

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

Complaint no. : 3971 of 2021
Date of filing complaint : 06.10.2021
First date of hearing : 20.11.2021
Date of decision : 23.08.2022

1. Mrs Priyadarshani 2. Dr. Ranjit Kumar R/O: - C-801, Dwarkadham Apartment Ploy no. 13, Sector-23, Dwarka, New Delhi- 110077.	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. Rajan Gupta	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

B.

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	108.07 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 flat buyer's agreement	27.02.2012 (on page no. 17 of complaint]



8.	Unit no.	A-161-GF (on page no. 23 of complaint)
9.	Unit area admeasuring	1999 sq. ft. (on page no. 23 of complaint)
10.	(Basic sale price)	Rs. 87,24,996/- (as per BBA)
11.	Total amount paid by the complainant	Rs. 32,66,472/- (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 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



		<p>proposes to hand over the 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 Panty shall additionally be entitled to a period of 180 days ("Grace Period") after the expiry of the said Comment 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	27.02.2014 (Calculated from the date of execution of BBA)
14.	Reminder letters	07.07.2011, 22.09.2011
15	Termination letter	21.08.2020 (page no. 115 of reply)



16	Occupation Certificate	Not on record
17	Offer of possession	07.10.2019 (as alleged by the respondent)

C. B. Facts of the complaint

3. That complainants booked a residential apartment in above mentioned project and were allotted one residential unit bearing no. A-161-GF, area admeasuring 1,999 sq. ft. in "Amstoria" at Sector102, Gurugram, Haryana. That the basic sale price of the said property was Rs. 87,24,996/-out of which the complainants had paid at the time of booking an amount of Rs. 8,94,966/-.
4. That as per buyer's agreement dated 27/02/2012 the respondent company assured the complainants that the construction of the said unit will be completed within 24 months plus 6 months grace period i.e. by 26/08/2014.
5. That respondent vide its email dated 23/05/2016 mentioned number of grounds of their inability to complete the construction in time including litigations with their institutional investor shareholders, selling company assets to raise funds, financial measures etc, and had shown their inability to deliver the project as promised in buyer's agreement.
6. That complainants were shocked and surprised to see that a demand of Rs. 50 to 60 lakh was raised by the respondent company and on the advice of officers of the respondent company, complainants

further deposited an amount of Rs. 2,50,000/-. However till today regarding the above said amount neither any receipt has been issued nor the same is showing in the statement of account maintained by respondent company.

7. That respondent company vide letter dated 21/08/2020 terminated/cancelled the booking/allotment/buyer's agreement and had not returned the payment of Rs. 32,66,472/- made by the complainants. It was not the complainants who violated the terms of the agreement rather from the above admitted facts it is the respondent who have failed to complete the project on time.
8. That since the respondent failed to fulfill its promise to deliver the project by 28/08/2014 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.

D. Relief sought by the complainants:

The complainants have sought the following relief:

- i) Respondent/opposite party be directed to return/refund the money paid by the complainants i.e. Rs. 32,66,472/- along with interest @ 24 % per annum from the date of payment till realization.



- ii) Respondent/opposite party be further directed to pay compensation and litigation expenses of Rs. 1,00,000/- to the complainants.

E. Reply by the respondent

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

9. That the respondent vide allotment cum demand letter dated 19.09.2011 allotted unit A-161-GF tentatively admeasuring 1999 sq. ft. to him.
10. 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'.
11. It is submitted that the complainants failed to clear the outstanding dues even after repeated reminder as elaborated in the list of dates, which are not repeated herein for the sake of brevity. The respondent was constrained to issue termination letter dated 21.08.2020.
12. It is pertinent to mention that as per floor buyer agreement Clause 7.1, the amount after deducting 25% earnest money, late payment charges, interest and any other amount which is non-refundable including incentive, brokerage charges etc shall be credited to the

complainant. Therefore, as per FBA, whole amount paid by the complainant stands forfeited.

13. The construction of project has been completed and the occupation certificate for the same has also been received where after, the respondent has already offered possession to the complainant vide letter dated 07.10.2019, however despite repeated requests made by the respondent, the complainant failed to clear the outstanding dues. The complainants, being investors do not wish to take possession as the real estate market is down and there are no sales in secondary market, thus has initiated the present frivolous litigation.
14. At the outset, it is stated that there is no merit whatsoever in the complaint filed and the same is liable to be dismissed. The complaint filed by the complainants before the Ld. Authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainants have misdirected themselves in filing the above captioned complaint before this Ld. Authority as the reliefs being claimed by the complainants cannot be said to even fall within the realm of jurisdiction of this Ld. Authority.
15. 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 submission made by the parties.

E. Jurisdiction of the authority



16. 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.

F. E. I Territorial jurisdiction

17. 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

18. 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.

19. The respondent has contended that the complainants have made defaults in making payments as a result thereof, it had to issue reminders dated 07.07.2011 and 22.09.2011, 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 27.02.2012 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 parties..."

20. 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 87,24,996/-. The complainants admittedly paid a sum of Rs. 32,66,472/- 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 21.08.2020, 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.

21. 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.

22. As per cancellation letter dated 21.08.2020 annexed on page no. 115 of reply, the earnest money deposit and brokerage shall stand forfeited against amount of Rs. 32,66,471/- paid by the complainants. As per the complaint, the said unit was booked by the complainants, the sum of Rs. 32,66,472/- were paid against sale consideration of Rs.87,24,996/- which is approx. 37% of total consideration. Upon perusal of documents on records, various reminders for payment were raised by the respondent, the complainants received cancellation notice dated 21.08.2020 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

23. 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:


24. 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:

- 1) The respondent is directed to return the amount paid by the complainant/allottee i.e. Rs. 32,66,472/- 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 till the date of realization of payment as the cancellation of the allotted unit was made on 21.08.2020 i.e. after the Act of 2016.
- 2) 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.

25. Complaint stands disposed of.

26. File be consigned to the Registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.08.2022