

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

Complaint no. : 2601 of 2021
Date of filing complaint : 28.06.2021
Date of decision : 08.08.2022

Mr. Vikrant Gupta R/O: - House no. 441, sector-14, Gurugram, Haryana	Complainant
Versus	
1. M/s S.S. Group Pvt. Ltd. Regd. Office at: - Ss Group, Plot No. 77, Sector-44, Gurugram-122003 2. M/s Shiva Profins Pvt. Ltd. Regd. Office at: B-4/43, 2 nd floor, Sadarjung Enclave	Respondents

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Atul Rustogi	Advocate for the complainant
Sh. Dhruv Dutt	Advocate for the respondents

ORDER

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

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

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	"The Leaf", Sector 85, Gurugram
2.	Nature of project	Group Housing Complex
3.	Licensed area	11.9 acres
4.	DTPC License no.	81 of 2011 dated 16.09.2011 and valid up to 15.09.2024
	Name of licensee	M/s Shiva Profins Private Limited
5.	HARERA Registration no.	Registered 23 of 2019 dated 01.05.2019 and valid up to
6.	Unit no.	7B, 7 th floor, Building No. 4 [Page no. 60 of complaint]
7.	Super area	2600 Sq. Ft. [Page no. 60 of complaint]
8.	Date of allotment	10.09.2012

9.	Date of buyer's agreement	12.09.2013. (Page no. 59 of complaint)
12.	Possession Clause	<p>8. Possession</p> <p>8.1 Time of handing over the possession</p> <p>8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty six months from the date of signing of this agreement. The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months or such extended period, for applying and obtaining occupation certificate in respect of the Group Housing Complex. (emphasis supplied)</p>
13.	Due date of possession	12.09.2016 (Calculated from the date of signing of buyer agreement)

		<i>Grace period not allowed</i>
14.	Total sale consideration	Rs. 1,46,89,000/- (Page no. 85 of complaint)
15.	Amount paid by the complainants	Rs. 42,33,615/- [As per applicant ledger dated 28.11.2021 at page no 90 of the reply]
16.	Occupation certificate	24.08.2021 (Page no. 123 of reply)
17.	Offer of possession	Not offered

B. Facts of the complaint

3. That the complainant booked a unit in the said project on 08.08.2012 details of which being such unit no.7A admeasuring super area 2,600 sq.ft. for a total sale consideration of Rs. 1,44,89,000/-/-and accordingly paid an amount of Rs. 42,33,615/- till date.
4. That the respondents started raising various demands for payment against the allotted unit. The complainant made the payments to the respondents under a bonafide belief that all the monies paid by him would be utilized by them for the construction of the project and the completion of his dream home. The details of the demands raised by the respondent-builder and payment made by the complainant are mentioned below: -

S. No	Installment Name	Date of Payment	Amount Paid	Cheque No.	Bank Name	Receipt no.
1.	Booking Amount	08/08/2012	12,00,000	463281	Punjab And Sind	SSG /85 / R00365
2.	At Time Of Allotment	18/10/2012	2,11,203	834661	Punjab And Sind	SSG /85 / R00780
3.	On or before 45 days Of Allotment	29/10/2012	14,11,206	834689o	Punjab And Sind	SSG /85 / R00973
4.	On Commencement of Construction work	20/3/2013	14,11,206	175544	Punjab And Sind	SSG /85 / R01342
	Total Amount Paid		42,33,615			

5. That according to the flat buyer's agreement signed on 12th September 2013 between parties, the assured/committed date for possession on 10/12/2016 after encapsulating the grace period of 90 days mentioned in the clause 8 of that agreement. The unit was booked under a construction linked payment plan
6. That the complainant received a communication dated 7/10/2020 from the respondent-builder intimating that it has approached SWAMIH INVESTMENT FUND-I to complete the project. This shows that the respondent(s) have misappropriated all the funds received from the innocent investors.

7. That the possession of the allotted unit was to be offered to the complainant of the completion of the project by 10.12.2016 as provided under clause 8.1 of the buyer's agreement. However, despite a passage of more than four and half years, the project is still incomplete.
8. That the delay in construction of the said project can be established from the photographs clicked by the complainant on 14/02/2021. These photographs clearly establish the delay in possession by the respondent-builder.
9. Thus, due to the above-mentioned facts the complainant was left with no other option but to approach this Hon'ble Authority for protection of his rights as a homebuyer by withdrawing from the project and seeking refund of the paid up amount besides interest and compensation.

B. Relief sought by the complainant:

The complainant has sought following relief(s):

- To direct the respondent to refund the amount of Rs. 42,33,615/- along with prescribed rate of interest.

C. Reply by the respondents

10. That the complaint filed before the authority is not maintainable being misconceived and erroneous one.
11. That the complainant is estopped from filling this complaint by his act and conduct and the same is an abuse of the process of law.
12. That the complainant has miserably and willfully failed to make payments in time or in accordance with the terms of the

allotment/ flat buyer's agreement. It is submitted that till date, the total delay in rendering the payment towards due installments by the complainant is approx. **15,368** on various occasions under different installments. It is further submitted that the complainant has defaulted in making timely payments of due installments right from the inception. It is pertinent to mention here that as per the record maintained by the respondent, he has not fulfilled his obligations and has not paid the installments on time that had fallen due, despite receipt of repeated demand letters. The following payment sheet clearly shows the delay in number of days in making payments by the complainant:

<u>Event</u>	<u>Due Date</u>	<u>Due Amount</u>	<u>Payment Date</u>	<u>Taxes</u>	<u>Actual Amount Paid</u>	<u>Amount Unpaid (Including Taxes)</u>	<u>Days Delay</u>
At the time of booking	11.08.2012	1200000	23.08.2012	35969	1200000	0	12
At the time of Allotment	14.09.2012	211203	19.10.2012	6334	211203	0	35
On or Before 45 th Day of the Allotment	29.10.2012	1411202	01.11.2012	42302	1411206	0	3
On Commencement of Construction Work	31.03.2013	1419662	21.03.2013	50762	1411206	8452	0
On Completion of Lower Basement Slab	19.12.2015	1428447	Not Paid	59547	NIL	1436899	2168
On Completion of Ground Floor Slab	01.07.2017	766588	Not Paid	82138	NIL	2203487	1608
On Completion of 2 nd Floor Slab	01.07.2017	766588	Not Paid	82138	NIL	2970075	1608
On Completion of 5 th Floor Slab	01.07.2017	766588	Not Paid	82138	NIL	3736663	1608
On Completion of 8 th Floor Slab	01.07.2017	766588	Not Paid	82138	NIL	4503261	1608
On Completion of 10 th Floor Slab	01.07.2017	766588	Not Paid	82138	NIL	5269839	1608
On Completion of Brick	22.08.201	766588	Not Paid	82138	NIL	603642	1556

Work in within the Apartment	7					7	
On Completion of Final Floor Slab	02.02.2018	766588	Not Paid	82138	NIL	6803015	1392
On Completion of Internal Plumbing, Electricity Conduiting & Internal Plaster within the Apartment	25.12.2018	766588	Not Paid	82138	NIL	7569603	1066
On Completion of External Plaster in Superstructure	13.06.2019	718674	Not Paid		NIL	8293417	896
On Completion of Finishing work in the Flat including Wooden Flooring	08.09.2021	718674	Not Paid		NIL	9006951	78
On Completion of Internal & External Paint works & fixing of doors & windows	25.09.2021	718674	Not Paid		NIL	9725625	61
At the time of notice for handing over of Possession	25.09.2021	1541174	Not Paid		NIL	11266799	61
TOTAL DEMANDED AS ON 25.09.2021 WITHOUT INTEREST	---	---	---		42,33,615	11266799	15368

13. It is further submitted that the complainant has frustrated the terms and conditions of the flat buyer's agreement, which were the essence of the arrangement between the parties and therefore, he now cannot invoke a particular clause, and so, the complaint is not maintainable and be rejected at the threshold. The complainant has also misdirected in claiming refund on account of alleged delayed in offer for possession of allotted unit.

14. That the Municipal Corporation of Gurugram vide direction dated 14.10.2019 bearing Memo No.MCG/ADMC/2019 imposed a complete ban from 11.10.2019 to 31.12.2019 on the construction activities in Gurugram. Further, Environment Pollution (Prevention and Control) Authority for NCR vide



direction dated 01.11.2019 bearing EPCA-R/2019/L-53 imposed a complete ban from 01.11.2019 to 05.11.2019. Further, Hon'ble Supreme Court vide its order dated 04.11.2019 in the matter bearing W.P (C) No. 13029/1985 also banned the construction activities in Delhi NCR till further orders keeping in mind the damage caused to the environment due to construction and demolition activities. It is pertinent to mention here that the Hon'ble Supreme Court has only on 09.12.2019 partially uplifted the ban on construction activities in Delhi NCR between 6am to 6pm. Thereafter despite facing practical issues in arranging manpower, the respondent had managed to maintain the minimum labour force constantly in the labour camps at the project site to complete the pending work at the earliest. This clearly shows bonafide intention of the respondent to complete the project on time. Even in the year 2018, vide Notification No. EPCA- R/2018/L-91 and EPCA-R/2018/L-100, periodic bans on constructions were imposed. Such bans that have been imposed from time to time in the past years, had enormous adverse impact on the construction of infrastructure projects. The adverse effects of banning the construction activity disrupts the arrangement of plant & machinery, supply of raw material and manpower resources as it takes a long time to reorganize the labour force once the ban is lifted. Another factor to be considered is that most of the labour force in NCR hails from Eastern UP/Bihar. So, during such period wherein the ban remains in effect, the labour force usually heads back to their hometowns, as it becomes difficult for them to sustain here without any source of income. It is an

admitted fact, consequently, on an average the construction ban of a day culminates into roughly a 10 days of delay in overall construction activity. It is also not disputed that due to the outbreak of Covid 19, the entire world went into lockdown and all the construction activities were halted and no labour was available. Infact all the developers are still facing hardship because of acute shortage of labour. Even the HRERA, Gurugram has vide order dated 26.05.2020 declared the Covid 19 as a calamity under the Force Majeure clause and therefore there cannot be said to be any delay in delivering the possession by the respondent.

15. That there is a huge outstanding amount to be paid by the allottees, which has resulted in allege delay in handing over of possession to the allottees. It is further submitted that due to the money crunch created by the allottees by not making timely payments and in order to meet the gap for cost of completion of the project arisen on account of non-payment/default in payment of installments by the allottees, the company approached SWAMIH INVESTMENT FUND - I (Special Window for Completion of Construction of Affordable and Mid-Income Housing Projects) which has been formed to complete construction of stalled, RERA registered residential developments that are in the affordable housing / mid-income category, are networth positive and requires last mile funding to complete construction. It has a target corpus of Rs. 12,500 crores with a greenshoe option of Rs. 12,500 crores. The SWAMIH INVESTMENT FUND - I, vide their letter dated 23.07.2020 has sanctioned an initial amount of Rs. 110 Crores

to complete the project. The first trench had already been disbursed to the respondent company and the same is being infused into the project for speedy construction. As per the condition of the fund sanctioned, the entire amount of the fund is to be utilised only in completion of the project under the observation and monitoring of the agency deployed by the SWAMIH FUND in the project. The primary objective of establishment of SWAMIH FUND is to help the home buyers in getting their homes and is sponsored by the Department of Economic Affairs, Ministry of Finance, Government of India. If any adverse relief is allowed by this Hon'ble Authority, then the basic objective of the intervention of the Government of India would be defeated.

16. That on 10.09.2012, the complainant was allotted unit no. 7A, 4 BHK + PR + SR having an approximate super area of 2,600sq.ft. in the building-4 of the project "The Leaf" at the basic rate of Rs. 4,700/- per sq.ft. and preferential location charges (PLC) of Rs. 225/- per sq.ft. external development charges (EDC) of Rs. 355/- per sq.ft., infrastructure development charges (IDC) of Rs. 35/- per sq.ft. to be payable as per the payment plan. It is submitted that the total sale consideration of the flat booked by the complainant was Rs. 1,46,19, 000/-.However, it is submitted that the total sale consideration amount was exclusive of the registration charges, stamp duty charges, service tax and other charges to be paid by the complainant at the applicable stage. It is submitted that he agreed that the payment will be made as per the payment plan (Construction Linked Payment Plan)

annexed with the allotment letter and the copy of same was read over to the complainant.

17. That the complainant has failed to make payments in time in accordance with the terms and conditions as well as payment plan annexed with the allotment letter and flat buyer's agreement and as such the complaint is liable to be rejected. It is submitted that out of the total consideration of Rs. 1,44,89,000/- of the flat, the amount actually paid by him is Rs. 42,33,615/- i.e. less than 30% of the total consideration. It is further submitted that there was an outstanding amount of Rs. 1,12,66,799/- excluding interest payable by the complainant as on 25.11.2021 as per the construction linked plan opted by him. It is submitted that the complainant deliberately concealed the fact that on 31.08.2017, he wrote an e-mail to the respondent that he is interested in paying the outstanding amount and requested for the ledger.
18. It is submitted that status of the construction of the building in which the unit allotted to the complainant is located is complete and the respondent has already obtained the occupation certificate vide Memo No. 21036 dated 24.08.2021.
19. 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.

E. Jurisdiction of the authority

20. The respondents have raised an objection regarding jurisdiction of authority to entertain the present complaint.

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

21. 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

22. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale.

Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

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

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.

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 promoters leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

E. Findings on the relief sought by the complainant.

E.I Direct the respondents to refund the amount of Rs. 42,33,615/- along with prescribed rate of interest.

23. 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 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. Clause 8 of the agreement to sell provides for handing over of possession and is reproduced below:

8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty six months from the date of signing of this agreement. The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months or such extended period, for applying and obtaining occupation certificate in respect of the Group Housing Complex.

25. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to but subject to force majeure, political disturbances, circumstances cash flow mismatch and reason beyond the control of the company. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottees that even a single default by the allottee in making payment as per the plan may make the possession clause irrelevant for the purpose of allottees and the

commitment date for handing over possession loses its meaning. The incorporation of such clause in the agreement to sell by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottees of his right accruing after delay in possession. This is just to comment as to how the builder has misused their 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.

26. Admissibility of refund along with prescribed rate of interest: The complainant is seeking refund the amount paid by him. However, allottee intends to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

27. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
28. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 08.08.2022 is 7.80%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.80%.
29. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(1), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 8 of the agreement to sell executed between the parties on 12.09.2013, the possession of the subject apartment was to be delivered within a period of 36 months from the date of execution of signing of agreement. Therefore, the due date of handing over of possession is 12.09.2016. Further, the authority observes that there is no document place on record which shows that respondent has offered the possession of the allotted unit to the allottee after receipt of occupation

certificate on 24.08.2021. In view of the above-mentioned facts, when the allottee intends to withdraw from the project and is well within his right to do the same in view of section 18(1) of the Act, 2016. Further, the authority has no hitch in proceeding further and to grant a relief in the present matter in view of the recent judgement *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*” (Supra).

30. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondents is established. As such, the complainant is entitled to refund the entire amount paid by him at the prescribed rate of interest i.e., @ 9.80% p.a. from the date of payment of each sum till its actual realization as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017

F. Directions of the Authority:

31. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent/promoters are directed to refund the entire amount of Rs. 42,33,615/- paid by the complainant along with prescribed rate of interest @ 9.80% p.a. from the date of each payment till the actual date of refund of the



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deposited amount within 90 days from the date of this order as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.

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

32. Complaint stands disposed of.

33. File be consigned to the Registry.

v.i - S
(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.08.2022

HARERA
GURUGRAM

