

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

Complaint no. : 957 of 2019
First date of hearing: 26.11.2019
Date of decision : 13.05.2022

Sh. Sanjay Sharan S/o Sh. Ishwar Sharan
R/o: - 93/1, Sector 2-A, Gandhinagar, Gujrat-382007

Complainant

Versus

M/s BPTP Limited.
Regd. Office at: M-11, Middle Circle, Connaught Circus,
New Delhi

Respondent

CORAM:

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Sh. Sanjay Sharan
Sh. K.K. Kohli
Sh. Venkat Rao

Complainant in person
Advocate for the complainant
Advocate for the 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 unit details, sale consideration, the amount paid by the complainant, 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 | "Park Generation", Sector- 37-D, Gurugram | |
| 2. | Project area | 7.1 acres | |
| 3. | Nature of project | Group housing complex | |
| 4. | RERA registered/not registered | Registered, vide registration no. 07 of 2018 dated 03.01.2018 | |
| 8. | DTPC License no. | 83 of 2008 dated 05.04.2008 | 94 of 2011 dated 24.10.2011 |
| | Validity status | 04.04.2025 | 04.04.2025 |
| | Name of licensee | Super belts Pvt. Ltd and 4 others | Countrywide Promoters Pvt. Ltd and 6 others |
| 9. | Unit no. | T6-1601, T-6 Tower [As per CRA] | |
| 10. | Unit measuring | 1760 sq. ft. [As per CRA]] | |



| | | |
|-----|---|--|
| 11. | Date of execution of flat buyer's agreement | not executed |
| 12. | Application Form | 18.11.2011 (page no. 58 of reply) |
| 13. | Possession clause | <p>Clause 18 of application form</p> <p>The Subject to Clause 42 herein or any other circumstances not anticipated and beyond control of the Company and any restraints/restrictions from any courts/authorities and subject to the Applicant(s) having complied with all me terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement including but not limited timely payment of each and every instalment of the total Sale Consideration including DC Stamp Duty and other charges and having complied with all provisions, formalities, documentation etc, as a pea prescribed by the Company, whether under this Agreement or otherwise, from time to time, the Company to hand over the possession of the Flat to the Applicant(s) within a period of 36 months from the date execution of Flat Buyer's Agreement. The Applicant(s) agrees and understands that the Company shall be entitled to a grace period of 180 (One Hundred and Eighty) days, after the expiry of</p> |

| | | |
|-----|--------------------------------------|--|
| | | 36 months, for finishing work & applying and obtaining the occupation certificate in respect of the Colony from the concerned authority. The Company shall give Notice of Possession to the Applicant(s) with regard to the handing over of possession, and in the event the Applicant(s) fails to accept and take the possession of the said Flat within 30 days of, the Applicants) shall be deemed to be custodian of the said Flat from the date indicated in the notice of possession and the said Flat shall remain at the risk and cost of the Applicant(s). |
| 14. | Due date of possession | Though cannot be ascertain for lack of execution of FBA but taken from Clause 18 of application form for allotment as 18.01.2015. |
| 17. | Total sale consideration | Rs. 91,23,707/- (As per page no. 129 of reply) |
| 18. | Total amount paid by the complainant | Rs. 78,00,857/- (as per statement of account) (As per page no. 129 of reply) Rs. 75,57,876/- (As per CRA) |
| 19. | Occupation certificate | 20.09.2019 [As per page no. 124 of reply] |
| 20 | Offer of Possession | 26.10.2019 |

(As per page no. 126 of reply)

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That vide application dated 18.11.2011, the complainant applied for booking of a flat in the project of respondent known as 'Park Generation' sector 37-D, Gurugram. A sum of Rs. 6,00,000/- was paid as booking amount and the same led to allotment of unit bearing no. T-6-1601 measuring 1760 sq. ft. in the above mentioned project for a total sale of consideration of Rs. 9123707/-.
- II. That as per the payment plan agreed upon between the parties, the complainant started depositing various amounts against the allotted unit.
- III. It is the case of complainant that though he paid as an when demands against the allotted unit were raised but construction of the project was not going on as per the payment schedule. The respondent failed to get executed any builder buyer agreement despite a number of reminders. The flat buyer agreements executed by other buyers of the same project (which was executed in case of T-1, T-2 & T-3) are one sided and at the time of offer of possession, the builder would use similar tactics for extracting extra money from the complainant

- IV. The complainant has paid all the installments on time and deposited Rs. 75,57,876/- and the respondent in an endeavour to extract money from allottees devised a payment plan under which it linked more than 30% amount as an advance and rest 65% amount linked with the construction of super structure only, of the total sale consideration to the timelines, which is not dependent or co-related to the finishing of flat an internal development of facilities, amenities and after taking the same, the respondent has not bothered to complete the project.
- V. The complainant has apprehension that although more than the total cost of project has already been realised by the builder but the buyer would be asked to pay more as it can make demand towards escalation cost and increased in super area (Offer of possession for same project for other tower (T-1, T-2, T-3) in which builder demanded escalation cost & increased super area.
- VI. That keeping in view of the snail-paced work at the construction site and false promises, it is evident that the respondent is not only "COMMITTED TO" completing the project in near future but intends to exploit the period of delay as a means to escalate the cost of project and realise unethical financial gains at the cost of harassed buyers. This further compromises the interest of buyers including him, who has spent his entire life's hard earned savings in order to buy this home and stands at a crossroad to

nowhere. The inconsistent and lethargic attitude displayed by the respondent in the project, continues to cause him a great financial loss and emotional distress.

- VII. That a period of more than 8 years has already expired and the project is nowhere in completion. The complainant has paid more than 80% of the sale consideration of the allotted unit and intends to withdraw from the project and is d=seeking refund of the amount deposited with the respondent besides interest and compensation.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).
- i. **Direct the respondent to refund the entire amount of Rs.78,00,857/- to the complainant.**
 - ii. **Direct the respondent to pay litigation charges incurred by the complainant on account of this case.**
5. On the date of hearing, the Authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent contested the complaint on the following grounds: -
- i. That the complainant has 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 further submitted that the hon'ble apex court in plethora of decisions has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondent but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication. The respondent has contented on the following grounds:

- ◆ That the complainant has misrepresented that a discount was agreed at the stage of booking of the unit. However, it is submitted that as per the booking application form, the complainant had opted for a 3 BHK + lifestyle room, tentatively admeasuring 1760 sq. ft. It is also pertinent to point out at this stage that at the time of booking, the BSP for the unit chosen by the complainant was at Rs. 3765 per sq. ft. and an inaugural discount of Rs. 200 per sq. ft and hence the agreed BSP was at Rs. 3565 per sq. ft.
- ◆ The complainant has misrepresented that no allotment letter has been issued and he got to know about his unit through demand letter dated 10.08.2012. In this regard, it is

submitted that he was well aware of the unit as per the consent letter dated 13.07.2012 submitted by him. It is further submitted that post his consent to unit T6-1601, a formal allotment letter dated 19.12.2012 was also sent to him. However, the said post was received back with the remarks as the 'house was locked'.

- ◆ It is pertinent to mention here that vide email dated 05.12.2012, complainant informed the change of his mailing address. However, the complainant failed share any address proof of the new address as requested by the respondent vide its email dated 07.05.2012. It is sometime in 2013 that the complainant shared a proof of the new address so that requisite change could have been done by the respondent and the complainant was informed about the change in address vide email dated 10.04.2013. As a precautionary practice, the respondent does not change the mailing address without an address proof.
- ◆ The complainant has concealed the fact that against demand dated 09.04.2013, he had issued cheques 20.04.2013 and receipt was also issued by the respondent on same day along with timely payment discount of 32,341.35. Out these cheques, cheques to the tune of Rs.2,25,000 were drawn at Corporation Bank. It pertinent to mention here that out of

the said cheques, dishonoured one were returned to the complainant along with the bank return memos dated 23.04.2013. He has concealed the fact that the he was duly informed qua the same vide email dated 03.05.2013 along with the bank return memos. The complainant was further informed about the fact that the said cheques could not be posted as they were out-station cheques. The complainant was requested to provide the "Core banking cheques" or remit the payment via online funds transfer. The complainant was again reminded on 07.05.2013 of the fact that the said cheques could not be represented to the bank. The complainant was again requested to provide the core banking cheques for the outstanding amount while also informing the complainant that the cheque bouncing charges of Rs. 1000 were also payable by him.

- ii. That from the above, it is very well established, that the complainant has approached this authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the complainant is to unjustly enrich himself at the expense of the respondent by filing this frivolous complaint which is nothing but gross abuse of the due process of law and the

present complaint warrants dismissal without any further adjudication.

- iii. That at the stage of entering into the agreement and raising vague allegations and seeking baseless relief beyond the ambit of the agreement, the complainant is 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 complainant in the complaint under reply cannot be granted by this authority.
- iv. The parties had agreed under the flat 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 complainant has raised to dispute but did not take any step to invoke arbitration.
- v. That the possession of the unit in question had been delayed on account of reasons beyond the control of the respondent. It is submitted that the construction was affected on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It was submitted that vide its order, NGT placed sudden ban on the entry of diesel trucks more than ten years old and ordered that no vehicle from outside or within Delhi would be permitted to transport any construction material. Since the

construction activities were suddenly stopped, after the lifting of the ban, it took some time for mobilization of the work by various agencies employed with the respondent.

- vi. Copies of all the relevant documents 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 submissions made by the parties.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

8. 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

9. 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.

10. 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.

11. 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. 2021-2022(1) RCR (Civil), 357 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 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."

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, 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 complainants are in breach of agreement for non-invocation of arbitration.

13. The respondent has raised an objection for not invoking arbitration proceedings as per the provisions of application for allotment by sale of residential flat dated 18.11.2011 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 that document:

48. 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 company. The applicant(s) hereby confirms that he/she shall have or raise no objection to this appointment. The Courts at New Delhi and Delhi high Court at New Delhi alone shall have the jurisdiction in all matters arising out of/ touching and /or concerning the application and or flat buyer's agreement regardless of the place of execution of this application which is deemed to be at New Delhi. "

14. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the application form 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.

15. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within this right 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 complainant.

- E.I Direct the respondent to refund the entire amount of Rs.78,00,857/- to the complainant**
E.II Direct the respondent to pay compensation fees incurred by the complainant on account of this case.

16. It is not disputed that flat buyer agreement was not executed between the parties with regard to the allotted unit. The application for allotment of subject unit was moved by the complainant with the respondent on 18.11.2011 and which led to allotment of the unit in question to him and payments thereof against the total sale consideration. So, in the absence of the due date for lack of execution of the buyer's agreement, reliance has to be placed on the terms and condition mentioned in the application for the allotment annexure R-1 (page 52 of the reply). There is clause 18 of that application which provides for a period of 36 months with a grace period of 180 days to

complete the project and handover the possession of the allotted unit to the allottee but from the date of execution of flat buyer agreement. Since, that document did not see the light of the day, so relying upon clause 18 of the application form for allotment for the subject unit, the due date for completion of the project and handing over the possession of the allotted unit is calculated as 18.01.2015 by adding a reasonable period of 2 months for execution of buyer's agreement after allotment of the unit. Though, after completion of the project and receipt of occupation certificate on 20.09.2019, the offer of possession of the allotted unit has been offered to the complainant on 26.10.2019 but he withdrew from the project before its completion by filing complaint on 12.03.2019. 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 his 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.

17. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated was received after filing of application by the complainant for return of the amount received by the promoter on failure of promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. The complainant-allottee has already wished to withdraw from the project and the allottee has become entitled his right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate

from the promoter as he has failed to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return the amount received by him from the allottee in respect of that unit with interest at the prescribed rate

18. Then 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

19. 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.

20. This is without prejudice to any other remedy available to the allottee including compensation for which he may file an application for adjudging compensation with the adjudicating officer under section 71 read with section 31(1) of the Act of 2016.
21. The authority hereby directs the promoter to return the amount received by him i.e. Rs. 78,00,857/-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 actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*

E.II. Direct the respondent to pay litigation cost to the complainant.

22. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India, in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Supra), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation

shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Thus, the complainant is advised to approach the adjudicating officer for seeking compensation.

F. Directions of the authority

23. 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 respondent/promoter is directed to refund the entire amount of Rs.78,00,857/- 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 as per provisions of section 18(1) of the Act read with rule 15 & 16 of the rules, 2017.
- 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.


24. Complaint stands disposed of.

25. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.05.2022


(Dr. K.K. Khandelwal)
Chairman