

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

Complaint no. : 4751 of 2020
Date of filing complaint : 12.01.2021
First date of hearing : 10.03.2021
Date of decision : 13.05.2022

1. Anil Rustgi 2. Shobha Rustgi C/O: - 524 HEWO-I, Sector 56, Gurugram	Complainants
Versus	
1. M/s BPTP Limited 2. M/s Countrywide Promoters Pvt. Ltd. Regd. Office at: - OT-14, 3 rd Floor, Next door Parklands, Sector-76 Faridabad, Haryana-121004	Respondents

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Anil Rustagi	Complainant in person
Sh. Venket Rao	Advocate for the respondents

ORDER

1. The present complaint has been filed by the complainant/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.no.	Heads	Information
1.	Project name and location	'Amstoria', Sector 102, Gurugram, Haryana.
2.	Nature of the project	Independent residential floors
3.	a) DTGP license no	58 of 2010 dated 03.08.2010
	b) License valid up to	02.08.2025
	c) Name of the licensee	Shivanand Real Estate Pvt. and 12 others
	d) area	108.07 acre
4.	a) RERA registered/not registered	Not Registered
5.	Unit no.	A-130, Ground Floor (As per on page no. 37 of complaint)



6.	Unit admeasuring	1999 sq. ft. (As per on page no. 37 of complaint)
7.	Date of execution of the floor buyer's agreement	10.01.2012 (As per on page no. 31 of complaint)
8.	Total consideration	Rs. 96,39,552/- (As per on page no. 62 of complaint)
9.	Total amount paid by the complainants	Rs. 70,26,945/- (As per on page no. 62 of complaint)
10.	Nomination letter	17.11.2011 (As per page no. 49 of reply)
11.	Possession clause	"Clause 5.1- Subject to force majeure, as defined in clause 14 and further subject to the Purchaser(s) having complied with all its obligations under the terms and conditions of this agreement and the purchaser(s) not being in default under any part of this agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp duty and other charges and also subject to the purchaser having complied with all formalities or documentation as prescribed



		by the seller/ confirming party, the seller/ confirming party purposes to hand over the physical possession of the said unit to the purchaser within a period of 24 months from the date of sanctioning of the building plan or execution of floor buyers agreement, whichever is later (commitment period). The purchaser further agrees and understands that the seller/ confirming party shall additionally be entitled of the said commitment period to allow for filing and pursuing the occupancy certificate etc. from DTCP under the act in respect of the entire colony.
12.	Due date of delivery of possession	10.01.2014 (Calculated from the date of execution of FBA)
13.	Occupation certificate	Not obtained
14.	Offer of possession	Not offered

B. Facts of the complaint

3. Vide letter of allotment dated 05.08.2011, one Sukhbir Singh was allotted the unit detailed above by the respondent for a basic sale consideration of Rs. 96,39,552/-. He paid a sum of Rs. 29,25,747.28/- out of the total sale consideration. However on 07.11.2011 the complainants purchased the allotted unit from the said Sukhbir Singh and the amount paid

by him to the respondent was adjusted against the total sale consideration. So, in this way on the basis of nomination issued vide letter dated 17.11.2011 the complainants become allottees of the subject unit.

4. That a floor buyer agreement was entered into between the parties on 10.01.2012 and vide which the sale price of the unit remained the same. the amount deposited by the previous allottee was adjusted against the total sale price. It was agreed between the parties that the possession of the constructed unit would be offered to the complainants within a period of 24 months i.e., by 010.01.2014. It is the case of complainants that they started making payments against the allotted unit and in all paid a total sum of Rs. 70,26,945/- till date. They requested the respondents to deliver possession of the allotted unit but with no positive results .
5. It is further the case of complainants that respondents in an unfair manner siphoned of the funds meant for the project and utilize the same for their own benefits. The due date for completion of project and offer of possession of the allotted unit has already expired on 10.01.2014. neither the complainants have received any updates of the project nor the respondent applied for its occupation certificate.
6. That keeping in view the above mentioned facts the complainants withdrew from the project and are seeking refund of the amount deposited with the respondent besides

interest and other charges and hence, this complaint as prayed above.

7. Relief sought by the complainants:

The complainants have sought following relief(s):

- a). Direct the respondents to refund the entire payment made to them by the complainants to the tune of Rs. 70,26,945.41/- besides interest.

B. Reply by the respondents

The respondents by way of joint written reply dated 23.07.2021 made the following submissions :

8. That the complainants have concealed from this authority the factum of furnishing an affidavit dated 31.12.2011 and in taken of acceptance of the contents of the said affidavit, have further executed an appropriate undertaking dated 31.12.2011.

9. That the respondents vide various emails shared photographs of the project in question and they have always acted bonafidely towards its customers including the complainants, and thus, have always maintained a transparency with regard project progress. However, notwithstanding the several efforts made by the respondents to attend to the queries to their complete satisfaction, the complainants erroneously proceeded to file the present vexatious complaint before this authority against the respondents.

10. It is submitted that the construction of the project was affected on account of the NGT order prohibiting construction

(structural) activities of any kind in the entire NCR by any person, private or government authority. It is submitted that vide its various orders, NGT placed sudden ban on the entry of diesel trucks more than ten years old and directed that no vehicle from outside or within Delhi would be permitted to transport any construction material. Since the construction activities were suddenly stopped and after the lifting of the ban, it took some time for mobilization of the work by various agencies employed with the respondents, so the pace of construction could not be pickup at the desired speed.

11. Further, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), the constructions came to a halt and it took some time to get the labour mobilized at the site. However, it is submitted that the respondents shall abide by the terms and conditions as laid down in the floor buyer agreement executed between the parties and delay compensation as per the FBA, shall be paid to the Complainants, at the time of offering possession.

12. All other averments made in the complaint were denied in toto.

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 submissions made by the parties.

E. Jurisdiction of the authority

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

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

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 complainants at a later stage.

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.

14. 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."

15. 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."

16. 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.

F. II Objection regarding the project being delayed due to force majeure circumstances

From the bare reading of the possession clause of the floor buyer agreement, it becomes very clear that the possession of the apartment was to be delivered by **10.01.2014**. The respondents in their reply pleaded the force majeure clause on the ground of NGT order prohibiting construction activity of any kind in the entire NCR , Covid 19 and non-receipt of various approval from different governments authorities but all the pleas advanced in this regard are devoid of merit. The floor buyer's agreement was executed between the parties on 10.01.2012 and the respondents/promoters have not given any reasonable explanation as to why the construction of the project was being delayed and why the possession has not been offered to the complainants/allottees by the promised/committed time. The lockdown due to pandemic in the country began on 25.03.2020 i.e. much after the due date for handing over of possession of the unit after completion of the project. Similarly the various orders passed by NGT prohibiting construction activities are annual

features and the same have to be taken into consideration by a builder before launching a project. lastly, if there is any delay in granting sanctions/approvals for the project by different departmental authorities, then the allottees can't be blamed for the same and can't be said to be falling within the ambit of force majeure. So, the contention of the respondents/promoters to invoke the force majeure clause is to be rejected as it is a well settled law that **"No one can take benefit out of his own wrong"**. Moreover, there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate. A period of more than 8 years has expired and there is no evidence with regard to the project being complete. So, in such a situations the allottees are right in exercising their right for withdrawing from the project U/s 18(1) of the Act of 2016 and the authority is well within it jurisdiction to proceed further in the mater to grant refund in view of recent judgment of the Hon'ble apex of land in case of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors***, 2021-2022 (1) RCR(Civil) 357.

E. Findings on the relief sought by the complainants.

E.1 Direct the respondents to refund the entire amount of Rs.70,26,945/- along with interest.

17. The unit in question was allotted to the predecessor of the complainants on 05.08.2011 for a total sum of Rs. 96,39,552.90/- by the respondents. He paid a total sum of Rs. 29,25,747.38/- to the builder. But admittedly, that unit was later on purchased by the complainants on 07.11.2011 and which led to making an endorsement in their favour on 17.11.2021. the amount already paid by the previous allottee was adjusted against the total sale consideration. A floor buyer agreement was executed between the parties on 10.01.2012 and vide with a period of 24 months for completion of the project and handing over of the possession of the unit with a grace period of 180 days was given. So the due date for completion of the project was agreed upon as 10.01.2014. admittedly, the complainants already paid a sum of Rs. 70,26,945/- against the total sale consideration of Rs. 96,39,552.90/- upto dat. There is nothing on the record to show that the project is near completion or possession of the allotted unit is being offered to the complainants after obtaining occupation certificate . a period of more than 8 years has already has expired from the due date of possession. Thus, the allottee complainants wish to withdraw from the project and are demanding return of the amount received by the

promoters in respect of the unit with interest on their failure to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.

18. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondents-promoters. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have 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....."

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) 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 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 promoters are responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made there under or to the allottees as per agreement for sale under section 11(4)(a). The promoters have 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 promoters are liable to the allottees, as the allottee wishes to withdraw from the project, 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 allottees 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.

21. The authority hereby directs the promoters to return the amount received by them i.e., Rs. 70,26,945/-with interest at the rate of 9.40% (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 date of order within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G. 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 promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondents /promoters are directed to refund the amount i.e. Rs. 70,26,945/- received by them from the


complainants alongwith 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.

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.

23. Complaint stands disposed of.

24. File be consigned to the Registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 13.05.2022

HARERA
GURUGRAM