BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2842 of 2020
First date of hearing: 08.03.2021
Date of decision : 12.01.2023

1. Mukesh Kumar 2. Anju Bala **R/o:** - Flat no. C-403, BPTP Park Serene, Sector-37D, Gurugram	**Complainants**
Versus	
M/s Ish Realtors Pvt. Ltd. Office at: 219, 220, 221, 2nd floor, Vipul Agora, M.G Road, Gurugram	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Sanjeev Arora	**Member**

APPEARANCE:	
Sh. Sushil Yadav (Advocate)	On behalf of complainants
None	On behalf of respondent

ORDER

1. The present complaint dated 06.10.2020 has been filed by the complainants/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 19(4) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as

provided 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*.

2. The reply on behalf of the respondent has not been received. However, the AR of the respondent appeared on proceedings dated 16.11.2022 and ensure the filing of reply with a cost Rs. 5,000/- in addition to the earlier cost imposed on 14.09.2022. It was clearly directed that if the reply has not been filed the defence of the respondent shall be stuck off. Since, till today no reply has been submitted and none has appeared on behalf of respondent therefore, the authority assumes/ observes that the respondent has nothing to say in the present matter. Thus, the authority is proceeding as per the pleadings and documents on the record.

A. Unit and project related details

3. 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.No.	Heads	Information
1.	Project name and location	"The Skyline", Sector 109, Gurgaon, Haryana
2.	Project area	3.7187 acres
3.	Nature of the project	Commercial Project
4.	DTCP license no. and validity status	24 of 2011 dated 24.03.2011 valid upto 23.03.2015
5.	Name of licensee	Jitender S/o Meer singh and 3 others

6.	RERA Registered/ not registered	**Not Registered**
7.	Unit no.	67, 1st Floor (page no. 15 of complaint)
8.	Unit measuring	516 sq. ft. (page no. 15 of complaint)
9.	Date of Buyer agreement	10.09.2013 (page no. 13 of complaint)
10.	Due date of possession	10.09.2017 [as per possession clause]
11.	Possession clause	**15.** That the possession of the said premises is proposed to be delivered by the DEVELOPER to the ALLOTTEE within four years from the date of this Agreement. If the completion of the said building is delayed by the reason of non availability of steel and/or cement or other building materials, or water supply or electric power or slow down, strike or due to a dispute with the construction agency employed by the developer, lock out or civil commotion or by reason of war of enemy action or terrorist action or earthquake or any act of God or non-delivery of possession is as a result of any Act, Notice, Order, Rule or Notification of the Government and/or any other Public or Competent Authority or due to delay in action of building/ zoning plans/ grant of completion/ occupation

		certificate by any competent authority or for any other reason beyond the control of the DEVELOPER, the DEVELOPER shall be entitled to extension of time for delivery of possession of the said premises. The DEVELOPER as a result of such a contingency arising, reserves the right to alter or vary the terms and conditions of this Agreement or if the circumstances beyond the control of the Developer so warrant, the DEVELOPER may suspend the Scheme for such period as it might consider expedient.
12.	Total sale consideration	Rs. 41,69,280/- (as per page no. 15 of agreement)
13.	Amount paid by the complainants	Rs. 16,38,379/- (as per SOA on page no. 44-47 of complaint)
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered

B. Facts of the complaint

4. That the respondent give advertisement in various leading Newspapers about their forthcoming project named "The SKYLINE" in Sector 109 Gurgaon promising various advantages, like world class amenities and timely completion/execution of the project etc. relying on the promise and undertakings given by the respondent in the

advertisements the complainants, booked a shop admeasuring super area 516 sq. ft in aforesaid project of the respondent for total sale consideration is Rs 41,69,280/- and the builder buyers agreement was handed on 10.09.2013. Out of the total sale consideration amount, the complainants made payment of Rs. 16,38,379/- to the respondent vide different cheques on different dates.

5. That as per clause 15 of the said buyer agreement the complainants must have been given the possession of the said unit within four years from the date of agreement. This means the complainants should have received the possession of fully constructed unit by 10.09.2017 but it came to the knowledge of the complainants that nothing has been done on the land on which the proposed building had to be constructed thus the said project was abandoned by the respondent promoter and his liability to refund the entire amount along with interest accrued under the provisions of the Real Estate (Regulation and Development) Act, 2016. This shows the respondent's mala-fide and dishonest motives and intention to cheat and defraud the complainants.
6. That the complainants made several phone calls and wrote several letters to respondent and their authorized real estate agents praying for return of Rs. 16,38,379/- along with interest thereon.

C. Relief sought by the complainants:

- Direct the respondent to refund the amount of Rs. 16,38,379/- along with prescribed interest on compounded rate from the date of booking of unit in question.
- Direct to pay a sum of Rs. 55,000/- cost of litigation.

- Direct to pay a cost of Rs. 5,00,000/- for harassment and mental agony suffered by the complainants.

D. Jurisdiction of the authority

7. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D. 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.

D. II Subject matter jurisdiction

9. Section 19(4) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 19(4) is reproduced as hereunder:

Section 19(4)

The allottee shall be entitled to claim the refund of the amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

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." 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 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. Furthermore, the said view has been reiterated by the Division Bench of Hon'ble Punjab and Haryana High Court in "***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated***

13.01.2022 in CWP bearing no. 6688 of 2021. The relevant paras of the above said judgment reads as under:

> ***"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.***
>
> ***24) The substantive provision of the Act having been interpreted by the Supreme Court, the Rules have to be in tandem with the substantive Act.***
>
> *25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."*

13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra),*** and the Division Bench of Hon'ble Punjab and Haryana High Court in "***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others. (supra)***, the authority has the jurisdiction to entertain a complaint seeking refund of the amount paid by allottee along with interest at the prescribed rate.

E. Findings on the relief sought by the complainants

I. Direct the respondent to refund the amount of Rs. 16,38,379/- along with prescribed interest on compounded rate from the date of booking of unit in question.

14. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest as per section 18(1) of the Act and the same 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)*

15. Clause 15 of the buyer's agreement provides the time period of handing over possession and the same is reproduced below:

> *"**15:***
> *That the possession of the said premises is proposed to be delivered by the DEVELOPER to the ALLOTTEE within four years from the date of this Agreement. If the completion of the said building is delayed by the reason of non availability of steel and/or cement or other building materials, or water supply or electric power or slow down, strike or due to a dispute with the construction agency employed by the developer, lock out or civil commotion or by reason of war of enemy action or terrorist action or earthquake or any act of*

God or non-delivery of possession is as a result of any Act, Notice, Order, Rule or Notification of the Government and/or any other Public or Competent Authority or due to delay in action of building/ zoning plans/ grant of completion/ occupation certificate by any competent authority or for any other reason beyond the control of the DEVELOPER, the DEVELOPER shall be entitled to extension of time for delivery of possession of the said premises. The DEVELOPER as a result of such a contingency arising, reserves the right to alter or vary the terms and conditions of this Agreement or if the circumstances beyond the control of the Developer so warrant, the DEVELOPER may suspend the Scheme for such period as it might consider expedient.

16. The complainants booked a retail shop in the project of the respondent detail above for a total sale consideration of Rs. 41,69,280/-and the flat buyer's agreement was executed between the complainants and respondent on 10.09.2013.

17. As per the clause 15 of the buyer's agreement the possession of the unit was to be handed over within 4 years from the date of the agreement. The due date for handing over of possession comes out to be 10.09.2017.

18. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in **Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.**, civil appeal no. 5785 of 2019, decided on 11.01.2021.

".....The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

19. 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. 2021-2022(1) RCR (c), 357** 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 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."*

20. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a) of the Act. The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as 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 the unit with interest at such rate as may be prescribed.

21. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

22. **Admissibility of refund along with prescribed rate of interest:** The section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the respondent shall refund of the amount paid by the allottee 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."*

23. 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.

24. 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., 12.01.2023 is 8.60%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.60%.

25. The authority hereby directs the promoter to return the amount received by him i.e., ₹ 16,38,379/- with interest at the rate of 10.60%

(the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Rules ibid.

II. Direct to pay a sum of Rs. 55,000/- cost of litigation.

III. Direct to pay a cost of Rs. 5,00,000/- for harassment and mental agony suffered by the complainants.

26. The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the Adjudicating Officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

F. Directions of the authority

27. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):

i. The respondent/promoter is directed to refund the entire amount of Rs. 16,38,379/- paid by the complainants along with

prescribed rate of interest @ 10.60% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 from the date of each payment till the date of refund of the deposited amount.

ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

28. Complaint stands disposed of.

29. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 12.01.2023