

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

Complaint no. : 5107 of 2019
Date of filing of complaint: 29.11.2019
First date of hearing : 22.01.2020
Date of order : 05.09.2022

Parambir Kataria
R/o: H.no. 939, 8 Biswa, near Gold Smith
Temple, Gurugram, Haryana.

Complainant

Versus

Kashish Developers limited
Regd. Office at: Vatika Business Park, 5th floor,
Block 2, Sector 49, Gurugram.

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member

Member

Member

APPEARANCE:

Ms. Tanya proxy counsel for Shri Harshit Batra Counsel for the complainant
Sh. Yogesh Yadav Counsel for the respondent

ORDER

1. The present complaint has been filed 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) by the complainant/allottee 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 as provided under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of project, unit, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

| S. No. | Heads | Information |
|--------|--------------------------------|--|
| 1. | Project name and location | "Manor one" Sector- 111, Gurugram |
| 2. | Nature of the project | Group housing project |
| 3. | DTCP license no. | 110 of 2011 dated 16.12.2011 |
| | License valid up to | 13.12.2019 |
| | Licensed area | 14.84 acres |
| | Name of the licensee | M/s Vinman Construction Pvt. Ltd. and Anr. |
| 4. | RERA registered/not registered | Registered |
| | HAERA registration no. | 58 of 2019 dated 24.09.2019 |
| | Registration valid up to | 24.09.2019 till 31.12.2021 |
| 5. | Date of booking | 10.07.2012 [As alleged by the complainant] |
| 6. | Unit no. | B2-3A, 3 rd floor, Block-B2 (Page 35 of complaint) |
| 7. | Size of unit | 1715 sq. ft. |

| | | |
|-----|--|--|
| | | (Page 35 of complaint) |
| 8. | Allotment letter | 22.11.2012 (Page 35 of complaint) |
| 9. | Date of execution of buyer's agreement | Not executed |
| 10. | Total sale consideration | Rs.1,23,36,525/- (Page 35 of complaint) |
| 11. | Total amount paid by the complainant | Rs.46,43,579/- (Annexure I of CRA filed by the complainant on 04.04.2022) |
| 12. | Possession clause | Cannot be ascertained |
| 13. | Promised date for handing over of possession | 10.02.2016 [As alleged by the complainant, the possession was to be handed over within 42 months from the date of booking (10.07.2012)] |
| 14. | Occupation certificate | Not obtained |
| 15. | Offer of possession | Not offered |

B. Facts of the complaint: -

3. That the present complainant is a peace-loving and law-abiding citizen of India, who nurtured hitherto an un-realized dream of having his unit with all the legal and lawful formalities and approvals in the real estate project of the respondent under the name and style "Manor One" situated at Sector 111, Gurgaon, Haryana.
4. That the respondent is a company duly incorporated under Companies Act, 1956 having its corporate office at Vatika Business

Park, 5th Floor, Block-2, Sector-49, Gurugram, Haryana and claims to be one the leading real estate company. The said project is registered with RERA having the registration no. as GGM/364/96/2019/58 dated 24.09.2019.

5. That the complainant attracted by the shrewd gimmicks of the authorized representative of the respondent invested into the real estate project "Manor One" situated at Sector 111, Gurugram, Haryana through the authorized representative of the respondent purchased the unit in the said project. It is pertinent to note that the authorized representative of the respondent made tall and lucrative claims regarding the project and the complainant being lured by the same, invested in the unit in the above-mentioned project.
6. That the complainant booked unit no. B2-3A, admeasuring super area 1715 sq. ft. in the said project believing the claims and affirmations made by the authorized representative of the respondent for the total sale consideration of Rs. 1,23,36,525/- and paid an amount of Rs. 10,00,000/- vide cheque dated 10.07.2012 as the initial payment for booking of the unit.
7. That the complainant received the letter of allotment on 22.11.2012 vide which, the complainant was allotted the said unit. The respondent promised to deliver the possession of the unit within 42 months from the date of booking. The date of booking being 10.07.2012, and hence 42 months when calculated comes out

to be 10.02.2016. Furthermore, he made several payments against the said unit as and when demanded by the respondent.

8. That the complainant made several efforts to gain the information relating to the stage-wise progress of the project and relating to the execution of the builder buyer agreement but the same fell on the deaf ears of the respondent and no answers were ever received by the complainant regarding the same. That the complainant aggrieved and tired of the careless behavior of respondent decided to stop the further payments as neither there was any progress in the development of the project, nor the respondent was answering to the queries of the complainant. The complainant was allotted the unit on 22.11.2012 and today even after the lapse of 10 years, the complainant has neither received the possession nor the refund of the amount paid by him. That such conduct on part of the respondent is clear evidence of his *mala fide*, fraudulent, and deceptive behaviour which has caused unnecessary losses to the complainant.
9. That, furthermore, the complainant on various occasions had tried to connect with the respondent through telephonic conversations, personal visits to the office of the respondent but no heed was paid to the different alarms raised by the complainant concerning the pendency of the project and other inquires of the complainant.

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10. That the respondent company at the pretext of saving their skin, in a *mala fide* manner was compelling the complainant using its dominant position by threatening to cancel and forfeit the amount of the complainant but paid no heed to showcase any desire on their part to resolve the issues. The tactics of the respondent to dupe and retain the complainant in the project is crystal clear by their act of raising demands despite various requests for cancellation of allotment by the complainant. The respondent failed to execute the buyers agreement even after more than 10 years of booking and taking advantage of their dominant position, unilaterally had ignored the request of the complainant to withdraw its allotment and *mala fidely* had resorted to unfair trade practices by harassing the complainant by way of delaying the project by diversion of the money collected from the innocent and gullible buyers.
11. That the respondent has utterly failed to fulfill his obligations to deliver the possession in time or compensate or refund the money along with the interest and has caused mental agony, harassment, and huge losses to the complainant, hence the present complaint. On account of inordinate delay in handing over possession of the unit clearly amounts to deficiency of service on account of the respondent company and the complainant had rightly claimed to withdraw from the project and claimed total refund of amount along with other interest as per the Act along with other

compensations. That the construction work of the project is way behind its schedule and there is no hope for the completion of the same in near future, and it is submitted that the complainant cannot be expected to endlessly wait for the possession. This principle has been settled by the Hon'ble Apex Court in the matter of the **Fortune Infrastructure and Ors. Vs. Trevor D'Lima and Ors.**

12. That the respondent has utterly failed to fulfill his obligations which has caused mental agony, harassment, and huge losses to the complainant, and that it is the right of the complainant to claim refund of the deposited amounts as has been recently observed by the Hon'ble Supreme Court in **M/s Newtech Promoters and Developers Pvt. Ltd. vs. State of UP & Ors. etc. CIVIL APPEAL NO(S) 6745-6749 of 2021:**

"25. The unqualified right of the allottee to seek a 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."

Hence, the present complaint.

C. Relief sought by the complainant: -

13. The complainant has sought following reliefs:

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- i. Direct the respondent to refund the entire amount paid i.e., Rs. 46,43,579/- along with prescribed rate of interest from the date of respective deposits till its actual realization, in accordance with the provisions of the Act.
 - ii. Direct the respondent to produce the details of transaction done through separately maintain account for the project.
 - iii. Direct the respondent to pay compensation of Rs. 2,00,000/- for causing mental harassment and Rs. 1,00,000/- for the legal costs along with any other penalty deemed fit.
14. Notice for hearing to the respondent/promoter was served through E-mail address (INFO.NCR@kashishgroup.com) was sent and the delivery of same is shown as "delivery complete". Though the respondent put in appearance through its counsel on 22.01.2020, 08.03.2021, 07.09.2021, 13.10.2021, 19.10.2021, 25.11.2021, 31.01.2022 and 05.09.2022 but has failed to file written reply despite given several opportunities. Accordingly, the defence of the respondent stands struck off. So, the authority is left with no option but to proceed with the complaint based on averments given during arguments and the documents placed on record.

D. Jurisdiction of the authority

15. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I Territorial jurisdiction

16. 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 completed territorial jurisdiction to deal with the present complaint.

D. 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 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.

17. 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.

18. 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.*** SCC Online SC 1044 decided on 11.11.2021 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."

19. Furthermore, the said view has been reiterated by the Division Bench of Hon'ble Punjab and Haryana High Court in ***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021.*** The relevant paras of the above said judgment reads as under:





"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court, the Rules have to be in tandem with the substantive Act.

25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."

20. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)**, and the Division Bench of Hon'ble Punjab and Haryana High Court in **"Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others. (supra)**, the authority has the jurisdiction to entertain a complaint seeking refund of the amount paid by allottee alongwith interest at the prescribed rate.

E. Findings regarding relief sought by the complainant:

E.1 Direct the respondent to refund the entire amount paid i.e., Rs. 46,43,579/- along with prescribed rate of interest from the date of respective deposits till its actual realization, in accordance with the provisions of the Act.

21. 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. Section 18(1) of the Act is reproduced below for ready reference:

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”

(Emphasis supplied)

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22. The due date of possession as per mentioned in the table above is **10.02.2016**. 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.....”

23. 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. (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

“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."

24. 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. The promoter has failed to complete or unable to give possession of the unit till date. Accordingly, the promoter is liable to the allottee, as the allottee 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.
25. 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.
26. **Admissibility of refund along with prescribed rate of interest:** Section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the respondent shall refund of the amount paid by the allottee in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19] For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.



Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

27. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
28. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 05.09.2022 is 8.00%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.00%.
29. The authority hereby directs the promoter to return the amount received by him i.e., **Rs.46,43,579/-** 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 rules.

E.2 Direct the respondent to produce the details of transaction done through separately maintain account for the project.

30. In view of the aforesaid relief granted to the complainant, the said relief becomes infructuous. Hence, no direction in this regard.

E.3 Direct the respondent to pay compensation of Rs. 2,00,000/- for causing mental harassment and Rs. 1,00,000/- for the legal costs along with any other penalty deemed fit.

31. The complainant is claiming cost of litigation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation and cost under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before adjudicating officer under section 31 read with section 71 of the Act and rule 29 of the rules.

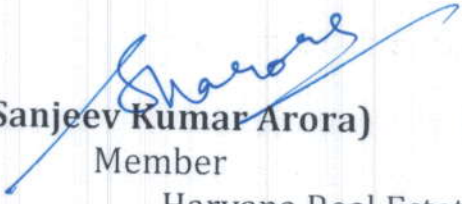
F. Directions of the Authority:

32. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoter as per the functions entrusted to the authority under section 34(f): -
- i. The respondent/ promoter is directed to refund the amount of Rs. 46,43,579 /- paid by the complainant along with interest at the prescribed rate i.e., 10% p.a. as prescribed under rule 15 of the rules from the date of each payment till the date of refund of the deposited 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.
 - iii. The respondent is further directed not to create any third-party rights against the subject unit before the full realization of paid-up amount along with interest thereon to the complainant, and even if, any transfer is initiated with



respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainant.

33. Complaint stands disposed of.
34. File be consigned to the registry.

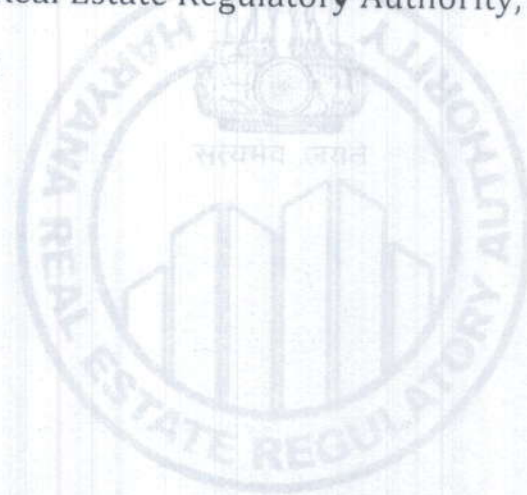

(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 05.09.2022



HARERA
GURUGRAM