

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

Complaint no. : 3691 of 2021
Date of filing complaint : 29.09.2021
First date of hearing : 21.10.2021
Date of decision : 23.08.2022

1. Mr. Vikas Khosla 2. Mrs. Poonam khosla R/O: - 13, Paschim Marg, GF, DLF City, phase-I, Gurugram.	Complainants
Versus	
1. M/s BPTP Limited 2. M/s Countrywide Promoters Private Limited Regd. Office at: - M-11, Middle Circle, Connaught Circus, New Delhi-110001	Respondents

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
M/s C.K. Sharma and Dhruv Dutt Sharma	Advocates for the complainants
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 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Description
1.	Name of the project	'Astaire Garden', Sector70-A, Gurugram, Haryana.
2.	Nature of the project	Residential Plotted Colony
3.	Project area	102.2 acre
4.	DTCP license no. and validity status	15 of 2011 issued on 07.03.2011 and valid upto 06.03.2024.
5.	Name of the license holder	IMPARTIAL BUILDERS DEVELOPERS PVT LTD and 22 others.
6.	RERA registration number	Registered 912 of 2021
7.	Date of execution of floor buyer's agreement	20.03.2012 (on page no. 66 of complaint]
8.	Unit no.	C-191-GF



		(on page no. 72 of complaint)
9.	Unit area admeasuring	2512 sq. ft. (on page no. 72 of complaint)
10.	(Basic sale price)	Rs. 96,88,006/- (as per BBA)
11.	Total amount paid by the complainant	Rs. 30,76,716/- (as alleged by the complainant)
12	Possession 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 installment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the physical possession of the said unit to the Purchaser(s)

		<p>within a period of 36 months from the date of sanctioning of the building plan or execution of Floor Buyers Agreement, whichever is later ("Commitment Period"). The Purchaser(s) further agrees and understands that the Seller/Confirming Party shall additionally be entitled to a period of 180 days ("Grace Period") after the expiry 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.</p>
	Building Plan	Not on record
13.	Due date of delivery of possession	20.03.2015 (Calculated from the date of execution of BBA)
14.	Emails regarding refund by the complainants	15.05.2017, 01.07.2021 & 04.08.2021 (page no. 102 to 105)
15	Occupation Certificate	Not obtained
16	Offer of possession	Not offered

B. Facts of the complaint

3. That the complainants booked a unit in the project namely, "ASTAIRE GARDENS" located at Sector 70-A, Gurgaon, Haryana and paid a booking amount of Rs. 15,00,000/- vide cheque bearing no. 501071 dated 21.02.2011 drawn on HDFC Bank to the respondents which was acknowledged vide receipt bearing no. 2010/1400033626 dated 25.02.2011.
4. That however due to personal reasons the complainants had to withdraw from the aforesaid booking and requested for refund of Rs. 15,00,000/-. Thereafter the officials of the respondents suggested the complainants to review their some other projects and after due negotiations and meetings the complainants took a decision to enroll himself in another project of the respondents, namely "Amstoria Country floors", Sector- 102. The complainants further requested the respondents to transfer the booking amount of Rs. 15,00,000/- to the account of new project.
5. That an allotment letter dated 18.10.2011 was issued by the respondents towards flat No. C-191-GF having area of 2512 sq. ft. in the project "Astaire Gardens" in favor of the complainants.
6. That thereafter a floor buyer's agreement dated 20.03.2012 was executed between the complainants and respondents. As per clause 5.1 of the Agreement, the physical possession of the Unit was to be offered within a period of **36 months from the date of execution of floor buyers agreement with a grace period of 180 days after the expiry of the said commitment period i.e. latest by 19.09.2015.** That the total cost of the Unit was Rs. 99,93,089/- including development charges (DC), IFMS and club membership charges (CLC).

7. That after constant follow ups from the complainants, the respondents finally adjusted a sum of Rs. 15,00,000/- from previous unit booked by the complainants to the present unit and the same was acknowledged vide receipt bearing no. 2012/1600003427 dated 04.05.2012. It is pertinent to mention here that there was a delay of more than 1 year from the side of the respondents to adjust the aforesaid amount. It is further pertinent to mention here that the respondents have raised illegal demands towards interest charges from the complainants without any fault of the complainants. The complainants have also written several e-mails to the respondents about the illegal charging of interest and raising arbitrary demands. Further, the respondents have arbitrarily and illegally escalated the cost of unit by Rs. 7,38,768.32/-.
8. That the complainants after getting no satisfactory reply from the respondents visited the said project to enquire about the status of the project. However, the complainants were shocked to see that their unit does not exist physically. This can be corroborated by the fact that no demand towards the construction of the Unit was raised by the respondents after the demand payable 'Within 150 days of Booking'.
9. That finding no other way the complainants sent E-mails dated 15.05.2017, 01.07.2021 & 04.08.2021 to the respondents for refund of Rs. 30,76,716/- on account of failure by the respondents to hand over the possession of the unit to the complainants on time. However, the respondents have failed to return the money to the complainants.
10. That the booking was made by the complainants in the said project about 10 years back and till date no possession has been offered by

the respondents. There is a delay of 6 years in handing over the possession of the unit to the complainants and the delay is still continuing. The complainants have now lost all hope and faith in the respondents and does not want to continue with the project.

11. That the complainants have at all times made payments against the demands of the respondents and as per payment schedule of the agreement pertaining to has flat, therefore the fraudulent act and conduct of the respondents needs to be penalized in accordance with the provisions of the Real Estate (Regulation and Development) Act, 2016 (Hereinafter being referred as "the act"),

C. Relief sought by the complainants.

12. The complainants have sought following relief:
 - (i) To direct the respondents to refund total amount of Rs. 30,76,716/- along with interest @ 18% p.a. from the date of deposit of each amount till its actual realization.
 - (ii) To Award a compensation of Rs. 5,00,000/- to the complainants towards mental torture and harassment.
 - (iii) Cost of Litigation to the tune of Rs. 55,000/- may also be awarded to the complainants

D. Reply by the respondents.

13. It is submitted 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 further submitted that the Hon'ble Apex Court in plethora of cases 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 respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

- That the complainants falsely stated that the timely payments were made by him as and when demanded by respondents, however, as detailed in the reply to list of dates, it is submitted that the complainants made several defaults in making timely payments as a result thereof, respondents had to issue reminder letters for payment of the outstanding amounts.
14. That agreements that were executed prior to implementation of the Act of 2016 and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented FBA executed by the complainants out of his own free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them.
 15. It is further submitted 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 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". In this regard, the respondents reserve their right to refer to and rely upon decisions of the Hon'ble Supreme Court at the time of arguments, if required.

16. 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.

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.

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.

F. Findings on the objections raised by the respondents.

F. I Objection regarding untimely payments done by the complainants.

17. It is contended that the complainants have made defaults in making payments as a result thereof and so the respondent had to issue reminder letter dated 21.02.2012 and last and final opportunity letter dated 14.03.2012. The respondent has further submitted that the complainant has still not cleared the dues. The counsel for the respondent pointed towards clause 7.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

*"7. TIMELY PAYMENT ESSENCE OF CONTRACT.
TERMINATION, CANCELLATION AND FORFEITURE"*

7.1 The timely payment of each installment of the Total Sale Consideration i.e. Basic Sale Price and other charges as stated herein is the essence of this transaction / agreement. In case payment of any installment as may be specified is delayed, then the Purchaser(s) shall pay interest on the amount due 18% pa. compounded at the time of every succeeding installment or three months, whichever is earlier. However, if the Purchaser(s) neglects, omits, ignores, or fails for any reason whatsoever to pay in time to the Seller any of the installments or other amounts and charges due and payable by the Purchaser(s) within three (3) months from the due date of the outstanding amount or if the Purchaser(s) in any

other way fails to perform, comply or observe any of the terms and conditions on his/her part herein contained within the time stipulated or agreed to, the Seller/Confirming Party may at its sole option forfeit the amount of Earnest Money and other charges including late payment charges and interest deposited by the Purchaser(s), and any other amount of a non-refundable nature including Incentive, brokerage charges paid by the Seller/Confirming Party to the broker in case the booking is done through a broker, etc. and in such an event the allotment shall stand cancelled and the Purchaser(s) shall be left with no right, lien or interest on the said Floor and the Seller/Confirming Party shall have the right to sell the said Floor to any other person. Further, the Seller/Confirming Party shall also be entitled to terminate/cancel the allotment of the Purchaser(s) in the event of default of any of the terms and conditions of this Agreement"

18. At the outset, it is relevant to comment on the said clause of the agreement i.e., "7. *TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE*" wherein the payments to be made by the complainant has been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority observes that despite complainant being in default in making timely payments, the respondent has not exercised discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 7.1 of the floor buyer's agreement whereby the complainant would be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate

as may be mentioned in the notice for the period of delay in making payments. In fact, the respondent has charged delay payment interest as per clause 7.2 of the buyer's agreement and has not terminated the agreement in terms of clause 7.1 of the buyer's agreement. In other words, the respondent has already charged penal interest from the complainant on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(z a) of the Act provides that the rate of interest chargeable from the allottees by the promoters, in case of default, shall be equal to the rate of interest which the promoter would be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10% by the respondent which is the same as is being granted to the complainant in case of delay possession charges.

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

19. Another contention of the respondent 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 floor 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."

20. 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 as under-

"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."

21. 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 allottees 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.

G. Findings on the relief sought by the complainants.

Relief sought by the complainants: The complainants have sought following relief:

- (i) Direct the respondents to refund the total amount of Rs. 30,76,716/- along with interest @18% p.a. from the date of deposit of each amount till its actual realization.

- (ii) Compensation of Rs. 5,00,000/- to the complainants towards mental torture and harassment.
- (iii) Litigation Cost to the tune of Rs. 55,000/-
22. The allottee-complainants wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016. The due date of possession as per agreement for sale as mentioned in the table above is 20.03.2015 and there is delay of 6 years 6 months 09 days on the date of filing of the complaint.
23. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-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.....”
24. The promoters are 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 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 promoter is liable to the allottee, as the allottees wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by them in respect of the unit with interest at such rate as may be prescribed.

25. The authority hereby directs the promoters to return the amount received by him i.e., Rs. 30,76,716/- with interest at the rate of 10% (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*.

F.II Compensation of Rs. 5,00,000/- to the complainants towards mental torture and harassment

F.III Litigation Cost to the tune of Rs. 55,000/-

26. The complainants in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), 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. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation

H. Directions of the authority

27. 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):


1) The respondent/promoters are directed to refund the entire amount of Rs. 30,76,716/- paid by the complainants 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.

2) 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.

28. Complaint stands disposed of.

29. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.08.2022



HARERA
GURUGRAM