

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

Complaint no. : 1688 of 2021
First date of hearing: 21.05.2021
Date of decision : 13.05.2022

1. Sh. Ritesh Raj Saxena S/o Rajesh Kumar Saxena
2. Mrs. Pooja Saxena W/o Ritesh Raj Saxena
both R/o: - A003, The Crest, DLF Phase-V, Gurgaon

Complainants

Versus

1. M/s BPTP Limited.
 2. M/s Countrywide Promoter Pvt. Ltd.
- Regd. Office at:** M-11, Middle Circle, Connaught Circus,
New Delhi

Respondents

CORAM:

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Sh. Bhupender Pratap Singh
Sh. Venkat Rao

Advocate for the complainants
Advocate for the respondents

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations,

responsibilities and functions under the provision of the Act or the Rules and regulations made there under or to the 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.N.	Particulars	Details
1.	Name of the project	"Amstoria", Sector- 102, Gurugram
2.	Project area	108.07 acres
4.	RERA registered/not registered	Not Registered
8.	DTPC License no.	58 of 2010 dated 03.08.2010
	Validity status	02.08.2025
	Name of licensee	Shivanand Real estate Pvt. Ltd and 12 others
9.	Unit no.	C-211 [As per page no. 76 of complaint]
10.	Unit measuring	226 sq. yd. (2034 sq. ft) [As per page no. 76 of complaint]
11.	Date of booking	06.12.2010
12.	Addendum to buyer's agreement	30.04.2013 (page 65 of the complaint as annexure C-6)
11.	Date of execution of plot buyer's agreement	28.01.2014

		(Page no. 70 of complaint)
13.	Possession clause	<p>5. POSSESSION</p> <p>5.1. Subject to Clause 13 herein or any other circumstances not anticipated and beyond the control of the Seller/Confirming Party and any restraints/restrictions from any courts/authorities and subject to the Purchaser(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement including but not limited to timely payment of all instalments and the of total Sale Consideration and Stamp Duty and other charges and having complied with all provisions, formalities, documentation etc, as prescribed by the Seller/Confirming Party, whether under this Agreement or Maintenance Agreement or otherwise, from time to time, the Seller Confirming Party proposes to hand over the possession of the Plot to the Purchaser(s) within a period of 36 months from the date of sanctioning of the service plan of the entire colony or execution of Plot Buyer's Agreement, whichever is later. The Purchaser(s) agrees and understands that subject to Clause 13 of this agreement, the</p>

		Seller/Confirming Party shall be entitled to a grace period of 180 (One Hundred and Eighty) days, after the expiry of 36 months as stated above, for applying and obtaining necessary approvals in respect of the colony
14.	Due date of possession	28.01.2017 (calculated from the execution of BBA)
17.	Total sale consideration	BSP Rs. 89,83,500/- [As per page no. 82 of reply]
18.	Total amount paid by the complainant	Rs. 1,08,06,226/- [As alleged by the complainant]
19.	Completion certificate	Not obtained
20	Offer of Possession	27.10.2017 (page 105 of complaint)

B. Facts of the complaint

The complainants have made the following submissions: -

- That a project by the name of 'Amstoria' situated in sector 102, Gurugram was being developed by respondent no. 1. The complainants coming to know about the same from advertisements in sept-Oct 2010 made a booking of a plot bearing no. C-211 measuring 226 sq.yd. for a basic sale of consideration of Rs. 89,83,500/- on 06.12.2010. a sum of Rs. 9,00,000/- was paid as booking amount for the unit.

4. That as per clause 15 of the application, the possession of the allotted unit was to be handed over within 24 months from the date of execution of builder buyer agreement.
5. That after booking of the unit, the complainants started depositing various amounts and 60% of the sale consideration was collected by respondent no1 even without entering into buyer's agreement. Though, the complainants sent copies of buyers agreement duly signed but the same were not allegedly received by the respondents. So, when they visited the office of respondents, they again executed buyer's agreement but the date of execution of the same was put as 28.01.2014.
6. That the complainants had already paid more than 95% of the sale consideration and the timeline for delivery of the possession of the allotted unit was changed from 24 months to 36 months. Moreover, the agreement so entered into between the parties was laden with one sided , unfair and illegal clauses such as providing 25% of the total sale consideration as earnest money, charge of penal interest at 18% compounded quarterly for delayed payments , club membership charges of Rs. 2,00,000/- , excessive charge of development charges etc.
7. That on 23.05.2017, the complainants received letter with regard to revised lay out plan wide annexure C-10. Though, on 27.10.2017 an offer of possession of the allotted unit was made

but the same was sent without complying with the provision of sec. 18, conditional one, with reduced size of the allotted unit and lack of proof of completion certificate.

8. That though, the complainants raised their grievance against the same vide email dated 27.02.2017 but without any positive results. Ultimately, vide email dated 12.01.2018, the respondents offered the complainants an alternative unit no. C-390 but the same was not of their liking being located near EWS houses, not preferentially located.
9. That ultimately, vide email dated 30.01.2021 the complainants refused to make an allotment as per the original booking, leading to their withdrawal from the project and seeking refund of the amount deposited with the respondents besides interest and compensation as prayed above.

C. Relief sought by the complainants:

10. The complainants have sought following relief(s).
 - i. ***Direct the respondents to return sale consideration sum of Rs. 1,08,06,226/- along with interest and declare the offer of possession dated 27.10.2017 as non-est and illegal.***
 - ii. ***Direct the respondents not to levy any holding charges from the date of purported offer of possession in view of the aforesaid prayers***
 - iii. ***Direct the respondents to pay /award cost of Rs. 1,00,000/- and compensation for harassment and mental agony amounting to Rs. 5,00,000/- in favour of the complainants***

11. On the date of hearing, the Authority explained to the respondent/promoters about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondents

The respondents contested the complaint on the following grounds: -

12. That the complainants have approached this authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the hon'ble apex court in plethora of decisions 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. The respondents have contented on the following grounds:

- ◆ That with regard to club membership charges, the complainants have made frivolous allegations against the respondents by stating that they are recovering cost of

construction from them and other allottees. However, it is submitted that respondents are not charging the cost of construction of the club from the complainants or other allottees but are charging for membership for club from them for usage of the service of club built in the colony for all residents/ occupants of colony.

- ◆ That at the stage of booking, the respondents had levied the charge - "Development Charges" or DC while clarifying that DC shall mean the amount charged by the company towards the development work of the colony including providing water supply, drainage network for sewage, sullage, storm-water etc., necessary provisions of treatment and disposal of sewage, sullage and storm water, roads, electrical work, solid waste management and disposal, hospitals, stadium/sports complex, fire stations, grid sub-stations, etc. and such other developments which shall be undertaken in addition to works done by the Government of Haryana or through Haryana Urban Development Authority. The rate at which DC is charged is mentioned in the price list attached with the booking application and was agreed upon by them.

13. From the above, it is very well established, that the complainants have approached this authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts

pertaining to the case at hand. It is further submitted that the sole intention of the complainants is to unjustly enrich themselves at the expense of the respondents by filing this frivolous complaint which is nothing but gross abuse of the due process of law and the present complaint warrants dismissal without any further adjudication.

14. That 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'. Therefore, in light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this authority.
15. The parties had agreed under the flat buyer's agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainants have raised to dispute but did not take any step to invoke arbitration.
16. It was further pleaded that demands against the allotted unit were raised as per the payment schedule agreed upon between the parties. A plot buyer agreement dated 28.01.2014 was executed between the parties with was executed by the

complainants out of their free will and consent and the same is binding on them.

17. That from time to time, the respondents have been sending construction updates to the complainants w.r.t. the unit in question and copies of the mails send in this regard are annexure R-12.
18. It was denied that offer of possession was not made as per the buyer's agreement and the same is illegal in any manner and without paying any compensation. Infact, a sum of Rs. 20951 /- along with special credit of Rs. 83899/- as already been paid in the account of the complainants. Rather, the fault lies with complainants who after due offer of possession in the year 2017 failed to turnup and take possession of the allotted unit. It was denied that any illegal demands have ben raised against the complainants either before offer of possession or at the time of possession.
19. All other averments made in the complaint were denied in toto.
20. 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 submissions made by the parties.

E. Jurisdiction of the authority

21. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

22. 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

23. 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.

24. 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.

25. 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 (Civil), 357 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."

26. 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 that amount.

F. Findings on the objections raised by the respondents.

F. I Objection regarding complainants are in breach of agreement for non-invocation of arbitration.

27. The respondents have raised an objection for not invoking arbitration proceedings as per the provisions of plot buyer's agreement which contains a provision regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

"31. Dispute Resolution by Arbitration

All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a Sole Arbitrator who shall be appointed by the Managing Director of the seller and whose decision shall be final and binding upon the parties. The Purchaser(s) hereby confirms that he shall have no objection to this appointment of the Sole Arbitrator by the Managing Director of the Seller, even if the person so appointed, as a Sole Arbitrator, is an employee or advocate of the Seller/Confirming Party or is otherwise connected to the Seller/ Confirming Party and the Purchaser(s) confirms that notwithstanding such relationship/connection, the

Purchaser(s) shall have no doubts as to the independence or impartially of the said Sole Arbitrator.

28. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Section 88 of the Act also provides that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506* and followed in case of *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

29. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **in case titled as *M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** decided on

- 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.
30. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act, 1986 and Act of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.
- E. Findings on the relief sought by the complainants.**
- E.1 Direct the respondents to return sale consideration sum of Rs. 1,08,06,226/- along with interest and declare the offer of possession dated 27.10.2017 as non-est and illegal**
31. The complainants submitted that the allotted plot was booked 8 years back and the respondents have yet not applied for CC/ part CC. However, the respondents submitted that they have already offered the possession of the plot to the complainants on 27.10.2017. The complainants further alleged that as per the layout and dimensions of the plot shared by the respondents, the same is irregular in shape and is not a perfect rectangle whereas the respondents denied their claim on these counts.
32. The authority calculated due date of possession as per clause 5.1 of the plot buyer's agreement dated 28.01.2014 i.e. within a period of 36 months from the date of sanctioning of the service plan of the entire colony or execution of plot buyer's agreement, whichever is later. The date of sanctioning of the service plan of the entire colony is not

available on record and therefore, the due date of handing over of possession is calculated from sale agreement i.e. 28.01.2014. As such the due date of handing over of possession of plot comes out to be 28.01.2017. In the instant case, the respondents have offered the possession of the plot to the complainants vide letter dated 27.10.2017 but it is pertinent to mention here that a valid offer of possession must consist of following attributes:-

- i) The possession must be offered after obtaining occupation certificate (or CC, as the case may be);
- ii) The subject unit should be in habitable condition;
- iii) The possession should not be accompanied by unreasonable additional demands.

In the instant case, the first and foremost condition of a valid offer of possession are not satisfied. Therefore, the offer of possession cannot be regarded as a valid offer of possession.

33. As the allottees intend to withdraw from the project under section 18(1) of the Act, 2016 and the authority is well within its jurisdiction to proceed further in the matter to grant refund to the complainants in view of the recent judgement of the Hon'ble Apex court in the case of *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.(supra)*. Since the date of handing over of possession of plot has already been due and there is nothing on record that the CC / part CC of the said plot has yet been obtained, the authority has no hitch in directing the promoters to return the amount received by them i.e., Rs. 1,08,06,226/- along with interest at the rate of 9.40% p.a. as prescribed under rule 15 and rule 16 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 within 90 days .

E. II Direct the respondent not to levy any holding charges from the date of purported offer of possession in view of the aforesaid prayers.

34. The respondents are not entitled to claim holding charges from the complainant(s)/allottee(s) at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in Civil appeal nos. 3864-3889/2020 decided on 14.12.2020

E.III. Direct the respondent to pay litigation cost to the complainant.

35. The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India, in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Supra), 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. Therefore, the complainants are advised to approach the adjudicating officer for seeking compensation.

F. Directions of the authority


36. 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.1,08,06,226/- paid by the complainants along with prescribed rate of interest @ 9.40% p.a. from the date of each payment till the actual date of refund of the deposited amount.

- ii. A period of within 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow. Complaint stands disposed of.

37. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.05.2022



HARERA
GURUGRAM