

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

Complaint no. : 2217 of 2018  
First date of hearing: 26.03.2019  
Date of decision : 13.05.2022

1. Mr. Rahul Bhatia S/o Sh. Vidya Ratan Bhatia  
2. Mrs. Harleen Kaur W/o Sh. Rahul Bhatia  
both RR/o: - 11c, Tower-3, Bellevue, Central Park-2,  
Sector-48, Sohna Road, Gurgaon, Haryana-122001

**Complainants**

Versus

1. M/s BPTP Limited.  
2. M/s Countrywide Promoters Pvt. Ltd.  
**Regd. Office at:** M-11, Middle Circle, Connaught Circus,  
New Delhi-110001.

**Respondents**

**CORAM:**

Shri K.K. Khandelwal  
Shri Vijay Kumar Goyal

**Chairman  
Member**

**APPEARANCE:**

Sh. Sanjeev Sharma  
Sh. Venkat Rao

Advocate for the complainants  
Advocate for the respondents

**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 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	"Pedestal", Sector- 70 &70-A, Gurugram
2.	Project area	102.2 Acre
3.	Nature of the project	Residential
4.	DTCP license no. and validity status	15 of 2011 dated 07.03.2011
5.	Name of licensee	Impartial Builders Developers Pvt. Ltd and 22 others
8.	RERA Registered/ not registered	Not Registered
9	Unit no.	D-61D-FF, First Floor [page no. 75 of complaint]
10.	Unit area admeasuring	1080 Sq. Ft. [page no. 75 of complaint]
11	Tripartite Agreement	26.11.2013. (page no. 99 of complaint)
12.	Date of execution of agreement	20.11.2013 (page no. 70 of complaint)
13.	Possession clause	<b>5. Possession</b> 5.1 The Seller/Confirming Party proposes to offer possession of the



		<p>Unit to the Purchaser(s) within the Commitment Period. The Seller/Confirming Party shall be additionally entitled to a Grace Period of 180 days after the expiry of the said Commitment Period for making offer of possession to Purchaser(s).</p> <p><b>1.4 "Commitment Period"</b> shall mean, subject to Force Majeure circumstances, intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities and/or documentation as proscribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of all installments of the sale consideration as per the payment plan opted, the Seller/Confirming Party shall offer the possession of <b>the Unit to the Purchaser(s) within a period of 36 months from the date of execution of Floor Buyer's Agreement.</b></p>
14.	Due date of possession	<p>20.11.2016</p> <p>(calculated from the execution of flat buyer agreement)</p> <p>Grace period not allowed</p>

15.	Total sale consideration	Rs. 94,48,773/- (As per CRA)
16.	Amount paid by the complainants	Rs. 39,64,567/- (As per CRA)
17.	Occupation certificate /Completion certificate	Not received
18.	Offer of possession	Not offered

**B. Facts of the complaint**

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

3. The complainants vide application dated 05.08.2013 applied for the allotment of a unit in the project namely 'Pedestal' situated in sectors 70 & 70A, Gurugram. A unit bearing No. D-61D-FF in the project detailed above was allotted to them for a total sale consideration of Rs. 9448773/-. Subsequently, a floor buyer agreement was executed between the parties on 20.11.2013 and as per the same, the possession of the subject unit was to be handed -over to the them on 20.11.2016.
4. That the unit was booked by the complainants under a construction linked payment plan. Thus, adhering to the payment plan they paid a total sum of Rs. 3964567/- to the respondents as and when demands were raised against the construction.
5. That the respondents vide its letter dated 21.11.2013 to ICICI Bank Ltd. had intimated for the approval of the building plans etc. for sanction loan to the complainants for buying the said unit in their project. A



tripartite agreement dated 26.11.2013 was executed between the parties and as per the same, the subvention scheme would end on 30.11.2015.

6. That the complainants have been diligently making payments as per the demand of the respondents and also PEMI/EMI payments to ICICI Bank, believing that the money was being used to construct the project. But to the shock and disappointment of the complainants, their money was being retained by the respondents as they have failed to construct the project till date and provide any details on the date of possession.
7. The complainants cannot be expected to wait endlessly for the completion of the project. Hence, the complainants have preferred the present complaint for refund at a prescribed rate of interest.

**C. Relief sought by the complainants:**

8. The complainants have sought following relief(s).
  - I. To direct the respondents to refund total amount Rs. 39,64,567/- with interest i.e. MCLR+2% till the date of filing of complaint;

**D. Reply by the respondents:**

9. That the complainants have approached this authority for redressal of the alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is submitted complainants are investors as admitted by them vide their email dated 20.11.2016. There is not even single document

exchanged between the parties which shows that the pre-EMI interest was to be directly paid to the bank by the respondents.

10. It is pertinent to mention here that complainants have alleged that they have paid an amount of Rs. 39,64,567/- towards the subject unit . As a matter of fact, out of said amount, they have only paid an amount of Rs. 15,27,010/- whereas ICICI's contribution was Rs. 19,38,915/- and the respondents had adjusted towards pre-EMI an amount of Rs. 9,59,963/-
11. That having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless relief beyond the ambit of the agreement, the complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the 'Doctrine of Aprobate & Reprobate". Therefore, in light of the settled law, the relief sought by the complainants in the complaint under reply cannot be granted by this authority.
12. The parties had agreed under the floor buyer's agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainants have raised dispute but did not take any step to invoke arbitration.
13. That the respondents have been giving updates of the construction raised at the site of the project as evident from email dated 23.08.2017. it was denied that the complainants were not informed about the stage of construction and progress being made at the site. Copies of emails

dated 14.12.2017, 25.03.2018, 08.04.2018, 07.05.2018, 08.05.2018 and 15.06.2018 (annexure R-15) are a pointer in this regard.

14. It was further pleaded that though the complainants were being informed about the latest qua the construction in the project but defaulted in making remaining payments leading to issuance of various reminders vide letters dated 08.08.2018, 14.09.2018, 16.11.2018, 15.02.2019 and 13.03.2019 respectively, but with no positive results.
15. Copies of all the relevant do have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

**D. Jurisdiction of the authority**

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

**D.I Territorial jurisdiction**

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

**D.II Subject-matter jurisdiction**

18. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

**Section 11**

.....  
(4) The promoter shall-

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

**Section 34-Functions of the Authority:**

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

19. 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.
20. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*** SCC Online SC 1044 decided on 11.11.2021 wherein it has been laid down as under:

*"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is*



that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

21. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of *M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*, and followed by a Division Bench of Hon'ble Punjab and Haryana High Court in "*Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others CWP no. 6688 of 2021 decided on 13.01.2022*, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on that amount.

**F. Findings on the objections raised by the respondent.**

**F.1 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.**

22. The contention of the respondents 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. The 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)** decided on 06.12.2017 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."*

23. Further, 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."*

24. 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 clause 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.

**F. II Objection regarding complainants in breach of agreement for non-invocation of arbitration.**

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

"33. *Dispute Resolution by Arbitration*

*All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a Sole Arbitrator who shall be appointed by the Managing Director of the seller and whose decision shall be final and binding upon the parties. The Purchaser(s) hereby confirms that he shall have no objection to this appointment of the Sole Arbitrator by the Managing Director of the Seller, even if the person so appointed, as a Sole Arbitrator, is an employee or advocate of the Seller/Confirming Party or is otherwise connected to the Seller/ Confirming Party and the Purchaser(s) confirms that notwithstanding such relationship/connection, the Purchaser(s) shall have no doubts as to the independence or impartiality of the said Sole Arbitrator. The Courts at New Delhi and Delhi high Court at New Delhi alone shall have the jurisdiction."*

26. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Section 88 of the Act also provides that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*** and followed in case of ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, wherein it has been held that the remedies provided under the Consumer

Protection Act are in addition to and not in derogation of the other laws in force. Consequently, the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

27. 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.

28. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act, 1986 and Act of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

**E. Findings on the relief sought by the complainants.**

**E.1 To direct the respondents to refund total amount Rs. 39,64,567/- with interest i.e. MCLR+2% till the date of filing of complaint.**

29. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject apartment along with interest at the prescribed rate as provided under section 18(1) of the Act. Section 18(1) of the Act is reproduced below for ready reference.

***"Section 18: - Return of amount and compensation***

*18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building:-*

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*

***he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act;***

*Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*  
*(Emphasis supplied)*

30. Clause 5.1 read with 1.4 of the agreement to sell provides for handing over of possession and is reproduced below:

*5.1 The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser(s) within the Commitment Period. The Seller/Confirming Party shall be additionally entitled to a Grace Period of 180 days after the expiry of the said Commitment Period for making offer of possession to Purchaser(s).*

*1.4 "Commitment Period" shall mean, subject to Force Majeure circumstances, intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities and/or documentation as proscribed/requested by Seller/Confirming Party, under*

*this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of all installments of the sale consideration as per the payment plan opted, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 36 months from the date of execution of Floor Buyer's Agreement.*

31. 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 builders have misused their dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.
32. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the rate of 18% p.a. However, allottees intend to withdraw from the project and are seeking refund of the amount paid by them 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.

33. 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.
34. 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., 13.05.2022 is 7.40%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.40%.
35. 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 18(1), the Authority is satisfied that the respondents are in contravention of the provisions of the Act. By virtue of clause 1.4 of the agreement to sell executed between the parties on 20.11.2013, the possession of the subject apartment was to be delivered within a period of 36 months from the date of execution of floor buyer's agreement. Therefore, the due date of handing over of



possession is 20.11.2016. Further, the authority observes that there is no document on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact when the allottees intend to withdraw from the project and are well within their 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)


36. 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 complainants are entitled to refund the entire amount paid by them at the prescribed rate of interest i.e., @ 9.40% 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.

**H. Directions of the authority**

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

- i. The respondents/promoters are directed to refund the entire amount of Rs.39,64,567/- paid by the complainants along with prescribed rate of interest @ 9.40% p.a. from the date of each payment till the actual date of refund of the 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. The amount of Pre-Emi's paid by the respondents/promoters in the account of complainants, if any, would be deducted while calculating the total amount due towards them.
  - iii. The loan amount received by the complainants against the allotted unit and paid by the respondents/promoters would be a charge payable to the financial institution and the same would be paid to it i.e the bank prior to paying the deposited amount to them.
38. Complaint stands disposed of.
39. File be consigned to registry.

V.K. -   
**(Vijay Kumar Goyal)**  
Member

  
**(Dr. K.K. Khandelwal)**  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.05.2022