

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

Complaint no. :	654 of 2019
Date of filing complaint:	25.02.2019
First date of hearing:	27.09.2019
Date of decision :	25.07.2022

Sh. Raja Arjun Gupta S/o Sh. Virendra Nath R/O: H no.- 72, Sector-16A, Faridabad-121002	Complainant
Versus	
M/s ATS Realworth Private Limited Regd. office: ATS Tower, Plot no.16, Sector-135 Noida- 201305	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Pankaj Chandola (Advocate)	Complainant
Sh. M.K. Dang (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Name and location of the project	"ATS Tangerine", Sector 99A, Gurugram
2.	Nature of the project	Residential Group Housing
3.	Project area	11.5875 acres
4.	DTCP License	37 of 2013 dated 03.06.2013
	valid up to	02.06.2024
	Name of the licensee	M/s Hasta Infrastructure Private Limited
5.	HRERA registered/ not registered	Registered vide registration no. 06 of 2018 dated 02.01.2018 valid till 28.11.2022
6.	Application dated	26.12.2014 (A per page no. 31 of complaint)
7.	Allotment letter dated	19.02.2015 (As per page no. 31 of complaint)
8.	Date of execution of flat buyer's agreement	02.07.2015 (As per page no. 33 of promoter information)
9.	Unit no.	3081 on 08 th floor, tower 03 (As per annexure 3 on page no. 31 of complaint)
10.	Super Area	1550 sq. ft.

		(As per page no. 31 of complaint)
11.	Total consideration	BSP- Rs. 86,02,000/- TSC- Rs. 99,33,750/- (excluding tax) (As per schedule III on page no. 65 of the complaint)
12.	Total amount paid by the complainant	Rs. 51,43,669/- (As per page no. 02 of promoter's information)
13.	Possession clause	Clause 6.2 <i>(The Developer shall endeavour to complete the construction of the Apartment <u>within 42 (forty two) months from the date of this Agreement, with the grace period of 6 (six) months ie. ("Completion Date")., subject always</u> to timely payment of all charges including the basic sale price, stamp duty, registration fees and other charges as stipulated herein. The Company will send possession Notice and offer possession of the Apartment to the Applicant(s) as and when the Company receives the occupation certificate from the competent authority(ies).)</i>
14.	Due date of possession	02.07.2019 (Calculated from the date of the agreement i.e.; 02.07.2015 + grace period of 6 months) Grace period is allowed
15.	Occupation Certificate	Not obtained
16.	Offer of possession	Not offered
17.	Email sent before filing of present complaint seeking	20.10.2018 (followed by reminder letter dated 26.10.2018)

refund

(As per page no. 73 of complaint)

B. Facts of the complaint:

3. That in November 2014, the marketing representatives of the respondent approached the complainant, making tall claims with respect to the project and of the longstanding credentials of respondent and lured the complainant to book an apartment in the above project namely "ATS Tangerine" at Sector-99A, Gurugram, Haryana (hereinafter referred as "project"). It was represented that the said project is one of the finest and is free from all kinds of encumbrances. The complainant was allotted unit bearing no. 3081 on the 8th floor of tower no. 3 in the project vide allotment letter dated 19.02.2015.
4. That on 02.07.2015, a buyers' agreement (hereinafter referred as "agreement") was executed between the parties. As per clause 6.2 of said agreement, the possession of the apartment was to be handed over within 42 months from the date of the agreement. It is pertinent to note that the agreement was one-sided, as there are no definite timelines defined for the builder to start the construction or for that matter, complete the project. However, it was assured by the respondent that the project would be completed within 42 months from the signing of the agreement. Therefore, the due date for handing over the possession was 01.01.2019. However, it failed to hand over the possession of the apartment to the complainant within time. In fact, the respondent has abandoned the development of the

project "Tangerine" and did not even bother to inform the same to the complainant. It abandoned the project and conceived a new project namely "ATS Grandstand" in place of Project "ATS Tangerine". The complainant found out about the same to his surprise, only upon his visit to the site on 20.10.2018.

5. That the complainant made an enquiry about the project "Tangerine" and in reply, a representative of the respondent vide email dated 24.06.2018, stated details of a new project "ATS Grandstand", setting up on the same piece of land in Sector 99A, Gurugram, where the project "Tangerine" was to be constructed. The deceitful step was taken by the respondent without any notice or intimation to the complainant.
6. That the complainant paid the instalments on time as per the payment schedule and paid a huge amount of Rs. 51,43,669/-, against the demands raised by it. The agreement, however, acknowledges an amount of Rs. 49,89,493/-, the rest was adjusted towards service tax. That the respondent even after receiving the due amounts for the apartment, failed to handover the possession of the said apartment within stipulated time period. The complainant requested the respondent many times over phone, and by meeting personally to seek information on the status of the project and also the probable time/date of handing over of possession. However, it did not give any heed to the request of the complainant nor gave a satisfactory reply.

7. That on 20.10.2018, the complainant personally visited the site of the project and was surprised to find out that there is no construction under the name of project "Tangerine" going on at the project site. Instead, the site was being used by it for construction of another project named "Grandstand".

8. That the complainant, therefore, vide letter dated 20.10.2018 sought refund of the amount of Rs. 51,43,669/- paid by him towards the apartment, along with an interest @12%. But the respondent paid no heed to the requests made by him. The complainant vide email dated 26.10.2018 sent a reminder seeking refund along with interest.

C. Relief sought by the complainant:

9. The complainant have sought following relief(s):
- Direct the respondent to refund the entire amount paid by the complainant to the respondent till date along with interest.
 - Direct the respondent to pay a sum of Rs. 1,00,000/- as cost of litigation.

D. Reply by respondent:

The respondent by way of written reply made following submissions

10. That the present complaint is not maintainable on account that clause 21.1 & 21.2 of 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.

11. That the complainant, after checking the veracity of the project namely, 'ATS Tangerine', Sector 99-A, Gurugram applied for allotment of an apartment and subsequently provisional allotment of unit bearing no. 3081, 8th floor, tower no. 03 having super built up area of 144 sq. meter was made.
12. That based on it, the respondent sent copies of the apartment buyer's agreement to the complainant which were signed by him on 02.07.2015. It is pertinent to mention herein that when the complainant booked the unit with the respondent, the Real Estate (Regulation and Development) Act, 2016 was not in force and the provisions of the same cannot be enforced retrospectively.
13. That the complainant has made the part- payment of the amount of Rs. 51,43,669/- out of the total sale consideration of Rs. 99,33,750/-. However, it is submitted that the total sale consideration of the unit was exclusive of the applicable registration charges, stamp duty, service tax as well as other charges payable along with it at the applicable stage.
14. That the possession of the unit was to be offered to the complainant in accordance with the agreed terms and conditions of the buyer's agreement wherein clause 6.2 provides that the developer would endeavour to complete the construction of the apartment. From the said clause, it is evident that only the construction was to be completed within a period of 42 months from the date of the agreement and the same would be

extended on account of any force majeure conditions not under the control of the respondent as defined in the apartment buyer's agreement. The possession of the unit had to be offered to the complainant only after grant of occupation certificate from the concerned authorities.

15. That on account of certain factors which were beyond its reasonable control, the project became unviable and the construction of the project could not continue. Accordingly, the respondent informed all the allottees of the project, including the complainant.
16. That, for the benefit of the complainant and in order to resolve the issue, the officials of the respondent company met the complainant and offered him to opt for a substitute unit of similar or greater area in ATS Grandstand or in a ready to move in unit of other projects of the respondent company. The complainant accepted the offer made by the respondent company and requested the respondent for some time so as to decide the new unit, he wanted in place of the originally allotted unit. It is pertinent to mention herein that the respondent being a customer-oriented company has even intimated the complainant about the project 'ATS Grandstand' on the same land vide its email dated 24.06.2018. No objections whatsoever was ever raised by the complainant. It is submitted that the complainant is a real-estate investor who has invested his money with an intention to make profit in a short span of time. However, his calculations went wrong on account of slump in the real estate market. Despite accepting offer of the respondent company, the complainant now instead of resolving the issue, is

trying to wriggle out of his obligations by concocting a baseless and false story as an afterthought in order to mislead this forum and to unnecessary harass and pressurize the respondent to submit unreasonable demands.

17. Copies of all the relevant documents have been filed and placed on 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.

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 allottee and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent:

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

19. The respondent has raised an objection that the complainant has not invoked arbitration proceedings as per the provisions of buyer's agreement which contains provisions 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:

20. *"All or any disputes that may arise with respect to the terms and conditions of this Agreement, including the interpretation and validity of the provisions hereof and the respective rights and obligations of the parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be under the Arbitration and Conciliation Act, 1996 and any statutory amendments/modification thereto by a sole arbitrator who shall be mutually appointed by the Parties or to be mutually appointed or if unable to be*

mutually appointed, then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties.

The venue of Arbitration shall be at Gurgaon and only the courts at Gurgaon shall have the jurisdiction in all matters arising out of this Agreement".

21. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainant, the same shall be adjudicated through arbitration mechanism. 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. Similarly, 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 complainant and builders could not circumscribe the jurisdiction of a consumer forum.

22. 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. The relevant para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

23. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within the rights 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.

F.II Objections regarding the complainant being investors:

24. It is pleaded on behalf of respondent that complainant is an investor and not consumer. So, he is not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded 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 observes 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 the main aims and objects of enacting a statute but at the same time, the 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. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainant is a buyer and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

"Z(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."

25. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainant is an allottee as the subject unit allotted

to him by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in *appeal No.0006000000010557 titled as M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Entitlement of the complainant for refund:

- G.I Direct the respondent to refund the entire amount paid by the complainant to the respondent till date along with interest.**
26. The project detailed above was launched by the respondent as residential group housing complex and the complainant was allotted the subject unit in tower 03 against total sale consideration of Rs. 86,02,000/-. It led to execution of builder buyer agreement between the parties on 02.07.2015, detailing the terms and conditions of allotment, total sale consideration of the allotted unit, its dimensions, due date of possession, etc. A period of 42 months with grace period of 6 months was allowed for completion of the project to the respondent and that period has admittedly expired on 02.07.2019. It has come on record that against the total sale consideration of Rs. 86,02,000/-, the complainant have paid a sum of Rs. 51,43,669/- to the respondent. The respondent himself sent an email dated 24.06.2018 (page 67 of complaint) stating details of new project "ATS Grandstand"

going to be established on the same piece of land where the project "ATS Tangerine" was to be established.

27. In view of said email detail 24.06.2018, the complainant visited the project site and came to know that no construction of the project "ATS Tangerine" was started and rather, the respondent is planning to start the construction of the other project. In view of the circumstances, the complainant wrote an email dated 20.10.2018 where in demanded the refund of amount paid by him which was followed by another reminder email dated 26.10.2018.
28. The respondent has taken advantage of his dominant position by changing the entire project and despite request of the complainant, the respondent failed to return the amount to him. Therefore, the respondent is using the funds of complainant. The complainant filed the present complainant seeking refund of the amount deposited with the respondent besides interest at the prescribed rate. It is not disputed that the project in which the complainant was allotted a unit by the respondent has been abandoned & in its place a new project is being constructed. No consent of the allottee in this regard was taken. Thus, keeping in view the fact that the allottee-complainant wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on his failure 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.

29. 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. (2021-2022(1)RCR(Civil),357)*** 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

30. 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 allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

31. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

32. In view of aforesaid circumstances, the authority hereby directs the promoter to return the amount received by him i.e., Rs. 51,43,699/-with interest at the rate of 9.80% (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*.

G.II Direct the respondent to pay a sum of Rs. 1,00,000/- as cost of litigation.

33. The complainant is claiming compensation in the above-mentioned relief. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority:

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



- i) The authority hereby directs the promoter to return the amount received by him i.e., Rs. 51,43,699/-with interest at the rate of 9.80% (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.
- ii) A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

35. Complaint stands disposed of.

36. File be consigned to the registry.

v.1-3
(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.07.2022