BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1022 of 2021**
Date of filing complaint:	**23.02.2021**
First date of hearing:	**12.04.2021**
Date of decision :	**24.11.2022**

Rajesh Kalra S/o Late Sh. Nand Lal Kalra **R/O**: B-862, Ansals, Palam Vihar, Gurugram-122017	**Complainant**
Versus	
M/s Satya Developers Private Limited **Regd. office:** 34, Babar Lane, Bengali Market, New Delhi-110001. **Corporate Office: Plot no. 8, Sector-44, Gurugram-122002.**	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Sanjeev Kumar Arora	**Member**
Shri Ashok Sangwan	**Member**
APPEARANCE:	
Ms. Preeti Yadav (Advocate)	Complainant
Ms. Kadambari (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under

the 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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.N.	Particulars	Details
1.	Name of the project	"The Hermitage", Sec 103, Gurgaon
2.	Unit no.	7th floor, Tower – 1, no. 03 [Annexure P5 at page 47 of the complaint]
3.	DTCP	28 of 2011 dated 28.03.2011 valid upto 27.03.2019
4.	RERA registration	Not registered
5.	Super area	1947 sq. ft. [Annexure P5 at page 47 of the complaint] **2000 sq. ft.** [increased area on offer of possession]
6	Date of approval of building plan	15.03.2013 (annexure 5 of promoter information)
7.	Date of company's intimation along with BBA	26.03.2014 [Annexure P4 at page 42 of the complaint]
8.	Date of builder buyer's	09.07.2014

	agreement	[Annexure P5 at page 44 of the complaint]
9	Possession clause	**6.2 - Possession of unit** That the developer shall, under normal conditions, complete the construction of tower in which the said unit is to be located within a period of 36 (thirty-six) months from the start of construction of the said tower or execution of this agreement whichever is later beyond which, the developer shall further be entitled to a grace period of another 6 months. **(As per page 56 of the complaint)**
10	Due date of possession	**09.01.2018** ***(Grace period is allowed being unqualified)***
11	Total sale consideration	**Basic sale price - Rs.1,08,58,419/-** (As per page 49 of the complaint) **Rs. 1,50,54,423/-** [As per statement of account dated 15.03.2021 at page no.76 of the reply]
12	Amount paid by the complainant	**Rs. 33,17,739/-** [As per statement of account dated 15.03.2021 at page no.76 of the reply] **[30.55% of the Basic sale price]**
13.	Occupation certificate	12.03.2018 [Annexure 7 of promoter information]
14.	Intimation of possession	14.03.2018

	cum final call letter	(as per page no. 85 of complaint)
15	Request for refund made by complainant	November,2018 (page no. 90 of the complaint)
16	Last and final opportunity to take over the possession	26.04.2019 (as per page no. 01 of complaint)
17	Copy of letter dated 14.05.2019 written by the complainant to the authority for refund and its reply dated 21.05.2019	Annexure P-13 and P-14 at page no. 101 and 103 of the complaint
17	Pre cancellation letter	08.07.2019

B. Facts of the complaint:

3. That a project by the name of 'The hermitage' situated in Sector-103, Gurugram was being developed by the respondent builder. The complainant coming to know about that project and from various advertisement approached it and booked a unit in that project in the year 2013 by paying Rs. 2,59,270/- as booking amount.

4. That after booking of the unit in the above mentioned project of the respondent, it raise a demand for Rs. 11,40,330/- on 29.01.2014 and the same was duly met through an account pay cheque encashed on 15.02.2014.

5. That on 26.03.2014 the respondent builder send a builder buyer agreement to be executed between the parties, leading to its execution on 09.07.2014 and allotting the above mentioned unit for a basic sale price Rs.

10663719/- besides PLC and totalling to Rs. 1,085,8419/- inclusive of two parking spaces i.e. one in the basement and the other one in the open area of the project. Thereafter the respondent also raised demand vide letter date 08.04.2014 for Rs. 16,58,869/- and the same was met and paid vide an account pay cheque but it acknowledged only a sum of Rs. 15,99,558/- instead of Rs. 33,17,739/- as per payment plan.

6. That as per the payment plan the complainant was required to pay 30% of the sale consideration and the remaining 70% against the allotted unit was to be paid at the time of offering its possession. The construction of the tower in which the allotted unit was situated was to be completed within 36 months from the date of execution of buyer's agreement dated 09.07.2014. So as per that agreement, the complainant had already paid 30% of the sale consideration of the allotted unit and the remaining was to be paid at the time of offer of possession.

7. That vide letter dated 14.03.2018, an intimation with regard to possession of the allotted unit was sent to the complainant besides raising demand for the amount due and mentioning increase in super area of the same. However keeping in view increase in the super area of the unit and its price, the complainant was astonished. He has already suffered huge financial loss in the business in the year 2016 and was not in a position to pay as per the demand raised by the respondent. So he wrote a letter in November 2018 to the respondent either to refund the booking amount or transefer the paid up amount to a smaller unit of 2BHK.

8. That despite meeting the officials of the respondent, nothing materialize and rather received letter dated 26.04.2019 giving him last and final opportunity to pay a sum or Rs. 12518951/- and the same was followed by conditional letter of cancelation dated 08.07.2019. though the complainant again met official of the respondent and pleaded for refund or in the alternative transfer of his paid up amount to a smaller unit but with no positive results. Rather he was informed that the unit allotted to him has already been cancelled and re-allotted to a third person.

9. The complainant sent emails dated 26.06.2018 and 27.06.2018 to the officials of the respondent about deficiency in service and their mala fide and cheating but with no effect. He also made a complaint in this regard to the authority on 14.05.2019 but the same was returned on 21.05.2019 and was directed to file a complaint for redressal of his grievances. He also issued a legal notice dated 22.07.2019 to the respondent but no reply to the same was received leading to filing of the complaint seeking refund of the paid up amount besides interests compensation and cost of litigation.

C. Relief sought by the complainant:

10. The complainant sought following relief(s):

i. Direct the respondent to refund the paid money along with prescribed interest from the date of payment till date of refund.

ii. Direct the respondent to pay compensation of Rs. 5,00,000/- for mental agony, tension , harassment and Rs. 60,000/- as the cost of litigation.

D. Reply by respondent:

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

11. The complainant and the respondent executed a builder buyer agreement dated July 09, 2014, for allotment of the unit bearing no. **T1-703** and measuring 1947 sq. ft (**'Unit'**) in the residential Project.

12. The total consideration for the Unit payable was Rs. 1,42,24,008/-, which was to be paid strictly in accordance with payment plan set out in annexure 2 and annexure 3 to the agreement. The complainant paid a total sum of Rs. 33,17,739/- towards allotment the unit. A tabular representation encapsulating the payments made by the complainant (annexure-3) is as under-:

S.No	Date of Payment	Amount (INR)
1.	01.01.2014	2,50,000
2.	14.02.2014	11,40,330
3.	20.01.2014	2,68,540
4.	29.04.2014	16,58,869
	Total	**33,17,739**

13. It is pertinent to mention that the respondent completed construction of the unit before the expiry of 36 months and submitted an application for inspection of the completed units and issuance of the occupancy certificate on March 27 2017, to the concerned authority. After the receipt of the occupancy certificate on March 12, 2018, respondent issued the letter of

offer of possession **('final call letter')** on March 14, 2018 to the complainant. In the final call letter, the respondent requested the complainant to make the requisite payments of Rs. 1,08,20,744/- latest by April 13, 2018, and complete the documentation as specified to enable the Respondent to initiate the process of handover of the unit. It is pertinent to note that the respondent intimated the complainant about the minor increase in the super-area and provided the calculation of the price of unit after the adjustments of the amount paid towards the allotment in the enclosed financial statements. however, the complainant failed to accept the possession of the unit and make timely payment as prescribed by the final call letter.

14. Following the due date of payment prescribed by the final call letter, the respondent, on April 26 2019, provided another opportunity to the complainant for the payment of the unpaid dues. However, even after continuous persuasion and multiple oral reminders by the respondent's representatives, the complainant failed to settle the dues as per the prescribed date and refused to accept the possession of the completed unit.

15. That the respondent, on November 20, 2020, invoked the arbitration clause contained in the agreement by nominating Hon'ble Justice AK Sikri as the sole arbitrator for adjudication of the breach of the obligations and unlawful repudiation of the agreement. However, the complainant has failed to provide consent for the sole arbitrator's appointment and continues to repudiate the agreement to date.

16. That the complainants has failed to place material facts on record and filed the present complaint with the sole intention to cause legal injury to it. All the allegations made in this complaint are a figment of the complainant's imagination and do not hold true as he himself defaulted on payment terms due to financial constraints and in turn is holding the respondent accountable.

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

18. 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 written submissions made by the parties and reiterating their earlier version as given in the pleadings.

E. Jurisdiction of the authority:

19. 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 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 promoter, the allottees 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 complainant at a later stage.

20. 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."

21. 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. Entitlement of the complainant for refund:

G.I Direct the respondent refund the paid money along with prescribed interest from the date of payment till date of refund.

22. Some of the admitted facts of the case are that the complainant was allotted unit bearing no. 03 in Tower-1 in 7th floor of the project "The Hermitage" situated in sector 103, Gurugram for a total sale of consideration of Rs. 14224008/- to be paid as per the payment plan. A buyer's agreement in this regard was executed between the parties on 09.07.2014 setting out the terms and conditions of allotment the payment plan, the due date of possession and various other details w.r.t. allotted unit. As per the payment

plan (annxure-3) a sum of Rs. 83,40,753/- besides EDC, IDC and PLC amount to be paid at the time of offer of possession. The rest of the amount was required to be paid on booking , within 45 days of booking and within 120 days of booking or commencement of 6th floor, whichever is late. The complainant paid a sum of Rs. 33,17,739/- which is 30.55% of the basic sale price and did not pay the remaining sale consideration due to one reason or other. It is contended that due to financial hardships in the year 2016, the complainant could not arrange the remaining amount despite demands being raised against the allotted unit and made a request for refund of the paid up amount or transfer of his money to a smaller 2BHK unit in November 2018. That request was again repeated in may 2019, but nothing materialised and rather received demands and pre-termination notice against the allotted unit. So, in such a situation he approached the authority seeking refund of the paid up amount besides interest. But it has come in the pleadings as well as documents placed on the record by the respondent that the complainant failed to pay against the allotted unit despite repeated reminders and offering him possession of the amount due vide letters dated 14.03.2018, 26.04.2019 and 08.07.2019 respectively. So, in such a situation when the respondent has received occupation certificate of the project and offered possession of the allotted unit to the complainant then his plea w.r.t. refund of the paid up amount is not tenable and is liable to be rejected .

23. Section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottee wishes to withdraw

from the project and is demanding return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.

24. The due date of possession as per agreement for sale as mentioned in the table above is 09.01.2018 and there is delay of 3 years 7 months 21 days on the date of filing of the complaint. The allottee in this case has filed this application/complaint on 23.02.2021 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made to him and demand for due payment was raised, then only filed a complaint before the authority. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after obtaining occupation certificate. Section 18(1) gives two options to the allottee if the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

    (i) Allottee wishes to withdraw from the project; or
    (ii) Allottee does not intend to withdraw from the project

25. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the allottee has tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in

proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money he has paid to the promoter are protected accordingly.

26. Further in the judgement of the Hon'ble Supreme Court of India in the cases of Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others (supra). it was observed as under

> *25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed*

27. Keeping in view the above mention facts it is proved that the allottee wishes to withdraw from the project after the due date of possession and seeks refund of the paid up amount besides interest and compensation. He initially moved the respondent in this regard in November 2018, by writing a letter to it and followed by a complaint with the authority on 14.05.2019. the occupation certificate of the project of the allotted unit was already received by the developer on 12.03.2018 and on the basis of which he offered possession of the same to the allottee vide letter dated 14.03.2018, followed by reminders and precancellation letter dated 26.04.2019 and 08.07.2019 respectively. So it means that after possession of the allotted unit was offered to him, he wants to withdraw from the project and is

seeking refund of the paid up amount . Though, it is contended on behalf of the respondent that the complainant is not entitled to seek refund of the amount paid with it but it is well settled that an allottee cannot be compelled to take possession if he shows unwillingness due to financial and other constraints. The respondent can proceed against him as per the terms and the conditions of buyer's agreement with regard to cancellation / surrender and forfeit the earnest money not exceeding 10% of basic sale price besides other non-refundable statutory charges .

28. Similarly Regulation 11 of the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, provides as under-

> *"5. AMOUNT OF EARNEST MONEY*
>
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"*

29. In view of aforesaid circumstances, the respondent is directed to refund the amount after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 within 90 days from the date of this order along with an interest @ 10.35% p.a. on the refundable amount, from the date of surrender till the date of

realization of payment as surrender of the allotted unit after the Act of 2016.

F.II Direct the respondent to pay compensation of Rs. 5,00,000/- for mental agony, tension , harassment and Rs. 60,000/- as the cost of litigation.

30. The complainant in the aforesaid relief is 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 allottee is 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 complainant is advised to approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the Authority:

31. 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 promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondent-promoter is directed to refund the amount i.e. Rs. 33,17,739/- after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder)

Regulations, 2018 along with an interest @ 10.35% p.a. on the refundable amount, from the date of surrender i.e. 23.02.2021 till the date of realization of payment after the Act of 2016.

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.

32. Complaint stands disposed of.

33. File be consigned to the registry.

(Sanjeev Arora)
Member

(Ashok Sangwan)
Member
24.11.2022

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 24.11.2022