

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

Complaint no. : 4202 of 2023
Date of complaint : 03.10.2023
Date of order : 11.09.2024

Rahul Khosla,
R/o: - B-1403, BPTP Freedom Park Life,
Sector-57, Gurgaon-122001.

Complainant

Versus

M/s Orris Infrastructure Private Limited.
Regd. Office at: C-3/260, Janakpuri,
New Delhi-110058.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Dhiraj Kumar (Advocate)
Charu Rustagi (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 provisions 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 unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

| Sr. No. | Particulars | Details |
|---------|--------------------------------------|--|
| 1. | Name of the project | Floreal Towers, Sector 83, Gurugram, Haryana |
| 2. | Project area | 9.052 acres |
| 3. | Nature of the project | Commercial colony |
| 4. | DTCP license no. | 260 of 2007 dated 14.11.2007 |
| | License valid till | 13.11.2024 |
| | Licensed area | 9.05 acres |
| | License holder | M/s Seriatim Land & Housing Pvt.Ltd. |
| 5. | HRERA registered/ not registered | Not registered |
| 6. | Assured return agreement executed on | 23.11.2007 [Page 14 of complaint] |
| 8. | Assured Return clause | <p>3. That a committed return/interest of Rs. 65/- per sq. ft. per month amounting in all to Rs. 32,500/- (Rupees Thirty Two Thousand Five Hundred Only) shall be paid by the Developer to the purchaser from 1st December, 2007 to 31st July, 2009. Towards this, PDCs for specific amount (net of TDS) shall be issued in favour of the Purchaser for the entire period of construction, which is estimated at 20 months from 1st December, 2007.</p> <p>4. Return on completion of the project and letting out of space That on the completion of project, the space would be let-out by the Developer at his own cost to a recognized lessee which would bring a minimum rental of Rs.65/- per sqft. per month amounting in all to Rs32,500/-less income tax at source. In the event of the Developer being unable to finalise the lease arrangements, it shall pay the minimum rent at Rs 65/- per sq.ft. to the Purchaser as Minimum Guaranteed Rent for the first 36 months after completion of the</p> |

| | | |
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| | | <p>building or till the date the said flat/space is put on lease, whichever is earlier. If on account of any reason, the lease rent achieved is less than Rs 65/-per sq.ft. per month of the super area then the Developer shall return to the Allottee, a compensation calculated at Rs. 109/-for every one rupee drop in the lease rental below @ 65/- per sq.ft. Per month. If the lease rent exceeds Rs. 65/-per sq.ft., per month, the Allottee shall pay to the Developer such additional consideration will be calculated at 50% of Rs. 109/- per sq. ft. for every one rupee increase in the lease rental .It is further clarified that the Developer shall issue a demand notice for the same and the Allottee shall have to make the payment as mentioned, within 90 days of receipt of the demand notice and upon payment of the additional sale consideration as described above, the benefit of the entire enhanced rental shall accrue to the Allottee.</p> <p>[Page 15-16 of complaint]</p> |
| 9. | Unit no. | 430, 4 th Floor, Tower-B (pg. 24 of complaint) |
| 10. | Unit admeasuring | 500 sq. ft. (super area) (page 24 of complaint) |
| 11. | Space buyer agreement executed between complainant and respondent | 02.04.2009 (pg. 21 of complaint) |
| 12. | Possession clause | <p>10.1 Schedule for Possession of the said Unit</p> <p>The company based on its present plans and estimates and subject to all just exceptions. contemplates to complete construction of the said Building / said Unit within the period period of 36 months from the date of execution of the Space Buyer Agreement by the Company or Sanction of Plans or Commencement of Construction whichever is later, unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1). (11.2). (11.3) and Clause</p> |

| | | |
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| | | <p>(38) or due to failure of Allottee(s) to pay in time the price of the said Unit along with all other charges and dues in accordance with the schedule of payments given in Annexure I or as per the demands raised by the Company from time to time or any failure on the part of the Allottee (5) to abide by any terms or conditions of this Space Buyer Agreement. (pg. 37 of complaint)</p> |
| 13. | Date of sanction of building plans | Not on record |
| 14. | Date of commencement of construction | Not on record |
| 13. | Due date of possession | 02.04.2012 (calculated as 36 months from the date of buyer's agreement) |
| 14. | Total consideration as per BBA at page 26 of complaint | Rs.27,24,000/- |
| 15. | Amount paid by the complainant as per statement of account dated 06.04.2018 at page 22 of reply | Rs.27,24,000/- |
| 16. | Assured return paid from December 2007 to December 2016 as per page 11 of reply | Rs.35,42,500/- |
| 17. | Occupation certificate | 16.08.2017 [Only till floor 2 of tower B Ground floor to 18 th floor of tower A] [page 18 of reply] |
| 18. | Offer of constructive possession | 06.04.2018 (page 20 of reply) |
| 19. | Unit shifting letter from tower B to tower A being an unintentional error/mistake | 02.07.2018 (page 24 of reply) (As per said clarification, the unit of the complainant is in Tower-A) |

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That the complainant was allotted a commercial unit bearing no. 430, admeasuring approx. 500 sq. ft. located at Tower no. B in the project of the respondent named "Floreal Towers" at Sector-83, Gurugram.
- II. That the possession of the said unit was to be handed over to the complainant within 36 months from the date of execution of space buyer agreement with all amenities as promised by the respondent.
- III. That the complainant applied and deposited 100% consideration amount as booking of Rs.27,24,000/- to the respondent against the said unit in the year of Nov 2007 under the assured return plan.
- IV. That the respondent vide assured return agreement/MoU dated 23.11.2007 made a commitment to the complainant that an assured return of Rs.65/-per sq. ft. per month amounting to Rs. 32,500/- shall be paid to him starting from 01.12.2007 to 31.07.2009 (for the entire period of construction). The respondent also assured the complainant that on completion of the project the said unit (space) would be let-out by the respondent only on their own cost to a recognized lessee and in the event of delay in leasing out the said unit by the respondent after offer of possession then in that condition there would be no maintenance charges payable by the purchaser i.e. complainant.
- V. That the complainant raised his request to the respondent with regard to the execution of buyer's agreement various times and after around 15 months from the acceptance date of booking (03.08.2007) the respondent confirmed the temporarily allotted space vide allotment cum space buyer agreement dated 02.04.2009 in the name of complainant and asked to sign the same.

- VI. That the complainant visited the project site somewhere in Feb-Mar 2011 to cross verify the construction/development and that time he got to know that the construction/development work was not even started as per the promises made by the respondent.
- VII. That the respondent arbitrarily stopped the assured return payment from Dec 2016 without giving any advance information to the complainant. The respondent evidently themselves admitted its arbitrary acts in the letter dated 02.07.2018 for offer of possession under which the respondent accepts the liability of pending assured return payable to complainant as per assured return agreement dated 23.11.2007.
- VIII. That the respondent offered possession of the unit vide letter dated 06.04.2018 followed by another possession cum demand letter dated 02.07.2018. That the respondent sent the said letters cum demand of offer of possession despite having the knowledge that the complainant had deposited the total consideration amount in Nov 2007 only.
- IX. That the complainant raised his concerns through various emails with regard to the non-compliance of agreement terms in order to transfer assured return maintenance charges and peaceful possession of the said allotted unit various times to respondent, but no concrete answer was ever provided to the complainant till date. That the officials of the respondent were keep on demanding maintenance charges from the complainant despite knowing the fact the respondent themselves promised to deposit the maintenance charges by self or by through upcoming lessees vide assured return agreement dated 23.11.2007.
- X. That the respondent has neither provided peaceful/lawful possession nor refunded any amount to the complainant and has not even responded or paid heed to any of the requests of the complainant.

- XI. That the respondent swindled the complainant and kept on evading their legal liability by making one or other excuse. It is pertinent to mention here that the complainant since the booking of commercial unit in the respondent's project is running from pillar to post to get their refund.
- XII. That the complainant has been left with no other option but to approach the doors of this Authority to get a refund of his legitimate money.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).
- i. Direct the respondent to refund the entire amount deposited alongwith prescribed rate of interest.
5. 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.

6. The respondent contested the complaint by filing reply dated 10.01.2024 on the following grounds: -
- i. That the complainant was allotted a unit being no. 430, 4th Floor, Tower-A, admeasuring 500 sq.ft. in the project "Floreal Towers" located at Sector-83, Gurugram.
- ii. That the MoU between the parties was executed on 23.11.2007 and the builder buyer agreement between the parties took place on 02.04.2009 wherein as per clause 10.1 of the buyer's agreement, the respondent was supposed to handover the possession within a period of 36 months from the date of execution of buyer's agreement.

iii. That thereafter, several obstructions had taken place which hampered the pace of the construction wherein in the year, 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) were regulated. The Hon'ble Supreme Court directed framing of Modern Mineral Concession Rules. Reference in this regard may be had to the judgment of "Deepak Kumar v. State of Haryana, (2012) 4 SCC 629". The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce in the NCR as well as areas around it. Further, the respondent was faced with certain other force majeure events including but not limited to non-availability of raw material due to various stay orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal thereby stopping/regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. It is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 02.11.2015 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna Riverbed. These orders inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the Hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh as well. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity as

detailed above continued, despite which all efforts were made and materials were procured at 3-4 times the rate and the construction continued without shifting any extra burden to the customer. That the above said restrictions clearly fall within the parameter "reasons beyond the control of the respondent as described under of clause 13.1 of the buyer agreement.

- iv. That during that time, a writ petition was filed in the Hon'ble High Court of Punjab and Haryana titled as "Sunil Singh vs. Ministry of Environment & Forests Parayavaran" which was numbered as CWP-20032-2008 wherein the Hon'ble High Court pursuant to order dated 31.07.2012 imposed a blanket ban on the use of ground water in the region of Gurgaon and adjoining areas for the purposes of construction. That on passing of the abovementioned orders by the High Court, the entire construction work in the Gurgaon region came to stand still as the water is one of the essential parts for construction. That in light of the order passed by the Hon'ble High Court, the respondent had to arrange and procure water from alternate sources which were far from the construction site. The arrangement of water from distant places required additional time and money which resulted in the alleged delay and further as per necessary requirements STP was required to be setup for the treatment of the procured water before the usage for construction which further resulted in the alleged delay.
- v. That orders passed by Hon'ble High Court of Punjab and Haryana wherein the Hon'ble Court has restricted use of groundwater in construction activity and directed use of only treated water from available sewerage treatment plants. However, there was lack of number of sewage treatment plants which led to scarcity of water and

- further delayed the project. That in addition to this, labour rejected to work using the STP water over their health issues because of the pungent and foul smell coming from the STP water as the water from the S.T.P' s of the State/Corporations had not undergone proper tertiary treatment as per prescribed norms.
- vi. That on 19.02.2013, the office of the executive engineer, HUDA Division No. II, Gurgaon vide memo no. 3008-3181, had issued instruction to all developers to lift tertiary treated effluent for construction purpose for Sewerage Treatment plant Behrampur. Due to this instruction, the respondent company faced the problem of water supply for a period of several months as adequate treated water was not available at Behrampur.
- vii. That the occupation certificate of the tower in question was obtained by the respondent on 16.08.2017 and constructive possession of the unit was offered to the complainant on 06.04.2018 and thereafter, another letter dated 02.07.2018 was sent to the complainant informing them about the pending dues and outstanding amount of the assured returns and the same shall be adjusted in demand raised by respondent. The complainant was also informed that his unit falls under Tower A and not under Tower B.
- viii. That the respondent company cannot be made liable for the delay. As per clause 11.1 of the space buyer's agreement which clearly states that respondent shall be entitled to extension of time for delivery of possession of the said premises if such performance is prevented or delayed due to conditions as mentioned therein.
- ix. That there was a change in the zoning plan due to which the land owner company, i.e., Seratum Land and Housing Pvt Ltd ("Seratum") had sent a letter regarding the approval from Director General Town

and Country Planning Haryana vide letter dated 14.03.2014 wherein it was also requested grant of occupation certificate and to deposit compounding charges as per prevailing policies. On 22.05.2015 a letter from DTCP, Haryana was received by the Seratum wherein the amount of the compounding fees was informed and vide letter dated 06.09.2014, Seratum informed DTCP regarding payment of the requisite fees along with the details. Again, the respondent as well as Seratum vide letters dated 17.11.2014 and 21.04.2016 respectively requested for grant of occupation certificate but the same was issued by the statutory authority on 16.08.2017.

- x. That the complainant has already received an amount of Rs.35,42,500/- as assured return from the respondent for the period commencing from December 2007 to December 2016. Then an additional amount of Rs.5,85,000/- was adjusted in the final statement for complainant for the period January 2017 to June 2018.
- xi. That it is submitted that even otherwise the complainant cannot invoke the jurisdiction of the Hon'ble Authority in respect of the unit allotted to the complainant, especially when there is an arbitration clause 49 provided in the space buyer agreement, whereby all or any disputes arising out of or touching upon or in relation to the terms of the said agreement or its termination and respective rights and obligations, is to be settled amicable failing which the same is to be settled through arbitration. Once the parties have agreed to have adjudication carried out by an Alternative Dispute Redressal Forum, invoking the jurisdiction of this Hon'ble Authority, is misconceived, erroneous and misplaced.
7. 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 submissions made by the parties.

E. Jurisdiction of the authority

8. The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection 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

9. 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

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

Section 11.....

(4) The promoter shall-

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

Section 34-Functions of the Authority:

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

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter.

E. Findings on the objections raised by the respondent.

E. I. Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

12. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute and the same is reproduced below for the ready reference:

"35. Dispute Resolution by Arbitration

"All or any disputes arising out of or touching upon or in relation to the terms of this Space Buyer Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceeding shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at the corporate office of the Company alone at Gurgaon stated hereinabove by a Sole Arbitrator who shall be nominated by the Company. The Allottee hereby confirms that he/she shall have no objection to this appointment. The courts at Gurgaon alone and the Punjab & Haryana High Court at Chandigarh alone shall have the jurisdiction in all matters arising out of/touching and/or concerning this Space Buyer Agreement regardless of the place of execution of this Space Buyer Agreement which is deemed to be at Gurgaon."

13. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall

be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

14. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. Further, while considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court in ***case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018*** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within his right to seek a special

remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

E. II Objection regarding the project being delayed because of force majeure circumstances.

15. The respondent-promoter has raised the contention that the construction of the project has been delayed due to force majeure circumstances such as orders/restrictions of the NGT as well as competent authorities, High Court and Supreme Court orders, 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 02.04.2012. 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. 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.

F. Findings on the relief sought by the complainant.

F.I. Direct the respondent to refund the entire amount deposited alongwith prescribed rate of interest.

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

17. Clause 10.1 of the space buyer's agreement dated 02.04.2009 provides for handing over of possession and is reproduced below:

10.1 Schedule for possession of the Said Unit

"The company based on its present plans and estimates and subject to all just exceptions. contemplates to complete construction of the said Building / said Unit within the period of 36 months from the date of execution of the Space Buyer Agreement by the Company or Sanction of Plans or Commencement of Construction whichever is later, unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1). (11.2). (11.3) and Clause (38) or due to failure of Allottee(s) to pay in time the price of the said Unit along with all other charges and dues in accordance with the schedule of payments given in Annexure I or as per the demands raised by the Company from time to time or any failure on the part of the Allottee (s) to abide by any terms or conditions of this Space Buyer Agreement."

18. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and

documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the 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.

19. **Due date of handing over possession:** As per clause 10.1 of the buyer's agreement dated 02.04.2009, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 36 months from the date of execution of the buyer's agreement or sanction of building plans or commencement of construction, whichever is later. As no document w.r.t the commencement of construction as well as sanction of building plans is placed on record. Accordingly, the due date of possession has been calculated from the date of execution of buyer's agreement. Therefore, the due date for handing over of possession comes out to be 02.04.2012.
20. 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 on demand of due payment at the time of offer of possession, 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.

21. After considering the documents available on record as well as submissions made by the parties, it is concluded that the OC/CC of the Tower in which the unit of complainant is situated has been obtained by it. The due date of possession as per buyer's agreement was 02.04.2012 and the complainant has surrendered the unit by filing the present complaint on 03.10.2023 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The OC was received on 16.08.2017 whereas, offer of possession was made on 06.04.2018. 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 has filed a complaint before the authority.
22. The right under section 18(1)/19(4) accrues to the allottee 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 allottee has 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 him, it impliedly means that the allottee 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 allottees interest for the money he has 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; that: -

25. *The unqualified right of the allottees 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 allottees, 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 allottees/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 allottees 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.*

23. 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. 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 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 allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.

24. In case the allottee wishes to withdraw from the project, the promoter is liable on demand to return the amount received by it with interest at the prescribed rate if it fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that the allottee has to make intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready then he impliedly agreed to continue with the project i.e. he do not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and the allottees shall be paid interest at the prescribed rate for every month of delay by the promoter.
25. In the instant case, the unit was allotted to the complainant vide buyer's agreement dated 02.04.2009 and the due date for handing over for possession was 02.04.2012. The OC was received on 16.08.2017 whereas, offer of possession was made on 06.04.2018. However, the complainant has surrendered the unit by filing of the present complaint. Therefore, in this case, refund can only be granted after certain



deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 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"

26. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is liable to refund the paid-up amount of Rs.27,24,000/- after deducting 10% of the sale consideration of Rs.27,24,000/- being earnest money along with an interest @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 on the refundable amount, from the date of surrender i.e., 03.10.2023 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid. After calculating the above, it is determined that the respondent is liable to refund an amount Rs.29,85,685.6/- to the complainant till date.
27. Further, it is observed that the complainant has received an amount of Rs.35,42,500/- on account of assured return from December 2007 to December 2016 from the respondent in terms of agreement dated 23.11.2007 and the same is admitted by both the parties in their pleadings. Therefore, in case the complainant wishes to withdraw from



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the project, the amount so credited shall be deducted from the refundable amount. Thus, after considering the above, no case for refund is made out.

28. Complaint stands disposed of.
29. File be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 11.09.2024



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