

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

Complaint no. : 5125 of 2019
Complaint filed on: 20.11.2019
Date of order : 16.05.2023

Ms. Saloni Ahuja

R/o: - 391, Teliwara, Shahdara Delhi- 110032

Complainant

Versus

1. M/s Lotus Green Developers Private Limited.

Regd. office: Lotus Business Park, Level-7, Tower- B, Plot No. 8, Sector- 127, Noida, U.P. – 201304

2. M/s Bright Buildtech Private Limited.

Regd. office: D-107, Panchsheel Enclave- 1, New Delhi- 110017

Respondents

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

Sh. Vishal Mehra (Advocate)
Sh. Deeptanshu Jain (Advocate)
Sh. Aishwary Jain (Advocate)

Complainants
Respondent no. 1
Respondent no. 2

ORDER

1. This 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 details

2. The particulars of unit, 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. No.	Heads	Information	
1.	Name and location of the project	"Woodview Residences", Sector 89-90 Gurugram, Haryana	
2.	Nature of the project	Plotted Colony	
3.	Area of the project	101.081 acres	
4.	DTCP License	59 of 2013 dated 16.06.2013	
	valid up to	15.07.2021	
	Licensee name	Orris Land & Housing Pvt. Ltd. and 42 others	
5.	RERA registered/ not registered	Registered vide no. 34 of 2020 dated 16.10.2020	
	Valid up to	15.07.2023	
6.	Unit no.	Old Unit details	New unit details
		B-15, under ground floor, pocket-1, (Page no. 60 of the complaint)	B-42, under ground floor, pocket-1, (Page no. 87 of the complaint)

7.	Total area admeasuring	1090 sq. ft. (Page no. 60 of the complaint)	1090 sq. ft. (Page no. 87 of the complaint)
8.	Allotment Letter	11.02.2015 (Page no. 54 of the complaint)	20.06.2016 (Page no. 56 of the complaint)
9.	Date of execution of buyer's agreement	11.09.2015 (Page no. 59 of the complaint)	19.12.2016 (Page no. 84 of the complaint)
10.	Possession clause	<p>Clause 5(I)</p> <p>The company shall endeavor to complete the construction of the building block in which the dwelling unit is situated within 36 months, with a grace period of 6 months from the date of issuance of allotment letter provided that all amounts due and payable by the buyer has been paid to the company in timely manner.</p>	
11.	Due date of delivery of possession	<p>20.12.2019</p> <p>(Calculated from date of allotment letter dated 20.06.2016 + 6 months)</p> <p>(Grace-period allowed)</p>	
12.	Total consideration	<p>Rs.82,38,117/-</p> <p>(As per payment plan page no. 103 of the complaint)</p>	
13.	Total amount paid by the complainant	<p>Rs.27,69,198/</p> <p>[As per applicant ledger at page no. 105 of the reply]</p>	
14.	Date of offer of possession	Not offered	
15.	Occupation certificate	Not obtained	

B. Fact of the complaint

3. The complainant has made the following submissions: -

- I. This complaint is preferred under section 31 read with section 18 of the Act, 2016 for the benefit of the complainant, who is buyers in a residential real estate project. By way of this complaint, the complainants seek the relief of refund contemplated under section 18 i.e., the refund of the entire amount of Rs.27,69,198/- along with Interest deposited towards the total consideration of Rs.82,38,177/- their respective unit "B-42-UGF" with interest of 12% p.a. in the project 'Wood view Residences' sector 89 & 90, Gurgaon (Haryana).
- II. That the date for giving possession has expired for the complainant of the dwelling unit and the project is still at the stage of skeletal structure even after expiration of 6 years of the launch of the project. The complainant has paid allotment money of Rs.8,00,000/- towards the price of the dwelling unit pursuant to the representations made by the respondents. The entire episode and dealings with the respondents have caused much anguish and frustration to the complainants and can no longer afford to wait and are forced to seek a refunded of the entire principal amount paid along with 12% interest p.a. compounded annually.
- III. That the balance of convenience lies in favour of the complainant who has invested hard-earned savings with the respondents. Thus, she has humbly requested this authority to allow the complaint.

- IV. That the complainant is aggrieved by the deficiency of service and unfair trade practices adopted by the respondents. They have grossly aggrieved by their act of not starting with the construction of the property/dwelling units even after expiration of the time for delivering such possession.
- V. She has invested life savings to make payments to the respondents. The failure of the respondents to deliver possession of the units (which are currently languishing at the stage of incomplete skeletal structures) has caused immense pressure and financial burden on the complainant.
- VI. That the complainant continuously inquired about the project almost 1.5 years after paying the booking amount on 11.02.2015 and was found no development was there and the project got delayed so my client fed. The unfair trade practices of the respondents are evident from the fact that if allottees defaulted in making payments of any installments, the same would have invited forfeiture and cancellation at their option.
- VII. That the facts which make the filing of the present complaint necessary are enumerated herein below.
- That the respondents launched the project in the name of 'Wood view residence' in 2013-14 and offered to public at large to apply for residential unit.

- That the complainant and the other allottees were influenced by the advertisement and assurance regarding the delivery period and quality of the project and were allured by the respondents to apply for the units in the project of the respondents.
- That the complainant had applied for booking an independent floor measuring 1090 sq. ft./101.26 sq. mts. bearing unit no. B-42-UGF vide allotment letter dated 11.02.2015.
- That the complainant made payment of Rs.8,00,000/- at the time of booking on 29.11.2014. That aggrieved by the lack of progress in the project even after the due date of the completion of the project, the complainants sent legal notices to both the respondents.
- That the respondents have grossly failed to deliver possession to the complainant. The dwelling units in the project are languishing at the stage of skeletal structures, and that the non-completion of the project is not attributable to any circumstance provided for the force majeure clause of the builder buyer's agreement.
- That the respondents have breached the terms of the agreement entered into with the complainants and failed to deliver the unit by the agreed possession date. The conduct, deficiency of service and unfair trade practices employed by the respondents have caused harassment and immense mental agony to the complainants and she is entitled to refund of the

total amount deposited along with an interest of 12% p.a. from the date of deposits/payments.

VIII. That the respondents being the builder and marketer respectively are enjoying the substantial amount of consideration paid by her and other allottees of the project. On the other hand, they after having paid substantial amount of consideration towards the unit are still empty handed. They have wasted several years in attempting to purchase a home and have also lost out on other interest yielding investments.

IX. That the cause of action arose when the respondents failed to handover the possession of the unit as agreed upon. The cause of action is a continuous one and continues to subsist as the respondents has not redressed the grievances of the complainant.

C. Relief sought by the complainant:

4. The complainant sought following relief(s):

I. Direct the respondent to refund the amount of Rs.27,69,198/- received by him in respect of the dwelling unit allotted to her along with prescribed rate of interest.

5. On the date of hearing, the authority explained to the respondent/promoters 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 respondents have contested the complaint on the following grounds.

- I. That the respondent no.1, i.e., Lotus Greens Developers Pvt. Ltd. (presently. known as "Broad Homes Private Limited") is only the group company of the respondent no. 2 and has initially marketed the project which is being developed by the respondent No. 2. It is pertinent to mention that there is no privity of contract between the respondent no. 1 and the complainants, and it does not owe any responsibility whether contractual or otherwise, so far as the completion and delivery of the units in the project is concerned. Hence, the name of the respondent no.1 be deleted from the array of parties.
- II. That the respondent No.2 (Bright Buildtech Pvt. Ltd.) which is a group company of the respondent no.1 is developing the project namely "Wood view Residences" on its share in the project land admeasuring 101.081 acres situated at revenue estate of village Hayatpur, Sector 89 and 90, Gurugram. It is pertinent to mention that the respondent no.2 has appointed M/s. Ace Mega Structures Private Limited (hereinafter referred as "Ace") as development manager for development, construction, sales and marketing of the project vide development management agreement' dated 23.05.2019 with the objective of ensuring expeditious development of the project and to provide professionally proficient customer-care interaction. The role and responsibility of 'Ace' was restricted to manage and supervise the construction and development of the said project and to ensure

- timely completion. The status of 'Ace' is purely that of a service provider who shall receive a fee as consideration for providing project management and development services to the respondent no. 2.
- III. That at the time of submitting the application, she was provisionally allotted 'dwelling unit no. B-15-UGF, subsequently, the complainant addressed a letter dated 04.05.2016, whereby the complainant requested to the respondents for swapping the allotment of unit no. 15, UGF to unit no. B-42, UGF block- B in the said project. That the said letter along with the affidavit of the complainant. The said request of the complainant was considered by the respondents and accordingly, the new builder buyer's agreement dated 16.12.2016 was executed between the parties. She was allotted the above-mentioned unit at the basic sale price plus EDC, IDC charges plus club members fee plus interest free maintenance security totalling to Rs.82,38,177/-.
- IV. That the complainant at the time of submission of the application form opted for 'construction linked payment plan' and the detailed payment plan in respect of the said dwelling unit was sent to the complainants along with allotment letter dated 11.02.2015. At the time of booking of the said dwelling unit, they had also deposited the booking amount of Rs.8,00,000/-. Accordingly, the respondent

- /promoter had issued a payment acknowledgment receipt in respect of the receipt of the booking amount.
- V. That the complainant was required to pay the due installments as per the payment schedule, in respect of the said unit. However, the payment schedule was never adhered to by the complainant. Pertinently, the respondent/promoter issued demand notices and reminder letters to the complainants on several occasions calling upon them to make the timely payment of the due installments. Later, on 11.09.2016 and 16.12.2016, builder buyer agreement was executed and copy of the said agreement was sent to the complainants for their record. Since the respondent surrendered unit no. B-15 UGF, as such on her request another unit no. B-42, UGF was allotted to her, and the fresh buyer's agreement was executed.
- VI. However, instated of making timely payments of the complainant sent a legal notice dated 27.07.2019, calling upon the respondents to refund the complete amount along with interest @ 12% p.a., which was duly replied by the respondent no. 2. The respondent/promoter has duly informed the complainant that such arbitrary demands cannot be entertained, and the allotment cannot be cancelled, as the amounts paid has already been utilized in the construction of the said project. Furthermore, the said aspect was duly discussed with the complainants, and it was informed that the respondent/promoters are not in a position to entertain the request of cancellation and

refund and therefore, they should make the timely payment of the installments overdue. Even then, the complainants remained negligent and neither fulfilled their part of contract nor paid the instalment, as per the agreed payment plan.

- VII. That the complainant who are at fault in not making timely payment of due instalments and the construction of the said project became delayed. Non- payment of the instalments by the allottees is a force majeure circumstance. Furthermore, the other reasons for delay in project are stoppage of construction activities in NCR region by the orders of Court, non-availability of construction material and labour, implementation of nationwide lockdown' to contain the spread of 'Covid-19', etc. Moreover, all these situations and adverse conditions are 'force majeure' circumstance beyond the control of the respondents.
- VIII. That the complainant is well aware of the fact that the respondent /promoter has appointed the development manager 'Ace Mega Structures Pvt. Ltd.' for construction and completion of the said project. The respondent/promoter vide letter dated 03.10.2019 informed them about the appointment of the "development manager" who was responsible for all activities including the construction and sales of the project as per the development management agreement (DMA) dated 23.05.2019.

- IX. That the said project is reasonably delayed because of 'force majeure' situation beyond the control of the respondent/promoter. The respondent/promoter has filed the application for change of developer (COD) with the concerned authority i.e., Director General Town and Country Planning' (DGTCP) for the inclusion of the name of the 'co-developer' 'i.e., Bright Buildtech Pvt. Ltd., which is pending adjudication before the concerned authority. However, despite all odds, still, the respondent/ promoter along with development manager 'Ace' is making all efforts to complete the construction work at project site at full pace and is expecting to handover the possession very soon, once the present situation of pandemic 'Covid-19' gets over and situation normalizes.
- X. That due to the exponential increase in the cases of 'Covid-19', the Central Government imposed nationwide lockdown' w.e.f. 25.03.2020 which was extended till 30.06.2020 and resultantly the same is causing serious impact on the economy posing difficult challenges for everyone. It is pertinent to mention that prior, to this unprecedented situation of pandemic Covid-19', the respondent no.2 along with the development manager had been carrying out the construction of the project at full pace and was expecting to deliver the units to the buyers by the end of year 2020. However, due to the sudden outbreak of the pandemic and closure of economic activities, the respondents too are experiencing the liquidity crunch, as such,

amid, this difficult situation of 'force majeure' they were not in a position to adhere to the arbitrary demands of the complainants for cancellation of the allotment and refund of the monies along with interest due the reasons mentioned hereinabove. Although, considering the seriousness of the situation and prevailing circumstances caused due to implementation nationwide lockdown, the Government of India has already extended the project completion deadlines by 6 months from the commencement of lockdown period. Therefore, it was expected to complete the entire project within the extended time period and deliver the flat/ unit to the complainants very soon.

- XI. That the natural life cycle was about to come back on track which was derailed in March 2020 and the sudden outbreak of second wave of pandemic of COVID in April 2021 in the nation made the situation worst from worse and the country once again was under the grip of COVID and subsequently, lockdown was imposed in the country all over once again. It is further submitted that the second wave caused severe damage to the economy and real estate sector being no exception was hit the worst.
- XII. That other than the above reasons, there was delay in handing over of the possession of the allotted unit due to the various reasons which were beyond the control of the respondent no. 2. Following

important aspects are relevant submitted for the kind consideration of this authority: -

- a) Non-booking of all apartments seriously affected the construction: - It is submitted that the global recession badly hit the economy and particularly the real estate sector. The construction of project is dependent on the amount of monies received from the bookings made and monies received henceforth, in form of instalments paid by the allottees. However, it is submitted that during the prolonged effect of the global recession, the number of bookings made by the prospective purchasers reduced drastically in comparison to the expected bookings and anticipated by the respondent no.2 at the time of launch of the project. The reduced number of bookings along with the fact that several allottees of the project either defaulted in making payment of the instalment or cancelled booking in the project, resulted in less cash flow to the respondent no.2, henceforth, causing delay in the construction work of the project.
- b) Lack of adequate sources of finance;
- c) Shortage of labour;
- d) Rising manpower and material costs;
- e) Approvals and procedural difficulties.
- f) There was extreme shortage of water in the region which affected the construction works.



- g) There was shortage of bricks due to restrictions imposed by Ministry of Environment and Forest on bricks kiln,
- h) Unexpected sudden declaration of demonetization policy by the Central Government, affected the construction works of the respondent in a serious way for many months. Non-availability of cash-in-hand affected the availability of labours.
- i) Recession in economy also resulted in availability of labour and raw materials becoming scarce.
- j) There was shortage of labour due to implementation of social schemes like National Rural Employment Guarantee Act (NREGA) and Jawaharlal Nehru Urban Renewal Mission (JNNURM).
- k) Direction by the Hon'ble National Green Tribunal & Environmental authorities to stop the construction activities for some time on regular intervals to reduce air pollution in NCR region.
- l) Due to the increase in pollution in National Capital Region, the Hon'ble Supreme Court of India vide Order dated 04.11.2019 passed in **Writ Petition (Civil) No. 13029 of 1985 titled as "M.C. Mehta-Versus- Union of India & Ors"** had put restrictions on various construction activities. It is reiterated herein that the company was attempting to make its best efforts to complete the construction works and to give

possession of the flat to the allottees as soon as possible. It is submitted that the whenever the construction activity has stopped at the project site, it is due to the above said reasons of 'force majeure' beyond the control of the respondent no.2. Therefore, the unfair and unreasonable demands of the complainants be not entertained. It is submitted herein that the respondent no.2 is attempting to make its best efforts to complete the construction work and to give possession of the unit' to the allottees as soon as possible.

XIII. That the project. is at advanced stage of construction and is complete to the extent of 70%. Therefore, in view of the same, the complainants should not be allowed to raise unreasonable demands which can materially affect the entire project. It is submitted that the respondent no.2/Bright Buildtech Pvt. Ltd. has launched 420 numbers of independent floors to be constructed on 140 plots. Out of the total number 258 floors/units were sold by the company till date and the company is expecting to handover the possession of sold units on or before June 2022.

XIV. That the complainant had applied for the allotment of the unit as investment and not for personal use, which fact is abundantly clear and evident from their conduct. The complainants invested in the unit with intent to have monetary gains by way of reselling the unit to a higher bidder at an appreciated value.

XV. That on 03.02.2021, Secretary RERA, Haryana has filed an affidavit before **Hon'ble Supreme Court of India in SLP (Civil) No. 13005/2020 titled as "M/s. Sana Realtors Pvt. Ltd. vs. Union of India & Ors."**, wherein, at Para Nos. 43 to 46 of the Counter Affidavit, it has been submitted as under:

In the cases where the projects are delayed inordinately i.e. delay ranging from 2 to 10 years, the RERA Act and RERA Rules provide that in the event of delay, compensation shall be paid @SBI-MCLR +2% per year, which usually works out to simple interest@ of about 10%. It is further submitted by RERA, that keeping in view the overall interest of parties and in exercise of the regulatory functions the Authority can come to the finding that the compensation for the entire period of delay for entire period prior to enactment of RERA Act, 2016 be paid at the rate provided in Rule 15 of the RERA Rules and this provision can be made applicable on all the previous agreement also delay irrespective of period"

In view of the above stand of before the Hon'ble Supreme Court, in the cases of delay in completion of projects, the HRERA provides for compensation, keeping in view the overall interest of the parties. As such, this authority should take into account the adverse circumstances which were beyond the control of the respondents, and which has led to the delay in completion of project. However, the respondents are endeavourings to finish the project on or before June 2022. Therefore, this authority should not consider the prayer of refund of monies.

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 these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

8. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection 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

9. 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

10. 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.

11. 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 complainants at a later stage.
12. 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. (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.”

13. 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. Objections regarding the complainants being investors.

14. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, she is not entitled to the protection of the Act and 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 consumer 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 the 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.27,69,198/-** 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 and 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;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement cum provisional allotment letter executed between promoter and complainant, it is crystal clear that she is an allottee(s) as the subject unit 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 "investors". 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) 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 allottees being investors is not entitled to protection of this Act also stands rejected.

F. II Objection regarding force majeure conditions:

15. The respondent/promoters have raised the contention that the construction of the tower in which the unit of the complainants is situated, has been delayed due to force majeure circumstances such as delay on part of the developer M/s. Ace Mega Structures Private Limited, shortage of labour, implementation of various social schemes by Government of India, demonetisation, lockdown due to covid-19 various orders passed by NGT, weather conditions in Gurugram and non-payment of instalment by different allottees of the project etc. But all the pleas advanced in this regard are devoid of merit. The plea advanced that the developer has failed to handover the possession of project on time as per 'development management agreement' entered between them on dated 23.05.2019. It is observed the plea advanced cannot be taken as the complainant was never a party to said contract and thus, there was no privity of contract. Further, the respondent has taken a plea that there was a delay in construction of the project on account of NGT orders, orders by EPCA, orders by Hon'ble Supreme Court of India, etc but did not particularly specified that for which period such orders has been made operative for. Though some allottees 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 on hold due to fault of some of the allottees. Thus, the promoter respondents cannot be given any leniency on based of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.

F.III Objection regarding delay in completion of construction of project due to outbreak of Covid-19

16. The Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020*** dated 29.05.2020 has observed as under:

69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

17. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 20.12.2019. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period cannot be excluded while calculating the delay in handing over possession.

F. IV. Objection with regard to mis joinder of respondent no. 1 in the complaint.

18. While filing the complaint the complainant sought relief against M/s Lotus Green Developers Private Limited and Bright Buildtech Private Limited being the developers of the project. On failure to fulfil their

liability to complete the project by the due date, the complainants approach the authority seeking relief of refund the amount received against the allotted unit. A perusal of various documents placed on the record shows that respondent no. 2 is a group company of respondent no. 1 i.e., Lotus Green Developers Private Limited now known as "Broad Homes Private Limited". It is not disputed that the allotment of the unit in favour of the complainant was made by the respondent no. 2 though its group company i.e., of respondent no. 1. The buyer's agreement with regard to the allotted unit was executed between the complainant and respondent no. 2. Even after allotment and buyer's agreement, demands for various payments were raised against the allotted unit by respondent no. 2 only. Thus, it shows that there is no privity of contract between respondent no. 1 and the complainant and as such the plea of the respondent no. 1 is valid and thus, would be justified to delete his name from array of party.

G. Findings on the relief sought by the complainant

G.1 Direct the respondent to refund the amount of Rs.27,69,198/- received by him in respect of the dwelling unit allotted to her along with prescribed rate of interest.

19. The complainant was allotted a unit bearing no. B-15, UGF in the project of the respondents detailed above on 11.02.2015 for a total sale consideration of Rs.82,38,117/-. The builder buyer's agreement was executed on 11.09.2015. Thereafter, she was request to the respondent/promoter vide letter dated 04.05.2016 to request to change the allotment to another unit. The said request was considered by the

respondents and thereby allotted a new unit bearing no. B-42 UGF on 20.06.2016 and the builder buyer agreement executed in this regard on 19.12.2016. The possession of the subject unit was to be offered within 36 months with a grace period of 6 months from the date of issuance of allotment letter. The due date of completion of project and offering possession of the unit comes out 20.12.2019. But the respondents failed to carry out the construction of the project and which led to their withdrawal from the project and seeking refund by filing of complaint. However, the complainant has approached the authority on 20.11.2019 i.e., before due date of handing over of possession. She also made request to the respondent/builder through legal notice dated 27.07.2019 i.e., before due date of handing over of possession seeking refund against the allotted unit.

20. As per clause 4.6 of the agreement to sell dated 19.12.2016, talks about cancellation/withdraw by allottee. The relevant part of the clause is reproduced as under: -

It is agreed between the Parties that, 10% of the Basic Sales Price of the Dwelling Unit shall constitute as the "Earnest Money" which is liable to be withheld/ deducted by the Company in case of default/ breach by the Buyer of any terms and conditions of this Agreement and on cancellation of booking/allotment for any reason whatsoever. The Buyer agrees and acknowledges that the Earnest Money shall, at all times, be a non-refundable deposit and constitute a genuine pre-estimate of the damage accruing to the Company, in the event of the failure of the Buyer to comply with its obligations for the booking/allotment/payment. Pursuant to such cancellation/withdrawal of the Allotment, the Buyer shall have no right, title, lien, claims or demands whatsoever against the Dwelling Unit and/or the Company and the Company shall have all the rights to

deal with the Dwelling Unit in whatever manner as it may deem fit.

21. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

"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."

22. It is evident from the above mentioned facts that the complainant paid a sum of Rs.27,69,198/- against basic sale consideration of Rs.82,38,117/- of the unit allotted on 20.06.2016. There is nothing on the record to show that the respondent acted on those representations of the complainant. Though the amount paid by the complainant against the allotted unit is about 33.6% of the basic sale consideration but the respondent/promoter bound to act and respond to the pleas for surrender/withdrawal and refund of the paid-up amount.

23. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainant against the

allotted unit and is directed to refund the same in view of the agreement to sell for allotment by forfeiting the earnest money which shall not exceed the 10% of the basic sale consideration of the said unit as per payment schedule and shall return the balance amount along 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 surrender i.e., 27.07.2019 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

24. 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 no. 2 is directed to refund to the complainant the paid-up amount of Rs.27,69,198/- after deducting 10% as earnest money of the basic sale consideration of Rs.82,38,117/- with interest at the prescribed rate i.e., 10.70% is allowed on the balance amount, from the date of surrender i.e., 27.07.2019 till date of actual 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.

25. Complaint stands disposed of.

26. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.05.2023



HARERA
GURUGRAM