

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

Complaint no. :	1049 of 2021
Date of filing complaint:	05.03.2021
First date of hearing:	13.04.2021
Date of decision :	25.08.2022

Yogesh Sharma Both R/o: RZ-B94, Roshan Vihar, Block-D Part-2 Najafgarh, New Delhi	Complainant
Versus	
M/s Neo Developers Private Limited Registered office at: 32B, Pusa Road, Delhi- 110005 Corporate office at: 1507, Tower- D, Global Business Park, Gurgaon, Haryana	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Ravi Rao proxy counsel for Sh. Sushil Yadav (Advocate)	Complainants
Sh. Venket Rao (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/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 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 complainants, 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.	Project name and location	"Neo Square", Sector 109, Gurugram
2.	Project area	2.71 acres
3.	Nature of the project	Commercial project
4.	DTCP license no. and validity status	102 of 2008 dated 15.05.2008 and valid up to 14.05.2022
5.	Name of licensee	Shrimaya Buildcon Pvt. Ltd., Kavita and 3 others
6.	RERA Registered/ not registered	Registered
	RERA Registration valid up to	vide registration no. 109 of 2017 dated 24.08.2017 23.08.2021
7.	Unit no.	31, ground floor, Tower B [Page 24 of the reply]
8.	Unit measuring (super area)	565 sq. ft. [Page 24 of the reply]
9.	Date of allotment letter	N/A
10.	Date of execution of builder buyer agreement	01.05.2013 [Page 15 of the complaint]
11.	Date of start of construction	The authority has decided the date



	of the project	of construction as 15.12.2015 which was agreed to be taken as date of start of construction for the same project in other matters. CR/1329/2019
12.	Possession clause	5.2 That the company shall complete the construction of the said building/complex within which the said space is located within 36 months from the date of execution of this agreement or from the start of construction whichever is later and apply for grant of completion/occupancy certificate. The company on grant of occupancy/completion certificate shall issue final letters to the allottee who shall within 30 days, thereof remit all dues. 5.4 That the allottee hereby also grants an additional period of 6 months after the completion date as grace period to the company after the expiry of aforesaid period. (emphasis supplied)
13.	Due date of delivery of possession	15.06.2019 [Calculated from the date of start of construction i.e.15.12.2015] Grace period of 6 months is allowed as has been decided in CR no.1329 of 2019
14.	Payment plan	Construction linked payment plan [Page 35 of the complaint]
15.	Total sale consideration	Rs.53,67,500/- [Page 35 of the complaint]
16.	Total amount paid by the complainant	Rs.16,26,579/- [As per account statement dated 15.03.2021 at page no. 48 of the reply]

17.	Occupation Certificate	Not Obtained
18.	Offer of possession	Not Offered

B. Facts of the complaint:

3. That the complainant, booked a shop admeasuring 565 sq. ft. in aforesaid project of the respondent for total sale consideration is Rs. 53,67,500/- which includes BSP, car parking, IFMS, PLC etc. in their forthcoming project named "NEO SQUARE" Sector 109 Gurgaon, promising various advantages, like world class amenities and timely completion/execution of the project etc.
4. Out of the total sale consideration of amount Rs 53,67,500/-the complainant made payment of Rs 16,26,579/-to the respondent vide different cheques on different dates. That as per buyer's agreement dated 01.05.2013 the respondent had allotted a unit/shop bearing no 31 on Ground Floor in Tower-B having super area of 565 sq. ft. to the complainant. That as per para no. 5.2 of the buyer agreement dated 01.05.2013, the respondent had agreed to deliver the possession of the shop in 01.11.2016 including an extended period of six months.
5. That complainant regularly visited the site but was surprised to see that construction work is not in progress and no one was present at the site to address the queries of the complainant. It appears that respondent has played fraud upon the complainant. The only intention of the respondent was to take payments for the Tower without completing the work. That despite receiving all payment as demanded by the respondent for the said shop and despite repeated requests and reminders over phone calls, emails and personal visits of the complainant, the respondent has failed

to deliver the possession of the allotted shop to the complainant within stipulated period.

6. That it could be seen that the construction of the block in which the complainant shop was booked with a promise by the respondent to deliver the shop by 01.11.2016 but was not completed within time for the reasons best known to the respondent. That as per clause 5.6 of the buyer agreement dated 01.05.2013 it was agreed by the respondent that in case of any delay, the respondent shall pay to the complainants a compensation @ Rs.10/- per sq. ft. per month of the super area of the shop.

C. Relief sought by the complainant:

7. The complainant has sought following relief(s):
- Direct the respondent to refund the amount of Rs. 16,26,579/- alongwith interest at prescribed rate i.e. MCLR+ 2% till date of filling of the complaint.

D. Reply by respondent:

8. That the buyer's agreement dated 01.05.2013 was executed between the complainant and the respondent prior to coming into force of the real estate (Regulation and Development) Act, 2016. Moreover, due to the on-going Covid-19 situation across the world and the nation, force majeure clause has been applied and various authorities have given extension to promoters for completion of on-going projects.
9. It is submitted that clause 5.2 of the buyer's agreement provides that the company shall complete the construction of the said

building within which the said space is located within 36 months from the date of execution of this agreement or from the start of construction, whichever is later. Further, a grace period of 6 months is also mentioned in the buyer's agreement. It is submitted that the said buyer's agreement was executed on 01.05.2013 and the construction started in the month of December 2015. Accordingly, the due date i.e. 'specified date' for handing over the possession of the unit has not occurred, neither in terms of the buyer's agreement nor in terms of the RERA registration.

10. That the Ld. Authority in the matter of **Ram Avtar Nijhawan vs M/s Neo Developers Pvt. Ltd**, complaint No. 1328 of 2019 vide order dated 05.09.2019, which pertains to the same project "Neo Square", has held that the construction of the project has started on 15.12.2015 and the due date of possession was 15.06.2019. The relevant paragraphs are reiterated for ready reference:

"19 ii. With respect to the third issue raised by the complainant, as per clause 5.2 read with 5.4 of buyer's agreement dated 12.02.2013, the possession of the unit was to be handed over within 36 months + 6 months grace period from the date of execution of agreement or date of start of construction whichever is later. The construction started on 15.12.2015. Therefore, the due date of handing over the possession shall be computed from 15.12.2105. Accordingly, the due date of possession was 15.06.2019"

11. That the respondent herein has already applied for the issuance of the occupation certificate by way of application dated 24.02.2020 and the same is pending before the concerned competent authority. Further, the respondent has received "Approval of firefighting scheme" vide Memo No. FS/2020/110 dated 20.04.2020.

12. That timely payment of installments and other applicable stamp duty, taxes etc. is the essence of the agreement. Any default in such payments hampers the construction process of the said space. It was clearly agreed by the complainant to make all payments as per the payment plan annexed to the agreement and/or when demanded as per clause 4.4 of the buyer's agreement. **Clause 4.4** is reiterated for ready reference:

" That the timely payment of instalments as stated in Payment Plan (Annexure-I) and applicable stamp duty, registration fee, maintenance charges, service tax, BOCW Cess, and other charges and taxes payable under this Agreement and/or law as and when demanded is the essence of this Agreement."

13. That it is pertinent to note herein that the buyer's agreement in clause 4.1 to 4.5 executed between the parties clearly stipulates that the entire relationship of the builder and the complainant herein is founded on timely payments by the complainant and the complainant being in default of the same cannot complain about the incapacity of the respondent to timely complete the project.
14. It is submitted by the respondent that the outstanding amounts to the tune of Rs. 47,24,017/- that stand due and payable on part of the complainant till date, against the sale consideration of Rs.63,50,596/-.
15. The payment of instalments was to be done as per the construction linked plan, as agreed upon in the buyer's agreement. It is submitted that the respondent issued various demand letters whereas, the complainant kept mum of all the demands and defaulted in clearing outstanding dues as per the demands raised or schedule of payments mentioned in the buyer's agreement.

16. It is submitted that out of the sale consideration amount of Rs. Rs.63,50,596/- the complainant had made payment of Rs. 16,26,579/- only. It is pertinent to note here that Clause 5.2 of the agreement says that the company shall complete the construction of the said building/ complex within 36 months from the date of execution of the buyer's agreement, or from the start of the construction, whichever is later . Clause 5.4 of the agreement also talks about the grace period of 6 months even after the expiry of the aforesaid period for the completion of the said building/ complex. Hence, as per Clause 5.2, the construction completion date shall be deemed to be the date when application for grant of completion/occupancy certificate is made. Clause 5.2, 5.3 and 5.4 of the buyer's agreement are reproduced herein below:

Clause 5.2: That the company shall complete the construction of said Building/Complex within which the said space is located within 36 months from the date of execution of this Agreement or from the start of construction, whichever is later and apply for grant of Completion/Occupancy Certificate. The Company on grant of Occupancy/ Completion Certificate, shall issue final letters to the Allottee(s) who shall within 30 (Thirty) days, thereof remit all dues.

Clause 5.3: That the construction completion date shall be deemed to be the date when application for grant of completion/occupancy certificate is made.

Clause 5.4: That the Allottee hereby also grants an additional period of 6 months after the completion date as grace period to the company after the expiry of the aforesaid period.

17. It is humbly submitted that due to the non- payment of due instalments by the complainant, the respondent has faced much financial hardship and difficulty in continuing with the construction due to lack of funds. it is further submitted that the complainant being fully aware with the terms of the agreement had executed the buyer's agreement with the respondent and now

cannot violate any clause contained in the agreement herein. clause 5.6 of the said agreement mentioned by the complainant in case the company, for reasons other than those beyond control fails to complete the construction of the said space within the stipulated time, then the allottee shall be entitled to receive compensation from the company @ Rs. 10 per sq. ft. per month for the period of delay.

18. it is submitted that clause 4.6 of the said buyer's agreement clearly states that the respondent may at its sole discretion, waive the breach of agreement committed by the allottee in not making the payments at specified time, but on condition that the allottee shall pay interest @ 24% per annum for the period of delay and such other penalties as the company may impose. it is submitted that the complainant is trying to shift its onus of failure on the respondent as it is the complainant who failed to comply his part of obligation and miserably failed to pay the instalments in time despite repeated payment reminders being sent by the Respondent from time to time.
19. 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:

20. 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 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 promoter leaving aside

compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F. I. Objection regarding Timely payments:

The respondent has alleged that the complainants having breached the terms and conditions of the agreement and contract by defaulting in making timely payments. Further the above-mentioned contention is supported by the builder buyer agreement executed between both the parties. Clause 4.4 provides that timely payments of the instalments and other charges as stated in the payment plan as and when demanded is essence of the agreement.

But The respondent cannot take advantage of this objection of timely payments being himself at wrong firstly by still not obtaining the occupation certificate and offering the possession of the unit despite being delay of more than 2 years and the complainants have paid 32% of the total sale consideration till date. Therefore, the respondent itself failed to complete its contractual and statutory obligations. Moreover, there is no document on file to support the contentions of the respondent regarding delay in timely payments.

F.II Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's

agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the

Standing Committee and Select Committee, which submitted its detailed reports."

Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings regarding relief sought by the complainants:

G.1 Direct the respondent to refund the amount of Rs. 16,26,579/- alongwith interest at prescribed rate i.e. MCLR+ 2% till date of filling of the complaint.

The complainant was allotted the subject unit by the respondent for a total sale consideration of Rs. 53,67,500/- as per payment plan at page no. 35 of the complaint. A buyer's agreement dated 01.05.2013 was executed between the parties. The due date of possession of the subject unit was calculated as per clause 5.2 & 5.4 where the possession has to be handover **within 36 months from the date of execution of this agreement or from the start of construction whichever is later** and which comes out to be 15.06.2019 as the authority has decided the date of construction as 15.12.2015 which was agreed to be taken in the other complaints of similar projects. After signing of buyer's agreement, the complainant started depositing various amounts against the allotted unit and paid a sum of Rs. 16,26,579/- as is evident from the account statement dated 15.03.2021 at page no. 48 of the reply. It is the case of complainant that since the construction of project was not as per schedule of payment, so they stopped making remaining amount due to the respondent and which ultimately led to their withdrawal from the project.

Keeping in view the fact that the allottee complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter 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. The matter is covered under section 18(1) of the Act of 2016.

The due date of possession as per agreement for sale as mentioned in the table above is **15.06.2019** and there is delay of more than 2 years on the date of filing of the complaint.

The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

“” The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project.....”

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). 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 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 the unit with interest at such rate as may be prescribed.

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.

The authority hereby directs the promoter to return the amount received by him i.e., Rs. **16,26,579/-** with interest at the rate of 10% (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*.

H. Directions of the authority:

21. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act of 2016 to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act of 2016:

- i. The respondent /promoter is directed to refund the amount i.e. **16,26,579/-** received by it from the complainants along with interest at the rate of 10% p.a. 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 deposited 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.

22. Complaint stands disposed of.

23. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. KK Khandelwal)
Chairman

Dated: 25.08.2022