

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

Complaint no. : 2479 of 2021
Date of filing complaint : 25.06.2021
First date of hearing : 01.09.2021
Date of decision : 11.11.2022

Rachna Kadosia Both R/O: - K-10/27-A, DLF Phase-II, Gurgaon, Haryana.	Complainant
Versus	
1. M/s BPTP Private Limited Regd. Office at: 28, ECE House, 1 st Floor, Kasturba Gandhi Marg, New Delhi 2. M/s Countrywide Promoters Pvt. Ltd Regd. Office at: - M-11, Middle Circle, Connaught Circus, new Delhi-110001.	Respondents

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Ms. Kritika and Akshya	Advocates for the complainant
Sh. Venkat Rao	Advocate for the respondents

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

S.N.	Particulars	Details
1.	Name of the project	"Amstoria", Sector- 102, Gurugram
2.	Nature of project	Residential floor
3.	RERA registered/not registered	Not Registered
4.	DTPC License no.	58 of 2010 dated 03.08.2010
	Validity status	02.08.2025
	Name of licensee	Shivanand Real estate Pvt. Ltd and 12 others
	Licensed area	108.07 acres

7.	Unit no.	A-45-SF, Second floor [As per page no. 54 of complaint]
8.	Unit measuring	2833 sq. ft. [As per page no. 54 of complaint]
9.	Allotment letter	06.09.2012 (As per page no. 38 of complaint)
9.	Date of execution of Floor agreement buyer's	08.07.2013 (Page no. 48 of complaint)
10.	Possession clause	<p>5. Possession</p> <p>5.1 Subject to Force Majeure, as defined in Clause 14 and further subject to the Purchaser(s) having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this Agreement including but not limited to the timely payment of each and every installment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the physical possession of the said</p>



		<p>unit to the Purchaser(s) within a period of 24 months from the date of sanctioning of the building plan or execution of Floor Buyers Agreement, whichever is later ("Commitment Period"). The Purchaser(s) further agrees and understands that the Seller/Confirming Party shall additionally be entitled to a period of 180 days ("Grace Period") after the expiry of the said Commitment Period to allow for filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony.</p>
12.	Due date of possession	08.07.2015 (calculated from the execution of BBA)
13.	Total sale consideration	Rs. 2,39,71,143/- [As per page no. 162 of reply]
14.	Total amount paid by the complainant	Rs. 1,58,95,421/- [As per page no. 162 of reply]
15.	Occupation certificate dated	15.07.2019 (As per page no. 158 of reply)
16.	Offer of possession	21.08.2019 (page 159 of reply)

17.	Legal Notice regarding refund by the complainant	09.05.2016 (page no. 92 of the complaint)
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B. Facts of the complaint

3. That on 06.09.2012, the complainant was allotted a unit bearing no. A-45, second floor in the said project, having area of 2833 sq. ft., for a total consideration of Rs. Rs. 2,39,71,143/- under the construction link payment schedule ("CLP"). It was agreed between the respondents and the complainant that there would be one PLC (Preferential Location Charges) i.e. two sides open.
4. That as per buyer's agreement dated 08.07.2013, the respondents assured the complainant that the construction of the said unit would be completed within a period of 24 months from the date of sanctioning of the building plan or execution of the agreement, whichever is later (hereinafter referred to as "Commitment Period") plus 180 days after the expiry of said commitment period to allow filing and pursuing of occupancy certificate, etc. from DTCP under the Act in respect of the entire colony. Thus, the possession of the unit was proposed to be offered till July 2015, i.e. 24 months from date of execution of the agreement dated 08.07.2013.
5. That in order to pay the huge amount of sale consideration, the complainant took a loan of Rs. 1 crores from PNB Housing Finance Ltd. Further, a tripartite agreement dated 08.07.2013 in this regard was also signed between the complainant, respondents and PNB. It

is further pertinent to mention herein that the complainant has to bear the cost of interest on the said loan, over and above the loan amount. The complainant, thus, has to pay a monthly EMI on the said loan for an amount of Rs. 93,171/-.

6. That a cheque dated 30.07.2013 bearing cheque no. 971784 for an amount of Rs. 1.00 crore was issued by PNB on behalf of the complainant in favour of the respondent no. 1 towards payment of the instalment.
7. The respondents through letter dated 27.08.2013 containing statement of account asked for payment of Rs. 7,21,905/- from her as charges for the second PLC alleging that the unit consists of two PLC's as the flat was adjacent to park which constitutes for the charges of second PLC. There is a huge difference in flat facing the park and flats which are adjacent to park, as the complainant opted for a flat which is adjacent to park and not the one which is facing the park. Therefore, the complainant is not liable for payment of second PLC as at the time of allotment/execution of the agreement, it was conveyed by the respondents that there is only one PLC. Now, the respondents took a completely different stance by demanding second PLC from her which is in violation of the terms of the agreement. The complainant sent an email to the respondents dated 26.08.2013 informing them regarding the terms and as such showed drawing shown by them at the time of initial booking of the unit thereby having only one PLC. Though, the respondents with a view to fulfil ulterior motives of illicit demand of second PLC, sent a

frivolous email dated 27.08.2013 to the complainant but since, there was no change in the blueprint of the flat, the complainant is not liable for second PLC and the illegal demand of second PLC being raised by the respondents is false and frivolous in nature.

8. That the complainant has been paying interest on the abovementioned loan amount of Rs. 1 Crore since 2013 and till date, she had paid an amount of Rs. 70 Lacs approx. as interest on the loan amount, despite not receiving the possession of the flat or refund of the amount paid to the respondents. The complainant herein is aggrieved at the hands of the respondents, as they not only failed to timely deliver possession of the flat but have also failed to refund the monies paid by her.
9. That since the respondents failed to fulfill promise to deliver the project to the complainant, so she is entitled for refund of the money invested in the above project along with prescribed rate of interest from the date of payment till realization from respondents. The respondents are also liable to compensate the complainant for the cheating and harassment done by them.

C. Relief sought by the complainant:

The complainant has sought the following relief:

- i) Direct the respondents to return sale consideration sum of Rs. 1,58,95,421/- along with interest.
- ii) Direct the respondents to pay an amount of Rs.73,94,430/- i.e. @Rs. 30 Per sq. ft. per month of the

built-up area of the floor for a period starting from July 2015 till march 2022.

- iii) Direct the respondents to pay an amount of Rs. 80,00,000/- approx. on account of EMI /interest paid by the complainant on the loan amount of Rs. 1,00,00,000/- since 2013.
- iv) Direct the respondents to pay an amount of Rs. 35,00,000/- approx. in lieu of the rent of the complainant from the period of July 2015 to march 2022 along with 9% interest p.a.
- v) Direct the respondents to pay Rs. 55,000/- towards the cost of litigation and compensation.

D. Reply by the respondents

The respondents by way of written reply made the following submissions.

10. It is submitted that the complainant has approached this Hon'ble Authority for redressal of the alleged grievances with unclean hands, i.e. by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of cases has laid down strictly, that a party approaching the Court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the

respondents but also against the Court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

- a) The complainant falsely stated that the timely payments were made by her as and when demanded by the respondents. It is submitted that the complainant made several defaults in making timely payments as a result thereof, the respondent vide emails dated 26.03.2014 and 11.04.2014 requested her to clear the outstanding dues. However, she failed to do the same. Therefore, the respondents were left with no option but to issue a last and final opportunity letter dated 02.05.2014 to the complainant for payment of outstanding dues within a period of 15 days from receipt of the letter. Due to non-compliance of the final notice dated 02.05.2014 by the complainant, booking/ allotment in her favour was cancelled/ terminated and respondents issued termination letter vide email dated 15.06.2015.
- b) That on repeated requests made by the complainant for restoration of unit, the respondents vide letter dated 23.05.2017 raised VAT demand payable on or before 07.06.2017. However, the complainant failed to pay the said demand within the stipulated time. Therefore, the respondents vide reminder emails dated 12.10.2017 and



18.06.2018 requested her for clearance of outstanding dues, but with no positive results.

- c) Thereafter, post-issuance of occupation certificate on 15.07.2019, the respondents offered possession to the complainant on 21.08.2019 and raised demand to the tune of Rs.80,75,722.53/-. However, the complainant failed to pay the same till date.
- d) The complainant has further misrepresented that the respondents have ulterior motives while alleging that demand raised for payment of second PLC being a park facing unit is beyond the agreement between the parties. The said unit in question is preferentially located unit and same attracts two PLCs in terms of the agreed terms and conditions of buyers agreement. The said charges were also clearly mentioned in clause 2.3 of the duly executed buyers agreement which stipulates that the PLC charges payable by the purchaser in case the floor allotted to the purchaser is preferentially located as mentioned in clause 2.3 of the agreement, and that there can be more than one PLC charges to a unit in case it is so located preferentially to more than one premium locations. In the present case, the subject unit is located facing park and also has two side open and accordingly the charges have been levied. Further, the demand qua the PLCs was raised vide letter dated 03.07.2013 i.e. prior to the execution of the agreement. It is



also noteworthy that the said PLCs have been charged from the allottees of the other floor on the same plot as well as well as on the neighbouring plots. Thus, the PLC have been charged in accordance with the location and agreement between the parties. It is reiterated that all the demands have been raised as per the terms and conditions of floor buyers agreement duly accepted and signed by the complainant after carefully reading and understanding the same. Hence, the complainant is now estopped from raising such frivolous allegation.

- e) That it is submitted that the allegations raised by the complainant are false, concocted and the true facts have not been revealed. Without prejudice to the fact that the said allegations are baseless, it is submitted that the floor buyers agreement was sent to the complainant on 20.11.2012 along with a check list of documents to be submitted along with the agreement. However, the same was not received in December 2012 as alleged. In July'2013, the complainant returned the signed copy of agreement along with other documents as per the checklist. It is further submitted that the said agreement was executed voluntarily, willingly, without raising any concerns whatsoever by the complainant. However, she is raising the said frivolous issue before this Hon'ble Authority, especially when the buyers agreement was executed by the complainant after spending

considerable time reading, understanding and then executing the said agreement, thus, considering the same to be a prudent commercial decision. Hence, the complainant is estopped from raising frivolous issue at belated stage.

f) That the complainant has falsely misrepresented that construction activities at the project site were ongoing at snail's pace. In this context, it is submitted that the respondents regularly apprised the complainant with respect to the construction status ongoing at the project site. It is pertinent to mention here that the respondents have already obtained occupation certificate for the project in question on 15.07.2019. Post-issuance of OC, the respondents offered possession to the complainant vide letter dated 21.08.2019. However, the complainant failed to make the requisite payment as per the offer of possession and to complete the documentation work required to take over possession of the unit in question.

11. All other averments made in the complaint were denied in toto.
12. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

13. The respondents have raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes

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

E. E. I Territorial jurisdiction

14. 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.

E. II Subject-matter jurisdiction

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

Section 11(4)(a)

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

Section 34-Functions of the Authority:

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

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.

F. Findings on the objections raised by the respondents.

F.1 Objection regarding untimely payments done by the complainant.

16. The respondents have contended that the complainant made defaults in making payments and as a result thereof, had to issue reminders dated 17.10.2013, 18.12.2013 and emails dated 19.04.2014, 24.03.2014, 26.03.2014, 11.04.2014 and last and final letter dated 02.05.2014 respectively. It is further submitted that the complainant has still not cleared the dues. The counsel for the respondents referred to clause 12 of the buyer's agreement dated 08.07.2013 wherein it is stated that timely payment of instalment is the essence of the transaction and the relevant clause is reproduced below:

12.1 Without prejudice to the rights of the Seller/Confirming Party as per the terms of the Agreement, the Seller/Confirming Party may at its sole discretion waive the breach by the Purchaser(s) in not making timely payments as per the payment plan as opted by the Purchaser(s) on such terms, conditions and charges as may be considered appropriate by the Seller /Confirming Party including but to limited to the acceptance of the due amounts along Seller/Confirming Party in this regard shall be final and binding upon the Parties. </ with interest @ 18% pa. The decision of the seller/ confirming party

in this regard shall be final and binding upon the parties..."

17. At the outset, it is relevant to comment on the said clause of the allotment letter i.e., "12. *TIMELY PAYMENT ESSENCE* wherein the payments to be made by the complainants have been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. The authority observes that the complainant in being in default in making timely payments, the respondents have exercised discretion to terminate the buyer's agreement vide email dated 15.06.2015 but restored the same on a request made by the allottee. The attention of authority was also drawn towards clause 12 of the buyer's agreement whereby the complainant would be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondents have charged delay payment interest as per clause 12 of the buyer's agreement. In other words, the respondents have already charged penal interest from the complainant on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(z) of the Act provides that the rate of interest chargeable from the allottees by the

promoters, in case of default, shall be equal to the rate of interest which the promoter would be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainant would be charged at the prescribed rate i.e., 10.25% by the respondents which is the same as is being granted to the complainant in case of delay possession charges.

E. Findings on the relief sought by the complainant.

E. I Direct the respondents to return sale consideration sum of Rs. 1,58,95,421/- along with interest.

E.II Direct the respondents to pay an amount of Rs.73,94,430/- i.e. @Rs. 30 Per sq. ft. per month of the built-up area of the floor for a period starting from July 2015 till march 2022.

E.III Direct the respondents to pay an amount of Rs. 80,00,000/- approx. on account of EMI /interest paid by the complainant on the loan amount of Rs. 1,00,00,000/- since 2013.

E.IV Direct the respondents to pay an amount of Rs. 35,00,000/- approx. in lieu of the rent of the complainant from the period of July 2015 to march 2022 along with 9% interest p.a.

18. The complainant was allotted unit no A-45-SF, Second floor in tower A in the project "Amstoria", Sector- 102, Gurugram by the respondents for a total consideration of Rs. 2,39,71,143/-. She paid a sum of Rs. 1,58,95,421/- which is approximately 66.3% of the total

sale consideration. The due date of possession as per agreement for sale as mentioned in the table above is 08.07.2015 and there is delay of 5 years 11 months 17 days on the date of filing of the complaint. Although the allottee filed this application/complaint on 25.06.2021 but she sent a legal notice to the respondents on 09.05.2016 after possession of the unit was offered to her after obtaining occupation certificate by the promoter. But the allottee has earlier opted/wished to withdraw from the project after the due date of possession was over. 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

19. The right under section 19(4) accrues to the allottee and the promoter is liable under section 18(1) 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. The allottee exercised the right to withdraw from the project after the due date of possession is over and has been demanding return of the amount with prescribed rate of interest impliedly means that he wished to withdraw from the project.
20. 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, 2021-2022 (1) RCR (Civil) 357* 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 and wherein 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"

21. 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). This judgement of the Supreme Court of India recognized unqualified right of the allottee and liability of the promoter in case of failure 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. The allottee has exercised this right and it is unqualified one and accordingly entitled to claim the refund of the amount paid along with interest at the prescribed rate.
22. The authority hereby directs the promoters to return the amount received from the complainant i.e., Rs. Rs. 1,58,95,421/- with

interest at the rate of 10.25% (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*.

23. **Admissibility of refund at prescribed rate of interest:** The complainant is seeking refund amount at the prescribed rate of interest on the amount already paid by her. However, the allottee intend to withdraw from the project and is seeking refund of the amount paid by her in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

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

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

24. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature,

is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

25. 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., 11.11.2022 is 8.25%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.25%.
26. The definition of term 'interest' as defined under section 2(za) of the Act provides that 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 allottees, in case of default. The relevant section is reproduced below:

"(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— 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,

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;"

27. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.25% by the respondent/promoters which is the same as is being granted to the complainant in case of delayed possession charges

E.VI Direct the respondents to pay Rs. 55,000/- towards the cost of litigation and compensation

28. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.*(supra), 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

F. Directions of the Authority:


29. 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/promoters are directed to refund the entire amount of Rs. 1,58,95,421 paid by the complainant along with prescribed rate of interest @ 10.25% p.a. from the date

of each payment till the actual date of refund of the deposited amount as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017

- ii) A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.

30. Complaint stands disposed of.

31. File be consigned to the Registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.11.2022

HARERA
GURUGRAM