucial and that resources must be focused solely on project completion to avoid stalling the projects again.
- y) That the respondent has obtained consent from the majority of homebuyers to defer any claims for refunds or compensation until after

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possession is offered. This approach ensures that all resources are directed towards project completion, protecting the interests of the larger homebuyer group. The respondent has also expressed willingness to engage in an amicable dialogue with the complainants to align their interests with those of the broader group. They argue that individual claims for compensation at this stage would undermine the collective objective of project completion, potentially leading to irreparable harm to all stakeholders, including the government's efforts to revitalize the real estate sector through the SWAMIH Fund. The complainants are urged to consider the broader benefits of project completion and align their actions accordingly to support the collective interests of all homebuyers.

7. All other averments made in the complaint were denied in toto.
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.
9. It is pertinent to note that the present complaint was filed by the complainant against the unit allotted by Ramprastha Promoters and Developers Pvt. Ltd. in their project "Rise," Sector 37-D. However, the complainant inadvertently named Ramprastha Rise Pvt. Ltd. as a respondent in the complaint. Despite this, Ramprastha Promoters and Developers Pvt. Ltd. filed a reply to the complaint.
10. During the proceedings dated 24.10.2024, the complainant requested that M/s Ramprastha Promoters and Developers Pvt. Ltd. be considered the correct respondent. The counsel representing M/s Ramprastha Promoters and Developers Pvt. Ltd. raised no objection to the same and confirmed that this entity had collected the payment from the complainant for the subject unit. Therefore, they agreed to be considered as the respondent in the

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instant complaint. In view of the submissions and the documents on record, M/s Ramprastha Promoters and Developers Pvt. Ltd. was formally impleaded as the respondent in the present complaint.

E. Jurisdiction of the authority

11. 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.

12. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

13. 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.

14. 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.

15. 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.*" SCC Online SC 1044 decided on 11.11.2021 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."

16. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of *M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Finding on objections raised by the respondent

F.I. Objection regarding the complainant being investor.

17. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, she is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a

statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. 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."

18. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is allottee(s) as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

F.I. Objection regarding the force majeure.

19. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as delay on part of govt. authorities in granting approvals and other formalities, shortage of labour force in the NCR region, ban on the use of underground water for construction purposes, heavy shortage of supply of construction material etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 30.09.2015. Hence, events alleged by

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

20. In the present complaint, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 30.09.2015. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant.

G.I Direct the respondent to refund the total amount paid by the complainant along with the prescribed rate of interest.

21. That the former allottee i.e. Dharam Vir Bharti and Sudha Bharti, were allotted a unit no. 1602 on the 16th floor, tower - C in the respondent's project, "RISE," Sector 37D, Gurugram with a super area of 1765 sq. ft., for an agreed sale consideration of Rs.83,21,925/-, vide allotment letter dated 09.04.2012. Thereafter, a builder-buyer agreement was executed between the former allottee and the respondent on 14.09.2012 for the subject unit. The unit was later transferred to the complainant by the former allottee through an addendum to the agreement to sell dated 30.09.2014 followed by

a no objection certificate letter issued by the respondent in favor of State Bank of India expressing no objection towards the transfer of unit in favor of complainant. Further, upon perusal of the documents and pleadings made by the parties the Authority observes that the respondent has received Rs.64,04,165/- against the subject unit and till date no offer of possession has been made to the complainant.

22. Herein, through the instant complaint complainants intends to withdraw from the project and is seeking return of the amount paid by her in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

Section 18: - Return of amount and compensation

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

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

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

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

(Emphasis supplied).

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

15. POSSESSION

Time of handing over the possession - Subject to terms of this clause and subject to the allottee having complied with all the terms and conditions of this agreement and the application, and not being in default under any of the provisions of this agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the developers, the developers propose to hand over the possession of the apartment by September 2015. The allottee shall agree and understands that the developers shall be entitled to a

grace period of hundred and twenty (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.

24. 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 favor of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

25. **Due date of possession:** The promoter has proposed to hand over the possession of the apartment by 30.09.2015 and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by it in the apartment buyer's agreement. Even with the allowance of the grace period and the recalculation of the due date for possession, it will not impact the current situation, wherein the respondent has failed to obtain the occupation certificate from the competent authority till date. As per the settled law one cannot be

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allowed to take advantage of his own wrong. Accordingly, allowance of the said grace period of 120 days cannot be allowed to the promoter at this stage.

26. Admissibility of refund along with prescribed rate of interest: The complainant/allottee intends to withdraw from the project and is seeking refund of the amount paid by her 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.

27. 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.

28. 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., 24.10.2024 is 9.10%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11.10%.

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

A 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;"*

30. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 15(a) of the agreement dated, the possession of the subject unit was to be delivered by 30.09.2015, whereas the same has not been offered till date.
31. Keeping in view the fact that the complainant/allottee wishes to withdraw from the project and is demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein, the matter is covered under section 18(1) of the Act of 2016.
32. The authority has further, observes that even after a passage of more than 9 years 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 her and for which she has paid a considerable amount i.e. Rs64,04,165/- towards the sale consideration. Further, the authority observes that there is no document place on record from which it can be

ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. Moreover, vide proceedings dated 24.10.2024, the counsel for the respondent stated at bar that occupation certificate in respect of the tower of the subject unit has not been obtained yet from the competent Authority. In view of the above-mentioned fact, the allottees intend to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.

33. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which she has paid a considerable amount towards the sale consideration
34. 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."

35. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and

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

36. 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 for refund of the entire amount paid by her at the prescribed rate of interest i.e., @11.10% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the Authority

37. 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):

1. The respondent/promoter is directed to refund the entire amount i.e Rs. 64,04,165/- paid by the complainant along with prescribed rate of interest @11.10% p.a. from the date of each payment till the actual date of refund of the deposited amount as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.



- II. A period of 90 days is given to the respondent to comply with the directions given in this order, failing which legal consequences would follow.
- III. The respondent is further directed to not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainant and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottees-complainant.

38. Complaint stands disposed of.

39. File be consigned to registry.

Dated: 24.10.2024



(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory
Authority, Gurugram

HARERA
GURUGRAM