

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

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| Complaint no. : | 1441 of 2018 |
| Date of filing complaint: | 21.11.2019 |
| First date of hearing: | 03.04.2019 |
| Date of decision : | 29.11.2022 |

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| Yashpal R/O: 606/23, Near Netaji Park, DLF colony, Rohtak. | Complainant |
| Versus | |
| M/s Kashish Developers Limited Regd. office: Manor One, Sector - 111, NPR, Dwarka Expressway, Gurugram | Respondent |

CORAM:

| | |
|--------------------------|---------------|
| Shri Ashok Sangwan | Member |
| Shri Sanjeev Kumar Arora | Member |

APPEARANCE:

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| Shri Gaurav Bayana (Advocate) | Complainant |
| Shri Sarang proxy for Yogesh Yadav (Advocate) | Respondent |

ORDER

- 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 | "Manor One ", Sec 111, Gurgaon, Haryana. |
| 2. | Nature of the project | Group Housing Project |
| 3. | Unit no. | A-11 , 11 th floor , block A [Apartment buyers agreement - Annexure C4] |
| 4. | DTCP | 110 OF 2011 Dated 19.06.2012 |
| 5. | RERA registration | 96 of 2019 |
| 6. | Super area | 895 sq. ft. [Apartment buyers agreement - Annexure C4] |
| 7. | Date of builder buyer's agreement | 15.01.2015 [Annexure C4] |
| 8. | Possession clause | 3(a) - Possession of unit That subject to terms of this clause and subject to the Apartment allottee(S) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and further subject to compliance with all provisions, formalities, registration of sale deed, documentation, payment of all amount due and payable to the Developer by the Apartment allottee |

| | | |
|-----|--------------------------------|---|
| | | <p>(S) under this agreement, as prescribed by the Developer, the Developer proposes to hand over the possession of the said Apartment within a period of thirty six (36) months (excluding a grace period of 6 months) from the date of execution of this Agreement. It is however understood between the parties that the possession of various Blocks/Towers comprised in the Complex and also the various common facilities planned therein shall be ready & completed in phases wise and will be handed over to the allottees of different Blocks/Towers as and when the same will be completed and in a phased manner. /</p> <p>(As per page 13 of ABA of the complaint)</p> |
| 9. | Due date of possession | <p>15.01.2018</p> <p>(calculated from the date of agreement.) (grace period is not allowed.)</p> |
| 10. | Total sale consideration | Basic sale price – Rs. 72,44,785/- |
| 11. | Amount paid by the complainant | Rs. 39,47,121/- |
| 12. | Occupation certificate | not obtained |
| 13. | offer of possession | not offered |

B. Facts of the complaint:

3. That the complainant gave his hard-earned money to M/s Kashish Developers Ltd. for booking of the unit their project named "Manor One" situated at Sector-111, Gurugram on 30.07.2012 based on assurances and promises which later on proved to be false assurance and promises.
4. That the complainant was allotted unit No. A-11A on the 11th floor on 24.11.2012 measuring 895 sq. ft. for consideration of Rs 72, 44,785/-. It was assured by the respondent that they will give the possession of the unit within reasonable time.
5. That the complainant made payments against allotted unit by way of cheques and the respondent issued receipts against the same. He made various payments as per the demand raised by the respondent company and paid a sum of Rs 39,47,121/-.
6. That on 19.01.2015, the respondent company acceding to the request of Mr. Sahil to surrender his Unit A-11H and transfer the fund paid by him to Mr. Yashpal and deducted an amount of Rs 9,32,734/ as brokerage without any reasonable and logical cause.
7. That despite payment of Rs. 39,47,121/- to the respondent it has failed to deliver the possession of the flat to the complainant as the construction of the property is going at very snail's pace. The apartment's buyer's agreement was executed on 15.01.2015 and as per clause 3. Possession of the allotted unit was to be hand over with-in 36 months from the date of execution of the agreement, but the actual position is that the respondents are not in a position to deliver the possession in near future. Due to serious

deficiency in services where the complainant has been suffering financially, mentally and physically.

8. That the complainant is fighting with life threatening disease i.e. Cancer and has to go for regular treatment and check-up at Rajiv Gandhi Institute which is very expensive and the income of the complainant is not sufficient to cope with his daily necessities and expenses of the treatment Moreover , he resides at a rented accommodation.
9. That the complainant who is suffering from cancer has to spend a lot on follow-ups and routine tests and is in dire need of money. He requested through letter for refund of his hard earned money as he has to borrow money from nears and dears to follow the line of treatment but there was no response from the respondent.
10. That the respondents gave false promises and assurances to the complainant and unlawfully grab huge amount by harassing innocent customers. This is unfair trade practice and deficiency in service on part of the respondent and is clear violation of the Act.
11. That the hard-earned money paid by him for the unit in its project is now being enjoyed by the respondent. The complainant must be compensated for such harassment caused by the it's and even after a lapse of almost 6 years he is suffering miserably at the hands of the respondent company physically, mentally and financially

C. Relief sought by the complainant:

12. 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. Cost of litigation.

D. Reply by respondent:

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

13. That the complainant himself approached the respondent as they wanted to buy a flat admeasuring 895 sq. ft. in the said project. The complainant has paid only Rs. 39,47, 121/- out of Total Cost of Rs.72,44,785/-
14. That the respondent company has already completed the construction up to 11th Floor out of total G+15 floors in Ttwer A in which the complainants have booked their unit. Brick work is completed upto G+8 in this tower and plaster is completed upto 0+3. Construction in other towers of the project is also progress and construction of civil structure is complete upto various levels from G+15 to G+15 out of total G+ 18. Brick work is complete up to various levels from G+8 to G+ 13. Plaster is complete upto various levels from 0+3 to 0+4. The work in the project is progressing fast and the project is scheduled to be handed over by 30th Sep 2019 after getting the OC for Phase- 1 (Total 5 towers)
15. That complainant has booked flat no. A-11A admeasuring 895 sq. ft. in tower-A in project " Manor One" situated in Sector-111,Gurugram. It is also admitted that he has paid Rs. 39,47, 121/- against total cost of Rs.72,44,7851- ;and an allotment letter for the above unit was issued on 24.11.2012. An apartment buyer agreement was also executed on

15.01.2015 between complainant and another and Respondent and It is admitted that possession was to be handed over to the complainant within a period of 42 months i.e. on or before 14.07.2018. The project is in advanced stage of completion and possession is scheduled to be given by 30.09.2019. project delayed if any is due to reasons beyond reasonable control of respondent like default in payments of due instalments by existing buyers, very few new sales due to slump in real estate market, shortage of supply of material due to remote location of site, delay in getting approvals from govt. authorities etc.

16. That the CRM team of respondent was in continuous touch with complainant throughout and kept him posted verbally many times about developments on the project he is not entitled to the relief of refund of amount with interest as the relief if any for delay shall be governed by the terms and conditions of apartment buyer agreement entered into between the parties and he would be offered possession of his unit by 30.09.2019 after getting OC from the competent authority .

E. Jurisdiction of the authority:

17. 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.

18. 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."

19. 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.I. Objection regarding delay due to force majeure

20. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as commonwealth games held in Delhi, shortage of labour due to implementation of various social schemes by Government of India, slow

pace of construction due to a dispute with the contractor, and non-payment of instalment by different allottee of the project but all the pleas advanced in this regard are devoid of merit. First of all the unit in question was transferred in the year 2013 and its possession was to be offered by 15.01.2018 so the events taking place such as holding of common wealth games, dispute with the contractor, implementation of various schemes by central govt. etc. do not have any impact on the project being developed by the respondent. Though some allottee may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of some of the allottee. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Entitlement of the complainant for refund:

G.I Direct the respondent refund the paid money along with prescribed interest .

21. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and 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.
22. The due date of possession as per agreement for sale as mentioned in the table above is **15.01.2018** and the same has be admittedly expired the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. 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 he has 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 allottees 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.....”

23. 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*** decided on 12.05.2022. it was observed

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.

24. 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 hand over the possession to the allottee as per within the terms of the agreement as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

25. This is without prejudice to any other remedy available to the allottee including compensation for which allottee 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.
26. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 39,47,121/- 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*.

F.II Cost of litigation

27. The complainant is claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

G. Directions of the Authority:

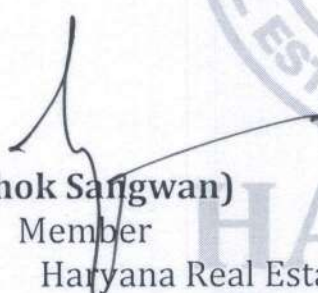
28. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations

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

- i. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 39,47,121/- 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.
- ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order.

29. Complaint stands disposed of.

30. File be consigned to the registry.


(Ashok Sangwan)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Sanjeev Arora)

Member

Dated: 29.11.2022

