

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

Complaint no. :	3437 of 2019
Date of filing complaint:	22.08.2019
First date of hearing:	03.12.2019
Date of decision :	30.08.2022

Smt. Kiran Gupta W/o Sh. Manoj Gupta R/O: 513, Near Town Park, Hisar	Complainant
Versus	
M/s ALM Infotech City Private Limited Regd. office: B-418, New Friends Colony, New Delhi - 110065	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Gaurav Bhayana (Advocate)	Complainant
Sh. Venket Rao & Sh. Pankaj Chandola (Advocates)	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 provision 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, have been detailed in the following tabular form:

S.n.	Particulars	Details
1.	Name of the project	"ILD Grand", Sector-37C, Gurgaon
2.	Nature of project	Group housing project
3.	RERA registered/not registered	Registered vide registration no. 386 of 2017 dated 18.12.2017
	Validity status	17.09.2019
	Licensed area	41223.953 sqm.
4.	DTPC License no.	96 of 2010 dated 03.11.2010
	Validity status	02.11.2025
	Licensed area	21.1804 acres
	Name of licensee	M/s Jubilant Malls Pvt. Ltd.
5.	Unit no.	3C on 3 rd floor of tower Skylark (type- 3BR) [As per page no. 17 of complaint]
6.	Unit area admeasuring	1789 sq. ft. [Super area] [As per page no. 17 of complaint]
7.	Date of builder buyer agreement	21.02.2013 [As per page no. 14 of complaint]



8. Possession clause	<p>Clause 9(i)</p> <p><i>Subject to Force Majeure circumstances as defined herein and subject to timely grant of all approvals, permissions, NOCs, etc. and further subject to the Allottee(s) having complied with all his obligations under the terms and conditions of this Agreement and the Allottee(s) not being in default under any part of this Agreement including but not limited to the timely payment of the total Sale Consideration and other charges/fees/taxes/levies and also subject to the Allottee(s) having complied with all formalities or documentation as prescribed by the Developer the Developer proposes to complete the construction <u>within a period of 36 months computed from the date of execution of this agreement with further grace period of 180 days under normal circumstances.</u></i></p>
9. Due date of possession	<p>21.08.2016</p> <p>[Calculated from the date of execution of buyer's agreement i.e. 21.02.2013 + grace period of 180 days]</p> <p>Grace period of 180 days is allowed.</p>
1. Payment plan	<p>Construction linked payment plan [As per page no. 46 of complaint]</p>
1. Total sale consideration	<p>Rs. 77,76,047/- [As per payment schedule on page</p>

		no. 18 of complaint]
1	Amount paid by the complainant	Rs. 26,91,586/- [As per demand notice dated 08.11.2013 on page no. 51 of complaint]
1	Occupation certificate	Not obtained
1	Offer of possession	Not offered

B. Facts of the complaint:

3. That the complainant was allotted flat unit bearing no. 3-C, floor 3rd, tower Skylark (A-2), admeasuring 1789 sq. ft. on 27.06.2012 as per the receipt issued by the respondent-company. It was assured by it that the possession of the property would be handed over within the reasonable time period which later on proved to be false and concocted story.
4. That the complainant made payment as per the demand raised and the same were duly acknowledged by the respondent. She has paid total amount of Rs. 26,91,586/- and the same is evident from the account statement. Thereafter, she did not pay any further installment as she was scared that her money will be wasted as the company was not progressing any construction work at the site of the flats. Due to serious deficiency in services on its part, the complainant is suffering financially, mentally and physically.

5. That the apartment buyer agreement was executed between the parties on 21.02.2013. As per the clause no. 9 (i) of the agreement, it was promised that the construction of the flat would be completed within a period of 36 months with a grace period of 6 months. But the real fact is that the respondent is very far from giving the possession of the flats to its allottees as the construction work at the project is either stopped or moving very slow which is clearly the violation of the Act.
6. That the respondent has given false promises and assurances to the complainant and unlawfully grabbed huge amount by harassing innocent customers.

C. Relief sought by the complainant:

7. The complainant has sought following relief(s):
- Direct the respondent to refund the complete amount as stated in account statement deposited against the apartment so booked along with interest 18 % p.a.
 - Direct the respondent to pay Rs. 10,00,000/- for causing mental agony due to delay in delivery of possession.
 - Direct the respondent to reimburse the litigation fees of Rs. 2,00,000.

D. Reply by respondent:

The respondent by way of written reply made following submissions

8. That the possession clause 9(i) of the agreement was subject to force majeure circumstances, timely grant of all approvals, permissions, NOC's,

etc. and further subject to the allottee(s) having complied with all his obligation under the terms and condition of this agreement and the allottee(s) not being in default under any part of this agreement including but not limited to the timely payment of the total sale consideration and other charges/fees/taxes/levies and also subject to allottee(s) having complied with all formalities or documentation as prescribed by the developer. However, the complainant is trying to shift the onus on the respondent as it is the complainant who has failed to comply her part of obligation and miserably failed to pay the installments in time despite repeated payment reminders being sent by it from time to time.

9. That the complainant is an investor and due to huge slump in real estate sector has stopped making payments towards her unit and with malicious an unlawful intent to withdraw from the project.
10. That the construction work of the project is in full swing and the subject apartment would be delivered soon. The respondent is taking every possible step to complete the project and in furtherance of which SWAMIH investment fund, a special window for completion of construction of affordable and mid-income housing projects has been sanctioned for the project ILD GRAND. Also, the suo moto proceeding with respect to the project ILD GRAND are pending before the Real estate regulating Authority, Gurugram.

11. Copies of all the relevant documents have been filed and placed on 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:

12. 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. I 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

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)(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 allottee as per the agreement for sale, or to the association of allottee, as the



case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 allottee 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 complainant at a later stage.

F. Findings on the objections raised by the respondent:

F.1 Objection regarding the complainant being investor:

13. It is pleaded on behalf of respondent that complainant is an investor and not consumer. So, she is entitled to any protection under the Act and the complaint filed by her under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful

perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainant is a buyer and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of the term allottee under the Act, and the same is reproduced below for ready reference:

"Z(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold(whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."

In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainant is an allottee as the subject unit allotted to them by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as *M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Entitlement of the complainant for refund:



- G.I Direct the respondent to refund the complete amount as stated in account statement deposited against the apartment so booked along with interest 18 % p.a.**
14. The project detailed above was launched by the respondent as group housing complex and the complainant was allotted the subject unit in tower Skylark against total sale consideration of Rs. 77,76,047/-. It led to execution of builder buyer agreement between the parties on 21.02.2013, detailing the terms and conditions of allotment, total sale consideration of the allotted unit, its dimensions and the due date of possession, etc. A period of 36 months with a grace period of 180 days for completion of the project was allowed to the respondent and that period has admittedly expired on 21.08.2016. It has come on record that against the total sale consideration of Rs. 77,76,047, the complainant has already paid a sum of Rs. 26,91,586/- to the respondent.
15. The respondent-builder stated that the complainant on several occasions has failed to make payments towards consideration of allotted unit. However, there is nothing on record to show that the respondent has proceeded with cancellation of subject unit. Since, there is delay in handing over of possession by the respondent, the allottee complainant wishes to withdraw from the project and is 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.

16. The due date of possession as per agreement for sale as mentioned in the table above was **21.08.2016** and even after delay of more than 3 years on the date of filing of the complaint i.e. 22.08.2019, the occupation 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

" The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottee 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....."

17. 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. (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. it was observed

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

18. 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 he 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.
19. 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.

The authority hereby directs the promoter to return the amount received by him i.e., Rs. 26,91,586/- 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*.

G.II Direct the respondent to pay Rs. 10,00,000/- for causing mental agony due to delay in delivery of possession.

G.III Direct the respondent to reimburse the litigation fees of Rs. 2,00,000.

20. The complainant is seeking relief w.r.t compensation in the aforesaid relief, 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. (SLP(Civil) No(s). 3711-3715 OF 2021)*, 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 may approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the Authority:

21. 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 promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:
- The respondent /promoter is directed to refund the amount i.e. **Rs. 26,91,586/-** 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 amount.

- 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.

22. Complaint stands disposed of.

23. File be consigned to the registry.

V.K. Goyal
(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.08.2022