

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

Complaint no. : 678 of 2018
First date of hearing: 10.01.2019
Date of decision : 22.08.2022

Bhawana Dutta
R/o: - D 801 Residency Apartments, Ardee city, Sector
52, Gurugram

Complainant

Versus

1. M/s BPTP Limited.
2. Kabul Chawla (Managing Director).
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. Mustafa Alam
Sh. Venkat Rao

Advocate for the complainant
Advocate for the respondents

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 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 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 | "Pedestial", Sector- 70A, Gurugram |
| 2. | Nature of project | Residential |
| 3. | RERA registered/not registered | Not Registered |
| 4. | DTPC License no. | 15 of 2011 dated 07.03.2011 |
| | Validity status | 04.04.2025 |
| | Name of licensee | |
| | Licensed area | |
| 4. | Unit no. | B-93-FF [As per page no. 60 of complaint] |
| 5. | Unit measuring | 1857 sq. ft. [As per page no. 60 of complaint] |
| 6. | Date of execution of Floor buyer's agreement | 06.07.2017 (Page no. 55 of complaint) |
| 7 | Allotment Letter | 24.03.2014 (page no. 44 of complaint) |
| 08. | Possession clause | 5. Possession |



5.1 The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser(s) within e 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 or documentation, as prescribed/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 instalments of the sale consideration as per the payment plan opted, Development Charges (DC). Stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the **Purchaser(s) within a period of 36 months from the date execution of Floor Buyer's Agreement.**

| | | |
|-----|------------------------|--|
| 9. | Due date of possession | 06.07.2020 (calculated from the execution of BBA) |
| 10. | Basic sale Price | Rs. 1,40,97,874/- [page no. 88 of reply] |

| | | |
|-----|--|--|
| 11. | Total amount paid by the complainant | Rs. 61,52,000/- (as alleged by the complainant) |
| 12. | Occupation certificate dated | not obtained |
| 13. | Offer of possession | not offered |
| 14 | Notice for cancellation of unit by the complainant | 05.06.2018 (on page no. 87 of complaint) |

B. Facts of the complaint

The complainant has made the following submissions in the complaint: -

3. That on 23.05.2013 an expression of interest for booking a residential Villa bearing unit No A-22 admeasuring 545 Sq. Yds situated at the respondents project namely "Visionnaire in Sector -70A Gurugram, Haryana was made by the complainant for a total consideration of Rs. 62,187,115/-.
4. That a booking amount of Rs. 40,00,000/- was paid as advance by the complainant vide cheque no. 985230 dt. 22.05.13 drawn on Axis Bank, DLF, Gurgaon and the respondents accepted the payment in the name of "M/s. Native Buildcon Pvt. Ltd" toward the booking amount.
5. That due to the paucity of funds the complainant and her husband requested for the exchange of unit of a lesser amount and area around March 2014. Subsequently, a unit bearing no. B93, FF in the project namely "Pedestal @7A" admeasuring 1857 Sq. ft was finalized by the complainant and the same was duly allotted by the respondents vide



allotment letter dt. 24.03.2014. The total cost of the above said new unit was Rs. 15,907,433/- and the payments were to be made as per the construction linked plan. Further, the booking amount of Rs. 40,00,000/- paid by her was also adjusted against the payables for the newly allotted unit, duly acknowledged by the respondents vide receipt dt. 25.03.2014.

6. That a demand for the payment of Rs 23, 72, 661.59/- was raised by the respondents with an assurance of discount of Rs. 220,715.88/- if paid and settled on or before 16.04.14. In furtherance of the said demand, a payment of Rs. 21,52,000/- was made by the complainant vide cheque no. 000032 drawn on Standard Chartered Bank, Gurgaon. The respondents duly acknowledged the above said amount vide their receipt dated. 16.04.2014.
7. That the respondents avoided to furnish the terms and conditions of the flat buyer agreement and the date of possession on one pretext or other for more than 3,5 years from the date of transfer of unit from 'Visionaire' to the 'Pedestal'. Further, she did not witness any substantial progress in the residential project during said period and got wary of her investments made into the respondents project, already delayed substantially.
8. The complainant cannot be expected to wait endlessly for the completion of the project. Hence, she preferred the present complaint for refund at a prescribed rate of interest.

C. Relief sought by the complainant:



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

- I. To direct the respondents to cancel the unit no. B-93, FF and refund a sum of Rs. 61,52,000/- along with prescribed rate of interest;

D. Reply by the respondents:

10. The complainant has approached the respondents on her own volition, after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same. It is submitted that she is an investor and it is quite visible from the fact that firstly, she has invested for booking of a unit in the project, "Visionnaire" located at Sector-70A, Gurugram and was issued the allotment letter for the said unit. It is submitted that on top of that she made several defaults in making timely payments as a result thereof. The respondents had to issue several reminder letters for payment of the outstanding amount and eventually cancellation notice dated 31.12.2013 was also issued by them. However, as a gesture of good will and being a customer centric company, on request by the complainant, the booking was transferred from the project "Visionnaire" to project "Pedestral", Gurgaon and unit no. "B-93-FF" was allotted in the name of "Mr. Romi Datta" and complainant as the co applicant. It is further submitted that the complainant booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slump in the real estate market, she could not see the same.



11. That the complainant in the entire complaint concealed the fact that the respondents raised VAT demand of Rs. 41,500/- vide demand letter dated 10.11.2016 payable by 25.11.2016. However the payment for the same was not remitted by her within the stipulated time. Thus, various emails were sent by the respondents to her as reminders for the payment of VAT demand. The complainant did not remit the payment till date. Vide emails dated 30.03.2017 and 12.05.2017, the respondents informed the complainant that a sum of Rs. 41,550/- was pending and as a one-time offer if the payment of outstanding VAT amount was received till 31.05.2017, interest accrued on unpaid VAT amount would be waived off as a good gesture from the respondents. However, the complainant neglected to clear the dues. Further, vide emails dated 12.10.2017 and 18.06.2018 respondents sent a final reminder to her for the payment of outstanding VAT amount however the same was not unpaid till date.
12. That it is submitted that as per the agreed payment plan, the respondents issued demand upon reaching the milestone on casting of ground floor slab for an amount of Rs. 15,15,803.40/- and previous outstanding due of Rs. 44,973.09 payable by 17.02.2018. It is submitted that upon non-receipt of the payment as demanded vide letter dated 02.02 2018, the respondents were compelled to send a reminder notice-1 dated 07.03.2018 for payment of the due amount of Rs. 15,60,776/-. It is reiterated that respondents upon reaching the milestone on casting of 'first floor roof slab' sent a demand letter as per the agreed payment



plan for payment of Rs. 15,15,803.40/- along with previous outstanding of Rs. 15,60,776.99 to be paid on or before 07.04.2018. Upon non-receipt of the payment as demanded vide letter dated 23.03.2018, the respondents were compelled to send a reminder notice-I dated 09.04.2018 for payment of the due amount of Rs. 30,76,580 Further, upon reaching the next milestone as per the construction schedule and agreed payment plan, the respondents sent a demand letter 'on casting of second floor roof slab' for an amount of Rs. 17,51,803.40/- and previous outstanding due of Rs. 30,76,580.89 payable by 07.06.2018. Upon non-receipt of the payment as demanded vide letter dated 23.05.2018, the respondents were compelled to send reminder notices dated 04.07.2018 and 23.08.2018 for payment of the outstanding dues of Rs. 48,28,384/-. As per the agreed payment plan, next demand was raised on achieving the milestone "On Completion of Brick Work" vide demand letter dated 31.08.2018 for an amount of Rs. 21,87,803.40 and previous outstanding of Rs. 48,28,384.79 payable by 15.09.2018. It is further submitted that due to various defaults committed by the complainant in timely payment of installments and despite of numerous reminders being sent to her, a final opportunity by way of demand letter dated 19.11.2018 was sent to her and the same is pending payment till date.

13. That the complainant has misrepresented in the complaint regarding unawareness of the starting date for computation of possession period. It is submitted that since the time of booking the complainant had



knowledge of the fact that the possession timelines would be commenced from the date of execution of the buyer's agreement as the same was clearly mentioned in the terms and conditions of the application for allotment.

14. The complainant has also concealed that with the motive to encourage her to make payment of the dues within the stipulated time, the respondents also gave additional incentive in the form of timely payment discount to her and in fact, till date, she has availed TPD of Rs. 2,20,661/-.
15. The complainant in the entire complaint concealed the fact updates regarding the status of the project were provided to her by the respondents vide emails dated 23.08.2017, 14.12.2017, 25.03.2018, 08.04.2018, 08.05.2018, 15.06.2018, 09.09.2018 and 04.11.2018. It is further reiterated that vide email dated 14.12.2017, the respondents intimated the complainant that the project was in advance stages of development and all efforts being made to expedite the delivery of homes and around 1400 workforce has already been deployed at the site in the township as of date and the same would increase as required from time to time.
16. That having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs 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 reliefs sought by the complainant in the complaint under reply cannot be granted by this authority.

17. 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 complainant has raised dispute but did not take any step to invoke arbitration.
18. 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

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

D.I Territorial jurisdiction

20. 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



21. 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.

22. 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.

E. Entitlement of the complainant for refund:

E.I Objection regarding the complainant being investor:

23. It is pleaded on behalf of respondent that complainant is an investor and not consumer. So, she is 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 consumers 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 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 a buyer and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of the 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."

24. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainant is an allottee as the subject unit allotted to them 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

F. Findings on the relief sought by the complainant.

F.1 To direct the respondents to cancel the unit no. B-93, FF and refund a sum of Rs. 61,52,000/- along with prescribed rate of interest.

25. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by her 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)*

26. The complainant was allotted unit no. B-93, FF, B-block, in the project 'Pedestial' by the respondent-builder for a basic consideration of Rs. 1,40,97,874/- and he paid a sum of Rs. 61,52,000/- which is approx. 43% of the total sale consideration. it is pertinent to mention here that the complainant visited at the site of the project and found that there was no construction going on.
27. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the 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 allottee 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.....”*
28. Further in the judgement of the Hon'ble Supreme Court of India in the cases of Newtech Promoter 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 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*
29. 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 allottees, as they wish 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.
30. The occupation certificate regarding subject unit has still not been obtained by the respondents and even after depositing 61,52,000/- by April,2014. The complainant has awaited long enough for delivery of the possession of the unit. Keeping in view the provisions of section 18(1) on demand of the allottee on failure of the promoter, to give

possession by the due date i.e. 06.07.2020, the refund is allowed alongwith interest at the prescribed rate of interest i.e. 10% per annum.

31. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him at the rate of 18% p.a. However, allottee intends to withdraw from the project and is seeking refund of the amount paid by her 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.

32. 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.
33. 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., 22.08.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.
34. 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 complainant is entitled to refund the entire amount paid by her at the prescribed rate of interest i.e., @ 10% 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

35. 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/promoters are directed to refund the entire amount of Rs.61,52,000/- paid by the complainant along with prescribed rate of interest @ 10% p.a. from the date of each payment till the actual date of refund of the deposited amount 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. 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.
- iii. The respondents are further directed not to create any third-party rights against the subject unit before full realization of paid-up amount along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the



HARERA
GURUGRAM

Complaint No. 678 of 2018

receivable shall be first utilized for clearing dues of allottee-complainant.

36. Complaint stands disposed of.
37. File be consigned to registry.

V.K.G.
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.08.2022

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



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