

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

**Complaint no.** : 1619 of 2019  
**Date of filing complaint** : 06.05.2019  
**First date of hearing** : 16.09.2019  
**Date of decision** : 04.10.2022

Mrs. Shashi Rashtogi & Colonel Rajendera Kumar Rastogi <b>R/O:</b> - House No. 195, Sector-45, Faridabad- 121010	<b>Complainants</b>
Versus	
M/s SS Group Pvt. Limited <b>Regd. Office at:</b> - SS House, Plot no.77, Sector-44, Gurugram, Haryana-122003	<b>Respondent</b>

<b>CORAM:</b>	
Shri Ashok Sangwan	<b>Member</b>
Shri Sanjeev Kumar Arora	<b>Member</b>
<b>APPEARANCE:</b>	
Complainant in person	Complainants
Sh. CK Sharma	Advocates 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:

Sr. No.	Particulars	Details
	Name of the project	'The Leaf', Sector -84-85, Gurugram
1	Unit no.	12B, 12 <sup>th</sup> Floor, Tower-1 (As per BBA)
2	Unit admeasuring	1620 sq. ft. (As per BBA)
3	Allotment Letter	08.09.2012 (page no. 36 of reply)
4	Date of execution of builder buyer agreement	24.09.2013
5	Possession clause	<b>8. Possession</b> <b>8.1: Time of handing over the possession</b> 8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having

		<p>complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, <b>the developer proposes to handover the possession of the flat within a period of thirty six months from the date of signing of this agreement.</b> However, this period will automatically stand extended for the time taken in getting the building plans sanctioned. The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months or such extended period, for applying and obtaining occupation certificate in respect of the Group Housing Complex. <b>(Emphasis supplied).</b></p>
6	Cancellation of the unit by the Complainants	<b>Email dated 03.12.2015 (annexure P-5 running page 43 of the complaint)</b>

7	<p>i. Legal notice for cancellation and refund and its reply.</p> <p>ii. Letter dated 15.02.2016 for refund sent to Deputy Commissioner Gurugram</p>	
8	Due date of delivery of possession	24.09.2016 <b>(calculated from the date of signing of buyer agreement)</b>
9	Total sale consideration	Rs. 89,38,800/- (as per BBA)
10	Total amount paid by the complainants	Rs. 39,38,001/- (as alleged by the complainant on page no. 31 of the complainant)
11	Occupation Certificate	09.05.2022 (As per page no. 5 of additional document)
12	Offer of possession	12-05-2022 (As per page no. 10 of additional document)
13	Grace period utilization	As per the clause for possession , the developer shall be entitled to a grace period of 90 days, after the

		expiry of thirty six month(36) months or such extended period for applying and obtaining the occupation certificate in respect of the Group Housing Complex. The promoter has not applied for occupation certificate within the time limit prescribed In the builder buyer agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Therefore , the grace period Is not allowed
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**B. Facts of the complaint**

3. That the complainants on 18.07.2012 booked residential flat No 12 B, Tower - 1, 12th floor in the project of the respondent namely, "The Leaf" located at Sector 84-85, Gurgaon, Haryana under the construction linked plan for a total sale consideration of Rs. 89,39,800/-.
4. That a flat buyer agreement (FBA) should have been signed by the respondent immediately after the receipt of booking amount of Rs 7,50,000/- on 18.7.2012. But in spite of repeated reminders, the same was signed by the respondent on 23.9.2013 i.e. after a delay of more than one year of receipt of booking amount without assigning any reason. The term and conditions of FBA were one sided and heavily loaded towards the respondent. The complainants raised objections but the same were not accepted by the respondent. As the respondent refused to return the booking amount of Rs 7,50,000/-, the complainants had no option but to

sign the FBA which was received more than one year after the booking of flat that too after repeated reminders.

5. That the complainants paid all instalments regularly till July 2015. But in spite of repeated requests by the complainants in person and on phone, no photograph regarding the status and progress of the construction was ever forwarded to them. Hence, the complainants visited the construction site on 22.7.2015 and to their dismay found that the construction work had been way behind the schedule of construction laid down as the slab for only 4th floor placed. After their aforesaid personal visit to construction site in July 2015, the complainants questioned the head of the customer care team of the respondent for the justification of further payment of instalments and were assured that the issue would be resolved once they visit their office.
6. That the revised schedule of construction was arbitrarily issued by the respondent in the newsletter of SS Group dated August 2015 without assigning any reason. A copy of the same is annexed and marked as Annexure P/4. According to the revised schedule, the laying of 6th floor and 9th floor slabs were to be completed by October and Dec 2015 respectively and the top floor was scheduled to be completed by Nov 2016; the super structure work including brick masonry, fixing of chowkhats and internal conduiting was scheduled to be completed within one month of the top floor i.e. Dec 2016. It was evident from the aforesaid schedule that the brick masonry work should have been undertaken in parallel so as to complete the work as scheduled but the same was not implemented by the respondent.
7. That since the issue was not resolved in spite of complainants' visit to their office and many telephonic reminders, an e-mail dated 3.12.2015

was sent by them to the respondent that due to the delay in completion of the project and offering the possession of flat, their booking of flat be cancelled, and the amount deposited so far with it be refunded to them along with 18% of interest. A legal notice dated 15.01.2016 was also served upon the respondent builder. Though a reply dated 29.01.2016 was received but without any positive results. The complainants also made a request dated 15.02.2016 in this regard to Deputy Commissioner cum Chairman Allottee Grievances Redressal Forum, Gurugram seeking refund of the paid-up amount. When nothing materialised, they withdrew that complaint on 08.10.2018.

8. That the complainants suffered loss and damage in as much as they had deposited the money in the hope of getting the said unit for residential purposes. They have not only been deprived of the said unit but also the benefit of escalation of price of the said unit and the prospective return, they could have got had they not invested in the project of the respondent. Therefore, the compensation in such cases would necessarily have to be higher than what is agreed in the buyer's agreement.
9. That the complainants have at all times made payments against the demands of the respondent and as per payment schedule of the agreement pertaining to the flat. Thus, the fraudulent act and conduct of the respondent needs to be penalized in accordance with the provisions of the Real Estate (Regulation and Development) Act, 2016.

**C. Relief sought by the complainants.**

10. The complainants have sought following relief:

- (i) Direct the respondent to refund sum of Rs. 39,38,001/- along with prescribed rate of interest.
- (ii) Direct the respondent to pay litigation cost @Rs. 50,000/- to the complainants.
- (iii) Direct the respondent to pay mental agony and harassment @Rs. 5,00,000/- to the complainants.

**D. Reply by the respondent.**

11. That the complaint filed by the complainants is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be rejected. The complainants have miserably and wilfully failed to make payments in time or in accordance with the terms of the allotment/ flat buyer's agreement. It is pertinent to mention herein that till date, the total number of delay in rendering the payment towards due installments is approx. 10366 days at various occasions under different installments. It is extremely pertinent to mention here that as per the records maintained by the respondent company, the complainants have defaulted in making payment of due installments right from the time the first installment became due and despite receipt of repeated demand letters and reminder letters. Hence, there can be no doubt that complainants' intention of not abiding by the terms of the flat buyer agreement right from the inception of contractual relations between the parties. The following payment sheet clearly shows the number of days of delay in payment by the complainants:

S. No.	Stage	Due date	Amount Demanded (Rs.)	Date of Payment	Amount Paid	Period of delay (days)
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1.	At the time of booking	18.07.2012	750000	01.08.2012	750,000/-	15
2.	At the time of Allotment	14.09.2012	125114	17.10.2012	125,114/-	34
3.	On or before 45 <sup>th</sup> Day of the Allotment	29.10.2012	875113	17.10.2012 04.12.2012	848,880/- 26,233/-	-- 37
4.	On Commencement of Construction work	15.07.2013	875113	15.07.2013	875,113/-	-
5.	On Completion of Lower Basement Slab	15.06.2014	875113	16.06.2014 24.09.2014	857,611/- 17,502/-	1 102
6.	On Completion of 1 <sup>st</sup> Floor Slab	22.05.2015	437558	27.05.2015	437,558/-	6
7.	On Completion of 3 <sup>rd</sup> Floor Slab	25.08.2015	439295	-	Not Yet Paid	1864
8.	On Completion of 6 <sup>th</sup> Floor Slab	28.12.2015	439826	-	Not Yet Paid	1739
9.	On Completion of 10 <sup>th</sup> Floor Slab	22.04.2016	445023	-	Not Yet Paid	1623
10.	On Completion of 15 <sup>th</sup> Floor Slab	21.10.2016	442178	-	Not Yet Paid	1441
11.	On Completion of Internal Plumbing, Electrical Conduiting & Internal Plaster within the Apartment	02.02.2018	475374	-	Not Yet Paid	972
12.	On Completion of Final Floor Slab	26.03.2018	475374	-	Not Yet Paid	920

13.	On Completion of Brick Work in within the Apartment	25.06.2018	475374	-	Not Yet Paid	829
14.	HVAT 1.05% Book on Demanded Amount up to 31.03.2014	10.08.2018	8913	-	Not Yet Paid	783
<b>In Total (Approx.)</b>						<b>10366</b>

12. That the project "The Leaf" has been registered with the authority vide registration no. 23 of 2019. It is submitted that there is a huge outstanding amount to be paid by the allottees which has resulted in alleged delay in handing over of possession to the allottees. It is further submitted that due to the money crunch created by the allottees by not making timely payments and in order to meet the gap for cost of completion of the project arisen on account of non-payment/default in payment of installments by the allottees, the company approached SWAMIH INVESTMENT FUND - I (Special Window for Completion of Construction of Affordable and Mid-Income Housing Projects) which has been formed to complete construction of stalled, brownfield, RERA registered residential developments that are in the affordable housing / mid-income category, are networth positive and requires last mile funding to complete construction. It has a target corpus of Rs. 12,500 crores with a greenshoe option of Rs. 12,500 crores. The SWAMIH INVESTMENT FUND - I vide their letter dated 23.07.2020 has sanctioned an initial amount of Rs. 110 crores which may extend upto Rs. 166 crores if required to complete the project. The company is in advanced stage for completing the formalities of the first trench of disbursement expected in September, 2020. As per the condition of the fund sanction, the entire

amount of the fund shall be utilised only in completion of the project under the observation and monitoring of the agency deployed by the SWAMIH FUND in the project. The primary objective of establishment of SWAMIH FUND is to help the Home Buyers in getting their homes and is sponsored by the Secretary, Department of Economic Affairs, Ministry of Finance, Government of India on behalf of the Government of India. If any relief is allowed by this Hon'ble Court, then the basic objective of the intervention of the Government of India would be defeated.

13. That after halt in work due to various reasons and not limited to delay on the part of the allottees, NGT Notifications, covid-19 pandemic, etc., recently the work had re-started and is going on in full swing and would be completed very soon, within the timeline committed before RERA Gurugram.
14. That it is to be appreciated that a builder constructs a project phase wise for which it gets payment from the prospective buyers and the money received from the prospective buyers is further invested towards the completion of the project. It is important to note that a builder is supposed to construct in time when the prospective buyers make payments in terms of the agreement. It is submitted that it is important to understand that one particular buyer who makes payment in time can also not be segregated if the payment from other prospective buyer does not reach in time. It is relevant that the problems and hurdles faced by the developer or builder have to be considered while adjudicating complaints of the prospective buyers. It is relevant to note that the slow pace of work affects the interests of a developer, as it has to bear the increased cost of construction and pay to its workers, contractors, material suppliers, etc. It is respectfully submitted that the irregular and

insufficient payment by the prospective buyers such as the complainants freeze the hands of developer / builder in proceeding towards timely completion of the project.

15. 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 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**

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.

**C. F. Findings on the relief sought by the complainants.**

**F.I Direct the respondent to refund sum of Rs. 39,38,001/- along with prescribed rate of interest.**

16. In the present complaint, the complainants wish to withdraw from the project and are 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 due date of possession as per agreement for sale as mentioned in the table above is 24.09.2016 and there is delay of 2 years 7 months 12 days on the date of filing of the complaint. The matter is covered under section 18(1) of the Act of 2016. The counsel for the respondent states that in year 2015 and 2016, the complainant sent various emails and legal notice for cancellation of unit which is prior to the due date with the reference of the judgement passed by this authority in CR no. 4716/2020 decided on 09.08.2022 would be considered as

surrender and deduction should be made as per the HARERA Gurugram Regulations, 11(5) of 2018.

17. The authority observes that the respondent never replied that email. Though after that the complainants sent a legal notice dated 15.01.2016 seeking refund of the paid-up amount and the same was replied vide letter dated 29.01.2016 but same was prior to due date of completion of the project i.e., 24.09.2016. No doubt there is no mention w.r.t. cancellation or surrender of the allotted unit to be made by an allottee in the unit but there is no bar for him to move in this regard due to certain circumstances beyond his control such as in the case in hand where allottees requested the respondent builder for cancellation and refund due to medical exigencies and the construction of the project not going as per the schedule and the payments received. The respondent builder did not opt to reply that notice though vide email dated 30.12.2015 sent some pictures as a proof of the construction of the tower being done. This request of complainants was again followed by a legal notice dated 15.01.2016 sent to the respondent and the same being replied vide letter dated 29.01.2016 declining request for refund of the paid-up amount. Though later on the complainants also made a representation in this regard with deputy commissioner Gurgaon vide letter dated 15.02.2016 but the same was ultimately withdrawn vide letter dated 08.10.2018. Thus, all these facts prove that the complainants have been making efforts for refund of the paid-up amount due to medical exigences and the construction of the project not going as per the schedule viz-a-vis the payments received by the respondent. Even as per clause 9.2 of model buyers agreement, the complainants were right in stopping making further payments against the allotted unit and particularly when the

construction of the project and the allotted unit was not going as per the schedule agreed upon between the parties. Now, the question for the consideration before the authority arises as to whether when a promoter fails to act upon a representation/request of an allottee for cancellation/surrender of a unit before the due date, whether deduction of 10% of the basic sale consideration of the unit can be made or he be allowed refund of the paid up amount without any deduction. It is contended on behalf of respondent builder that while dealing with complaint no. 4716-2020 the authority took a view on 09.08.2022 that when cancellation/surrender of a allotted unit is sought before the due date then deduction should be made as per regulation 11 of 2018 of the authority. But the facts of that case were different from the present one and wherein the promoter specifically declined the request of the allottee for surrender/cancellation before the due date vide letter dated 29.01.2016. This was not so in the case relied upon by the respondent. After issuance of letter of allotment an execution of buyers agreement dated 08.09.2012 and 24.09.2013 respectively, the complainant waited for the progress for their unit for about 3 years. When there was due progress of construction of the site at the project viz-a-vis the payments made and due to medical exigencies, the complainants moved for cancellation in December 2015 and sought refund of the paid up amount. But their request made in this regard went unheard leading to sending a legal notice dated 15.01.2016 and receiving its reply on 29.01.2016 declining the same. Thus keeping in view all these facts, the promoter illegally rejected the request of complainants for surrender of the allotted unit and retained the paid up amount, leading to filing of this complaint seeking refund on 06.05.2019. So, in such a situation the

complainants are entitled to refund of the paid up amount of Rs. 3938001/- besides interest @ prescribed rate from the date of each payment till actual realisation.

18. It is contended that the respondent builder obtained occupation certificate and offered possession of the subject unit after filing of application by the complainants for return of the amount received by the promoter on failure of promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. The complainant-allottees have already wished to withdraw from the project and they have become entitled to their right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as it failed to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return the amount received by it from the allottees in respect of that unit with interest at the prescribed rate.
19. Further in the judgement of the Hon'ble Supreme Court in the cases of Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) 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, 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*

20. 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 allottees 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 the allottee 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.
21. The respondent-builder obtained occupation certificate and offered possession of the subject unit after filing of application by the complainants for return of the amount received by the promoter on failure of promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. The complainant-allottees have already wished to withdraw from the project and the allottees have become entitled to them right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as it failed to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return

the amount received by him from the allottee in respect of that unit with interest at the prescribed rate. This is without prejudice to any other remedy available to the allottee including compensation for which allottee 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.

22. The authority hereby directs the promoter to return the amount received by him i.e. Rs. 39,38,001/- 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 That this Hon'ble Authority may direct the respondent to pay litigation cost @Rs. 50,000/- to the complainant.**

**F.III That this, Hon'ble Authority may direct the respondent to pay mental agony and harassment @Rs. 5,00,000/- to the complainant.**

23. 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 complainant is

advised to approach the adjudicating officer for seeking the relief of compensation


**G. Directions of the authority**

24. 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. 39,38,001/- 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 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 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 registry.

  
(Sanjeev Kumar Arora)  
Member

  
(Ashok Sangwan )  
Member

Haryana Real Estate Regulatory Authority, Gurugram  
Dated: 04.10.2022