HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	1167 of 2019
Date of filing:	21.05.2019
Date of first hearing:	28.06.2019
Date of decision:	31.01.2023

Monika Mittal
R/o #1264, Sector-21, Panchkula.

....COMPLAINANT

VERSUS

M/s Samar Estates Pvt. Ltd.
Registered office at #87, Sector-7, Panchkula.

....RESPONDENT

CORAM: Dr. Geeta Rathee Singh — Member
Nadim Akhtar — Member

Present: - Mr. Vishal Madaan, ld. counsel for the complainant
None for the respondent

ORDER (DR. GEETA RATHEE SINGH-MEMBER)

Present complaint dated 21.05.2019 has been filed by complainant under Section 31 of the Real Estate (Regulation & Development) Act, 2016 (for short Act of 2016) read with Rule 28 of the Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the

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provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

BRIEF HISTORY OF THE CASE:

2. Present case was disposed of vide order dated 28.06.2019 passed by Sh. Anil Kumar Panwar, the then ld. Adjudicating Officer, Haryana Real Estate Regulatory Authority, Panchkula vide which relief of refund was declined to the complainant and she was directed to pay all outstanding dues. Respondent was directed to deliver possession of the flat to the complainant by 30.09.2019 after completing the construction. It was further observed that outstanding amount has not been paid by the complainant, therefore respondent would be at liberty to cancel allotment and forfeit a part of already paid amount. Complainant has filed appeal before Hon'ble Appellate Tribunal and matter has been remanded back for rehearing the case on merits. Therefore, case was listed for rehearing.

A. UNIT AND PROJECT RELATED DETAILS:

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

S. No.	Particulars	Details
1.	Name of project	Ess Vee Apartments, Sector-20, Panchkula
2.	Nature of the Project	Affordable Group Housing
3.	RERA registered/not registered	Registered (HRERA-PKL-54-2018)
4.	Booking of the flat	18.05.2011 by original allottee Alka Jain
5.	Builder buyer agreement	10.01.2013
6.	Unit No.	E-901
7.	Unit Area	1725 sq. ft.
8.	Payment plan	Construction link Plan
9.	Total Sale Consideration	₹71,50,000/-
10.	Paid by the complainant	₹25,74,708/-
11.	Deemed date of possession	Within 36 months from date of builder buyer agreement i.e. 10.01.2016
12.	Offer of possession	NA

B. FACTS OF THE CASE AS STATED IN THE COMPLAINT FILED BY THE COMPLAINANT

4. Following are brief facts of the case:

i. Originally, flat was booked by Smt. Alka Jain and she has already paid total sum of ₹25,74,708/- to the respondent against the basic sale price of ₹71,50,000/-. Flat bearing no. E-901 was allotted to her by the respondent in his project "Ess Vee Apartments, Sector-20, Panchkula". Present complainant purchased flat from Smt. Alka Jain on 10.01.2013

and the same got transferred in the name of complainant on same date. Flat buyer agreement (FBA) between the parties was also executed on the same date i.e. 10.01.2013, copy of which has been placed at Annexure C-5. As per clause 32 of FBA, the respondent was obliged to offer possession of the flat within 36 months from the date of commencement of construction. Complainant's grievance is that neither construction has been completed nor possession has been offered even after lapse of over 8 years from the date of booking.

ii. Complainant further alleged that delay in offering of possession of flat caused great harassment to her and since project has neither been completed nor is likely to be completed because of mismanagement and severe defaults on the part of the respondent, her money should be refunded along with interest. She has also demanded compensation for the mental torture and harassment suffered at the hands of the respondent who has already caused delay of more than 8 years.

C. RELIEF SOUGHT:

5. The complainant in her complaint has sought following reliefs:

i. To direct the respondent to refund of the entire paid amount of ₹25,74,708/- along with interest @20% per annum from the respective dates of deposit or interest as prescribed Under section 18(1) of RERA Act,2016 read with rule 15 and 16 of HRERA Rules, 2017;

ii. To direct the respondent to pay ₹5,00,000 on account of deficiency and mental agony;

iii. To direct the respondent to refund of litigation expenses of ₹50,000/- incurred by the complainant;

iv. Any other relief which is deemed fit by this Hon'ble Authority.

D. REPLY:

6. Respondent does not dispute the payment of alleged money paid to it by the complainant. Its plea is that the delay in completion of the project is not intentional and it has been caused due to non-payment of the due amounts by the complainant, which were demanded vide letters dated 14.05.2017, 31.05.2016, 12.06.2015, 12.01.2015, 24.10.2014, 09.07.2014, 21.04.2014, 02.03.2014, 05.12.2013, 10.01.2013, 01.02.2012. Respondent further averred that inspite of the fact that no payment has been made after 07.01.2013 by the complainant, he had completed the final roof slab of Tower E and construction up to plaster work of the booked apartment. Claiming that he has paid all enhanced EDC and IDC which was due to the State Government. Respondent has further asserted that he has full intention of completing the project and handing over possession of completed apartment to the allottee.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT:

7. Learned counsel for the complainant submitted that respondent is not in position to complete the project and hand over possession of booked

flat to the complainant. Aggrieved from the default committed by respondent, the complainant has filed present complaint seeking refund of entire paid amount along with interest. Further, Authority has also disposed of bunch of complaint cases with lead complaint case no.865 of 2019 titled as "Mamta Gupta versus Samar Estates Pvt ltd.", allowing relief of refund along with interest provided under Rule 15 of HRERA, Rules 2017.

F. JURISDICTION OF THE AUTHORITY:

8. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint

F.1: 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, Haryana, Panchkula shall be the rest of Haryana except Gurugram for all purposes with office situated in Panchkula. In the present case the project in question is situated within the planning area Panchkula District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

F.2: Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

(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:

34. Functions of Authority.—The functions of the Authority shall include—(f) 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;

In view of the Provisions of the Act of 2016 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.

G. ISSUES FOR ADJUDICATION:

Whether complainant is entitled to refund of the deposited amount along with interest in terms of Section 18 of Act of 2016?

H. OBSERVATIONS OF THE AUTHORITY:

9. Considering above facts and pleadings made by learned counsel for complainant, Authority observed that this is a distress project.

Construction activities at the site have not taken place for more than 5-6 years. Project is badly delayed. Initially project was registered vide Registration No. HRERA-PKL-PKL-54 of 2018 dated 05.10.2018 but on account of the repeated defaults made by the respondent company, registration granted U/S 5 of the RERA Act,2016 was revoked and certificate of registration was withdrawn. On the basis of these findings, Authority has already allowed refund in bunch of complaints with lead complaint No.865 of 2019 titled as Mamta Gupta versus Samar Estates Pvt Ltd. vide order dated 09.10.2019. Detailed orders had already been passed in the said lead complaint No.865 of 2019 dated 09.10.2019, operative part of the same is reproduced below for reference:

> 9. Authority has gone through the proceedings of the matter over the course of last one year. It has gone through all the facts and documents placed before it. It has also gone through the documents submitted by the respondents while getting the project registered before this Authority. Keeping in view the facts and circumstances of the matter, it observes and orders as follows: -
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> > i) Project of the respondents was registered in this Authority vide registration certificate dated 05.10.2018. Entire project is comprised of 24 towers with 925 apartments, out of which 464 apartments have been allotted/sold. Respondents had assured the Authority, while getting the project registered, that Phase-I of the project will be completed by December, 2018 and Phase-II by March, 2019. The fact however is that for the last more than one year not even a brick has been laid in the project. No efforts whatsoever have been made by the respondents for completing the project and handing over the apartments to the complainants. No investment at all has been made in the project. Promoter does not appear to

be having any Plan of Action for doing so. Accordingly, it is concluded that the respondent has severally defaulted in fulfilling its obligations. Respondent has been making only false assurances without arranging funds for investment. Respondents have thus violated even the conditions of registration. Accordingly, a Show Cause Notice deserves to be issued to the respondents for cancellation of the registration granted to the project.

Law Associate shall send a copy of this order to the Project Section with the direction of the Authority to issue a Show Cause Notice to the respondents for cancellation of the registration certificate.

ii) Respondent has severely mis-managed the project. If assurances made by him at Sr. No. (ix) of Para-4 of the order dated 30.04.2019 are taken into account, against the projected cost of Rs. 340 crores, the respondent claims to have already invested Rs. 208 crores against which about 94 crores only could be collected from the allottees. Respondents appear to have commenced construction of much larger number of apartments than booked/sold whereas they should have constructed the project in phases in tandem with the sale of apartments. Respondent has also clearly has mis-managed his finances. Apparently, respondent also raised loans from banks and financial institutions and non-repayments of which may have resulted into a piling up of huge interest liability.

Real Estate (Regulation and Development) Act 2016 provides for payment of interest @ prescribes in case, apartments are not delivered in time. Apparently, with delay of 4 to 10 years, interest liability of the respondents towards allottees will also be huge.

It is a well-known fact that property market is down at present and sale of apartments projects like this is not likely to easy. Furthermore, the allottees who have lost faith in the promoter and have been waiting for possession of their apartments from the last more than 4-10 years are unlikely to pay more money to the promoter.

In these circumstances, promoter is unlikely be able to arrange funds for completion of the apartments of complainants as well as rest of the project. As noted by the

Authority earlier also, this has become a stuck project which the promoter is unlikely to be able to complete.

(iii) In accordance with the provisions of Section-8 of the RERA Act, efforts have been made to constitute associations of the allottees so that they may take over the project and complete it at their level at least to the extent of the towers in which their apartments are located. Allottees have repeatedly expressed their inability to join together and to constitute an association for this purpose. Accordingly, option of handing over the project to the association of the project is not available.

(iv) As per the conditions of the license, in case a promoter defaults in completion of the project, the Town and Country Planning Department of the State Government can take over the said project for completion. A letter had been written to the Town and Country Planning Department in this regard, to which they have submitted their reply dated 11.09.2019, the operative part of which is as under: -

> "Since, the applicant company has not submitted the bank guarantee of Rs. 98.65 lacs on account of IDW conveyed vide this office memo dated 04.06.2019 (CP/2014). Hence the request of the applicant for approval of service plan estimates and renewal of license cannot be processed due to non-deposition of bank guarantee and the same will be examined after deposition of Bank Guarantee on account of IDW. Therefore, the Department cannot take any action to take over the Project at this stage."

In simple words, the department is only concerned with recovery of Rs.98.65 lacs on account of internal development works and they would not bother themselves to the problems of the allottees. For all practical purposes, the department has flatly denied the responsibility for completion of the project.

(v) It is but natural that the promoter of the project would have incurred multiples liabilities during the last 10 years including liability of repayment of loans along with interest to the financial institutions; liability towards the

operational creditors; and liabilities towards State Government agencies. Most importantly, they have liabilities towards the allottees comprised of principal money received and interest liability incurred on account of delay caused in completing the project.

It is evident that the promoter does not have any liquidity to discharge any of the obligations besides funds needed for completion of the project.

For these reasons also, it is for unlikely that the respondent-promoter would be able to complete the project.

(vi) In the above circumstances, provisions of Section 18 of the RERA Act, provides for grant of relief of refund of the money paid by the allottees along with interest @ prescribed. Authority accordingly orders that the respondents shall refund the money paid by the complainants along with interest @ prescribed in Rule-15 of the HRERA Rules, 2017. All the complainants shall file their claims before the respondents and the respondents shall be liable to pay the amount as calculated in accordance with this order.

(vii) This Authority realises the fact that since respondents have not been able to arrange the money for completion even first phase of the project, now, they may not be able to arrange money for giving refund to the allottees. Accordingly, the Authority orders that allottees may use the provisions of any law of the land for enforcing their rights for getting the money refunded including considering class action against the respondents by invoking provisions of Insolvency and Bankruptcy Code, 2016 (IBC, 2016).

So that the respondents do not alienate their properties to the prejudice of the complainants and other similarly placed allottees, the Authority considers it just and fair to prohibit the respondents from alienating any of their properties including the properties of the project without permission of this Authority.

This Authority can grant the permission to sell the properties of the project, if justified, with a stipulation that proceeds of the sale shall be put into an

escrow account which shall be devoted first for refunding money to the complainants and rest for investment in the project.

(viii) While disposing of a bunch of cases in lead case No.383/2018 titled Gurbaksh Singh versus ABW Infrastructure Pvt Ltd., Authority had inter alia ordered as follows: -

> "13. We are of the considered view that the right granted to an allottee by the amendment ordinance of 2018 is a value-able right and that right can be pressed before the appropriate forum/authority for satisfaction of their claims against the promoters/debtors.
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> However, we are of the further view that the rights guaranteed by the RERA Act, 2016 for protection of allottees are very wide in nature and must be interpreted accordingly. As already stated in the arguments listed in Para 10 above that the allottees of a project, after having paid the EDC and substantial amount of money to the developer should be treated as deemed owners of the proportionate piece of the land and assets of the project, and their rights cannot be alienated by way of an agreement made between the promoter and the lending financial institution. Rights of the allottees must be treated superior to the rights of the lending financial institutions. Financial institutions, in so far as the assets of the related real estate project are concerned, are free to satisfy the claims from the remainders of the assets of the project after satisfaction of the claim of the allottees, and in addition they are free to set their claim satisfied from other assets of the promoters. They can press their claim even against the sureties and guarantees offered by the promoters.
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> 14. Aforesaid conclusion that the rights of the allottees should be treated superior to those of other financial creditors are also supported by the principles of natural justice and the express provisions of RERA Act, 2016. In support of these arguments it is observed as follows: -

(i) Financial institutions are expert agencies which carry out due diligence about the promoter as well as his project before taking decision to lend money. They have expert manpower and machinery to adjudge the viability of the project and creditworthiness of the promoters. They have capability to understand risk factors involved Accordingly, at the stage of lending, either they are fully aware of the facts that full or a portion of the project has been allotted to the allottees, thus creating third party rights or they are fully aware that the allotments will be made by the promoters in future, thereby creating third party interests in the assets hypothecated or kept with them as security. It is to be presumed that lenders have factored-in these facts at the time of lending.

Lending institutions are also supposed to monitor progress of the project in order to ensure that money lent by them is safe and is invested properly in the project. If the money lent by them is diverted or siphoned away, they must also share burden for the same for the purpose of protecting the rights of ordinary citizens. If the lenders fail to monitor the Project closely and if their loan is not repaid in time, they themselves also must share the blame. Allottee, however, must not suffer on behalf of the promoter or the financial institution.

(ii) On the other hand, an allottee typically is a middle-class person who harbours the dream of owning a house for his family. Savings of two or three generations usually have to be mobilized to own a house. He invests money on the basis of assurances held out to him by the promoters and the State Government agencies. He cannot access or understand the account of the project nor does he have any power to monitor progress of the project on day-to-day basis.

Principles of natural justice, therefore, dictate that the rights of the allottees should be treated superior and higher to those of the financial institutions.

(iii) It is relevant to quote here the provisions of ..... Section 79 and Section 89 of the Real Estate (Regulation & Development) Act, 2016.

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Section 79: *Bar of Jurisdiction- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.*

Section 89: *Act to have over-riding effect- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*

It is observed that Section 89 explicitly mandates that provisions of RERA Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Further, Section 18 guarantees that in the event of a project not being completed he shall have a right to seek refund of his money along with interest without prejudice to any other remedy available. Similarly Sub Section 3 and Sub Section 4 of Section 19 assure the allottee that he will be given refund of the money deposited by him in the event of default in completion of the project by the promoters.

This Authority is, therefore, of the considered opinion that since these rights of the allottees have been held superior to any other law for the time being in force, the rights of the allottee, therefore, shall be treated superior to that of the rights of other creditors including the financial institutions.

(i) Allottees of the project in question shall be treated as deemed owners of the project. The promoters of the project and the lending financial institutions cannot alienate the ownership rights of the allottees at their own level without their consent. Therefore, the claim of the allottees against the assets of the project shall be treated superior to any other right of any other person or entity including the financial institutions and/or other creditors.

(ii) If claims of the allottees are not satisfied fully from the assets of the project in question, they shall be treated creditors of the promoters at par with other creditors for satisfaction of their claims from the assets of the promoters other than the assets of the project in question.

(iii) ***

(iv) ***

(v) Complainants and other similarly placed allottees may present these orders before any authority dealing with liquidation of assets of the Project, or the respondents and seek satisfaction of their claims on priority. It is, however made clear that the claims of the allottees shall be restricted to the refund of the money paid by them to the respondents along with interest as provided for in rule 15 of the HRERA Rules, 2017.

Authority considers it just and fair to grant the similar rights to the complainants of this project as well.

10. Facts and circumstances of the captioned complaint are exactly similar to the matters already disposed of vide order dated 09.10.2019. Authority in the previous hearing has already gave its tentative view to allow refund in favour of complainant along with interest provided under Rule 15 of HRERA Rules 2017 in terms of above said order.

11. Authority finds it to be fit case for allowing refund in favour of complainant. As per Section 18 of Act, interest shall be awarded at such rate as may be prescribed. Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is as under:

> *"**Rule 15:** Interest payable by promoter and Allottee. [Section 19] - An allottee shall be compensated by the promoter for loss or damage sustained due to incorrect or false statement in the notice, advertisement, prospectus or brochure in the terms of section 12. In case, allottee wishes to withdraw from the project due to discontinuance of promoter's business as developers on account of suspension or revocation of the registration or any other reason(s) in terms of clause (h) sub-section (1) of Section 18 or the promoter fails to give possession of the apartment/ plot in accordance with terms and conditions of agreement for sale in terms of sub-section (4) of section 19. The promoter shall return the entire amount with interest as well as the compensation payable. The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest marginal cost of lending rate plus two percent. In case, the allottee fails to pay to the promoter as per agreed terms and conditions, then in such case, the allottee shall also be liable to pay in terms of sub-section (7) of section 19:*

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."

12. The legislature in its wisdom in the subordinate legislation under the provisions 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.

13. 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. 31.01.2023 is 8.60%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e. 10.60%.

14. The term 'interest' is defined under Section 2(za) of the Act which is as under:

(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. -For the purpose of this clause-

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

15. Accordingly, respondent will be liable to pay the complainant interest from the date amounts were paid by him till the actual realization of the amount. Hence, Authority directs respondent to refund to the complainant the paid amount of ₹25,74,708/- along with interest at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development) Rules, 2017 i.e at the rate of SBI highest marginal cost of lending rate (MCLR)+ 2 % which as on date works out to 10.60% (8.60% + 2.00%) from the date amounts were paid till the actual realization of the amount. Authority has got calculated the total amount along with interest at the rate of 10.60% till the date of this order and said amount works out to ₹56,26,832/- as per detail given in the table below:

S.No.	Principal Amount	Date of payment	Interest Accrued till 31.01.2023	TOTAL
1.	₹7,15,000/-	18.05.2011	₹8,88,093/-	₹16,03,093/-
2.	₹10,72,500/-	15.06.2011	₹13,23,418/-	₹23,95,918/-
3.	₹7,87,208/-	07.01.2013	₹8,40,613/-	₹16,27,821/-
Total	₹25,74,708/-		₹30,52,124/-	₹56,26,832/-

16. Regarding relief of compensation sought by the complainant under the heads: grievances and frustration and litigation expenses, it is made clear that nothing stated in this order shall debar the complainant from filing a complaint before the Adjudicating Officer to claim such compensations as she may be entitled under the law.

I. DIRECTIONS OF THE AUTHORITY:

17. Taking into account above facts and circumstances, the Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:

(i) Respondent is directed to refund the entire amount of ₹56,26,832/- to the complainant.

(ii) A period of 90 days is given to the respondent to comply with the directions given in this order as provided in Rule 16 of Haryana Real Estate (Regulation & Development) Rules, 2017 failing which legal consequences would follow.

18. The complaint is, accordingly, disposed of. File be consigned to the record room and order be uploaded on the website of the Authority.

NADIM AKHTAR
(MEMBER)

DR. GEETA RATHEE SINGH
(MEMBER)