

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

Complaint no. : 2442 of 2021
Date of filing complaint : 02.07.2021
First date of hearing : 01.09.2021
Date of decision : 23.08.2022

| | |
|---|---------------------|
| 1. Mr. Shashi Kant Bhatnagar 2. Ltate. Mrs. Veena Bhatnagar Both R/O: - 1802, Raheja Vedanta, sector-105, Dwarka Expressway, Gurugram. | Complainants |
| Versus | |
| M/s BPTP Private Limited Regd. Office at: - M-11, Middle Circle, Connaught Circus, new Delhi-110001. | Respondent |

| | |
|------------------------|-------------------------------|
| CORAM: | |
| Dr. K.K. Khandelwal | Chairman |
| Shri Vijay Kumar Goyal | Member |
| APPEARANCE: | |
| Sh. Archit vasudeva | Advocate for the complainants |
| Sh. Venkat Rao | Advocate for the respondent |

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 | Description |
|--------|--|---|
| 1. | Name of the project | 'Amstoria', Sector 102 & 102A, Gurugram, Haryana. |
| 2. | Nature of the project | Residential |
| 3. | Project area | 108.068 acre |
| 4. | DTCP license no. and validity status | 58 of 2010 issued on 03.08.10 and valid upto 02.08.2025 |
| 5. | Name of the license holder | Shivanand Real Estate Pvt. Ltd. |
| 6. | RERA registration number | Not registered |
| 7. | Date of execution of floor buyer's agreement | 10.05.2013 (on page no. 26 of complaint) |
| 8. | Unit no. | D-124-GF |



| | | |
|-----|---|---|
| | | (on page no. 32 of complaint) |
| 9. | Unit area admeasuring | 1770 sq. ft. (on page no. 32 of complaint) |
| 10. | (Basic sale price) | Rs. 73,99,999/- (as per BBA) |
| 11. | Total amount paid by the complainant | Rs. 23,95,567/- (as alleged by the complainant, on page no. 5) |
| 12 | Possession Clause | 5.1 Subject to Force Majeure, as defined in Clause 14 and further subject to the Purchaser(s) having pled with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) being in default under any part of this Agreement including but not limited to the timely payment of such 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 orbred by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the |



| | | |
|-----|------------------------------------|---|
| | | <p>Physical possession of the said unit to the Purchaser(s) 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(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 filling 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 | 10.05.2015 (Calculated from the date of execution of BBA) |
| 14. | Reminder letters | 07.03.2018, 09.04.2018 and 04.07.2018 |
| 15 | Termination letter | 05.03.2021 (page no. 109 of reply) |
| 16 | Occupation | Not obtained |

| | | |
|----|---------------------|-------------|
| | Certificate | |
| 17 | Offer of possession | Not offered |

B. Facts of the complaint

3. That complainants booked a residential apartment in above mentioned project and were allotted one residential unit bearing no. D-124-GF, area admeasuring 1,770 sq. ft. in "Amstoria" at Sector102, Gurugram, Haryana. That the basic sale price of the said property was Rs. 73,99,999/-out of which the complainants had paid an amount of Rs. 23,95,567/-.
4. That as per buyer's agreement dated 10.05.2013 the respondent company assured the complainants that the construction of the said unit will be completed within a period of 24 months from the date of sanctioning of the building plan or execution of the agreement, whichever is later (hereinafter referred to as "Commitment Period") plus 180 days after the expiry of said commitment period to allow filing and pursuing of occupancy certificate, etc. from DTCP under the Act in respect of the entire colony. Thus, the Possession was proposed to be offered till May 2015, i.e. 24 months from date of execution of the agreement dated 10.05.2013.
5. That after the execution of the agreement, the construction did not proceed as per the construction plan laid down in the agreement. After the year 2013, the respondent did not provide construction

updates to the complainants and did not inform a time period for the delivery of possession to the complainants.

6. That after gap of 4 years, on 7.08.2017 the opposite party raised a demand of Rs. 10,11,657.28/-. Thereafter another demands was raised, the details of which are as follows:

| S. No. | Date | Demand Receipt | Amount |
|--------|------------|----------------|--------------------|
| 1. | 07.08.2017 | Receipt No: | 10,11,657.28 |
| 2. | 06.09.2017 | Receipt No: | 26,76,362.71 |
| 3. | 06.10.2017 | Receipt No: | 2,25,833.54 |
| 4. | 08.12.2017 | Receipt No: | 8,29,627.85 |
| | | Total | Rs. 47,43,481.38/- |

The respondent-builder demanded total Rs. 47,43,481.38/- through emails.

7. That the complainants visited the project premises to check the actual progress of project work. However complainants were staggered to witness that the construction work was halted and not even started whereas on other hand the opposite party was demanding payment and claiming achievement of casting of basement roof slab. However, no construction was taking place. The delay on the part of the opposite party can be seen through various emails sent by the opposite party in the year 2017. It is worth mentioning that the opposite part in his email dated 14/03/2017 clearly mentioned that the possession of the premises will be given within 2-3 months despite knowing that it was impossible to do so.

8. That it is pertinent to mention that the payment request raised by the opposite party from August 2017 – December 2017 based on a calculation which did not match with the annexure-c of the agreement. The opposite party raised demand of payment on wrong calculations and by adding additional charges which were never discussed orally nor included in the agreement.
9. That the complainant on 21st January 2021 has again requested to the opposite party for an appointment and settle the accounts but no reply was received by the complainant. However, the complainants received an email dated 03.03.2021 for terminating/ forfeiture of the total amount that had been paid to the opposite party. On receipt of the said email, the complainant along with his son visited the office of the opposite party to know the reason for such termination/ forfeiture but instead they were abused physically and verbally by the officers of the respondent and man handled in the premises of the respondent. The officer of the respondent threatened the complainants to either pay Rs. 1.5 Crores for the said unit/ flat or leave their premises.
10. That since the respondent failed to fulfill its promise to deliver the project to the complainants are entitled for refund of their money invested in the above project along with prescribed rate of interest from the date of payment till realization from respondent/opposite party. The respondent is also liable to compensate the complainants for the cheating and harassment done by them.

B. Relief sought by the complainants:

The complainants have sought the following relief:

- i) Respondent be directed to return/refund the money paid by the complainants i.e. Rs. 23,95,567/- along with interest @ 24 % per annum from the date of payment till realization.
- ii) Respondent/opposite party be further directed to pay compensation for mental harassment and torture of Rs. 10,00,000/- and litigation expenses of Rs. 1,00,000/- to the complainants.

C. Reply by the respondent

The respondent by way of written reply made the following submissions.

11. It is submitted that the complainants have approached this Hon'ble Authority for redressal of their alleged grievances with unclean hands, i.e. by not disclosing material facts pertaining to the case at hand and also, 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.



- a) That the complainants have misrepresented this Hon'ble Authority that the possession of the unit was to be delivered within 24 months from the date of execution of the FBA, however it is submitted that the complainants at the time of the booking as well as FBA was aware of the fact that the possession timeline of the unit was dependent on force majeure clause as well as timely payment of each installment. It is further submitted that the complainants are an abysmal defaulter, so much so that the unit of the complainants were terminated on 05.03.2021.
- b) That the complainants falsely stated in the present complaint that the timely payments were made by the complainants as and when demanded by the respondents, however, as detailed in the reply to list of dates, it is submitted that the complainants made defaults in making timely payments.
- c) That the complainants have further concealed from this Hon'ble Authority that the respondent being a customer centric organization vide numerous emails has kept updated and informed the complainants about the milestone achieved and progress in the developmental aspects of the project. The respondents vide various emails has shared photographs of the project in question. Respondents have always acted bonafidely towards its customers including the complainants, and thus, has always



maintained a transparency with regard project progress. In addition to updating the Complainants, the respondent on numerous occasions, on each and every issue/s and/or query/s upraised in respect of the unit in question has always provided steady and efficient assistance. However, notwithstanding the several efforts made by the respondent to attend to the queries of the complainants to their complete satisfaction, the complainants erroneously proceeded to file the present vexatious complaint before this Hon'ble Authority against the respondents.

12. The complainants duly executed the FBA on 10.03.2013 out of their own free will and without any undue influence or coercion. As per the FBA, it has been agreed that subject to force majeure, the possession of the flat to the complainants would be handed over 24 months from the date of sanctioning of the building plan or execution of the floor buyer's agreement (whichever is later) with an additional grace period of 180 days. the respondent shall be liable to pay to the complainants, compensation calculated @ Rs. 10/- per sq. ft. for every month of delay for the first six months of delay, Rs. 20/- per sq. ft. for every month of delay for the next six months of delay and Rs. 30/- per sq. ft. for the built-up area of the floor per month for any delay.
13. It is further submitted that the complainants have not made any payment since 2017, however respondent being the customer centric give the reminder letters dated 11.12.2017, 07.03.2018 and

09.04.2018 however the complainants despite the reminder letters being issued failed to make the timely payment of the demand, therefore respondent being the customer centric company duly sent an last and final opportunity letter to the complainants to clear the outdoing amount, however the complainant opted not to clear the dues. it is further submitted that form 2017 till 2021 respondent tried to amicably settle the matter. It is further submitted that the nit of the complainants were duly terminated on 05.03.2021.

14. 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

15. The respondent has 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

16. 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

17. 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 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 respondent.

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

18. The respondent has contended that the complainants have made defaults in making payments as a result thereof, it had to issue reminders dated 07.03.2018, 09.04.2018 and 04.07.2018, it is



further submitted that the complainants have still not cleared the dues. The counsel for the respondent referred to clause 12 of the buyer's agreement dated 10.05.2013 wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

12.1 Without prejudice to the rights of the Seller/Confirming Party as per the terms of the Agreement, the Seller/Confirming Party may at its sole discretion waive the breach by the Purchaser(s) in not making timely payments as per the payment plan as opted by the Purchaser(s) on such terms, conditions and charges as may be considered appropriate by the Seller /Confirming Party including but to limited to the acceptance of the due amounts along Seller/Confirming Party in this regard shall be final and binding upon the Parties. </ with interest @ 18% pa. The decision of the seller/ confirming party in this regard shall be final and binding upon the paties...."

19. At the outset, it is relevant to comment on the said clause of the allotment letter i.e., "12. *TIMELY PAYMENT ESSENCE* wherein the payments to be made by the complainants have 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 allottees that even a single default by the allottees in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. There is nothing on the record to show as to what were the terms and conditions of allotment of the unit in favour of the complainants. Admittedly, the unit allotted to the complainants initially was changed two times by

the respondent due to one reason or the other. The total sale price of the allotted unit was Rs 73,99,999/-. The complainants admittedly paid a sum of Rs. 23,95,567/- to the respondent from time to time. Though, possession of the allotted unit changed from time to time was to be given within a period of 2 years from the date of approval of building plans or executions of buyers agreement of the project. The complainants admittedly made default in making payments but what was the status of construction at the spot at the time when termination of the unit was made by the respondent. Moreover, if the complainants were committing default in making payments due as alleged by the respondent, then on cancellation of their unit vide letter dated 05.03.2021, it was obligatory on it to retain earnest money and nonrefundable amount of the basic sale price and return the remaining amount to them. There is nothing on the record to show that after deducting earnest money and non-refundable amount of the basic sale price, the respondent sent any cheque or bank draft of the remaining amount to the complainants, and which is against the settled principle of the law as laid down by the Hon'ble Apex Court of the land in cases of in *Maula Bux V/s Union of India* AIR 1970 SC, 1955 and *Indian Oil Corporation Limited V/s Nilofer Siddiqui and Ors, Civil Appeal No. 7266 of 2009* decided on 01.12.2015 and wherein it was observed that forfeiture of earnest money more than 10% of the amount is unjustified. Keeping in view the principles laid down in these cases, the authority in the year 2018 framed regulation bearing no. 11 providing forfeiture of more

than 10% of the consideration amount being bad and against the principles of natural justice. Thus, keeping in view in the above-mentioned facts, it is evident that while cancelling the allotment of unit of the complainants, the respondent did not return any amount and retained the total amount paid by the complainants.

E. Findings on the relief sought by the complainants.

E. I Direct the respondent to refund the entire amount along with interest.

20. While discussing earlier it has been held that the complainants were in default in making timely payments leading to cancellation of the allotted unit by the respondent as per the term and conditions of allotment. Now, the issue for consideration arises as to whether the complainants are entitled for refund of the illegal deduction of earnest amount from the respondent.
21. As per cancellation letter dated 05.03.2021 annexed on page no. 109 of reply, the earnest money deposit and brokerage shall stand forfeited against amount of Rs. 23,95,567/- paid by the complainants. As per the complaint, the said unit was booked by the complainants, the sum of Rs. 23,95,567/- were paid against sale consideration of Rs.73,99,999/- which is approx. 35% of total consideration. Upon perusal of documents on records, various reminders for payment were raised by the respondent, the complainants received cancellation notice dated 05.03.2021 but did not return the balance amount after deducting earnest money and non-refundable amount. It is observed that the respondent has

raised various demand letters to the complainants and as per section 19 (6) & (7) of Act of 2016, the allottees were under an obligation to make timely payment as per payment plan towards consideration of the allotted unit. When sufficient time and opportunities have been given to the complainants to make a payment towards consideration of allotted unit, it would be violation of section 19 (6) & (7) of Act of 2016. As per the provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, the respondent builder has to return the remaining amount after deducting 10% of total sale consideration as earnest money, along with interest @10% (MCLR+2%) from the date of cancellation till its realization. The authority observes that the complainants are not entitled to refund to the entire amount as their own default, the unit has been cancelled by the respondent after issuing proper reminders. Therefore, the cancellation of the allotted unit by the respondent is valid. However, the respondent has contravened the provision of sec 11(5) of the Act and illegally held the monies of the complainants. Therefore, the respondent is directed to return the paid up amount after deducting 10% being earnest money of the total sale consideration as per allotment letter, along with interest @10% (MCLR+2%) from the date of cancellation till its realization.

E.II cost of litigation & mental harassment

22. The complainant 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 complainant is advised to approach the adjudicating officer for seeking the relief of compensation

F. Directions of the Authority:

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

- i) The respondent is directed to return the amount paid by the complainant/allottee i.e. Rs. 23,95,567/- after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 along with an interest @ 10% p.a. on the refundable amount, from the date of cancellation



HARERA
GURUGRAM

Complaint No. 2442 of 2021

till the date of realization of payment as the cancellation of the allotted unit was made on 05.03.2021 i.e. after the Act of 2016

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 the Registry.

v.l - 3
(Vijay Kumar Goyal)
Member

सत्यमेव जयते

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.08.2022

HARERA
GURUGRAM