

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

Complaint no. : 3097 of 2020
Date of filing complaint : 07.10.2020
First date of hearing : 03.03.2021
Date of decision : 17.02.2023

Rajeev Sharma R/O: - 116-B, AD Block, Pitampura, New Delhi-110034	Complainant
Versus.	
M/s SS Group Pvt. Limited Regd. Office at: - SS House, Plot no.77, Sector-44, Gurugram, Haryana-122003	Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Sh. Brahma Nand Prasad

Advocate for the complainant

Sh. Dhruv Dutt sharma

Advocates for the 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 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 allottee 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:

Sr. No.	Particulars	Details
	Name of the project	'The Leaf' , Sector -84-85, Gurugram
	Nature of the project	Group Housing Complex
	DTCP License No.	81 of 2011 dated 16.09.2011 Valid upto 15.09.2024
	RERA Registered/ Not Registered	RERA registered 35 of 2021 dated 14.07.2021
1.	Unit no.	1C, 1 st Floor, Tower-3 (BBA on page no. 34 of complaint)
2.	Unit admeasuring	1645 sq. ft. (BBA on page no. 34 of complaint)
3.	Date of booking	21.09.2014 (As per CRA)

4.	Date of execution of builder buyer agreement	21.09.2014 (on page no. 32 of complaint)
5.	Possession clause	<p>8. Possession</p> <p>8.1: Time of handing over the possession</p> <p>8.1 (a) subject to terms of this clause and subject to the flat buyer(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 complied with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty six months from the date of signing of this agreement. However, this period will automatically stand extended for the time taken in getting the building plans sanctioned. The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months or such extended period , for applying and obtaining occupation</p>

		certificate in respect of the Group Housing Complex. (Emphasis supplied).
6.	Due date of delivery of possession	01.09.2017 (calculated from the date of signing of buyer agreement)
7.	Total sale consideration	Rs. 1,05,91,425/- (as per BBA on page no. 34 of complaint)
8.	Total amount paid by the complainant	Rs. 30,42,425/- (As per CRA)
9.	Notice of cancellation of allotment	27.11.2021 (page no. 62 of reply) (Invalid cancellation as the complainant filed the complaint for refund earlier than cancellation of the allotted unit by the respondent before Hon'ble Authority)
10	Occupation Certificate	09.05.2022 (As per page no. 59 of reply)
11	Offer of possession	Not offered
12	Grace period utilization	As per the clause for possession , the developer shall be entitled to a grace period of 90 days, after the expiry of thirty six month(36) months or such

	<p>extended period for applying and obtaining the occupation certificate in respect of the Group Housing Complex. The promoter has not applied for occupation certificate within the time limit prescribed in the builder buyer agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Therefore, the grace period is not allowed</p>
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B. Facts of the complaint

3. That the complainant was allotted residential flat no- 1C on 1st floor in Tower-3 in the project of the respondent namely, "The Leaf" located at Sector 85, Gurgaon, Haryana under the construction linked plan for a total sale consideration of Rs. 1,05,91,425/-.
4. That a flat buyer agreement (FBA) should have been signed by the respondents immediately after the receipt of booking amount of Rs 7,50,000/- on 30.08.2014. Thereafter flat buyer's agreement was executed between the parties on 21.09.2014.
5. That the complainant complied all terms and condition of flat buyer's agreement and the complainant made payment in three installment within 90 days up to 30% of the total amount and the complainant made total payment a sum of rupees 30,42,429/- out of Rs. 1,05,91,425/- within stipulated period as per flat buyer's agreement.
6. That there was/is provision under clause no.8.1(a) of flat buyer's agreement executed between the respondent and the complainant that

within (36) thirty six months/three years from the date of signing the flat buyer's agreement as on from 21.09.2014 such that till 20 September 2017, the respondent would have to hand over the possession of the flat. The respondent neither complied the terms and condition of the flat buyer's agreement, handed over the possession of the flat in question to the complainant nor issued occupation certificate to the complainant and thus the respondents violated the term and conditions of the flat buyer's agreement.

7. That the complainant has at all times made payments against the demands of the respondent and as per payment schedule of the agreement pertaining to the flat, therefore the fraudulent act and conduct of the respondents needs to be penalized in accordance with the provisions of the Real Estate (Regulation and Development) Act, 2016.

C. Relief sought by the complainant.

8. The complainant has sought following relief:

- (i) Direct the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest.
- (ii) Direct the respondent to pay litigation cost.

D. Reply by the respondent.

9. That apparently, the complaint filed by the complainant is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be dismissed. No relief much less any interim relief, as sought for, is liable to be granted to the complainant.
10. That the complainant has miserably and wilfully failed to make payments in time or in accordance with the terms of the allotment/ flat

buyer's agreement. It is submitted that till date the total delay in rendering the payment towards due installments by the complainant is approx. 5283 days on various occasions under different instalments. It is further submitted that the complainant has defaulted in making timely payment of due instalments right from the inception. It is pertinent to mention here that as per the records maintained by the respondents, the complainant has not fulfilled his obligation and has not paid the instalments on time that had fallen due. The following payment sheet clearly shows the delay in number of days in making payment by the complainant:

<u>Event</u>	<u>Due Date</u>	<u>Due Amount</u>	<u>Payment Date</u>	<u>Taxes</u>	<u>Actual Amount Paid</u>	<u>Amount Unpaid (Including Taxes)</u>	<u>Days Delay</u>
At the time of booking	27.08.20 14	105175 0	27.08.20 14	37607	750000	0	0
			11.09.20 14		254002		15
			18.10.20 14		107921 5		52
Within 60 days from the date of booking	26.10.20 14	105175 0	07.11.20 14	37607	104123 0	0	12
Within 90 days from the date of booking	25.11.20 14	105175 0	22.04.20 15	37607	30.810	0	148
On Completion of Super Structure	15.06.20 18	454337 8	Not Paid		NIL	---	2528
HVAT	08.07.20 19	93369	Not Paid		NIL	---	2528
					11282 1	315525 7	5283

11. It is submitted that the complainant has frustrated the terms and conditions of the flat buyer's agreement, which were the essence of the arrangement between the parties and therefore, the complainant now

cannot invoke a particular clause, and therefore, the complaint is not maintainable and should be rejected at the threshold. That the complainant has also misdirected in claiming refund on account of alleged delayed offer for possession.

12. That the complainant has failed to make payments in time in accordance with the terms and conditions as well as payment plan annexed with the allotment letter and flat buyer's agreement and as such the complaint is liable to be rejected. It is submitted that out of the total consideration of Rs. 1,05,91,425/- of the flat, the amount actually paid by the complainant is Rs. 31,55,257/- i.e., less than 30% of the total consideration of the flat booked by the complainant. It is submitted that there was an outstanding amount of Rs. 46,36,751/- excluding interest payable by the complainant as on 27.10.2021 as per the payment plan opted by the complainant. It is submitted that the last payment was made by the complainant on 22.04.2015 and after that no payment has been made by the complainant. It is further submitted that the complainant is a real estate investor who has made the booking with the respondent only with an intention to make profit in a short span of time. However, it appears that his calculations have gone wrong on account of severe slump in the real estate market and the complainant is now raising several untenable pleas on highly flimsy and baseless grounds.
13. It is pertinent to mention here that the respondents have already completed the construction and had obtained the occupation certificate of the tower in which the unit allotted to the complainant is located. The respondent is in the position to hand over physical

possession of the said unit to the allottee; however, due to non-payment of installments the said unit was cancelled vide notice of cancellation dated 27.11.2021 and the amount deposited by the complainant was forfeited after deducting earnest money, taxes and interest, as applicable. There was NIL amount refundable, as the deposited amount was less than the forfeitable amount.

14. All other averments made in the complaint were denied in toto.
15. 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 these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

16. The respondent has 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. I Territorial jurisdiction

17. 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

18. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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.

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 respondent.

F.1 Objection regarding the complainants being investor.

19. It is pleaded on behalf of respondent that complainant is an investor and not consumer. So, he is entitled to any protection under the Act and the complaint filed by her under Section 31 of the Act, 2016 is not maintainable. It is pleaded 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 consumers of the real estate sector. It is settled principle of interpretation that preamble is

an introduction of a statute and states the main aims and 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 buyer's agreement, it is revealed that the complainants are buyers and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of the term allottee under the Act, and the same is reproduced below for ready reference:

"Z(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."

20. In view of above-mentioned definition of allottee as well as the terms and conditions of the buyer's agreement executed between the parties, it is crystal clear that the complainants are an allottees as the subject unit allotted to them by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition 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.0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. 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.1 Direct the respondent to refund to refund the entire amount paid by the complainant along with prescribed rate of interest.

21. The complainant was allotted unit no 1C, first floor in tower 3 in the project "The Leaf" by the respondent builder for a total consideration of Rs. 1,05,91,425/- and he paid a sum of Rs. ~~30,42,425~~¹⁴42,425/- which is approx. 30% of the total sale consideration. The respondent had sent various demand letters to make payment of the outstanding amount. The complainant continued with their default and again failed to make payment.
22. That the complainant received cancellation letter on 27.11.2021 due to failure of payment of due amount. Now, the issue for consideration arises as to whether the complainant is entitled for refund of the illegal deduction of earnest amount from the respondent. It is pertinent to mention here that the complainant filed the present complaint for refund much before the cancellation letter. So, the cancellation done by the respondent is invalid in the eye of law.
23. 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. The due date of possession as per agreement for sale as mentioned in the table above is 01.09.2017 and there is delay of 3 years 1 months 06 days on the date of filing of the complaint.

24. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after filing of application by the complainant for return of the amount received by the promoter on failure of 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 complainant-allottee has already wished to withdraw from the project and the allottee has become entitled his right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as the promoter fails to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return the amount received by him from the allottee in respect of that unit with interest at the prescribed rate.
25. 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 SLP (Civil) No. 13005 of 2020 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

26. 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 to the allottee, 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.
27. The authority hereby directs the promoter to return the amount received by him i.e. Rs. 30,42,425/- with interest at the rate of 10.70% (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*.

G.II That this Hon'ble Authority may direct the respondent to pay litigation cost.

28. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of compensation

G. Directions of the authority

29. 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):

- I. The respondent/promoter is directed to refund the entire amount of Rs. 30,42,425/- paid by the complainant along



with prescribed rate of interest @ 10.70% p.a. from the date of each payment till the actual date of refund.

- 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
30. Complaint stands disposed of.
31. File be consigned to registry.

V.J-3
Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 17.02.2023



HARERA
GURUGRAM