

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

Complaint no. :	4576/2019
Date of filing complaint:	20.09.2019
First date of hearing:	06.11.2019
Date of decision :	30.08.2022

Ajay Kumar Jain R/o: B-309 Plot 39C Karor Apts Dwarka Sector 6	Complainant
Versus	
M/s Cosmos Infra Engineering India Limited R/o: 4 Batter Lane Rajpur Road Civil Lines Delhi 110054	Respondent

CORAM:

Dr. KK Khandelwal **Chairman**

Shri Vijay Kumar Goyal **Member**

APPEARANCE:

Sh. Deepanshu Jain (Advocate) **Complainant**

Ms. Pooja Sareen (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 complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Name of the project	Cosmos Express 99 Sector 99, Village Dhankot , Tehsil and Distt., Gurugram
2.	Project area	10.025 acres
3.	Nature of the project	Residential Unit
4.	DTCP License no. & validity status	70 of 2011 dated 22.07.2011 upto 21.07.2024
5.	Name of Licensee	Shivnandan Buildtech Pvt Ltd
6.	RERA Registered / not registered	Registered bearing no. 62 of 2019 dated 14.10.2019 upto 30.09.2021
7.	Allotment Letter	07.05.2012 (Annexure C-2 page 22 of the complaint)
8.	Unit no.	E-402 (Annexure C-2 page 22 of the complaint)
9.	Unit admeasuring	1865 sq. ft. (Page no. 25 of the agreement)
10.	Date of excavation	14.03.2012 (Annexure C-7 page 66 of complaint)
11.	Date of execution of Flat buyer agreement	26.03.2012

		(Annexure C-3-page no. 23 of the agreement)
12.	Possession clause	3.1 3.1 That the developer shall, under normal conditions, subject to force majeure, complete construction of tower/building in which the said flat is to be located, in 4 years from the start of construction or execution of this agreement whichever is later (Emphasis supplied).
13.	Due date of delivery of possession	26.03.2016 (Calculated from the date of execution of this agreement being later i.e 26.03.2012)
14.	Total sale consideration	Rs 70,85,538. /- (As alleged by the complainant)
15.	Total amount paid by the complainant	Rs 58,01,629/- (As alleged by the complainant)
16.	Occupation certificate	Not obtained
17.	Offer of possession	Not offered

B. Facts of the complaint:

3. That the complainant booked a flat in the project of the respondent namely, "Cosmos Express 99" and applied for the registration/provisional allotment for the residential flat. An amount of Rs. 10,60,000/- was paid by the complainant on 14.02.2012, as a booking/registration amount. The allotment was made by the respondent on 07.05.2012 and the complainant was issued unit no. 402 located in type silver, Tower No. 'E' having an approximate super area of 1865 sq. fts.

4. That the buyer's agreement was executed on 26.03.2012 to handover the possession of the said flat within 4 years of the start of construction or execution of this agreement whichever is later. The complainant has already paid an amount of Rs. 58,01,629/- out of the total sale consideration.
5. That the home loan agreement was arrived between the complainant and HDFC Bank and wherein, he availed a total loan for an amount of Rs. 70,00,000/- out of which the total amount disbursed is amounting to Rs. 47,41,576/- till date towards the payment of the said flat. The complainant is paying the monthly EMIs of Rs. 43,731/- in every month despite the fact that the respondent has not delivered the possession of the said flat till date and even is not in a position to deliver the possession of the said flat.
6. That the respondent vide letter dated 01.08.2018 raised a demand against the complainant for an amount of Rs.8,00,610/-The bank denied to disburse the further loan amount to the respondent towards the construction as the query dated 17.08.2018 raised by the bank was as to whether the respondent was registered and (or) approved by the RERA.
7. That the complainant through email dated 18.09.2018 raised the query to the respondent, but despite of this fact, the respondent never replied to the complainant. The respondent in spite of replying to the aforesaid query has again raised a demand through letter dated 18.07. 2019.The respondent has failed to deliver the said flat within stipulated time and he has committed breach of the agreement executed between the parties.

8. That moreover no reasons for delay were assigned by the respondent qua the non-delivery of the said flat, which reveals respondent by 'acquiescence by silence is intentionally delaying the possession and (or) is not under the position for delivering the possession of the said flat, which results into causing harassment, victimizing, mental agony and loss to the complainant.
9. That the complainant has made the payment within the stipulated time as and when demanded by the respondent. The complainant till date is paying the monthly EMIs towards the total loan disbursement paid by the HDFC Bank.
10. The respondent never replied to the query raised due to which the bank officials were unable to disburse the loan amount towards the demand raised.
11. That the complainant was disappointed to realize that the possession of the flat till date has not been offered and it seems the respondent is not under aspiration of delivering the possession of the said flat.
12. That the complainant raised query to the respondent, but it never gave any concrete reply and has not offered the possession leading to filing this complaint seeking refund of the deposited amount.

C. Relief sought by the complainant:

13. The complainant has sought the following relief(s):
 - i. Direct the respondent to refund the amount of Rs. 58,01,629/- along with interest.
 - ii. Direct the respondent to pay a sum of Rs. 50,000/- as litigation cost and Rs. 1,0,000/- as harassment and mental agony.

- iii. Direct the respondent to not take any action which prejudices the complainants and further direct them to secure the substantial investment already made by the complainant.
- iv. Direct the respondent do not divert/utilise the funds collected from the complainant on any other project.

D. Reply by respondent:

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

14. That the delay caused in the construction of the project was not due to the acts of the respondent but due to the factors beyond its control. The following factors caused the delay in the construction of the project, not within the control of the respondent and are force majeure events.
15. That since basic infrastructure and facilities like road, water, electricity supply and sewer were not available, and the respondent could not continue with the construction
16. That the project is located on the Dwarka Expressway which was proposed in the year 2006 and was supposed to be completed by 2010-11. But, however due to the unfortunate delay in the construction of the expressway, the construction of the project got delayed as well as there was no road for commuting. The respondent even filed an RTI application with the NHAI in 2017 inquiring about the estimate time of completion of the Dwarka expressway to which no date of completion was informed in the reply given by the authority. The respondent has even filed an RTI with the HUDA asking information on water supply to the project.

In reply to which it was stated that it would take another 2-3 years for supplying water to the project which again delayed the project as the respondent could not have handed over the possession without basic amenities like water.

17. That the application for registration was immediately filed with the HARERA by the respondent on 31.07.2017 at the Panchkula Office. However, on 03.01.2018, an order was received by the respondent wherein it was stated that a copy of duly renewed license by the Director Town & Country Planning Haryana, was to be filed for the registration. On 16.03.2018, the renewed license was submitted with the concerned authority. However, no registration was granted by HARERA for reasons not known to the respondent. Thereafter, the respondent came to the know that Haryana Real Estate (Regulation & Development) Rules 2017 were superseded by Haryana Real Estate regulatory authority Gurgaon (Registration of projects) Regulation 2018 & had to submit a fresh application that required many permissions from TCP Haryana which took up a lot of time of the respondent.
18. Furthermore, the respondent even sent a reminder dated 28.03.2018 to the principal secretary cum DRA to Government of Haryana Chandigarh to register the project as soon as possible as all the conditions under the Act and application had been met. On 15.03.2018, the respondent received a reply to the said reminder, in which it was stated that as per the new regulation of 2018, the Gurgaon office had the authority to register the project rather than the panchkula office and a fresh application to be filed with the gurgaon office. A fresh application was again filed with the gurgaon office on 23.04.2018 and the registration was granted only on

14.10.2019 almost 27 months after the very first application was filed.

19. That the construction of the project was in full swing, and the respondent expected it to be completed within the timeframe promised to the buyers. But however due to the changes in law, the construction of the project suffered an unfortunate delay. On top of that, when the respondent tried to mobilize the construction of the project after receiving the registration, the world was struck by the pandemic in the year 2020 and a nationwide lockdown was imposed due to which many workers went back to their hometowns and have not returned till date.
20. That the bank accounts of the respondent were blocked due to the RBI circular RBrI2020-21/20DOR.No. BP. BC/7/21.04.048/2020-21 dated 6.08. 2020 and hence, the respondent could not use the funds for the development of the project.
21. That as per the notification dated 26.05.2020, issued by HARERA Gurugram, an extension period of 6 months has been granted to projects expiring in 25.05.2020 or after. Since the date of completion for the subject project is 30.09.2021, thus the extension is available for the respondent as well. Therefore, the construction of the project would be completed well within the time frame.
22. That the delay in the construction of the project due to the force majeure events, do not go against the provisions of the flat buyer's agreement and the agreement itself allows the delays caused by the factors beyond the control of the respondent.
23. 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:

24. 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

25. 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.

26. 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.
27. 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."

28. 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 relief sought by the complainant:

F.1 Direct the respondent to refund the amount of Rs. 58,01,629/- along with interest.

29. 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 26.03.2012. The total sale consideration of the unit was fixed Rs. 70,85,538/-. The complainant paid a sum of Rs. 58,01,629/- against the total price. The due date of possession as per agreement for sale as mentioned in the table above is 26.03.2016 and there is delay of 3 years 5 months 25 days 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. 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***

“ ... 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) and wherein 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 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.
32. 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.
33. The authority hereby directs the promoter to return the amount received by him from the complainant i.e., Rs 58,01,629/- 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.2 Direct the respondent to pay a sum of Rs. 50,000/- as litigation cost and Rs. 1,0,000/- as harassment and mental agony.



34. The the complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. 2021-2022 (1) RCR (c) 357*, has held that an allottee is entitled to claim compensation & litigation charges 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 & litigation expense 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 & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

F.3 Direct the respondent to not take any action which prejudices the complainants and further direct them to secure the substantial investment already made by the complainants.

F.4 Direct the respondent do not divert/utilise the funds collected from the complainants on any other project.

35. Keeping in view findings on issue no. 1 these issues become redundant.

G. Directions issued 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 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.58,01,629/- 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.
37. Complaint stands disposed of.
38. File be consigned to the Registry.

V.K. Goyal
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dr. KK Khandelwal
(Dr. KK Khandelwal)

Chairman

Dated: 30.08.2022

