

PROCEEDINGS OF THE DAY		26
Day and Date	Wednesday and 13.07.2022	
Complaint No.	CR/678/2021 Case titled as Rajiv Sethi Vs Orris Infrastructure Private Limited	
Complainant	Rajiv Sethi	
Represented through	Shri Mayank Sethi proxy counsel	
Respondent	Orris Infrastructure Private Limited	
Respondent Represented	Ms. Charu Rustogi Adv.	
Last date of hearing	12.01.2022	
Proceeding Recorded by	Naresh Kumari and HR Mehta	

Proceedings

The present complaint was filed on 12.02.2021 with the adjudicating officer and the reply on behalf of respondent was received on 26.08.2021.

File has been received on transfer from Adjudicating Officer in view of the judgment dated 11.11.2021 passed by the Apex Court in the case bearing no. **SLP(Civil) No(s). 3711-3715 OF 2021) titled as M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors.,** and wherein it was held that as matters regarding refund and interest under section 18(1) are to be decided by the authority and matters regarding adjudging compensation to be decided by the Adjudicating officer.

The application filed in the form CAO with the adjudicating officer and on being transferred to the authority in view of the judgement quoted above, the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case allottee wishes to withdraw from the project on failure of the promoter to give possession as per agreement for sale. It has been deliberated in the proceedings dated 10.5.2022 in CR No. 3688/2021 titled Harish Goel Versus Adani M2K Projects LLP and it is observed that there is no material difference in the contents of the forms and the different headings whether it is filed before the adjudicating officer or the authority.

Keeping in view the judgement of Hon'ble Supreme Court in case titled as M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. (Supra), the authority



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CA/2/18/2021

New PWD Rest House, Civil Lines, Gurugram, Haryana

नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

is proceeding further in the matter where allottee wishes to withdraw from the project and the promoter has failed to give possession of the unit as per agreement for sale irrespective of the fact whether application has been made in form CAO/ CRA. Both the parties proceeded further in the matter accordingly. The Hon'ble Supreme Court in case of Varun Pahwa v/s Renu Chaudhary, Civil appeal no. 2431 of 2019 decided on 01.03.2019 has ruled that procedures are hand made in the administration of justice and a party should not suffer injustice merely due to some mistake or negligence or technicalities. Accordingly, the authority is proceeding further to decide the matter based on the facts mentioned in the complaint and the reply received from the respondent and submissions made by both the parties during the proceedings.

Succinct facts of the case as submitted in the complaint and reply are as under:

S.N.	Particulars	Details
1.	Name of the project	"Aster Court Premier" Sec 85, Gurugram
2.	Project area	29.018 acres
3.	DTPC License no.	39 of 2009 dated 24.07.2009 and valid up to 23.07.2024 99 of 2011 dated 17.11.2011 and valid up to 16.11.2024
	Name of licensee	Be Office Automation Products Pvt Ltd and 6 others M/S Radha Estate Pvt Ltd and 2 Ors.
4.	HARERA Registration no.	Registered GGM/287/2018/19 dated 13.10.2018 and valid up to 30.06.2020
5.	Unit no.	302, 3 rd floor, Tower 3D [Page 28 of the complaint]
6.	Super area	1450 sq. ft. [Page 28 of the complaint]

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CR/218/2021

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		Revised area-1595 sq. ft. [Annexure C at page no. 53 of the complaint] Further Revised area- 1587 sq. ft. [Page no. 54 of the complaint]
7.	Date of apartment buyer's agreement	26.03.2011 [Annexure A at page 25 of the complaint]
8.	Sanctions of the plans	April 2012 [As per email dated 19.02.2018 at page no. 71 of the complaint]
9.	Commencement of construction	02.03.2011 [As per Intimation cum demand letter dated 09.08.2013 at page 55 of the complaint]
10.	Possession clause	Clause 10.1. The company based on its present plans and estimates and subject to all just exceptions, contemplates to complete the construction of the said building/said unit within the period of 36 months plus grace period of 6 months from the date of execution of the apartment buyer's agreement by the company or sanctions of the plans or commencement of construction whichever is later unless there shall be delay or failure due to reasons mentioned in clauses 11.2, 11.3 and clause 38 or due to failure of allottee to pay in time the

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		price of the said unit.... (emphasis supplied)
11.	Due date of possession	October 2016 [Calculated from the date of sanctions of the plans] Grace period of 6 months is allowed
12.	Total sale consideration	Rs.52,90,900/- [Page 28 of the complaint] Revised sale consideration- Rs.58,74,090/- [Annexure C at page no. 53 of the complaint] Further Revised sale consideration- Rs.58,34,954/- [Page no. 54 of the complaint]
13.	Amount paid by the complainant	Rs.57,12,002/- [As per statement of account dated 17.08.2021 at page no. 34 of the reply]
14.	Occupation certificate	06.04.2017 [Annexure D at page 56 of the complaint]
15.	Offer of possession	11.04.2017 [Annexure B at page no. 23 of the reply]

The complainant has sought following relief:

1. Direct the respondent to refund an amount of Rs.54,51,121/- alongwith interest of delay at 18% p.a. or at prevailing rate of interest as this authority may deem fit and proper.

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

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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.

The due date of possession as per agreement for sale as mentioned in the table above is **October 2016 and there is delay of 4 years, 4 months, 11 days** on the date of filing of the complaint. The allottee in this case has filed this application/complaint on 12.02.2021 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. 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 to him and demand for due payment was raised then only filed a complaint before the authority. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after obtaining occupation certificate. Section 18(1) gives two options to the allottee if the promoter fails to complete or is 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:

- (iii) Allottee wishes to withdraw from the project; or
- (iv) Allottee does not intend to withdraw from the project

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 has 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 he has paid to the promoter are protected accordingly.



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27/8/2021

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Further 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.

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). This judgement of the Supreme Court of India recognized unqualified right of the allottee 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 allottee has failed to exercise this right although it is unqualified one. He has to demand and make his intentions clear that the allottee wishes to withdraw from the project. Rather tacitly wished to continue with the project and thus made him entitle 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 allottee 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.

In the case of **Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.2021**, some of the allottees

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failed to take possession where the developer has been granted occupation certificate and offer of possession has been made. The Hon'ble Apex court took a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate. However, the developer was obligated to pay delay compensation for the period of delay occurred from the due date till the date of offer of possession was made to the allottees.

As per proviso to sec 18(1)

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 possession, at such as rate as may be prescribed.

In case allottee wishes to withdraw from the project, the promoter is **liable on demand** to the allottee return of the amount received by the promoter with interest at the prescribed rate if promoter 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 allottee has to make his 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 impliedly he has agreed to continue with the project i.e. he does not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and allottee shall be paid by the promoter interest at the prescribed rate for every month of delay. This view is supported by the judgement of Hon'ble Supreme Court of India in case of **Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Supra)** and also in consonance with the judgement of Hon'ble Supreme Court of India in case of **M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors.,**

The authority hereby directs that the allottee shall be paid by the promoter an interest for every month of delay till actual handing over of possession or offer of possession (after obtaining OC from the competent authority) plus two months whichever is earlier at prescribed rate i.e. the rate of 9.70% (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 within the timelines provided in rule 16(2) of the Haryana Rules 2017 *ibid*. The allottee is obligated to take the possession of

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the apartment since the construction is completed and possession has been offered after obtaining of occupation certificate from the competent authority. However, the developer is obligated to pay delay interest for the period of delay occurred from the due date till the date of offer of possession was made to the allottees.

2. Cost of litigation: The complainants are claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before adjudicating officer under section 31 read with section 71 of the Act and rule 29 of the rules.

Complaint stands disposed of. Detailed order will follow. File be consigned to the registry.

KI-
Vijay Kumar Goyal
Member

Dr. KK Khandelwal
Chairman
13.07.2022