

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

Complaint no. :	3358/2021
Date of filing complaint:	14.09.2021
First date of hearing:	26.10.2021
Date of decision :	23.08.2022

1. Pushp Lata Arya R/o: H.No. 17/09, First floor, Ashok Nagar, New Delhi	Complainant
Versus	
M/s Umang Realtech Pvt. Ltd. R/o: B-72, 7 th floor, Himalaya House, 23 Kasturba Gandhi Marg, New Delhi- 110001	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Shri Manish Kumar (Advocate)	Complainant
Shri Deeptanshu Jain (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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 provisions 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 the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, are being detailed in the following tabular form:

S. N.	Particulars	Details	
1.	Name of the project	"Monsoon Breeze Phase-II", Sector 78, Gurugram, Haryana	
3.	Nature of the project	Group Housing Colony	
4.	DTCP license no. and validity status	38 of 2008 dated 02.03.2008 valid up to 01.03.2020	77 of 2012 dated 01.08.2012 valid up to 31.07.2020
5.	Area	12.51 acres	7.34 acres
6.	Name of licensee	Siyona Construction Pvt. Ltd	
7.	Date of building plan approval	04.03.2013 [Page no. 22 of complaint]	
8.	RERA Registered/ not registered	Registered vide no. 121 of 2017 dated 28.08.2017	
9.	Unit no.	S-1604, 15 th floor, Tower/block-S (Page no. 10 of complaint)	
10.	Unit area admeasuring	1300 sq. ft. (Page no. 23 of complaint)	
11.	Date of execution of buyer apartment agreement	11.04.2015 (Page no. 21 of the complaint)	
12.	Possession clause	6.1 Possession	

		The developer shall endeavor to hand over the possession of the said apartment to the buyer within a period of 42 months from the date of approval of the building plans or signing of this agreement, whichever is later(commitment period). (Page 28 of the complaint).
13.	Due date of possession	11.08.2018 (Calculated from the date of Agreement)
14.	Total sale consideration	Rs.86,90,000/- (Page on 24 of complaint)
15.	Amount paid by the complainant	Rs.31,80,040/- (Page no. 4 of the complaint)
16.	Occupation certificate /Completion certificate	Not obtained
19.	Offer of possession	Not Offered

B. Facts of the complaint:

3. The complainant booked a unit in the project namely "Monsoon Breeze", Sector 78, Gurugram, Haryana, bearing unit no. S-1604, 15th floor of Tower-5 measuring 1300 sq. ft for total sale consideration of Rs. 86,90,000/-. Subsequently, a floor buyer agreement was executed between the parties on 11.04.2015 and as per the same, the possession of the subject unit was to be handed over to him on 11.08.2018.
4. The complainant made all the payments according to the payment plan and paid a total amount of Rs. 31,80,040/- to the promoter.

She also tried to reach the respondent seeking a reply as to when the possession would be offered to her. But after receiving no response, the complainant sent a legal notice dated 07.05.2019 to the respondent, seeking refund of the amount paid by her.

5. The respondent promised to deliver the said project on time and requested the complainant to provide it with adequate time, to which she agreed and continued to make payments with a hope of completion of the project.
6. The complainant approached the respondent a number of times to deliver the possession of the allotted unit but till date, it has not offered the possession leading to filing this complaint seeking refund of the paid up amount besides interest and compensation.

C. Relief sought by the complainant:

7. The complainant has sought the following relief(s):
 - i. To direct the respondent to refund the amount of Rs. 49,59,684/- along with interest.
 - ii. To direct the respondent to pay for litigation charges.

D. Reply by respondent:

The respondent-builder by way of written reply made the following submissions:

8. That a license for developing a residential colony was issued in favour of Siyona Construction Pvt. Ltd.. So in pursuant to that license the respondent entered into a Development agreement dated 12.03.2013 wherein it was decided that it would construct a residential project by the name and style of Monsoon Breeze II comprising 406 apartments in seven towers, one EWS tower along

with a community site on the land owned by the licensee. A collaboration dated 03.01.2007 was also executed between the landowner and M/s Uppal Housing Pvt. Ltd.

9. That after sanctioned of building plans, it transpired that a revenue Rasta existed in the land owned by gram panchayat of village, Naurangpur leading to non-issuance of environment clearance certificate. So the same led to a deadlock between them invoking arbitration proceedings pending for adjudication.
10. It was admitted that the complainant is an allottee of the project of the respondent and paid a sum of Rs. 31,80,040/- against the allotted unit.
11. It was further pleaded that vide order dated 20.08.2019 NCLT, New Delhi in case Rachana Singh and others VS. Umang Realtech Pvt. Ltd. Initiated corporate insolvency resolutions process against the respondent leading to challenge of that order before NCLAT, staying CIRP vide orders dated 04.02.2020 and directing the project to be completed within a specific timeline. That order is still in operation .
12. That since the respondent is already undergoing CIRP and is short of funds , so if refund is allowed then the same would amount to deficiency of amount for completion of project . Thus, the complaint be directed to take possession of the allotted unit along with reasonable compensation.
13. That the project could not be completed by the respondent due to lack of funds, covid-19, reduced number of allottees , lack of manpower, construction material, shortage of water , procedural difficulties, demonetization , slow down of economy, non-payment

of amount due by various allottees including the complainant and implementation of various social schemes initiated by Government of India.

14. It was denied that there was any intentional delay in completion of project and the complainant is entitled to withdraw from the project and entitled to refund the paid amount. Several factors detailed above were having contribution in delaying the completion of project.
15. It was further pleaded that the complainant was offered a unit in a separate project of the respondent, but she did not agree to the same.
16. Lastly it was pleaded that since the respondent is under CIRP , so the written reply is being filed through interim resolution professional duly appointed by NCLAT , New Delhi.
17. All other averments made in the complaint were denied in toto.
18. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be denied on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

19. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.1 Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. 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

20. 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.

- A** 21. 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.

22. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR (c) 357 and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022* wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

23. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondents.

F.I Objection regarding maintainability of complainant in view of suit pending before NCLAT.

24. In view of aforesaid circumstances, the authority vide order dated 04.07.2022 directed the respondent to submit the above-mentioned facts through an affidavit. However, despite specific directions the respondent has failed to provide an affidavit in respect of averments by it regarding pendency of suit before NCLAT which ultimately led to delay in completion of the project. Therefore, the authority was left with no other option but to proceed with the complainant on basis of facts and submission made by both the parties.

F.II Objection regarding force majeure circumstances.

25. The respondent / builder raised the contention that the construction of the project was delayed due to force majeure conditions such as demonetization, shortage of labour, various orders passed by NGT and weather conditions in Gurugram and non-payment of instalment by different allottees of the project, but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 11.04.2015 and as per terms and conditions of the said agreement the due date of handing over of possession comes out to be 11.08.2018. The events such as demonetization and various orders by NGT in view of weather condition of Delhi NCR region, were for a shorter duration of time and were not continuous as there is a delay of more than three years and even some happening after due date of handing over of possession. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of

the allottees. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrong.

26. As far as delay in construction due to outbreak of Covid-19 is concerned, Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020* dated 29.05.2020 has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."

27. The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by 17.10.2017 and is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period is not excluded while calculating the delay in handing over possession.

F. Findings on the relief sought by the complainant:

- F.1 Direct the respondent to refund the amount of Rs. 31,80,040/- along with interest.**

28. It is not disputed that the complainant booked a unit in the above-mentioned project of the respondent leading to execution of buyer's agreement on 11.04.2015. The total sale consideration of the unit was fixed Rs. 86,90,000/-. The complainant paid a sum of Rs. 31,80,040/- against the total sale consideration. The due date of possession as per agreement for sale as mentioned in the table above is 11.08.2018. There is delay of 3-year 1 month on the date of filing of the complaint. Neither the project is complete, nor the possession of the allotted unit has been offered to the complainant by the respondent. It is pleaded on behalf of the respondent that insolvency proceedings are pending against the promoter and that order is still in operation. Moreover, the respondent is being managed by Mr. Manish Kumar Gupta, IRP appointed by NCLT, New Delhi. Due to certain circumstances beyond the control of the respondent and detailed in para 13, the project could not be completed leading to its delay. Moreover, if refund of the paid-up amount is allowed then it would sound a death knell for the project and the allottees would be left nowhere who are waiting for their dream homes since long. But all the please advanced in this regard are devoid of merit. There may be litigation between the developer and the landowner and certain other factors contributing to delay in completion of project but it is not proved that the respondent stopped receiving due payments from the buyers and benefit in this regard was extended to the allottees. Secondly, IRP is manging the affairs of the respondent and is responsible for its all obligations as per the Act of 2016. It is not the case of the IRP that it is exempted from the operation of that act.

29. So, keeping in view the fact that the allottee complainant 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.
30. 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 allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has 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 as under:*

".... 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....."

Further in the judgement of the Hon'ble Supreme Court of India in the cases of Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others (Supra) it was 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.

31. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as she wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
32. This is without prejudice to any other remedy available to the allottee including compensation for which she may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
33. The authority hereby directs the promoter to return the amount received by him from the complainant i.e., Rs 31,80,040/-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. Direct the respondent to pay litigation charges.

34. The complainant is claiming compensation in the above-mentioned reliefs. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

G. Directions issued 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 functions entrusted to the Authority under section 34(f) of the Act of 2016:

- i. The respondent/ promoter is directed to refund the amount of Rs.31,80,040/- received by it from the complainant along with interest at the rate of 10% p.a. 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 deposited amount.

- ii. A period of 90 days is given to the respondent to comply with the orders of authority and failing which legal consequences would follow.
36. Complaint stands disposed of.
37. File be consigned to the Registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. KK Khandelwal)
Chairman

Dated: 23.08.2022



HARERA
GURUGRAM

