

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

Complaint no. :	2464/2022
Date of filing complaint:	25.05.2022
First date of hearing:	25.08.2022
Date of decision :	10.02.2023

Dr. Ravindra Kumar Resident of: C-24, Sushant apartments, Sushant Lok phase 1, Gurgaon.	Complainant
Versus	
M/s Neo developers Pvt. Ltd. R/o: 32B, Pusa Road, Delhi-110005.	Respondent

CORAM:	
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Complainant in person with Shri Satish Dabbas Advocate	Complainant
Shri Venkat Rao Advocate	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 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 complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Neo Square" Sector 109, Gurugram, Haryana
2.	Project area	8.237 acres
3.	Nature of the project	Commercial
4.	DTCP License	102 of 2008 dated 15.05.2008 valid up to 14.05.2024
5.	Name of the licensee	Shrimaya Buildcon Pvt Ltd. and 5 Others.
6.	RERA Registered/ not registered	Part Registration vide regd. No. 109 of 2017 dated 24.08.2017 valid up to 23.08.2021
7.	Shop no.	618, 6 th Floor, Tower A (Page no. 29 of complaint)
8.	Unit measuring (carpet area)	1022 sq. ft. (Page no. 29 of complaint)
9.	Date of allotment	15.10.2012 (Annexure C-1 Page No. 25 of complaint)
10.	Date of execution of Builder buyer agreement	15.11.2012 (Page No. 27 of complaint)
11.	Possession clause	5.2 That the company shall complete the construction of the said building/complex, within which the said space is located within 36

		months from the date of execution of this Agreement or from the start of construction, whichever is later and apply for grant of Occupation/Completion Certificate.
12.	Due date of possession	Due date comes to 15.06.2019 as per clause 5.2 of the said agreement as it was to be taken 36 months from the date of start of construction which was 15.12.2015 as was held in Ram Avtar Nijhawan versus Neo Developer in CR No.1328 of 2019 decided on 15.09.2019 as submitted by the counsel for the respondent).
13.	Total sale consideration	Rs.63,27,175/- (Original Payment plan) (Construction Linked) (Page no. 53 of reply) Rs. 63,88,939/- (As per new payment plan dated 27.07.2016) (Construction Linked) (P- 49 of complaint)
14.	Total amount paid by the complainants	Rs. 48,87,962/- (Including TDS) (As per customer statement attached on page 50 of complaint)
15.	Occupation Certificate	Not received
16.	Offer of possession	Not offered
17.	Cancellation letter	08.07.2016
18.	Withdrawal of cancellation letter	27.07.2016 (Page 60 of reply)

B. Facts of the complaint:

- That, the respondent had advertised its project namely Neo Square, Sec.109, Gurgaon, for office and commercial spaces in year 2011/2012 and promised timely delivery of the same.

4. That, the complainant booked one office space/unit (admeasuring 1022 sq, feet) bearing no. 618 (hereinafter for short referred to as the 'Office Area') in respondent's project namely Neo Square, Sec.109, Gurgaon.
5. That, the said office area/unit was offered to complainant for total sale consideration of Rs.63,88,999 /- and out of which amount, he was asked to pay Rs.14,22,333/- as booking amount. The balance sale consideration was required to be paid as per stage wise construction linked plan.
6. An allotment letter for the same was issued by the Respondent on 15.10.2012 and buyer's agreement was executed in relation to the said 'Office Area' on 15.11.2012.
7. That, the respondent had promised and assured the complainant the delivery of said office area/unit within 36 months of the agreement dated 15.11.2012. Further, as per the clause 5.6 of the agreement, it was also stipulated that in case of any delay in possession beyond 36 months, the respondent shall pay Rs.10 per sq. ft. as delayed possession charges.
8. That, after the passage of promised date of delivery of possession, the complainant approached the respondent in Jan 2016 for possession of the said Office Area. However, the respondent's directors told the complainant that project was delayed due to paucity of funds in company, and they further promised the complainant that the possession shall be handed over positively within next 6 months by June 2016.
9. Illegal acts of the respondent are also evident from the fact that in order to arm twist the Complainant in paying installments unlike

construction stage payment plan and suppress the timely possession demands, the respondent sent a false cancellation letter to the complainant on flimsy grounds. After the protest of the complainant and threat of legal action, the said cancellation letter was withdrawn, and apology was issued by the respondent.

10. That, the complainant has paid in total Rs.45,87,962/- by way of bank drafts and cheques on various dates to the respondent and has not received any offer of possession till date.

C. Relief sought by the complainant:

11. The complainant has sought the following relief(s):
- i. Pass an order to direct the respondent to refund the money Rs.45,87,962/- (Forty Five Lacs Eighty Seven Thousand Nine Hundred Sixty Two Only) paid by the Complainant towards Sale Consideration of the Office/Unit no.617 at Neo Square project of Respondent.
 - ii. Pass an order to direct the respondent to pay the interest at the rate of 18% per annum on the refundable amount to the complainant till the date of realization.
 - iii. Pass an order for cost of litigation w.r.t compensation for the present complaint.

D. Reply by the respondent

12. The complainant wished to invest in a project launched by respondent titled as "Neo Square" situated at sector-109, Gurgaon. In pursuance to that, the complainant applied for booking the unit vide application form dated 06.02.2012 and paid an amount of Rs. 2,00,000/- towards the booking amount.

13. Accordingly, the respondent allotted a Unit bearing no. 618, admeasuring 1022 Sq. ft. (*herein referred to as 'Unit'*) for a total sale consideration of Rs. 63,88,999/- in favour of the Complainants in the aforesaid Project.
14. That in the instant complaint, the complainant has not obliged its duties as per the buyer's agreement and further has not made the payments as per the agreed timeline. In these circumstances, the complainant is estopped from raising any allegations against the promoter as the complainant himself is in default. Further, not making timely payments have hampered the construction timeline and the progress of the Project o the Respondent.
15. That, the complainant has not paid the instalments since 22.05.2018 despite receiving repeated reminders. A table is being provided herein below for showing the delays on part of the Complainant in making the timely payments:

S.No.	Reminder Letter Date	Amount
1.	22.01.2020	Rs. 578,446/-
2.	30.10.2020	Rs. 479,956/-
3.	15.09.2021	Rs. 341,997/-
4.	30.09.2021 (for VAT)	Rs. 341,997/-
5.	05.11.2020 (for VAT)	Rs. 102,248/-

16. That, the Complainant had paid Rs. 45,87,962/- against the total sale consideration of Rs. 63,27,175/-, there exists vast outstanding amounts to the tune of Rs. 591,362/- that stand due and payable on part of the Complainant till date, and the rest of the amount is due on possession. That, in light of the facts mentioned herein, the Complainant cannot be allowed to take benefit of his own wrong.
17. That, according to Clause 5.2 of the Agreement the construction of the project was to be completed within 36 months from the date of execution of BBA or from the start of construction whichever is later. And in clause 5.4 additional grace period of 6 months was given to the Respondent to complete the project. However, in Clause 5.5 it was specifically recorded that in case of Force Majeure situations beyond the control of the respondent the completion date shall automatically extend.
18. That, due to force majeure situations beyond the control of the respondent, the construction of the Project was hampered. That some of the Force Majeure situations faced by the respondent are as follows, Jat reservation agitation, Demonetization, GST implications, prohibitions/directions by NGT, Covid pandemic.
19. That, the complainant has prior to the filing of the complaint has not sought any refund from the respondent, therefore, as per agreed terms, the payment made by the Complainant is liable to forfeiture of earnest money and other non-refundable charges.

20. That, the following amount shall be deducted by the respondent as per the terms of the agreement between the parties-

- I. 10% Earnest money
- II. Brokerage
- III. Marketing and advertising fee
- IV. Past-through charges
- V. Interest of pending payments

21. It is submitted that it was mutually decided between the complainant and the respondent in Clause 21 of the BBA dated 15.11.2012, that if any dispute or difference ever arises between the parties, then the same shall be referred to the arbitration.

22. Furthermore, it was also agreed between the parties in Clause 22 of the BBA dated 15.11.2012 that the courts, tribunals, and forums at Delhi shall alone have the jurisdiction concerning the transaction between the complainant and the respondent.

E. Jurisdiction of the authority:

23. 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

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.

24. 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.
25. **Objection regarding complaint not being maintainable due to presence of arbitration clause in the agreement between the parties.**



26. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains a dispute resolution mechanism clause to be adopted by the parties in the event of any dispute and the same is reproduced below for the ready reference: -

"21. Arbitration

"That in case of any dispute/difference between the parties, including in respect of the present agreement, the same shall be referred to arbitration of a sole arbitrator appointed by the chairman of the company. The venue of the arbitration shall be New Delhi and the language of arbitration shall be English. The cost of arbitration shall be borne jointly by parties."

27. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of the authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. The authority further puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, followed in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, by the National Consumer Disputes Redressal

Commission, New Delhi (NCDRC) wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force. Consequently, the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. It was also held in the latter case that the arbitration clause in agreements between the complainant and builder could not circumscribe the jurisdiction of a consumer.

28. While considering the issue of maintainability of a complaint before a consumer forum/commission in the face of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as **M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC.
29. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily. In the light of the above-

mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.

F. Findings on the relief sought by the complainant:

F.1 Direct the respondent to refund the amount of Rs. 45,87,962/- along with interest.

30. Keeping in view the fact that the allottee- complainant wishes to withdraw from the project and is 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.

31. 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....."

Then, the Hon'ble Supreme Court in the cases of *Newtech Promoters and Developers Private Limited Vs State of U.P.*



and Ors. 2021-2022(1) RCR ,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. 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

32. 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 wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.

33. This is without prejudice to any other remedy available to the allottee including compensation for which he 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.
34. The Authority hereby directs the promoter to return to the complainants the amount received by him i.e., Rs. 45,87,962/- with interest at the rate of 10.60% (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.2 Pass an order for cost of litigation w.r.t compensation for present complaint.

35. The complainant in the aforesaid relief is seeking relief w.r.t cost of litigation. 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 cost of litigation. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of cost of litigation.

G. Directions issued the Authority:

36. 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 amount of Rs. 45,87,962/- received by it from the complainant along with interest at the rate of 10.60% p.a. 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 deposited amount.
- 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.

37. Complaint stands disposed of.

38. File be consigned to the Registry.


Sanjeev Kumar Arora

(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.02.2023