BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1643 of 2019**
First date of hearing:	**06.12.2019**
Date of decision :	**16.02.2023**

1. Shri Om Prakash Gupta S/o Dhanna Lal Gupta 2. Smt. Kala Gupta W/o Sh. Om Prakash Gupta R/o: - 33-B-25-7, JalanTunlsmall, Villa Putra, Condo, Kualalumpur.	**Complainants**
Versus	
1. M/s Sweet Home Buildwell Pvt. Ltd. **Regd. Office at**: 449 RPS flats, Mansarovar Park, Shahdara, Delhi-110032. 2. M/s Paarth Infratech Pvt. Ltd. **Regd. Office at**: D-11/145, Third Floor, Sector-8, Rohini, New Delhi-85	**Respondents**

CORAM:	
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:	
Sh. Sanjeev Sharma	Advocate for the complainants
Sh. Kaushal Budhia	Advocate for the respondents

ORDER

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

that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

Sr. No.	Particulars	Details
	Name of the project	M2K Corporate Park, Sector-51, Gurugram, Haryana.
	Rera Registered/Not Registered	Not registered
1.	Unit no.	FF-42 (as per space buyer agreement) FF-40 (changed during construction as per Article 3 (J)(iii) of space buyer agreement.
2.	Unit admeasuring	1312.40 sq. ft. (As per space buyer agreement)
3.	Date of booking	01.08.2008 (Page no. 28 of reply)
4.	Date of execution of agreement for sale	04.08.2009

5.	Possession clause	**Article 5 clause B(i)** **The company shall handover possession of the said premises to the allottee within a period of thirty months from the date of commencement of construction or from the date of signing this agreement, whichever is later, with a grace period of 6 months (hereinafter called possession date) subject to receipt of occupancy , completion certificate,** happening of any Force Majeure Events (defined hereunder) and timely payments of entire sale consideration and other charges by the allottee as per the payment plan and or as demanded by the company from time to time. **(Emphasis supplied).**
6.	Due date of delivery of possession	04.02.2012 (Calculated from the signing of space buyer agreement)
7.	Cancellation notice	26.06.2014 (but restored later) (As per page no. 34 of reply)
8.	Total sale consideration	Rs. 1.08.27,300/- (As per BBA)
9.	Total amount paid by the complainant	Rs. 1,03,90,507/- (As alleged by the complainant)
10.	Offer for fit outs	20.04.2016

		(Invalid offer of possession)
11	Occupation certificate	21.10.2016 (Annexure R-6, on page no. 37 of reply)
12	Notice of offer of possession	09.11.2016 (Page no. 38 of reply)
13	Possession Letter	14.07.2018 (As per page no. 44 of reply))
14	Maintenance Agreement	14.07.2018 (Page no. 50 of reply)
15	NOC qua possession /Settlement deed	28.02.2019 (Page no. 43 of reply)

B. Facts of the complaint

The complainants have made the following submissions in the complaint: -

1. That a project by the name of M2K Corporate Park, Sector 51, Gurugram was being developed by respondent builder no. 1. The complainant coming to know our the same from various advertisements approached respondent builder and applied for booking a retail shop at its above-mentioned project vide application dated 01.08.2008 by paying Rs. 2460750/-.
2. That in pursuant to application made by the complainants they were allotted shop bearing no. FF-42 measuring 1312 sq.ft. of super area and having 729.11 sq.ft. as carpet area for a total sale consideration Rs. 1.08

crore approximately inclusive of preferential location charges. It led to execution of commercial space buyer agreement between the parties on 04.08.2009 setting out the terms and conditions of allotment of the unit, its price, area, the payment plan, the due date of possession and other details etc. At the time, the complainant also paid a sum of Rs. 984300/- by way of a cheque and which was acknowledge by the respondent.

3. That after the execution of space buyer agreement, the complainants continued to make payments against the allotted unit as and when demand by the respondent builder and did not commit any default. Since, they are residing in a foreign country, so they occasionally visited India to see the progress of the project. But they informed the respondent that they be informed above the progress of the project at their address of residence of Kaulalumpur(Malaysia).
4. That taking benefit of the complainants being residents of a foreign country, the respondent builder vide letter dated 16.11.2013 informed them with regard to change of floor plan of commercial complex and changing their unit from FF-42 to FF-40 and revising its area to 1216.70 sq.ft. (super area and 657.68 sq.ft) being covered area.
5. That the changes in the location of the allotted unit were made by the respondent builder without their permission. Even the letter vide which they were informed about the change was not accompanied by new floor plan. They were under the belief that there was only change of number of unit instead of its location and came to know about the actual location on

their visit to the project in February 2019. All this was done by the respondent builder with a malafide intention just the cheat the complainants being NRI's and concealing the true facts and location.

6. That as per the space buyer agreement dated 04.08.2009, the project was to be completed within a period of 30 months from the signing of that document with a grace period of 6 months. But the complainants were shock to received the letter possession in March 2017 dated 09.11.2016. They had put their hard-earned money to purchase the commercial unit but were cheated by the respondent builder who neither completed the project within the stipulated period nor offered possession by adjusting delay possession charges. Rather, respondent no. 2 raised maintenance charges against the allotted unit from the date of offer of possession and asked the complainants to pay interest in case of failure to pay the same.
7. That the respondent builder failed to adhere to the time schedule to complete the project and offer possession of the allotted unit. Even the unit changed later on was not meeting their requirements. So, they asked the officials of the respondent in this regard and who promised to set the things right but without any positive results. The complainant had already paid more than Rs 1 crore to the respondent builder and who failed in its obligations i.e., to complete the project and offer possession of the allotted unit.
8. That keeping in view above mentioned facts, the claimants, do not want to continue with the project and asked the respondent builder to refund back

the amount paid besides compensation but within no positive results leading to filing of the complaint as prayed above.

C. Relief sought by the complainants:

The complainants have sought following relief(s).

i. That change the location of the shop of the complainant from new one to original one as mentioned in the buyer's agreement i.e., FF42.

ii. If failed to change the location, then the complainants are entitled for the refund of the entire amount paid till date to the respondents i.e. Rs.1,03,90,507/-

iii. The complainants are entitled for the interest on the amount paid by them to the respondents.

iv. Complainants are entitled for compensation from the respondents.

v. Complainants are also entitled for the penalty imposed upon the respondents for not delivering the said project on time.

vi. The respondents need to be booked for criminal offences regarding the breach of agreement or any other relief.

9. No reply on behalf of respondent no 2 was received despite its due service.

D. Reply by the respondent builder:

10. The respondent-builder by way of written reply submitted as under: -

I. That vide application dated 01.08.2008, the claimants applied for allotment of a retail shop by paying Rs. 2460750/- leading to

execution of commercial buyer agreement dated 04.08.2009 between the parties for a total sale consideration of Rs. 1.08 Crore approximately. However, it was denied that the claimants are residents of Kaulalumpur. In fact as per the particulars supplied by them. They are residents of Jaipur(Rajsthan). It was denied that believing the representation of the respondent-builder, the complainants applied for allotment of a unit in its project detailed above.

II. It was pleaded that initially, the complainants were allotted unit bearing no. FF 42 measuring 1312.40 sq.ft. according to their requirement. But that allotment was tentative in nature as per the terms and conditions of applications form and the same was liable to be changed during the course of construction. It was denied that the complainants continued to make payments as and when demanded against an allotted unit. It was denied that complainants were not informed about the progress of construction from time to time. In fact, they used to be send communication in this regard and the payments against the allotted unit were being received from time to time.

III. It was denied that change in the number and location of allotted unit was made without the permission of the complainants. In fact, during the course of construction, they duly informed above the change vide letter dated 16.11.2013 and also about adjusting

the amount received already against the changed unit. No objection was raised in this regard by the claimanants till the filing of the complaint. Even the changes in the allotted unit were made as per the buyer agreement entered into between the parties with no objection from the side or allottees. It was denied that the complainants came to know about the change in the number and location of the allotted unit only in February 2019. In fact, after change, the claimants continue to make payments against the reallotted unit, agreeing to its change. Even vide letter dated 20.04.2016, they were offered possession of the changed unit for fit outs and no objection in this regard was raised.

IV. That there was some issue with regard to outstanding amount against a reallotted unit and the same was mutually settled between the parties on 28.02.2019 and the same was reduced in to writing. Even prior to that the complainants to were offered possession of the reallotted unit on 14.07.2018 and no objection at the time either with regard to change of location, its number etc. was raised. An indemnity bond in this regard was also executed by the claimants in favour of the respondent builder. So now keeping in view these facts, the claim of the allottees with regard to refund does not survive.

V. That after taking possession of the reallotted unit, the complainant also signed a maintenance agreement with

respondent no. 2 on 14.07.2018. So, on the basis of that document the allottees are liable to paid maintenance charges against the allotted unit from the due date of its possession.

VI. It was denied that the complainants approached the official of the answering respondent to settle the dispute with regard to change of location and number of the allotted unit or with regard to preferential charges. In fact, after receipt of occupation certificate of the project on 21.07.2016, the complainants were offered possession of the allotted unit on 09.11.2016 and failed to dispute the same.

11. All other averments made in the complaint were denied in toto.

12. Various preliminary objections were also taken with regard to cause of action of the complainants to file and maintain the complaint, jurisdiction of the authority to proceed with the complaint and the same being false and frivolous.

13. Copies various documents placed on the file have been perused. Their authenticity is not disputed. Hence the complaint can be decided on the basis of submissions oral/written made by the parties and the same have been perused.

D. Jurisdiction of the authority

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

D.I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purposes. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

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) 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.*

15. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be

decided by the adjudicating officer if pursued by the complainants at a later stage.

16. 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."*

17. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter detailed above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

E. Findings on the relief sought by the complainants.

18. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. 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)*

19. The complainants were allotted unit no FF 42, in the project "M2K" Corporate Park Sector 51, Gurugram by the respondent builder for a sale consideration of Rs. 10827300/-. A space buyer agreement in this regard was executed between the parties on 04.08.2009. As per clause B(1) of article V of the agreement, the possession of the allotted unit was to be offered to the complainant within a period of 30 months from the date commencement of construction or for the date of signing of the agreement,

which was later with grace period of six month. So, the due date for possession of the allotted unit was fixed as 04.02.2012. It has come on record that though vide notice dated 26.06.2014, the allotted unit was sought to be cancelled for non-payment of dues by 17.07.2014 but the same was restored later on. It is also a fact that against total sale consideration of Rs. 10827300/- of the allotted unit, the complainants paid a sum of Rs. 10390507/- to the respondent builder. There is letter dated 20.04.2016 sent to the complainants by the respondent builder offering the changed unit for fitouts possession and followed by reminder dated 09.11.2016. The main plea advanced on behalf of complainants is that though initially they were allotted unit no. FF-42 vide booking dated 01.08.2008 and agreement of sale dated 04.08.2009 but its location and number were changed without their consent and even informing them in this regard. Though they raised an objection to the same but were not considered. Moreover, they had already paid a substantial amount to the respondent builder and were not expecting any change either in the location or number of the unit. The plea of respondent builder is otherwise and who took a plea that the number and location of the allotted unit were changed as per the terms and conditions of space buyer agreement 04.08.2009. Even the allottees did not raise any objection to the same and took possession of the reallotted unit vide letter of possession dated 14.07.2018 and also gave a writing in this regard on 28.02.2019. The possession was followed by a maintenance agreement dated 14.07.2018 executed between the allottees and

respondent no. 02. So now, the allottees cannot challenge the number and location of reallotted unit and seek refund of the paid-up amount along with interest.

20. Some of the admitted facts of the case are that vide application dated 01.08.2008, the complainants applied for booking of a retail shop in the project of respondent builder by paying Rs. 2460750/-. It led to allotment of unit bearing no. FF-42 having carpet and super areas as 729.11 and 1312.40 sq.ft. respectively. A space buyer agreement in this regard was executed between the parties on 04.08.2009 setting out the terms and conditions of allotment of the unit its price, location, payment plan, the due date of possession and dimensions etc. The sale consideration of the allotted unit was fixed between the parties as Rs. 10827300/-. The allottees started making payment against the allotted unit and paid a total sum of Rs. 10390507/-. The allotment of the unit made to the complainants was provisional one subject to change. Though it is pleaded on behalf of complainant that they never gave any consent for change of number and location of the allotted unit but the same were made as per terms and condition of space buyer agreement. A reference in this regard may be made to following clause of the agreement and wherein it was specifically mentioned that:

> *whereas the allottee is aware that the building plans and specifications etc. shown to him are tentative and subject to variation , additions, alterations and modifications by the company as it may, in its sole*

discretion deem fit and proper or as may be done at the instance of any competent authority anytime till completion of construction and the allottee hereby gives his consent to such variations etc. without any reservation.

21. In pursuant to the above-mentioned conditions of allotment though the complainants continued to make payments against allotted unit but its location and number were changed from FF-42 to FF-40 and the allottees were paying against the reallotted unit as evident from payment receipts bearing number 1202, 1203, and 1204 dated 14.11.2013 respectively. It is not their case that at that time or there after they objected to that change and were not aware of the same. Then while issuing account statement, cancellation notice, offer of possession for fitouts and notice of offer of possession dated 14.12.2013, 26.06.2014, 20.04.2016 and 09.11.2016 respectively, the respondent-builder shown in all these communications, the reallotted unit of the complainants and no such objection as now being raised was raised with the promoter. Then the complainants took possession of the reallotted unit vide letter of possession dated 14.07.2018 in pursuant to buyers' agreement dated 04.08.2009 and which led to giving by them an indemnity bond in favour of the respondent builder. It was also followed by the maintenance agreement on the same date between the allottees and respondent no. 2. The factum w.r.t. the change of allotted unit is further fortified vide letter dated 28.09.2019 written by the claimants to M/s Parth Infrastructure pt. Ltd being the landowner of the project with a

copy to the respondent builder. Moreover as per document Annexure R-6 at page no. 37 of the reply , the occupation certificate of the project was received on 21.10.2016 and the allottees were formally offered possession of the reallotted unit vide letter dated 09.11.2016. lastly while filing written submissions, the complainants placed on file inquiry report dated 29.08.2022 conducted by SI Dharambir Singh of PS Sector 50, Gurugram. That inquiry report was submitted in the court of Sh. Sunil Kumar JMFC , Gurugram. A perusal of the same shows that while filling the complaint, the allottees levelled allegations of change of the unit from shop no. 42FF to 40FF M2K, Sector 51, Gurugram. It was concluded in that report that complainants had already taken possession of the reallotted unit bearing no. 40FF measuring 1221.50 sq.ft. and recommended filling of the complaint being matter of civil nature. So, all these facts prove beyond doubt that changes in the number and location of the allotted unit were made by the respondent builder as per terms and condition of space buyer agreement dated 04.08.2009 and the complainants knew about the same since 14.11.2013 and took possession of the reallotted unit on 14.07.2018.

22. Thus, in view of the findings recorded above, it is evident that the number and location of the allotted unit were changed as per the space buyer agreement entered into between the parties. The possession of the reallotted unit has already been taken over by the complainants. So, they are neither entitled to seek refund of the paid-up amount with interest nor

any proceedings in this regard can be initiated. However, they may seek any other appropriate relief if permitted by law or mutually agreed.

So, findings on issues number 1-3, 5-6 are hereby returned against the complainants accordingly.

Compensation

23. The complainants in the aforesaid relief are seeking relief w.r.t compensation. 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***. (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottees are 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 complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority

24. Hence, in view of the findings recorded by the authority on the aforesaid issues, no case for refund of the paid up amount with interest, imposition of any penalty or breach of agreement between the parties is made out. However, the complainants may seek any other appropriate relief if permitted by law or mutually agreed. Thus, the complaint is liable to be dismissed and as such is rejected.

25. Complaint stands disposed of.

26. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.02.2023