



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

Complaint no. : 4676 of 2022
Date of filing complaint : 28.06.2022
Date of decision : 21.03.2023

Nikita Kukreja R/O: - Mona Cottage, 7/181, A-2, Swaroop Nagar, Kanpur, Uttar Pradesh-208002.	Complainant
Versus	
1. M/s BPTP Limited 2. M/s Countrywide Promoters Pvt. Ltd. Regd. Office at: - M-11, Middle circle, Connaught Circus, New Delhi-110001	Respondents

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Ravi Kumar	Advocate for the complainant
Sh. Harshit Batra	Advocate for the respondents

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 complainants, 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	"Terra", Sector- 37-D, Gurugram
2.	Nature of project	Group Housing Towers
3.	RERA registered/not registered	Registered 299 of 2017 dated 13.10.2017
4.	DTPC License no.	83 of 2008 dated 05.04.2008 94 of 2011 dated 24.10.2011
	Validity status	04.04.2025 23.10.2019
	Name of licensee	SUPER BELTS COUNTRYWIDE PVT. LTD and 3 others PROMOTERS PVT LTD and 6 others
	Licensed area	23.18 acres 19.74
7.	Unit no.	T-22-1803, Tower 22 [As per page no. 34 of complaint]
8.	Unit measuring	1691 sq. ft. [As per page no. 34 of complaint]
9.	Date of execution of Flat buyer's agreement	24.01.2013 (Page no. 25 of complaint)
10	Allotment Letter	07.12.2012 (page no. 21 of complaint)

11.	Possession clause	<p>5. Possession</p> <p>5.1 The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser(s) within e Commitment Period. The Seller/Confirming Party shall be additionally entitled to a Grace Period of 10 days after the expiry of the said Commitment Period for making offer of possession of the said Unit.</p> <p>1.6 "Commitment Period" shall mean, subject to, Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC). Stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyer's Agreement, whichever is later.</p>
12.	Due date of possession	<p>28.07.2016</p> <p>(Calculated from the date of execution of buyer agreement as sanction letter of building plan is</p>

		not placed on record)
13.	Total consideration sale	Rs. 1,09,95,306/- [as per payment schedule on page no. 22 of complaint]
14.	Total amount paid by the complainant	Rs. 59,54,709/- (As alleged by the complainant)
15.	Occupation certificate dated	Not obtained
16.	Offer of possession	not offered

B. Facts of the complaint

3. That the complainant booked a 3 BHK apartment on 07.09.2012 bearing an apartment no. T-22-1803 in tower- T22 having a super area of 1691 sq. ft. in the project "Park Terra", Sector -37D, Gurugram. The apartment was booked for a total sale consideration of Rs. 1,09,95,306/- under the subvention payment plan.
4. That the parties entered into flat buyer's agreement dated 24.01.2013. In compliance with the terms of the agreement and payment schedule, the complainant made regular payments towards the total sale consideration for the said apartment. She made a total payment of Rs.59,54,709.2/- towards the total sale consideration. However, there is more than 5 years delay in handing over possession of the said apartment and there has been no progress in the construction of the apartment.
5. That the complainant made several follow up calls to the officials of the respondents seeking the progress of the construction and requesting for handing over the possession of the said apartment, which was duly received and acknowledged by the respondents. But there was no satisfactory response from the respondents with regard to same.

6. That almost 5 years have lapsed now from the date when the respondents promised to deliver possession of the said apartment to the complainant. Despite passing of that time the respondents had deliberately failed to handover the possession of the unit to the complainant.
7. That the respondents have misappropriated the hard earned money of the gullible complainant for their self use without utilizing the same for the said project, resulting in almost abandoning the construction work in between for which are liable to refund the principal amount along with an interest besides compensation for the harassment, mental agony and litigation charges.

B. Relief sought by the complainant:

The complainant has sought following relief(s):

- To direct the respondents to refund the entire amount paid by the complainant along with prescribed rate of interest.
- Litigation Cost.

C. Reply by the respondents

8. It is submitted that the complainant has approached this Hon'ble Authority for redressal of her alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of cases has laid down strictly, that a party approaching the Court/Authority for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the Court/Authority and in such situation, the

complaint is liable to be dismissed at the threshold without any further adjudication.

- a) That the complainant has concealed from this hon'ble authority that on various occasions, she conveniently defaulted in remitting the timely payments qua the demands raised by the respondents due to which they on various occasions was constrained to issue reminder letters/ notices such as on 21.08.2013, 20.06.2014, 09.11.2015, 09.12.2015, 22.08.2016, 09.10.2016, 13.01.2016, 05.01.2017 and final demand notice on 17.02.2016 and 17.02.2017 requesting therein for the immediate payment of the outstanding dues, Hence, the acts of the complainant are in complete derogation of the provisions of the Act of 2016 and Clause 7 of the flat buyer agreement dated 24.01.2013.
- b) The complainant has further attempted to conceal from this Hon'ble Authority that the construction of her unit as well as the tower in which the said unit is situated has been duly completed by the respondents in terms of the FBA. Subsequently an application for the grant of occupancy certificate ("OC") has been made by the respondents to the Department of Town and Country Planning ("DTCP"), Haryana, on 18/01/2021, prior to the receipt of which they are lawfully bound to not to release the offer of possessions to the complainant for the unit in question.
- c) The complainant has further misled this hon'ble authority by stating that the respondents never informed about the status of the project. However, it is submitted that the

respondents being the customer-centric organization have sent various construction update emails to the complainant.

From the above, it is very well established, that the complainant has approached this Hon'ble Authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the complainant is to unjustly enrich herself at the expense of the respondents by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that in light of the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.

9. It is submitted that the construction of the project was going on in full swing, however, the same got affected initially on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. Vide its order NGT placed sudden ban on the entry of diesel trucks of more than ten years old and directed that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly came of halt. So, after the lifting of the ban it took some time for mobilization of resources by various agencies employed with the respondents. Thereafter, the Environment Pollution (Prevention and Control) Authority, EPCA, imposed a ban on the construction activities within the Delhi-NCR region expressing alarm on severe air pollution level. The said ban w commenced from 31/10/2018 and was initially subsisted till 10/11/2018 whereas the same was further extended till 12/11/2018.
10. The construction of the unit is going on and the respondents would offer possession soon, as they invested the resources from the external

sources. However, it be noted that due to the sudden outbreak of present pandemic of novel coronavirus (COVID 19), construction came to a halt and it took some time to get the labour mobilized at the site. However, the respondents are hopeful to handover possession of the unit in question at the earliest.

11. It is germane to mention herein that the construction was further affected by the ban announced by the Commission for Air Quality Management ("CAQM") on 16.11.2021 on the directions issued by the Hon'ble Supreme Court of India whereby it banned the construction and demolition activities in Delhi-NCR region along with calling curbs on polluting sources such as banning the entry of the trucks into Delhi, except those carrying essential items which was thereafter lifted by the Hon'ble Supreme Court on 25.11.2021.
12. That the project in question was launched in August 2012. It is submitted that while the total number of flats sold in the Project "Terra" is 401, for non- payment of dues, 78 bookings/ allotments have since been cancelled. Further, the number of customers of the project "Terra" who are in default of making payments for more than 365 days are 125. Hence, there have been huge default in making payments of various instalments by large number of applicants in the project.
13. All the averments made in the complaint are denied in toto.
14. 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

15. 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

16. 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

17. 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.

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.

18. 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 promoters leaving aside

compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the relief sought by the respondents.

F.I Objection regarding delay due to force majeure.

19. The respondent-promoter raised the plea that the construction of the project was delayed due to force majeure conditions such as ban announced by the Commission for Air Quality Management (CAQM), 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 flat buyer's agreement was executed between the parties on 24.01.2013 and the events taking place such as ban announced by the Commission for Air Quality Management (CAQM), Covid-19, etc. do not have any impact on the project being developed by the respondents. 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 some of the allottees. Thus, the promoter respondents cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainants.

G. I Direct the respondents to refund the entire amount paid by the complainant along with prescribed rate of interest.

20. 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 promoters in respect of the unit with interest on failure of the promoters 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 28.07.2016 and there is delay of 5 years 11 months on the date of filing of the complaint.

21. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoters. 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.....”

22. 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 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

23. The promoters are 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 promoters are 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 her in respect of the unit with interest at such rate as may be prescribed
24. The authority hereby directs the promoter to return the amount received by him i.e., Rs 59,54,709/-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*.
25. **Admissibility of refund at prescribed rate of interest:** The complainant is seeking refund at the prescribed rate of interest on the amount already paid by her. However, proviso to section 13 provides that where an allottee does not intend to withdraw from the project, he

shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

26. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
27. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 21.03.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
28. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the

allottees, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause— the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

29. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges

Litigation Cost:

30. 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 for seeking the relief of compensation

F. Directions of the Authority:

31. 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 /promoters are directed to refund the amount paid by the complainant i.e., Rs. 59,54,709/- along with interest @10.70% 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 amount.
 - ii) A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.
32. Complaint stands disposed of.
33. File be consigned to the Registry.


(Sanjeev Kumar Arora)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 21.03.2023