

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

Complaint no. :	2514/2020
Date of filing complaint:	01.09.2020
First date of hearing:	22.09.2020
Date of decision :	13.12.2022

Reena Sharma D/o Sh. Devdutt Sharma R/o: A-175, Sarvattom Nagar , P.O. Railway Colony, Sabarmati, Ahmedabad, Gujarat	Complainant
Versus	
BPTP Pvt. Ltd R/o:M-11, Middle Circle , Connaught Place, New Delhi-110001.	Respondent

CORAM:

Shri Vijay Kumar Goyal **Member**

Shri Sanjeev Kumar Arora **Member**

APPEARANCE:

Sh. D.D. Sharma (father of the complainant) **Complainant**

Sh. Pankaj Chandola **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 provisions 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	"Amstoria", Sector- 102, Gurugram
2.	Nature of project	
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.	C-384 [As per page no. 39 of reply]
8.	Unit measuring	206 sq. yd. (1854 sq. ft.) [As per page no. 39 of reply]
9	Date of Booking	24.08.2019 (page no. 29 of reply)
9.	Allotment letter	30.08.2019 (As per page no. 39 of reply)
9.	Date of execution of Floor buyer's agreement	not executed



10.	Possession clause	Within 15 days from the date of booking (page no. 40 of reply)
12.	Due date of possession	08.09.2019 (calculated from the possession clause of allotment letter)
13.	Total consideration sale	Rs. 1,03,00,000/- [As per allotment letter on page no. 39 of reply]
14.	Total amount paid by the complainant	Rs. 10,00,000/- [As per page no. 10 of complaint]
15.	Occupation certificate dated	not obtained
16.	Offer of possession	04.09.2019 (page 41 of reply)
17.	Reminder letters	Dated 16.10.2019, 19.12.2019, 15.11.2019
18.	Demand Letter	04.09.2019
18.	Cancellation letter	Dated 26.12.2019 [As per page no. 61 of reply]

B. Facts of the complaint:

3. That on 30.08.2019, the complainant applied for allotment of a plot in the project of respondent known as 'Amstoria' situated in sector 102, Gurugram, by paying a sum of Rs. 5,00,000/-. She was allotted a plot bearing no. C-384 bearing 206 sq. yd. situated in the above mentioned project of the respondent at the rate of Rs. 50,000/- per sq.yd. The sale consideration of Rs. 1,03,00,000/- of the allotted unit

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was to be paid as per the payment schedule. Though the complainant paid a sum of Rs. 5,00,000/- at the time of booking but she was required to pay the remaining amount of sale consideration at the time of offer of possession i.e. 15 days from the date of booking plus IFMS and PLC. While issuing letter of allotment, it was mentioned by the respondent builder that 25% of the total sale consideration would constitute earnest money of the unit.

4. That no buyer's agreement w.r.t. to the allotted unit was executed between the parties.
5. That vide letter dated 04.09.2019, the complainant was offered possession of the allotted unit and was asked to pay the remaining amount of sale consideration as per payment plan by 14.09.2019
6. Thereafter, the complainant visited the site and was shocked to know that the plot area is less than 206 sq. yd, due to restrictions of a boundary wall on the eastern side towards other's land, thereby reducing its width to less than 8.35m as per the given location plan. The said fact was brought to the notice of the respondent by an email dt. 04.09.2019 and mentioning that further payment would be made only when the plot was made ready for possession for 206sq.yd by shifting the wall towards east for its agreed size.
7. That despite of an email and telephonic talks by the complainant with the respondent to make the plot ready for 206 sq.yd as per allotment and possession letters by shifting the wall on the east as per the given location plan, it didn't reply. Hence, the complainant sent a registered letter alongwith plot location plan and site photograph dt. 19.09.2019 through RG138890613IN to the respondent for the cancellation of the allotment of the said plot for not making the plot ready for 206 sq.yd. and for which the payment

was demanded on or before 14.09.2019, thereby defaulting on terms & conditions of sales and further requested for the refund of the paid amount of Rs. 10,00,000/- .

8. That no reply was received by the complainant in consequence to the letter dt. 19.09.2019. So, she again sent a registered reminder letter RG138897015IN on 05.10.2019 to the respondent reiterating the prayer qua the cancellation of the plot and refund of the paid amount of Rs. 10 lakh but no response was received.
9. That the respondent informed the complainant telephonically and by an email on 26.12.2019 asking to submit the surrender documents as per the given format for cancellation of the plot and for refunding the booking amount. The same were sent by an email to the respondent the same day. But even after receiving the surrender documents, respondent did not refund the paid amount to the complainant.
10. That on the contrary, instead of refunding the booking amount, the respondent issued a "Rejection" letter the same day on 26.12.2019, thereby cancelling the provisional booking and forfeiting the booking amount.
11. That since there was no action towards refund, the complainant get issued a legal notice on 25.01.2020 asking for refund of the paid up amount but the respondent did not reply leading to filling of the present complaint as prayed above .

C. Relief sought by the complainant:

12. The complainant has sought the following relief(s):

- i. Direct the respondent to return amount of Rs. 10,00,000/- along with interest @18% for the period of delay.

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- ii. Direct the respondent to pay Rs. 55,000/- towards the cost of litigation and compensation.
- iii. Direct the respondent to pay a sum of RS. 1,00,000/- for the harassment and mental agony suffered by her.

D. Reply by respondent:

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

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

- 1) That the complainant has concealed that the respondent being the customer centric company intimated her about the non-encashment of the cheque dated 21.08.2019 for the amount of Rs.5,00,000/-. In the said letter, the complainant was duly informed that said cheque has been returned with the comment "payment stopped by the Drawer". In that view, it is submitted that the payment or the acknowledgement issued against the said payment stands cancelled.



- 2) That the complainant has concealed the fact that possession of the plot has already been offered to her on 04.09.2019 and till date, she did not make the payment of Rs96,09,590/- due to which the respondent sent the reminder letters dated 16.10.2019, 15.11.2019 and 19.12.2019 respectively. It is further submitted that finding no alternative, the unit of the complainant was terminated on 26.12.2019. Thus, in such a situation, she is not entitled to seek refund of the paid up amount.
- 3) It was denied that the allotted unit was not of the size offered to the complainant and the unit offered to her was not fit for occupation. The averments made in this regard are wrong and baseless just to escape from making further payments against the allotted unit and to take its possession
14. That the complaint is further liable to be dismissed in as much as the complainant has indulged in raising various grave and defamatory allegations against the respondent which require detailed investigation and cannot be decided in summary proceedings.
15. All other averments made in the complaint were denied in toto.
16. Though vide orders dated 13.05.2022, the parties were directed to file written submissions but failed to do so within the stipulated period.
17. 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 submissions made by the parties.

A E. Jurisdiction of the authority:

18. 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

19. 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.

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20. 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 the compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
21. Further, the authority has no hitch in proceeding with the complaint and to grant 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. 2021-2022(1) RCR (c) 357*** and 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*** 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."

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

F. Findings on the relief sought by the complainant:

F.1 Direct the respondent to refund the amount of Rs. 10,00,000/- with interest.

23. Some of the admitted facts of the case are that on the basis of application dated 30.08.2019 submitted by the complainant with the respondent, she was allotted the unit in question bearing 206 sq.yd. by it in its project "Amstoria" plots sector-102, Gurugram on receipt of Rs. 5,00,000/- as earnest money for a total sum of Rs. 1,03,00,000/- under the time linked payment plan. The letter of allotment dated 30.08.2019 issued in favour of the complainant contains terms and conditions of allotment, the payment plan and date of offer of possession of the unit. In pursuant to the terms and conditions mentioned in the letter of allotment, the respondent vide letter dated 04.09.2019 offered possession of the allotted unit and requiring the complainant to pay the remaining amount by 14.09.2019. Though the complainant raised no. of issues w.r.t. the area of the allotted unit, existence of a boundary wall in its eastern side but the remained unanswered, leading to issuance of reminders for remaining payment and ultimately cancelation vide letter dated 26.12.2019 and the booking amount being forfeited. Now the issue for consideration arises as to whether the respondent builder was justified in raising further demands vide letters dated 16.10.2019, 15.11.2019, 19.12.2019 and ultimately issuance of cancellation vide

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letter dated 26.12.2019 without entering into a buyers agreement with the allottee as per section 13(1) of the Act of 2016 providing as under :

A promoter shall not accept a sum more than ten percent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force

24. It was pleaded by the complainant through her father that the respondent was directed to file written submissions vide order dated 13.05.2022 besides status of removal of boundary wall existed prior to 04.09.2019 when the offer of possession of the unit was made. Even that fact is against the assurance given by the respondent vide its email dated 02.09.2019 to the effect that the boundary wall and demarcation stone shifting process would be done. So, the offer of possession with existing physical obstructions and reduced dimensions of the unit was not a valid offer and the complainant cannot be held liable for not taking possession and making payment as per the letter of allotment. Even the respondent builder assured multiply times to make refund of the deposited amount vide emails dated 16.01.2020 and 05.02.2020 respectively but nothing materialized. But the version of respondent builder is otherwise and who took a plea that the unit of the complainant was cancelled as she failed to pay against the same as per terms and conditions of allotment contained in letter dated 24.08.2019. though she was offered possession of that unit vide letter dated 04.09.2019 but neither she came forward to take possession nor made the due payment despite reminders issued vide letters dated 16.10.2019, 15.11.2019 and 19.12.2019 respectively and ultimately leading to

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termination of the unit vide letter dated 26.12.2019. It was denied that the area of the allotted unit was less than 206 sq.yd. and the complainant ever visited the site and pointed out towards the shifting of the wall in its eastern side. Thus the unit of the complainant was rightly cancelled and was offered any amount by way of refund as she was not entitled to the same.

25. It is a fact that there is no buyer's agreement w.r.t. the allotted unit executed between the parties. Though the complainant admittedly paid a sum of Rs. 10,00,000/- to the respondent against the total sale consideration of the allotted unit but did not pay the remainder due to one reason or the other, leading to raising further demands. But the action of the respondent in this regard cannot be justified in the absence of a written agreement for sale w.r.t. the allotted unit and there is no whisper of evidence in this regard in the pleading of the respondent. No doubt, the terms and conditions of allotment and payment plan of the allotted unit were mentioned in the letter of allotment dated 30.08.2019 by the respondent but it was also obligatory for it to enter into agreement of sale for that unit with the allottee setting out the details as mentioned above. The possession of the allotted unit was offered to the complainant vide letter dated 04.09.2019 giving her time upto 14.09.2019 to make payment and take possession but that offer was contrary to the provisions of the act detailed above. Thus, the act of respondent in issuing various reminders after allotment of the unit vide letter dated 30.08.2019 and ultimately cancelling the same due to non-payment by the allottee cannot be said to be legal in any manner and the same is hereby ordered to be set-aside.

26. During the course of hearing, a specific plea was taken on behalf of the complainant with regard to boundary wall and demarcation stone shifting process by the respondent assured vide its email dated 02.09.2019 and the offer of possession issued vide letter dated 04.09.2019 being valid one. Moreover the site of the unit was not clear inspite of multiply request through emails and no deduction in the paid up amount by the complainant can be made. The respondent through its counsel was directed to clear its position by filing written submissions as to how offer of possession of the unit was made when there were physical obstructions at the site and the dimensions of the unit were not available as per letter of allotment. But despite the time given in this regard, it failed to clarify the position by filling any written submissions. So, it shows that while offering possession of the allotted unit to the complainant vide letter dated 04.09.2019, there was boundary wall in its eastern side having physical obstruction thereby diminishing its area. Thus, when the allottee has already opted for refund of the paid-up amount vide letter dated 26.12.2019 due to the facts detailed above, then the respondent builder was bound to act upon the same and pay back the received amount and could not have forfeited the same. So, the respondent builder is directed to refund the amount of Rs. 10,00,000/- received from the complainant received against the allotted unit from the date of receipt of each payment upto the date of actual realisation at the prescribed rate of interest i.e. 10.35% per annum.

F.2 Direct the respondent to pay Rs. 55,000/- towards the cost of litigation and compensation .

F.3 Direct respondent to pay an amount of RS. 1,00,000/- for causing mental agony /torture, physical harassment

27. The complainant in the aforesaid reliefs 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.

Directions of the authority

28. 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 entire amount of Rs. 10,00,000/- paid by the complainant along with prescribed rate of interest @ 10.35% 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 respondent to comply with the directions given in this order and failing which legal consequences would follow.

29. Complaint stands disposed of.
30. File be consigned to the Registry.


(Sanjeev Kumar Arora)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.12.2022



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GURUGRAM