

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

Complaint no. :	775 of 2021
Date of filing complaint:	11.02.2021
First date of hearing:	03.05.2021
Date of decision :	25.05.2022

Kanta Lamba W/o Mangat Ram Lamba R/o: H.No. J-59, Second Floor, Saket, New Delhi-110017	Complainant
Versus	
M/s Ninaniya Estates Limited R/o: Prism Tower, Tower A, 6 th floor, Sec 2, Gwal Pahari, Faridabad Road, Gurugram- 122003	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Sandeep Nagar (Advocate)	Complainant
Sh. Shagun Singla (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 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 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.	Project name and location	"Prism Portico", Sec 89, Gurugram
2.	Project area	5.05 acres
3.	Nature of the project	Commercial complex
4.	DTC? License	179 of 2008 dated 11.10.2008 and valid up to 10.10.2018
5.	Name of the licensee	Ninaniya Estate Ltd.
6.	RERA Registered/ not registered	Unregistered
7.	Unit no.	PPES- 605, 6th floor [Page 36 of the complaint]
8.	Unit measuring (super area)	550 sq. ft. [Page 36 of the complaint]
9.	Date of allotment	N/A
10.	Date of execution of builder buyer agreement	28.06.2013 [Page 33 of the complaint]
11.	Memorandum of understanding	05.04.2013 [Page 26 of the complaint]
12.	Date of commencement of construction	01.04.2015 [As per email received from the



		respondent on 21.01.2022]
13.	Possession clause	5.1 That the Company shall complete the construction of the said Unit within 36 months from the date of execution of this agreement and/or from the start of construction whichever is later and Offer of possession will be sent to the Allottee subject to the condition that all the amounts due and payable by the Allottee by the stipulated date as stated in Annexure II attached with this agreement including sale price, maintenance charges, security deposit, stamp duty and other charges etc. have been paid to the Company. The Company on completion of the construction shall apply for completion certificate and upon grant of same shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues. (emphasis supplied)
14.	Due date of possession	01.04.2018 Calculated from the date of start of construction i.e. 01.04.2015
15.	Total sale consideration	Rs.29,87,500/- [Page 58 of the complaint]
16.	Total amount paid by the complainant	Rs.25,30,215/- [As per the facts of the complaint annexed at page no. 9]
17.	Payment plan	Construction linked payment plan [Page 58 of the complaint]
18.	Occupation certificate	Not obtained
19.	Offer of possession	Not offered
20.	Assured Return Clause	Clause 2 of MOU

		The developer shall give an investment assured return of Rs.22,089/- per month w.e.f. 18.12.2012 in arrears till the date of possession of the fully furnished said unit is handed over to the buyer.
21.	Amount received by the complainant by way of assured return	Rs.14,79,000/- [As admitted by the respondent in his reply]

B. Facts of the complaint:

3. That the respondent in the month of November 2012 approached the complainant and offered a commercial suite in above detailed project. The respondent assured the complainant of timely construction & delivery of fully furnished unit and also offered monthly assured returns till the delivery of physical possession of said unit. That relying on the false assurances and misrepresentations on the part of respondent, complainant on 14.12.2012 agreed to purchase a unit in its above-mentioned project for the total sale consideration amount of Rs. 28,87,500/-. That the respondent-builder also agreed to pay the monthly assured returns.
4. That the advance payment of Rs. 25,30,215/- was made by the complainant to the respondent towards the sale consideration and the said fact is duly recorded in the builder buyers' agreement. The payment was made through two cheques being no. 000010 & 000011 both dated 14.12.2012 for the amount of Rs. 20,30,215/- and Rs. 5,00,000/- respectively.

5. That both the parties also entered into a memorandum of understanding dated 05.04.2013 wherein the respondent-builder agreed to pay interest by way of assured return of Rs. 22,089/- (after deducting TDS) per month till the possession of fully furnished unit is handed over to the complainant. Afterwards, the builder buyer's agreement was duly executed between the parties on 28.06.2013.
6. That as per clause 5.1 of builder buyer's agreement dated 28.06.2013, respondent -builder was bound to deliver the physical possession of fully furnished said unit within 42 months (including six months grace period) from the execution of the BBA i.e. till 27.12.2016. That the respondent failed to deliver the physical possession of the said unit within stipulated time period. That the respondent, time being the essence of the contract, has violated the material terms of the contract. That respondent even after the lapse of more than four years after the stipulated time period, has not handed over the physical possession of the said unit till date. It is submitted that project is still under construction and only basic structure has been erected at the site.
7. It is pertinent to mention here that the respondent-builder paid the amount of assured returns as per MOU but stopped the same from April 2018 and till date, no payment has been made despite several demands and requests.
8. That the complainant sent a legal notice dated 23.03.2019 to the respondent builder through counsel demanding the refund of the

amount paid towards the sale of said unit and dues of the monthly assured returns but respondent builder neither refunded the deposited amount nor cleared dues of monthly assured returns.

That despite paying 85% of the total cost of the unit and delay of more than four years, the possession of the unit has not been handed over to the complainant. It is pertinent to mention that no completion certificate and occupation certificate have been issued by the concerned authorities qua the project till date.

That the complainant made several enquiries about the development of project and expected completion time, but respondent company never provided any sort of information. Even the official website of respondent does not provide any information about the project, its stage, expected completion date and other information as mandated under the Act.

C. Relief sought by the complainant:

9. The complainant has sought following relief(s):

- i. Direct the respondent to refund the total deposited sale amount of Rs. 25,30,215/- to the complainant along with interest at the prescribed rate from 14.12.2012 (date of payment) till the full refund of total amount.
- ii. Direct the respondent to pay monthly assured returns @ Rs. 22,089/- per month from April 2018 till 31.01.2021 amounting to Rs. 4,85,958/- along with the interest at prescribed rate and further payment of mentioned monthly assured returns till it remains payable.

- iii. Direct the respondent to pay the compensation of Rs. 8,00,000/- to the complainant for mental agony, harassment, and financial losses, and Rs. 2,00,000/- towards litigation charges.

D. Reply by respondent:

The respondent builder by way of written reply made following submissions:

10. That from a bare reading of the buyer's agreement executed between the parties, it is clearly visible that the intention of the complainant has never been to take possession and only to gain assured returns. From the facts of the complaint and the agreed terms and conditions of the buyer's agreement, it may be implied that the complainant is an investor as the only purpose of booking a commercial unit in the project was to get monetary gains even after the completion of the said unit.
11. That the complainant be treated as 'co-promoter' and not as an 'allottee', as she invested in the project just to earn profits from the commercial unit. The complainant has already received a sum of Rs 14,79,000/- towards the payment of assured return from the respondent in respect of the unit in question. The progress of the project in question is in full swing and the respondent is ready to hand over the possession of the unit in question by the end of May 2022.

12. That the alterations in the timeline for the completion of the project cannot be attributed to the respondent and is result of external factors were beyond its control. The timeline as postulated within the agreement is intended and tentative and based on the timely payments made by the investors, force majeure etc.
13. 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:

14. 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 completed 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 complainant at a later stage.

F. Findings on the objections raised by the respondent:

F.1 Objection regarding force majeure conditions:

The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as, shortage of labour, two stage process of environmental clearance, labour strikes, slow pace of

construction due to a dispute with the contractor, demonetisation, lockdown due to covid-19 and weather conditions in Gurugram but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 28.06.2013 and the events taking place such as demonetisation, labour strikes, dispute with the contractor, do not have any impact on the project being developed by the respondent. Moreover, the due date for completion of the project was 01.04.2018 and the impact of covid 19 resulting in lockdown came only in March 2020. Though there may be shortage of labour, raw material and unfavourable weather conditions but the same cannot be taken into consideration for delay in completion of the project and that too for more than 4 years. Some of the allottees may not be regular in paying the amount due but the interest of all the stakeholders concerned with the said project can't be put on hold due to their fault. Thus, the promoter respondent cannot be given any leniency based on of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.

F.2 Objections regarding the complainant being investor:

15. It is pleaded on behalf of respondent that complainant is investor and not consumer. So, she is not entitled to any protection under the Act and the complaint filed by her 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 consumer 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 the 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 he 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 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."

In view of above-mentioned definition of allottee as well as the terms and conditions of the buyer's agreement executed between the parties, it is crystal clear that the complainant is allottee as the subject unit allotted to her 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.1 Direct the respondent to refund the total deposited sale amount of Rs.25,30,215/- to the complainant along with interest at the prescribed rate from 14.12.2012 till the full refund

and

Direct the respondent to pay the complainant monthly assured returns @Rs.22,089/- per month from April 2018 till 31.01.2021 amounting Rs.4,85,958/- along with interest at prescribed rate.

16. Both the issues are interconnected and hence are being taken together.

The complainant was allotted the subject unit by the respondent for a total sale consideration of Rs. 29,87,500/-. A buyer's agreement dated 28.06.2013 was executed between the parties. The due date of possession of the subject unit was calculated as per clause 5.1 where the possession was to be handover **within 36 months from the date of execution of the agreement and/or from the start of construction whichever was later** which comes out to be 01.04.2018. It is an admitted fact

that a MOU dated 05.04.2013 was also executed between the parties with regard to payment of assured returns against the allotted unit at the rate of Rs.22,089/- (after deducting TDS) per month w.e.f. 18.12.2012 till the date of possession of fully furnished unit is handed over to the complainant-allottee. At the time of signing of buyer's agreement, the complainant paid sum of Rs. 25,30,215/- which is not disputed by the respondent in its written reply. It is the case of complainant that since the construction of project was not as per schedule of payment, so she stopped making remaining amount due and which ultimately led to her withdrawal from the project.

17. So, keeping in view the fact that the allottee- complainant wishes to withdraw from the project and is 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 was **01.04.2018** and there is delay of approx. 3 years on the date of filing of the complaint on 27.01.2021.
18. The occupation certificate of the project where the unit is situated has not been obtained by the respondent-promoter and 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 she has paid major 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.....”

19. 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)*** and followed by the Hon'ble High Court of Punjab & Haryana in case ***Ramprashtha Promoters and Developers Pvt Ltd Vs Union of India and Ors. in CWP No.6688 of 2021*** decided on 04.03.2022, and wherein it was observed as under:

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

20. 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 allottees 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 she wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it 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 allottees including compensation for which she 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 respondent has admitted in its reply that an amount of Rs.14,79,000/- has already been paid to the complainant by way of assured return. Therefore, taking note of all the circumstances, the authority holds its view that the complainant-allottee is entitled for refund and hereby, direct the respondent to return the balance amount received by it from the complainant-allottee after deducting an amount of Rs.14,79,000/- already paid to the complainant on pretext of assured return; along with an interest at the rate of 9.40% 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 from the date of this order within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.2 Legal expenses:

21. The complainant is claiming compensation under the present relief. The Authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee(s) can claim. For claiming compensation under sections 12,14,18 and Section 19 of the Act, the complainant may file a separate complaint before the adjudicating officer under Section 31 read with Section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority:

22. 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 promoter as per the functions entrusted to the Authority under section 34(f) of the Act of 2016:

- i) The respondent /promoter is directed to return the balance amount received by it from the complainant-allottee after deducting an amount of Rs.14,79,000/- paid on pretext of assured return along with an interest at the rate of 9.40% 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 from the date of this order.

- 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.

23. Complaint stands disposed of.

24. File be consigned to the Registry.

V.K. Goyal
(Vijay Kumar Goyal)
Member

Dr. KK Khandelwal
(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.05.2022