

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

Complaint no. :	2665 of 2021
Order reserved on :	21.03.2023
Order pronounced on:	30.05.2023

1. Arunabh Madhur,
2. Nehha Chandra,
both R/o: - Building 5, House No. 8B,
The Hibiscus, Sector 50,
Gurugram, Haryana-122018.

Complainants

Versus

M/s Sepset Properties Private Limited.
Regd. Office at: - 11th Floor, Paras Twin Towers,
Tower-B, Sec-54, Golf Course Road,
Gurugram, Haryana.
Also At: - Room no. 205, Welcome Plaza,
S-551 School, Block-II, Shakkarpur,
Delhi-110092.

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

Shri. K.P Singh (Advocate)
Shri Akshay Sharma (Advocate)

Complainants
Respondent

ORDER

1. The present complaint dated 16.07.2021 has been filed by the complainant/allottees 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 thereunder 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.N.	Particulars	Details
1.	Name of the project	"Paras Dews", Sector- 106, Gurugram
2.	Nature of project	Group Housing Colony
3.	RERA registered/not registered	Registered 118 of 2017 dated 28.08.2017
4.	DTPC License no.	61 of 2012 dated 13.06.2012
	Validity status	12.06.2020
	Name of licensee	Sepset Properties
	Licensed area	13.76 acre
5.	Unit no.	Apartment no. 2101, 21 st floor, Tower C [As per page no. 34 of complaint]
6.	Unit measuring	1760 sq. ft. [As per page no. 34 of complaint]
7.	Date of execution of Floor buyer's agreement	12.06.2013 (Page no. 31 of complaint)
8.	Possession clause	3. Possession 3.1 The Seller proposes to hand over the possession of the Apartment to the Purchaser(s) within a period of 42 (Forty-Two) months with an additional grace period of 6 (six) Months from the date of execution of this Agreement or date of obtaining all licenses or approvals for commencement of construction,

		<i>whichever is later, subject to Force Majeure.</i>
9.	Due date of possession	06.09.2017 (Calculated from the date of obtaining Environmental Clearance i.e., 06.09.2013) (Grace period of 6 months is allowed being unqualified)
10.	Basic sale Price	Rs. 89,63,680/- [As per SOA on page no. 101 of reply]
11.	Total sale consideration	Rs. 1,05,10,880/- (As per SOA on page no. 101 of reply)
12.	Total amount paid by the complainant	Rs. 1,13,01,044/- (as per SOA on page no. 104 of reply)
13.	Occupation certificate dated	15.01.2019 (page no. 72 of complaint)
14.	Offer of possession	24.01.2019 (page no. 75 of complaint)
15.	Refund Request	09.12.2020 (as per email dated 09.12.2020)

B. Facts of the complaint:

3. The complainants have made the following submissions: -

- I. That the project named "PARAS DEWS" was being developed by respondent on a parcel of land admeasuring 13.762 acres situated at Sector 106, at Village- Daultabad, Tehsil & District Gurgaon.
- II. That on relying upon the facts and assurances of timely competition of project by the respondent's representatives, the complainants booked a flat bearing no. T-C/2101 on 21st floor, admeasuring super area of 1760 sq.ft. for a total sale consideration of Rs.1,05,10,880/- and paid a sum of Rs.1,13,01,044/- against the same. Thereafter, the buyer's agreement was executed on 12.06.2013.

- III. That as per clause 3.1 of the buyer's agreement, the project was to be completed within 42 months with 6 months of grace period from the execution of the said agreement. So, the stipulated date for handing over possession of the said unit was 06.09.2017 but the same was offered on 24.01.2019.
- IV. That the respondent received an occupation certificate of the project on 15.01.2019 and offer of possession of the unit was made on 24.01.2019. Thereafter, several requests for inspecting the property were made by the complainants and they were allowed to inspect the same in November 2020. On visiting the project, they found that the project was still under construction and there was a crematorium at the back of Tower-A neither disclosed to them at any stage of construction since 2013 nor it was a part of any layout plans. Thereafter, the complainants took up the said issue with the management of the respondent and sent various emails to hold physical meeting but it deliberately avoided the same. Therefore, the complainants vide emails dated 09.12.2020, 21.12.2020 and 14.01.2021 requested it to refund the entire paid-up amount alongwith interest @18% p.a due to indefinite delay, incomplete work and inhabitable site. But no heed was paid to any of the requests of them despite follow ups. Feeling aggrieved with the same they sent a legal notice dated 01.06.2021 via speed post requesting refund and the same was delivered to it on 04.06.2021. But no reply was received from it.
- V. That in the aforesaid facts and circumstances of the case, the complainants are left with no option except to file this complaint.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

I. To refund the entire paid-up amount of Rs.1,13,01,044/- (Rupees One Crore Thirteen Lac One Thousand and Forty-Four only) along with prescribed rate of interest.

II. To pay a sum of Rs.10,00,000/- towards the compensation.

5. On the date of hearing, the authority explained to the respondent/promoter 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 respondent/builder.

6. The respondent has contested the complaint by filing reply dated 09.11.2021 on the following grounds: -

i. That the complainants are not a genuine flat purchaser or consumer and purchased the said flat for commercial and investment purposes for which the jurisdiction of this Hon'ble Authority cannot be invoked. The object of RERA Act is to protect the interests of the consumers and not the investors.

ii. That the present complaint is not maintainable as the possession had to be handed over to the complainants in terms of clause 3.1 and 3.2 of the buyer's agreement. The complainants have been themselves guilty of not adhering to the payment schedule and made most of the payments after passing of the respective due dates. The same is not permissible in terms of RERA Act, 2016 and in view of the same, the complaint merits outright dismissal.

iii. That the complaint is infructuous and not maintainable as the construction of Tower-C has already been completed and the

occupation certificate has also been received on 15.01.2019. The offer of possession has already been issued to the complainants on 24.01.2019 with the demand for the remaining payment. However, they not only failed to make the payment of the due amount but filed the present complaint to harass the respondent.

- iv. That due to the failure of the complainants in paying the complete consideration, the respondent suffered immense monetary hardships. Hence, it is most humbly prayed that this Authority ensures that they should comply with the terms of the buyer's agreement and the provisions of RERA Act, 2016 and Haryana Real Estate (Regulations and Development) Rules, 2017.
 - v. That the complaint is not maintainable as the complainants have not filed the same as per the correct form of the Haryana Real Estate (Regulation and Development) Rules, 2017.
 - vi. All other averments made in the complaint are denied in toto.
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 those undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

The respondent raised a preliminary submission/objection that 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

8. 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

9. 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.

10. 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.
11. 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. 2021-2022(1) RCR(C), 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*** and 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."

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case 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 Objection regarding the complainants being investor.

13. The respondent has taken a stand that the complainants are investor and not consumers. Therefore, they are 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 consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of the 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 it 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 complainants are buyers and had paid a total sum of Rs.1,13,01,044/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, 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;"

14. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainants are allottees as the subject unit was allotted to them 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 "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) 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 investor are not entitled to protection of this Act stands rejected.

F. II Objection regarding the delay in payments.

15. The objection raised by the respondent regarding delay in payments by the allottees is totally invalid as they have already paid an amount of Rs.1,13,01,044/- against the total sale consideration of Rs.1,05,10,880/- to it as evident from the statement of account annexed with the reply. The fact cannot be ignored that there might be certain group of allottees who defaulted in making payments. But upon perusal of documents on record, it is observed that no default have been made by them in the instant case. Hence, the plea advanced by the respondent is rejected.

G. Findings on the relief sought by the complainants.

G.I To refund the entire amount deposited i.e., Rs.1,13,01,044/- by the complainants along with prescribed rate of interest.

16. The complainants booked a flat bearing no. T-C/2101 on 21st floor, admeasuring super area of 1760 sq.ft. for a total sale consideration of Rs.1,05,10,880/- and paid a sum of Rs.1,13,01,044/- against the same. Thereafter, the buyer's agreement was executed on 12.06.2013.
17. Section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. The due date of possession as per buyer's agreement was



06.09.2017 and the allottees in this case have filed this complaint on 16.07.2021 after possession of the unit was offered to them after obtaining occupation certificate by the promoter. The OC was received on 15.01.2019 whereas the offer of possession was made on 24.01.2019. The complainants vide email dated 09.12.2020 requested the respondent that they wish to withdraw from the project and made a request for refund of the paid-up amount on its failure to give possession of the allotted unit in accordance with the terms of buyer's agreement. On failure of respondent to refund the same, they have filed this complaint seeking refund.

18. The right under section 18(1)/19(4) accrues to the allottees on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottees have not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to them, it impliedly means that the allottees tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottees interest for the money they have paid to the promoter is protected accordingly and the same was upheld by 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; that: -

25. *The unqualified right of the allottees 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 allottees, 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 allottees/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 allottees 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.*
19. 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 allottees as per agreement for sale. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure 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. But the complainant/allottees failed to exercise the right although it is unqualified one. The complainants have to demand and make their intention clear that they wish to withdraw from the project. Rather, tacitly wished to continue with the project and thus made themselves entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottees invest in the project for obtaining the allotted unit and on delay in completion of the project and when the unit is ready for

possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

20. This view is supported by the judgement of Hon'ble Supreme Court of India in case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Civil appeal no. 5785 of 2019)*** wherein the Hon'ble Apex court took a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate and also in consonance with the judgement of Hon'ble Supreme Court of India in case of ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors (Supra)***.
21. The above said unit was allotted to complainants vide buyer's agreement dated 12.06.2013. There is a delay in handing over the possession as due date of possession was 06.09.2017 whereas, the offer of possession was made on 24.01.2019 and thus, becomes a case to grant delay possession charges. The authority observes that interest of every month of delay at the prescribed rate of interest be granted to the complainant/allottees. But now, the peculiar situation is that the complainants want to surrender the unit and want refund. Keeping in view of the aforesaid circumstances that the respondent-builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, and judgment of

Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.2022, it is concluded that if the complainant/allottees still want to withdraw from the project, the paid-up amount shall be refunded after deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018.

22. The Hon'ble Apex court of the land in cases of *Maula Bux Vs. Union of India (1973) 1 SCR 928* and *Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136*, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as *Jayant Singhal and Anr. Vs. M/s M3M India Ltd.* decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under: -

"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"

23. Further, clause 12.6 of the buyer's agreement also talks about the deduction of 10% of the basic sale price of the dwelling unit in case of withdrawal of the allotment and the same is being reproduced for ready reference as under: -

12.6 "The Purchasers has fully understood and agreed that in case the Purchaser(s) withdraws or surrender his allotment, for any reason whatsoever at any point of time, then the Seller at its sole discretion may cancel/ terminate the booking/ allotment Agreement and shall forfeit the amounts paid deposited up-to the Earnest Money, along with other dues of non-refundable nature. No separate notice shall be given in this regard."

24. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainants against the allotted unit and is directed to refund the paid-up amount of Rs.1,13,01,044/- after deducting 10% of the basic sale consideration of Rs.89,63,680/- being earnest money along with an interest @10.70% p.a. (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 on the refundable amount from the date of surrender i.e., 09.12.2020 till actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.II To pay a sum of Rs.10,00,000/- towards the compensation.

25. The complainants in the aforesaid relief are 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 complainants are advised to approach the adjudicating officer seeking the relief of compensation.

26. The respondent vide written arguments dated 26.04.2023 placed on record a circular bearing no. 188/20/2022-GST, issued by the office of Principal Commissioner, GST at New Delhi prescribing manner of filing an application for refund by unregistered persons. However, it is applicable on unregistered buyers dealing in supply of services of construction of the flats/building etc. to the builder and the same is not applicable in the present case.

H. Directions of the authority

27. 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/builder is directed to refund the paid-up amount of Rs.1,13,01,044/- after deducting 10% of the basic sale consideration of Rs.89,63,680/- being earnest money along with an interest @10.70% p.a. on the refundable amount from the date of surrender i.e., 09.12.2020 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.

28. Complaint stands disposed of.
29. File be consigned to the registry.


(Sanjeev Kumar Arora)

Member


(Ashok Sangwan)

Member


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.05.2023



HARERA
GURUGRAM