

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

Complaint no.	:	143 of 2019
Date of filing complaint:		18.01.2019
First date of hearing:		18.09.2019
Date of decision	:	15.12.2022

1. Sh. Shiva Kumar Kaushik S/o Sh. S.C Sharma 2. Smt. Seema Kaushik W/o Sh. Shiva Kumar Kaushik Both R/O: Flat no. 49, First Floor, On Crescent Wood Road, Malibu Town, Sohna Road, Sector 47 Gurugram	Complainants
Versus	
M/s ALM Infotech City Private Limited Regd. office: B-418, New Friends Colony, New Delhi -110065	Respondent

CORAM:

Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member

APPEARANCE:

Sh. Virender Singh (Advocate)	Complainants
Sh. Pankaj Chandola (Advocate)	Respondent

ORDER

- The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed

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

A. Unit and project related details

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

S. no.	Particulars	Details	
1.	Name of the project	"ILD Grand", Sector-37C, Gurgaon	
2.	Nature of project	Group housing project	
3.	RERA registered/not registered	Registered vide registration no. 386 of 2017 dated 18.12.2017	
	Validity status	17.09.2019	
	Licensed area	41223.953 sqm.	
4.	DTPC License no.	96 of 2010 dated 03.11.2010	118 of 2011 dated 26.12.2011
	Validity status	02.11.2025	25.12.2024
	Licensed area	21.1804 acres	
	Name of licensee	M/s Jubilant Malls Pvt. Ltd.	
5.	Allotment letter	13.09.2012 [As per page no. 53 of complaint]	

6.	Unit no.	9A on 9 th floor of tower Vision B2 (type- 3BR) [As per page no. 53 of complaint]
7.	Unit area admeasuring	1819 sq. ft. [Super area] [As per page no. 53 of complaint]
8.	Date of builder buyer agreement	05.02.2012 [As per page no. 64 of complaint]
9.	Possession clause	<p>Clause 9(i)</p> <p><i>Subject to Force Majeure circumstances as defined herein and subject to timely grant of all approvals, permissions, NOCs, etc. and further subject to the Allottee(s) having complied with all his obligations under the terms and conditions of this Agreement and the Allottee(s) not being in default under any part of this Agreement including but not limited to the timely payment of the total Sale Consideration and other charges/fees/taxes/levies and also subject to the Allottee(s) having complied with all formalities or documentation as prescribed by the Developer the Developer proposes to complete the construction <u>within a period of 36 months computed from the date of execution of this agreement with further grace period of 180 days under normal circumstances.</u></i></p>
10.	Due date of possession	<p>05.08.2015</p> <p>[Calculated from the date of execution of buyer's agreement i.e. 05.02.2012 + grace period of 180 days]</p> <p>Grace period of 180 days is allowed.</p>

11. Payment plan	Subvention scheme payment plan
12. Total sale consideration	Rs. 87,81,952/- [As per payment schedule on page no. 68 of complaint]
13. Amount paid by the complainants	Rs. 84,11,629/- [As per ledger account dated 31.03.2019 on page no. 106 of complaint]
14. Tri-partite agreement dated	02.03.2016 [As per page no. 109 of complaint]
15. Demand letters dated	13.07.2012, 18.07.2012, 14.08.2012 (As alleged by the respondent on page no. 02 of reply)
16. Occupation certificate	Not obtained
17. Offer of possession	Not offered

B. Facts of the complaint:

3. That the complainants booked a residential apartment bearing no. 9A on ninth floor in Tower-Vision of the project namely "ILD GRAND" of the respondent no. 1 admeasuring tentative super area approximately of 1819 sq. ft. and paid a sum of Rs. 6,00,000/- as booking amount vide three cheques bearing no. 006306, 006307 dated 28.05.2012 and 02.06.2012 respectively drawn of ICICI Bank and cheque bearing no. 117449 dated 25.05.2015 drawn on HDFC Bank.

4. That the said unit was booked under subvention scheme. The respondent assured the complainants that it would issue the allotment letter at the earliest and maximum within one week and they would get the apartment buyer's agreement as a confirmation of the allotment of said residential apartment in their name.
5. That the respondent issued provisional allotment letter dated 13.09.2012, wherein confirming the allotment of aforesaid unit for the total consideration of Rs. 87,81,952/- wherein basic sale price was calculated @ Rs. 4,123/- per sq. ft. and EDC/IDC @ Rs. 335/- per sq. ft amounting to Rs. 6,09,365, preferential location charges of Rs. 1,81,900/-, utility charges Rs. 3,00,000/-, club membership charges of Rs. 1,00,000/- and Interest free maintenance security amounting to Rs. 90950/-.
6. That the respondent sent a letter dated 24.09.2012 to the complainants introducing "Zero Interest & No EMI" for 36 months or till possession, whichever is earlier scheme. Vide such letter dated 24.09.2012, it was informed that the respondent had a very special home loan scheme setup with M/s Dewan Housing Finance Limited (DHFL)' whereby based on the complainants/buyer's application, DHFL would be sanctioning loan up to 80% of the total cost of the said flat at prevailing interest rates and the complainants will be free from payment of any interest/principal amount for next 36 months or till the possession is given.

7. That the complainants time and again requested it to get the apartment buyer's agreement executed as per its promise but the respondent acting arbitrarily and negligently refused and ignored the requests of the complainants stating lame excuses and deliberately delaying the execution of the apartment buyer's agreement for almost six months and ultimately it was executed on 05.02.2013 (*sic 05.02.2012*).
8. That as per the ledger account statement issued by the respondent, they have paid Rs. 84,11,629/- towards total sale consideration of the allotted unit and the same was duly acknowledged by the respondent.
9. That the complainants have paid all the demands raised by the respondent without any default or delay on their part. They also fulfilled other obligations conferred upon them vide such apartment buyer's agreement. The complainants were and have always been ready and willing to fulfil their part of agreement, if any pending.
10. The respondent as per said agreement promised to deliver the possession of the allotted unit by expiry of maximum period of 42 months from the date of booking i.e. by January 2016. However, the respondent has miserably failed to comply with their promise.
11. That the complainants entered into a 'Tripartite Agreement' with HDFC Bank to borrow a sum of Rs. 60,00,000/- for payment of the said flat @ 9.50 % p.a. and the respondent issued permission to mortgage the said unit to HDFC Bank.

12. That the respondent raised demand of Haryana Value Added Tax (H-VAT) against the said unit up to F.Y 2015-16 of Rs. 2,44,980/-. As per the ledger account statement issued by it, they have paid Rs. 84,11,629/- towards total sale consideration and now nothing major is to be paid on the part of complainants.

C. Relief sought by the complainants:

13. The complainants have sought following relief(s):
- Direct the respondent to refund the amount paid by them along with future and pendent-lite compounding interest @ 18% p.a., from date of payments till its actual payment.
 - Direct the respondent to pay an amount of Rs. 55,000/- to the complainants as cost of present litigation.

D. Reply by respondent:

The respondent by way of written reply made following submissions

14. That the complaint is required to be filed before the Adjudicating Officer under Rule-29 of the said rules and not before this Authority under Rule-28 as this authority has no jurisdiction whatsoever to entertain such complaint and such complaint is liable to be rejected. The complainants sought reliefs which is in nature of compensation, therefore, the present complaint is not maintainable before the authority. Therefore, the present complaint is liable to be dismissed on this ground alone.

15. That the complainants is making false, misleading, frivolous, baseless, unsubstantiated allegations against the respondent with malicious intent and sole purpose of extracting unlawful gains from the respondent. It is submitted that it has received the "SWAMIH Investment Fund" dated 29.09.2020.
16. That the complainants never adhered the payment schedule as mentioned in the agreement. The respondent issued a call notice dated 13.07.2012 for first instalment under subvention plan of Rs. 9,46,295/- payable on or before 03.10.2012. On 18.07.2012, it issued the call notice to remit a sum of Rs. 17,19,444/- latest by 05.10.2012 which was followed by reminder notice dated 14.08.2012 to remit the overdue outstanding amount of Rs. 7,73,148/-. However, they consistently ignored all the demands and reminders raised by it.
17. That as per the clause 10.1 of the agreement, it contemplates to complete the construction of the said building/unit within three years from the date of execution of said agreement, with grace period of 6 months, unless there shall be delay on account of non-receipt of any approval of any reason beyond the control of the developer or there shall be failure due to reasons mentioned in clause 11.1, 11.2, 11.3, and clause 41 or due to failure of allottees to pay in time the price of the said unit along with other charges and dues in accordance with the schedule of payments or as per the demands raised by the developer from time to time or any

failure on the part of the allottees to abide by all or any of the terms or condition of this agreement.

18. That as per clause 14 of the application form states that allotment made to the applicants shall be provisional till the execution of sale deed, and the it would have rights to effect suitable alteration in the layout plan, if and when found necessary. Such alteration may include change in the area, layout plan, floor, block and number of the said unit, and increase/decrease in the area of the said unit. The opinion of the company's architects on such changes will be final.
19. That the complainants signed the apartment buyer's agreement on 05.02.2012 without raising any objection in this regard and voluntarily with their free will and consent signed the agreement after being fully satisfied with the terms and condition of the agreement. There is no point in raising question on the agreement after 6 years of signing the same, this gesture clearly shows the malafide intention of the complainants to get illegal profits from the respondent.
20. That the complainants alleged that the respondent is charging arbitrary demands whereas in the application from, it was clearly mentioned that an amount of Rs. 1,00,000/- shall be charged on pretext of club membership charges and Rs. 3,00,000/- for utility membership charges. However, in the apartment buyer's agreement, club membership charges and utility charges has been charged cumulatively in club membership

charges along with utility charges of Rs. 4,000/-. The respondent always acted for the benefits of allottee. However, due to reasons beyond its control the project got delayed. The construction work of the project is in full swing and same will be handed over to the complainants in no time.

21. That the complainants are not entitled for any damages and compensation as there was no delay on part of the respondent whereas the delay due to circumstances which were beyond the control of the respondent which further led to scarcity of workers as all the workers went their home towns and there was complete lockdown in the whole county in the first wave and second wave of COVID-19.
22. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

23. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all

purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

24. 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 and followed in M/s Sana Realtors Private Limited & others V/s 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."

25. 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. and M/s Sana Realtors Private Limited & others V/s Union of India & others (supra)***, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the amount paid by him

F. Findings on the objections raised by the respondent:

F.1 Objection regarding force majeure conditions:

26. The respondent-promoter has raised the contention that the construction of the project was delayed due to reasons beyond the

control of the respondent such as COVID-19 outbreak, lockdown due to outbreak of such pandemic and shortage of labour on this account. The authority put reliance judgment of Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and IAs 3696-3697/2020*** dated 29.05.2020 which has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 05.08.2015. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession

G. Findings on relief sought by the complainants:

- G.I Direct the respondent to refund the amount paid by them along with future and pendente-lite compounding interest @ 18% p.a., from date of payments till its actual payment.**

27. The project detailed above was launched by the respondent as group housing complex and the complainants vide letter dated 13.09.2012, were allotted the subject unit bearing no. 9A on 9th floor in tower Vision B-2 against total sale consideration of Rs. 87,81,952/-. It led to execution of builder buyer agreement between the parties on 05.02.2012, detailing the terms and conditions of allotment, total sale consideration of the allotted unit, its dimensions, due date of possession, etc. A period of 36 months with a grace period of 180 days from date of execution of agreement, for completion of the project was allowed to the respondent and that period has admittedly expired on 05.08.2015. It has come on record that against the total sale consideration of Rs. 87,81,952/- the complainants have paid a sum of Rs. 84,11,629/- to the respondent. Despite payment of more than 95.78% of total consideration, the respondent-builder failed to handover the possession of the allotted unit and thus, wishes to withdraw from the project. Keeping in view the fact that the allottees-complainants wish to withdraw from the project and are 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.
28. The due date of possession as per agreement for sale as mentioned in the table above is 05.08.2015. There is delay of 3 years 5 months 13 days on

the date of filing of the complaint i.e. 18.01.2019. The occupation certificate of the project where the unit is situated has still not been obtained by the respondent-promoter.

29. 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 they have paid a considerable amount towards the sale consideration and as observed by *Hon'ble Supreme Court of India in Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021: -*

".... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottee cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

30. 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 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 the allottees wish 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 allottees including compensation for which they may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

The authority hereby directs the promoter to return the amount received by him i.e., Rs. 84,11,629/- with interest at the rate of 10.35% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each

payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.II Direct the respondent to pay an amount of Rs. 55,000/- to the complainants as cost of present litigation.

33. The complainants are seeking relief w.r.t. compensation in the above-mentioned reliefs. 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.*, 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, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

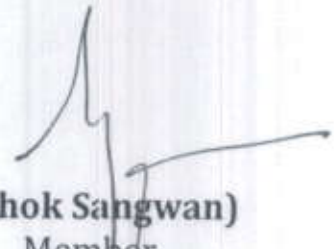
H. Directions of the Authority:

34. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent /promoter is directed to refund the amount i.e. **Rs. 84,11,629/-** received by him from the complainants along with interest at the rate of 10.35% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.
 - ii) A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
 - iii) The respondent is further directed not to create any third-party rights against the subject unit before full realization of paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainants.
35. Complaint stands disposed of.
36. File be consigned to the registry.


(Sanjeev Kumar Arora)

Member
Haryana Real Estate Regulatory Authority, Gurugram


(Ashok Sangwan)

Member

Dated: 15.12.2022