

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

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| Complaint no. | : | 5380 of 2022 |
| Date of complaint: | | 26.07.2022 |
| Date of decision | : | 21.03.2023 |

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| Rohit Gupta R/o: - R-30, Greater Kailash-1, New Delhi-110048. | 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:

| | |
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| Shri Vijay Kumar Goyal | Member |
| Shri Sanjeev Kumar Arora | Member |

APPEARANCE:

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| Sh. Dalip 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 allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

| S. No. | Heads | Description |
|--------|--|---|
| 1. | Name of the project | 'Amstoria', Sector 102 & 102A, Gurugram, Haryana. |
| 2. | Nature of the project | Residential |
| 3. | Project area | 108.068 acre |
| 4. | DTCP license no. and validity status | 58 of 2010 issued on 03.08.10 and valid upto 02.08.2025 |
| 5. | Name of the license holder | Shivanand Real Estate Pvt. Ltd. |
| 6. | RERA registration number | Not registered |
| 7. | Date of execution of floor buyer's agreement | 17.08.2012 (On page no. 16 of complaint) |
| 8. | Date of building plan | 05.10.2010 |
| 9. | Unit no. | A-130-FF (On page no. 22 of complaint) |
| 10. | Unit area admeasuring | 1999 sq. ft. |

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|-----|--------------------------------------|--|
| | | (On page no. 22 of complaint) |
| 11. | (Basic sale price) | Rs. 1,07,93,001/- (As per BBA) |
| 12. | Total amount paid by the complainant | Rs. 84,14,154/- (As alleged by the complainant, on page no. 9) |
| 13 | Possession Clause | <p>5.1 Subject to Force Majeure, as defined in Clause 14 and further subject to the Purchaser(s) having pled with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) being in default under any part of this Agreement including but not limited to the timely payment of such and every installment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as orbred by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the Physical possession of the said unit to the Purchaser(s) within a period of 24 months from the date of sanctioning of the building plan or execution of floor buyers agreement, whichever is later Commitment Period"). The Purchaser(s) further agrees and understands that the Seller/Confirming Party shall additionally be entitled to a period of 180 days ("Grace Period") after the</p> |

| | | |
|-----|------------------------------------|---|
| | | expiry of the said Comment Period to allow for filling and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony. |
| 13. | Due date of delivery of possession | 05.10.2014 (Calculated from the date sanctioning of building plan being later) Inadvertently mentioned as 27.06.2014 in proceeding dated 21.03.2023 |
| 14 | Occupation Certificate | Not obtained |
| 15 | Offer of possession | Not offered |
| 16 | Grace period | Grace period is not allowed |

B. Facts of the complaint

The complainant has made the following submissions in the complaint: -

3. That the complainant booked a unit no. A-130-FF, in the project Amstoria vide floor buyer's agreement dated 17th August, 2012 at basic sale price of Rs. 1,05,78,000 /- exclusive of certain other charges like PLC, development charges, club membership fees, interest free maintenance security, electrification charges, power back up, water connection etc.
4. That undisputedly since date of booking till date a sum of Rs. 84,14,154/- has already been paid by complainant i.e., 80% of total basic sale price.
5. That complainant through his representative regularly visited the site time and again for last 7-8 years and sought status of booked unit as agreed and

promised. But except furnishing the site photographs, there is no development at the site. The complainant did not receive any concrete response from respondent's officials. He was constrained to made enquiry on numerous occasions vide various letters/emails, but all went vain as all the promises, assurances and representations made at the time of booking of floor/unit and thereafter proven to be false. Thus, complainant lost trust, faith in the respondent. Lastly, the complainant expressively informed that he is no more interested in going ahead with the respondent's floor in aforesaid project as there is progress at spot. Rather, the spot condition has been deteriorated like an abandoned project. The photographs already furnished alongwith emails which are self-explanatory and are matter of record thus needs no further justifications/clarifications about spot conditions and all these were very disappointing for complainant. The emails/letters were duly delivered and acknowledged by respondent. But inspite of that the respondents have not responded on the units booked by the complainant. On the contrary to mislead complainant writing one after another frivolous, baseless emails and asking him to get alternate without offering a reasonable compensation for all the period respondents used complainant's money. This is another wrongful acts of criminal breach of trust and cheating to usurp the hard earned money of complainant which respondents have enjoying for last 7 years and failed to honor their commitments as per agreement dated 17-08-2012.

6. That the complainant had no option left and he got issued a legal demand notice dated 29.09.2021 dispatched on 30.09.2021 and called the respondents to refund the entire amount paid by complainant till date i.e Rs. 84,14,154/- and interest of Rs. 1,01,42238/-@18% p.a (till 15-09-2021) and further interest till actual date of payment from respective dates of payment, an amount of Rs. 20,00,000/- on account of mental pain and agony be also paid. Despite the service of notice, the respondents nor refunded the amount nor responded.
7. That it is submitted that inspite of several requests made by the complainant from time to time, the respondent company is postponing the matter on one pretext or the other and did not refund an amount of Rs. 84,14,154/- and paid compensation till date to him.
8. The complainant cannot be expected to wait endlessly for the completion of the project. Hence, he has preferred the present complaint for refund at a prescribed rate of interest.

C. Relief sought by the complainant:

The complainant has sought following relief(s).

- i. Direct the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest.
- ii. Direct the respondent to give Rs. 20,00,000/- as compensation on account of loss/injury as well as mental agony suffered by the complainant.

D. Reply by the respondents:



9. The complainant duly executed the FBA on 17.08.2012 out of own free will and without any undue influence or coercion. As per the FBA, it has been agreed that subject to force majeure, the possession of the floor to the complainant would be handed over 24 months from the date of sanctioning of the building plan or execution of the floor buyer's agreement (whichever is later) with an additional grace period of 180 days. The remedy in case of delay in offering possession of the unit was also agreed to between the parties as also extension of time for offering possession of the unit. The building plan was sanctioned on 05.10.2012.
10. It is submitted that the construction was also affected on account of the NGT order prohibiting construction (structural) activities of any kind in the entire NCR by any person, private or government authority. It is also submitted that vide its order, NGT placed sudden ban on the entry of diesel trucks more than ten years old providing that no vehicle from outside or within Delhi would be permitted to transport any construction material. Since the construction activities were suddenly stopped and after the lifting of the ban, it took some time for mobilization of the work by various agencies employed with the respondents.
11. Thereafter, the Hon'ble Supreme Court of India on 04/11/2019, in case of M.C. Mehta v. Union of India banned all the construction activities. The said ban was partially lifted on 09/12/2019 whereby relaxation was accorded to the builders for continuing the construction activities



from 6:00 am to 6:00 pm. The complete ban was lifted by the Hon'ble Apex Court on 14/02/2020. It is imperative to mention herein that the construction of the project was going on in full swing. However, the changed norms for water usage, non-permitting construction after sunset, disallowing sand quarrying in Faridabad area, shortage of labour and construction material, liquidity crunch, non-funding of real estate projects and delay in payment of instalments by customers etc. were the reasons for delay in construction. After that the Government took long time in granting necessary approvals owing to its cumbersome process. Furthermore, the construction of the unit was going on in full swing and the respondents were confident to handover possession of the units in question. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), from past 2 years construction came to a halt and it took some time to get the labour mobilized at the site. It was communicated to the complainants vide email dated 26.02.2020 that the construction was nearing completion and the respondents were confident to handover possession of the unit in question by March 2020. But it be noted that due to the sudden outbreak of the coronavirus (COVID 19), the construction came to a halt and it took some time to get the labour mobilized at the site.

12. That without accepting the contents of the complaint in any manner whatsoever and without prejudice to the above-mentioned contentions, it is submitted that if in the circumstance refund is allowed, it has to be



after deduction of statutory charges like GST, VAT, Service Tax, EDC, IDC, EEDC. That the deductions of such charges was also allowed by this Hon'ble Authority in Complaint no. 1228 of 2021 and 36 others, decided on 10.05.2022.

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 submissions made by the parties.

D. Jurisdiction of the authority

15. The authority has completed territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.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.

D.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) 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.

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 promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
19. 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.*** "SCC Online SC 1044 decided on 11.11.2021 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 culis 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."

20. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter noted above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

E.I Objection regarding force majeure conditions:

21. The respondent-promoter contended that grace period on account of force majeure conditions be allowed to it. It raised the plea that the construction of the project was delayed due to force majeure conditions such as demonetization, shortage of labour, various orders passed by NGT, weather conditions in Gurugram and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. The floor buyer's agreement was executed between the parties on 17.08.2012 and as per terms and conditions of the said agreement, the due date of handing over of possession comes out to be 17.08.2014. The events such as demonetization and various



orders by NGT in view of weather condition of Delhi NCR region were for a shorter duration of time and were not continuous as there is a delay of more than three years and even some happening after due date of handing over of possession. There is nothing on record to show that the respondent has even made an application for grant of occupation certificate. Hence, in view of aforesaid circumstances, no period grace period can be allowed to the respondent- builder. 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-respondent cannot be given any leniency on based of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrong.

22. As far as delay in construction due to outbreak of Covid-19 is concerned, 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 (I) (Comm.) no. 88/ 2020 and IAs 3696-3697/2020*** dated 29.05.2020 has observed that-

"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."



23. The respondents were liable to complete the construction of the project and the possession of the said unit was to be handed over by 17.08.2014 and are 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 is not excluded while calculating the delay in handing over possession.

E. Findings on the relief sought by the complainant.

E. I Direct the respondents to return sale consideration received by them from the complainant till date along with prescribed interest.

24. In the present complaint, the respondent states at bar that the unit cannot be offered for possession and neither constructed as there is a dispute with the land collaborator and hence, offers refund of the amount deposited.
25. Also, the complainant intends to withdraw from the project as the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoters and is seeking return of the amount paid by him in respect of subject apartment along with interest at the prescribed rate as provided under

section 18(1) of the Act. Section 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building,-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case 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 that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided 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 the possession, at such rate as may be prescribed."
(Emphasis supplied)

26. 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

27. The authority is of view that the allottee cannot be expected endlessly for making a valid offer of possession and execution of conveyance deed for which substantial consideration amount has already been paid. The authority hereby directs the promoters to return the amount received by him i.e., Rs 84,14,154/- 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*.
28. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by it at the prescribed rate of interest. However, allottee intends to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest at prescribed rate as provided 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.

29. 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.
30. 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 %**.
31. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondents are established. As such, the complainant is entitled to refund the entire amount paid by him at the prescribed rate of interest i.e., @ 10.60% p.a. from the date of payment of each sum till its actual realization as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.

Compensation towards mental torture, harassment and litigation cost.

32. The complainant under 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), 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

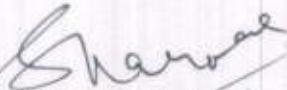
H. Directions of the authority

33. 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/promoters are directed to refund the entire amount of Rs. 84,14,154/-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 respondents to comply with the directions given in this order and failing which legal consequences would follow.
 - iii. The respondents are further directed not to create any third-party rights against the subject unit before full realization of paid-




up amount along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainant.

34. Complaint stands disposed of.
35. File be consigned to registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.03.2023


(Vijay Kumar Goyal)
Member