

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

Complaint no. : 6027 of 2019
First date of hearing: 16.01.2020
Date of decision : 11.05.2022

1. Mr. Girish Sharma
 2. Mrs. Uma Sharma
- both RR/o: - 1210, Sector 7D, Faridabad

Complainants

Versus

1. M/s BPTP Limited.
2. M/s Countrywide Promoters Pvt. Ltd.
Regd. Office at: M-11, Middle Circle, Connaught Circus,
New Delhi-110001.
3. Anjali Promoters and Developers Pvt. Ltd.
Regd. Office at: 7, Barakhamba Road, New Delhi,
Central Delhi.

Respondents

CORAM:

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Sh. Sukhbir Yadav
Sh. Venkat Rao

Advocate for the complainants
Advocate for the respondents

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia*

prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. 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. N.	Particulars	Details
1.	Name of the project	"CentraOne", sector-61, Gurugram
2.	Project area	3.68 acres
3.	Nature of the project	Commercial
4.	DTCP license no. and validity status	277 of 2007 dated 17.12.2007 Valid upto 16.12.2019
5.	Name of licensee	Saiexpo Overseas Pvt. Ltd
8.	RERA Registered/ not registered	Not Registered
9	Unit no.	SF-08, 2nd floor [As per page no. 56 of reply]
10.	Unit area admeasuring	951 sq. ft. [As per page no. 56 of reply]
11	Date of booking	05.03.2010
12.	Date of execution of agreement	11.04.2014 (As per page no. 44 of reply)
13.	Possession clause	2. Possession 2.1 Subject to Force Majeure



circumstances, intervention of statutory authorities and Purchaser having timely complied with all its obligations, formalities or documentation, as prescribed by Seller and not being in default under any part hereof and the Agreement, including but not limited to the timely payment of installments of the Total Sale Consideration and other charges as per the payment plan opted, the Seller proposes to offer possession of the Said Premises to the Purchaser within a period of 12 months from the date of execution of the Agreement ("Commitment Period"). After filing an application for grant of Occupation Certificate (OC), Seller shall not be liable for any delay in grant thereof by the competent authority and such delay shall proportionately extend the Commitment Period. The Seller shall give Notice of possession to the Purchaser with regard to the date of handing over of possession, and in the event the Purchaser fails to accept and take the possession of the said Premises on such date specified in the notice the Purchaser shall be deemed to be custodian of the



		said Premises from the date indicated in the notice of possession and the said Premises shall remain at the risk and cost of the Purchaser.
14.	Due date of possession	11.04.2015 [Calculated from date of execution of FBA] Grace period not allowed
15.	Total sale consideration	BSP- Rs. 82,67,250/- Total amount- 97,19,762/- [As per page no. 108 of reply]
16.	Amount paid by the complainants	Rs. 40,85,187/- [As per page no. 108 of reply]
17.	Occupation certificate /Completion certificate	09.10.2018 (page no. 104 of reply)
18.	Offer of possession	14.12.2018 (page no. 106 of reply)

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -

1. That the complainants along with their two sons namely Deepak Sharma & Sunil Sharma booked a residential plot in the project of respondents namely BPTP, Parklands, Faridabad by paying Rs. 12,00,000/- vide two different cheques dated 23.06.2008 and 26.06.2008 respectively. The possession of that plot was to be handed over to them within 12 months of the booking. But, the



- respondents failed to honour that commitment and offered the unit in question in the project detailed above for allotment. So, on a request made by the builder-developer the booking amount of Rs. 12,00,000/- was transferred in the account of the allotted unit SF-08, admeasuring 951 sq. ft.
- II. That a buyer's agreement was executed between the parties wherein the possession of the allotted unit was to be offered on or before 31.12.2011. but the respondents failed to offer the possession of the unit as per terms and conditions of allotment. So, in April 2013, they asked for refund of the amount along with interest. But, the respondents vide letter dated 11.02.2014, promised to pay return on the paid up amount at Rs. 80 per sq. ft per month with effect from 01.04.2013 till possession.
- III. It is further the case of complainants that on 11.04.2014, a builder buyer agreement was executed between the parties and vide which the possession of the allotted unit was sought to be delivered within a period of 12 months from the date of execution of that document.
- IV. That though the respondents paid a sum of Rs. 678900/- with effect from 01.04.2013 to 30.09.2014 but did not pay any amount after that.
- V. That the complainants have already paid a sum of Rs. 40,85,187 to the respondents but failed to complete the project and offer possession of the allotted unit to them despite issuance of various

reminder through emails and persuasions, leading to their withdrawal from the project and seeking refund of the amount as prayed above.

- VI. That the complainants had filed a petition under section 9 of Arbitration and Conciliation Act, 1996, before the District Judge, Patiala House Courts, Delhi, on 04.07.2017, for refund of money along with interest. But on 16.07.2019, they withdrew that petition with liberty to file afresh with proper jurisdiction.
- VII. That in the present complaint is that in spite of complainants paid Rs. 40,42,539- by July, 2010 i.e., more than 55% of total cost of shop and was ready and willing to pay the remaining amount, the respondent party has failed to deliver the possession of shop on time.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s).
- I. Direct the respondents to refund amount of Rs. 40,85,187/- along with interest
 - II. Direct the respondents to pay Rs.1,00,000/- towards the cost of litigation and compensation.
 - III. Direct the respondents to pay Rs. 1,00,000/- towards mental agony harassment, discomfort and undue hardship

D. Reply by the respondents:

The respondents by way of written reply have made the following submissions:



5. That the complainants have approached this authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the hon'ble apex court in plethora of decisions has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondent but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication. The respondents have contented on the following grounds:
- The complainant Girish Chandra applied for booking of a unit in the project, namely "BPTP Parklands, Faridabad, Haryana" of the respondent No. 1 and paid booking amount of Rs.12,00,000/-, accordingly receipt was issued. However, that allotment was cancelled on surrender of the unit bearing no. "T-37" in the project, namely "BPTP Parklands, Faridabad, Haryana" by signing the cancellation-cum-surrender Letter dated 05.03.2010 and further the complainants applied for booking of commercial space in the project "Centra One" at Gurgaon. The complainants after conducting thorough due diligence and investigating the real estate market, approached respondent no. 2 through a broker



namely, "Kapur Estates" for booking of Unit No. SF-08 in the project "Centra One" at Gurugram.

- That the respondents after receiving OC from the concerned authorities on 09.10.2018, duly served possession letter dated 14.12.2018 to them, however they have failed to clear the outstanding dues.
 - The respondents have adjusted Rs.18,42,041.00/- as assured return in the complainants account and the same is reflected in the statement of accounts annexed with the Offer of Possession Letter dated 14.12.2018. The respondents have already paid Rs.6,78,900.00/- as assured return to the complainants.
 - That the complainants have also concealed from this Authority that the respondents being a customer centric company have always addressed their concern and had requested the complainants time and again to visit the office of the respondents in order to amicably resolve their concern. However, notwithstanding the several efforts made by the respondents to attend to the queries of the complainants to their complete satisfaction, they deliberately proceeded to file the present complaint before this Authority against the respondents.
6. Thus from the above, it is very well established, that the complainants have approached this authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the

complainants is to unjustly enrich themselves at the expense of the respondents by filing this frivolous complaint which is nothing but gross abuse of the due process of law and the present complaint warrants dismissal without any further adjudication.

7. That at the stage of entering into the agreement and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the 'Doctrine of Aprobate & Reprobate'. Therefore, in light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this authority.
8. The parties had agreed under the flat buyer's agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainants have raised to dispute but did not take any step to invoke arbitration.
9. That despite sending construction status of the allotted unit vide emails dated 20.06.2017, 24.08.2017 and 18.09.2018 (annexure R-5) the complainants failed to pay the amount due and instead asked for refund of the amount deposited.
10. It is further pleaded that after completing the construction of the project, the respondents receives occupation certificate on 09.10.2018 . they offered possession of the allotted unit to the complainants vide letter dated 14.12.2018. but instead of depositing that amount, the

moved the authority with the complaint seeking refund , being not maintainable.

11. All other averments made in the complaint were denied in toto.
12. Copies of all the relevant do 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.

D. Jurisdiction of the authority

13. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I Territorial jurisdiction

14. 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.

D.II Subject-matter jurisdiction

15. 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.

16. 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.
17. 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."

18. 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)**, and the Division Bench of Hon'ble Punjab and Haryana High Court in "**Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others**, in CWP bearing no. 6688 of 2021 decided on 13.01.2022, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent.

F. I Objection regarding complainants are in breach of agreement for non-invocation of arbitration.

19. The respondents have raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains a provision regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

"33. Dispute Resolution by Arbitration

All or any disputes arising out of or touching upon or in relation to the terms of this 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 shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory

amendments/modifications thereto for the time being force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a Sole Arbitrator who shall be appointed by the Managing Director of the seller and whose decision shall be final and binding upon the parties. The Purchaser(s) hereby confirms that he shall have no objection to this appointment of the Sole Arbitrator by the Managing Director of the Seller, even if the person so appointed, as a Sole Arbitrator, is an employee or advocate of the Seller/Confirming Party or is otherwise connected to the Seller/Confirming Party and the Purchaser(s) confirms that notwithstanding such relationship/connection, the Purchaser(s) shall have no doubts as to the independence or impartiality of the said Sole Arbitrator. The Courts at New Delhi and Delhi high Court at New Delhi alone shall have the jurisdiction."

20. 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. Section 88 of the Act also provides 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* and followed in case of *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, 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.

21. 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.
22. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act, 1986 and Act of 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. Findings on the relief sought by the complainants.**
- E.1 Direct the respondents to refund amount of Rs. 40,85,187/- along with interest**
23. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject apartment along with interest at the prescribed rate as provided under section 18(1) of the Act. Section 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)

24. Admittedly complainant Girish Chandra along with his two sons booked a plot in the project of respondent no. 2 at Faridabad in the year 2008 and paid Rs. 12,00,000/- as booking amount. The possession of that plot could not be offered for one reason or the other and which led to surrender/cancellation of that booking at Faridabad, on 05.03.2010 transfer of that amount to the booking of the subject unit and subsequently entering into builder buyer agreement on 11.04.2014 providing a period of 12 months for offering possession. But in between, an issue arose with regard to handing over possession of the allotted unit by 31.12.2011 on the basis of allotment dated 05.03.2010. So, it ultimately led to issuance of letter dated 11.02.2014 by the respondents promising return on paid amount at the rate of Rs.

80 per sq. ft. per month with effect from 1.04.2013 till possession. That amount to the tune of Rs. 678900/- was admittedly paid by the respondents with effect from 01.04.2013 to 30.09.2014. It is pleaded on behalf of the complainants that as per buyer's agreement executed inter-se the parties on 11.04.2014, the due date of possession of the unit was 11.04.2015. A number of emails dated 18.11.2016, 01.02.2017, 03.02.2017, 04.02.2017 and 16.02.2017 were exchanged between the parties raising concern about delay in possession of the allotted unit and in the alternative seeking refund of the entire amount deposited by the allottees. Though on 04.07.2017, an arbitration petition for possession of the subject unit was filed before District Judge, Patiala House Court, Delhi but the same was got dismissed as withdrawn on 16.07.2019. A pursual of the legal notice dated 20.04.2017 shows the intention of the complainants not to continue with the project and seeking refund of the amount. The respondents-builders failed to accept the request of the allottees for withdrawal from the project and refund of the paid-up amount. So, a complaint seeking refund before this authority was filed on 26.11.2019. The counsel for the complainants further submitted that relied upon the judgment in the case of M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors. and invoked sections 11(4), 12, 18 & 19(4) and prayed for a refund along with interest after adjustment of paid up amount of assured return. On the other hand, the counsel for the respondents submitted that by virtue of an email dated

26.03.2019, the complainants wished to continue with the project, therefore, they are not entitled to refund.

25. The respondents sought a clarification regarding the application made by the complainants under section 9 of the Arbitration and Conciliation Act and it was pointed out on behalf of the complainants that the application was for seeking refund from the respondents. The complainants sent an email giving proposal to the respondents for settlement of issues regarding payment of assured return post filing an application under Section 9 and the issuance of offer of possession. The respondents through their counsel drew the attention of the authority towards an email dated 06.03.2019 on page no. 129 of the complaint sent by the complainants to the respondents post offer of possession wherein they had sought assured return for 68 months from April 2013 till November 2018. The respondents have already paid assured return amounting to Rs. 25,63,588/- to the complainants as per the statement of account (on page 124 of the reply). The respondents through their counsel also submitted that the amount be refunded to the complainants post deduction of 10% earnest money and assured returns already paid by the respondents to them.
26. The authority is of the opinion that though earlier, complainants asked for refund of the deposited amount vide emails of different dates as well as legal notice but sought possession of the subject unit by filing a petition on 04.07.2017 before District Judge, Patiala House Court, Delhi. Secondly after receipt of occupation certificate on 19.10.2018,

the complainants were offered the possession of the allotted unit on 14.12.2018 but continued to negotiate with regard to arrears of assured return, the total amount deposited and DPC as evident from email dated 06.03.2019(page no. 129 of complaint). It is submitted on behalf of complainants that the allottees have send various emails regarding the said project to the respondent builders. But, they failed to provide any justification of the said queries raised by the complainants. . In April 2013, the complainants asked for a refund of the paid amount along with interest, but the respondents/builders assured compensation for the delayed period and offered assured return of Rs. 80 per sq. ft. per month and a new buyers agreement was executed inter-se the parties on 11.04.2014. Then vide emails dated 30.01.2017 & 31.03.2017, the complainants wishes to withdraw from the project and asked for refund and thereafter a legal notice dated 20.04.2017 was also served upon the respondent-builders for refund. As it is clearly intended by the complainants that they wanted to get refund as a relief, therefore, refund of the paid-up amount is allowed with interest @9.40% per annum from the date each payment of payment, till the realisation of money after adjustment of the amount of assured return already paid to the complainants.

H. Directions of the authority

27. 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/promoters are directed to refund the entire amount of Rs.40,85,187/- paid by the complainants along with prescribed rate of interest @ 9.40% p.a. from the date of each payment, till the realisation of paid-up amount after adjustment of amount of assured return paid to the complainants.

(2) A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow

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


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. K.K. Khandelwal)
Chairman

Dated: 11.05.2022