

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

Complaint no. : 1614 of 2021
First date of hearing: 13.05.2021
Order pronounced on: 25.04.2023

Ajay Pal Singh

R/O: - H. No. 887, Block-B, Ansal Sushant City,
Sector-19, Panipat, Haryana.

Complainant

Versus

Blackberry Realcon Pvt. Ltd.,
Office address: - 11th Floor, Paras Twin Tower,
Sector 54, Golf Course Road, Gurugram, Haryana.

Respondent

CORAM:

Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

Sh. Kamal Dahiya (Advocate)
Sh. Akshay Sharma (Advocate)

Complainant
Respondent

ORDER

1. The present complaint dated 09.04.2021 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 thereunder 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	"Paras Square" at sector-63A, Village-Behrampur, Tehsil- Sohna, Gurugram, Haryana.
2.	Project Type	Commercial complex
3.	DTPC license no.	23 of 2013 dated 17.05.2013
4.	RERA registered/Not registered	13 of 2018 dated 06.09.2018 Valid till 31.12.2018 (page no. 58 of reply)
5.	Date of approval of building plan	30.07.2013
6.	Allotment letter	30.08.2013
7.	Unit no.	01, 3 rd Floor, Block -B, having super area of 1225sq.ft. (Page no. 31 of complaint)
8.	Date of builder buyer agreement	31.12.2013 [page no. 28 of complaint]
9.	Possession clause	7 DATE OF COMPLETION. (a) Time of handing over the Possession (i) <i>The date of completion of the Project shall be Thirty-Six (36) months from the start of construction hereof, subject to force majeure or/and any other reason beyond the control of Developer, subject to all</i>



		<p><i>Allottee(s) having strictly complied with all the terms and conditions of this Buyer's Agreement and not being in default under any provisions of the same and all amounts due and payable by the Allottee(s) under this Buyer's Agreement having been paid in time to the Developer, The Developer immediately upon the receipt of OC/CC, shall give notice to the Allottee(S), in writing, to take possession of the Unit for his/its fit-outs and occupation and use ("Notice of Possession"), on furnishing certain documents by the Allottee (S).</i></p> <p><i>(ii)The Allottee(s) agrees and understands that the Developer shall be entitled to a grace period of one hundred and Eighty (180) days over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 7, for completion of the Project.</i></p> <p><i>(Emphasis supplied)</i></p>
10.	Date of excavation as per statement of account dated 15.11.2021	13.02.2014 [page no. 71 of reply]
11.	Due date of possession	13.08.2017 [Computed from the date of start of construction i.e. 13.02.2014] Note: Grace period is allowed being unqualified and unconditional
12.	Legal notice for refund	07.02.2017 (page no. 73 of complaint)
13.	Total sale consideration	Rs.1,12,35,575/- (as per SOA dated 15.11.2021 on page no. 69 of reply)
14.	Total amount paid by the complainant	Rs.69,50,444/- (As per SOA dated 15.11.2021 on page no. 72 of reply)



15.	Occupation certificate	23.07.2018 {page no. 67 of reply}
16.	Offer of possession	28.07.2018 (page no. 55 of reply)

B. Facts of the complaint:

3. The complainant has made the following submissions: -

- I. A project by the name of Paras Square situated in Sector 63A, Gurugram was being developed by the respondent. The complainant coming to know about the same booked a unit measuring 1225 sq. ft. in it and was issued a letter of allotment dated 30.08.2013 for a total sale consideration of Rs.11,23,5,575/-. A builder buyer agreement dated 31.12.2013 in this regard was executed between the parties setting out the price of the allotted unit, due date of its possession, its area, dimensions and other details. The due date for completion of project and of offer of possession of the allotted unit was fixed as 13.08.2017.
- II. That in pursuant to buyer's agreement between the parties, the complainant started making various payments against the allotted unit and paid a sum of Rs. 69,50,444/- in all.
- III. That the respondent failed to complete the construction of the project and offer of possession of the allotted unit. He made a number of oral requests in this regard, but with no positive results leading to seeking cancelation of allotment vide legal notice dated 07.02.2017. But the respondent neither send any reply to that legal notice nor cancelled the allotted unit leading to filing of complaint seeking refund of the paid-up amount besides interests and compensation.



IV. The respondent filed reply to that complaint admitting the allotment of the subject unit, its price, receipt of payment, execution of buyer's agreement and fixing the due date of possession for competition of project and offer of possession of the allotted unit. The authority vide its order dated 30.10.2018 instead of allowing refund of the paid up amount directed the respondent to deliver possession of the subject unit within a week besides paying delay possession charges on payment of the amount due. Feeling aggrieved with the same the complainant filed an appeal before the appellate tribunal bearing no. 237/2019 and wherein, vide its order dated 10.09.2020, the same along with the complaint filed before the authority were allowed to be dismissed as withdrawn with liberty to file the fresh petition before the adjudicating officer in accordance with law. So in pursuant to that order, the complainant filed a complaint seeking refund of the paid-up amount before the adjudicating officer and which was received on transfer in view of judgement passed by the hon'ble apex court in case of M/s Newtech Promoters and Developers Pvt. Ltd.. This is how, the complaint is being dealt with afresh by the authority.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):

I. To refund the entire amount of Rs.69,50,444/- along with prescribed rate of interest.

II. To pay the cost of litigation and to pay the compensation of Rs.2,00,000/- for mental agony, pain and harassment.

5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been

committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondents.

6. The respondent contested the complaint by filing reply dated 16.11.2021 on the following grounds:-:-

(i) That the instant complaint of refund is not maintainable, as the hon'ble authority after considering the entire aspect of the matter has passed an order of possession vide its order dated 30.10.2018 in complaint no. 262 of 2018 titled as **Ajay Pal Singh vs M/s Blackberry Realcon Pvt Ltd.** The said order is just and proper order and need no interference.

(ii) That the possession of the unit was offered to the complainant on 28.07.2018 i.e. during the pendency of the earlier complaint i.e. complaint no. 262 of 2018, between the same parties before authority. The authority, after considering entire aspect of the matter has passed an order of possession and not of refund. As the complainant has even withdrawn the appeal preferred by him before the Appellate Authority, the order dated 30.10.2018 attained finality. Moreover, the liberty granted to the complainant to file a fresh claim before the adjudicating officer can only be as per law and as refund has already been disallowed by the authority vide its order dated 30.10.2018, in complaint no. 262 of 2018 for non-payment of instalments. The instant complaint is liable to be dismissed as infructuous.

(iii) That at the further outset, it is submitted that the instant complaint of refund is also not maintainable before the adjudicating officer in terms of decision of the hon'ble apex court in **IREO Grace Realtech Pvt. Ltd. Vs Abhishek Khanna & Ors (2021) 3 SCC 241** wherein it was

specifically held that in cases where the respondent/builder pursuant to receipt of occupancy certificate has offered possession of the unit to an allottee, the allottee in such cases is bound to take possession of its unit with DPC, if any, and no order of refund is warranted in such cases. The ratio of aforesaid judgement is very well applicable to the facts and circumstances of the instant case. The respondent has already obtained occupancy certificate for the project on 23.07.2018 itself pursuant to which the complainant was also offered with possession of the unit on 28.07.2018. But it is the complainant who is not ready & willing of taking over possession of the unit by clearing outstanding dues. As such, in terms of **Ireo Grace (Supra)**, complainant be directed to take possession of the unit with DPC if any but subject to clearance his entire dues. It is also submitted that the adjudicating officer even does not have jurisdiction to try the complaint in terms of rule 28 & 29 of Haryana Real Estate (Regulation & Development) Rules, 2017 read with Regulation 25 of the Haryana-Real Estate Regulatory Authority, Gurugram (General), Regulation, 2018 as it is the authority which has power to grant an order of refund.

- (iv) That the complainant is not a genuine flat purchaser or consumer and has purchased the said flat for commercial and investment purposes for which the jurisdiction of the authority cannot be invoked, as the object of the Act is to protect the interests of the consumers and not the investors.
- (v) That the complainant himself has been guilty of not adhering the payment schedule, as he himself has defaulted in payment of its complete instalments in terms of agreement. The same is not



permissible in terms of Act as such, and the complaint merits outright dismissal.

(vi) That the respondent has issued several demand letters, reminder letters etc. to the complainant for payment of instalment. However, he has not only failed to make payment of the due amount but has also filed the present complaint just to harass the respondent.

(vii) That on account of failure of the complainant to take possession of the unit within 30 days of such offer, the respondent is entitled to holding charges in terms of clause 10.1 of the buyer's agreement. The possession of the unit was offered on 28.07.2018. So, in terms of clause 10.1 of the agreement, the respondent is also entitled to holding charges after 30 days from the date of such offer and till the date the complainant takes over possession of his unit by clearing its entire dues. Moreover, the respondent is also entitled to delay interest on account of the failure on the part of the complainant in not taking over possession of the unit despite the said unit was offered to him on 28.07.2018 itself.

7. 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

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

8. 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

9. 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.

10. 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.

11. 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. & Ors. (Supra.)*** 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."



12. 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 objections raised by the respondent.

F.I Objection regarding maintainability of complaint being barred by res-judicata.

13. It is contended on behalf of the respondent that the instant complaint for refund is not maintainable being barred by res-judicata, as the hon'ble authority after considering the entire aspect of the matter has already passed an order of possession vide its order dated 30.10.2018 in complaint no. 262 of 2018. However, the counsel for the complainant submitted that the earlier order was passed without subject matter jurisdiction and therefore, is null and void. Now the question before the authority is whether the present complaint filed by the complainant is barred on the principle of res-judicata.
14. In the present case, being aggrieved due to unreasonable delay in getting possession, the complainant earlier filed a complaint before authority for seeking refund along with interest against the paid amount. The said complaint was disposed of by the authority vide order dated 30.10.2018 with the direction to the allottee to take possession and disallowing the claim of refund. Thereafter, the order dated 30.10.2018 was challenged by the complainant-allottee in appeal. The tribunal allowed the appeal as well as the complaint to be withdrawn with liberty to file fresh complaint before adjudicating officer vide order dated 10.09.2020. Thereafter, the complainant filed



the present complaint before adjudicating officer and during the pendency of the said complaint; the complaint was transferred to the authority from the adjudicating officer in view of authoritative pronouncement of the Hon'ble Supreme Court with regard to jurisdictional issue. Hence, in view of the above order dated 10.09.2020 passed by the Appellate tribunal, the complaint filed a fresh is maintainable and is not barred under section 11 of Code of the Civil procedure 1908.

F.II Objection regarding entitlement of refund on ground of complainant being investor

16. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is a buyer and paid total price of Rs.69,50,444/- to the promoter towards purchase of an



apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

17. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer agreement, it is crystal clear that the complainant is an allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 000600000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And Anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant
G.I Direct the respondent to refund along with interest as per the provision of the Act.

18. The complainant booked a unit in project namely Paras Square situated in Sector 63A, Gurugram being developed by the respondent vide



allotment letter dated 30.08.2013 for a total sale consideration of Rs.1,12,35,575/-. The complainant has paid a sum of Rs.69,50,444/- till date to the respondent. A buyer's agreement dated 31.12.2013 in this regard was executed between the parties. It is observed that the complainant requested the respondent even before filing of the complaint for withdrawal from the project. The complainant vide legal notice dated 07.02.2017 requested the respondent to cancel the booking and refund of the paid up amount due to illegal and arbitrary demands raised by it as construction of the project was not completed as per the payment plan.

19. **Admissibility of grace period:** The promoter has proposed to handover the possession of the said unit within a period of 36 months from the date of start of construction. As per the documents available on record, the respondent has raised the 'Demand on account of Excavation' on 13.02.2014. Since in the present matter, the BBA incorporates unqualified reason for grace period/extended period of 180 days in the possession clause accordingly, the grace period of 180 days is allowed to the promoter being unqualified and unconditional. Therefore, the due date of handing over possession of the unit comes out to be 13.08.2017.
21. The occupation certificate of the project was admittedly received during the pendency of the previous complaint on 23.07.2018 and on the basis of which the possession of the allotted unit was offered to the complainant on 28.07.2018. But he has already withdrawn from the project by sending a legal notice dated 07.02.2017 and sought refund of the paid-up amount with interest. So, in such a situation, the complainant withdrew from the project even prior to the due date. So,



he is not entitled to refund of the complete amount but only after certain deductions i.e., 10% of the basic sale price as earnest money besides non-refundable statutory charges as per settled law of the land. Even the authority also framed a regulation in this regard known as The Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, providing 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."

21. Thus, keeping in view the aforesaid legal provision, the complainant cannot be allowed refund of the paid-up against the allotted unit and the respondent is directed to refund the paid-up amount of Rs.69,50,444/- after deducting 10% of the basic sale consideration being earnest money besides non-refundable statutory charges along with an interest @ 10.70% p.a. (the State Bank of India highest



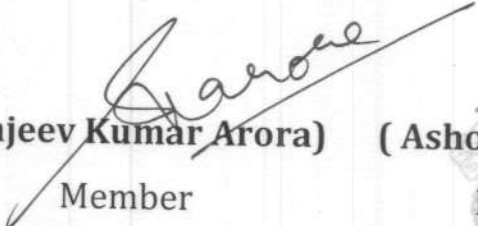
marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of surrender i.e., 07.02.2017 till actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

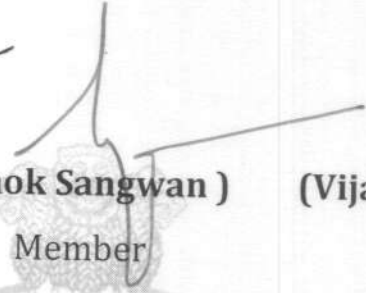
22. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (supra)*, has held that an allottee is entitled to claim compensation under sections 12, 14/18 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 seeking the relief of compensation.

H. Directions of the authority

23. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34 (f) of the Act:
24. The respondent/builder is directed to refund the paid-up amount of Rs.69,50,444/- after deducting 10% of the basic sale consideration Rs.10,16,7,500/- being earnest money along with an interest @ 10.70% p.a. on the refundable amount, from the date of surrender i.e., 07.02.2017 till date of actual refund.

25. 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.
26. Complaint stands disposed of.
27. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.04.2023


HARERA
GURUGRAM