BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1230 of 2019 /723 of 2021**
First date of hearing:	**27.11.2019**
Order pronounced on:	**12.04.2023**

Vinod Dalal, S/o Ved Prakash Dalal,
Through G.P.A Holder- Devinder Dalal,
S/o Ved Prakash Dalal,
R/o: - H-002, BPTP Park Prime,
Sector-66, Gurugram, Haryana-122001. **Complainant**

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 **Member**
Shri Ashok Sangwan **Member**
Shri Sanjeev Kumar Arora **Member**

APPEARANCE:
Sh. Mukul Kumar Sanwariya (Advocate) Complainant
Sh. Akshay Sharma (Advocate) Respondent

ORDER

1. The present complaint dated 02.04.2019 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 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 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	Paras Dew', sector-106, Gurugram
2.	Nature of project	Residential group housing project
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.	602, 6th floor, Tower-C [As per page no. 31 of complaint]
6.	Unit measuring	1760 sq. ft. [As per page no. 31 of complaint]
7.	Date of execution of Flat buyer's agreement	02.04.2013 (page no. 28 of complaint)
8.	Allotment Letter	10.01.2013 (page no. 25 of complaint)
9.	Possession clause	**3. Possession** 3.1 Subject to Clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the Seller and any restraints restrictions from any courts/ authorities and subject to the

		Purchaser(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and having complied with all provisions. formalities, documentation, etc. as prescribed by the Seller, whether under this Agreement or otherwise, from time to time, **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 of date of obtaining all licenses or approvals for commencement of construction, whichever is later, subject to Force Majeure.**
10.	Due date of possession	06.09.2017 (calculated from the date of approval of Environmental clearance) (grace period is allowed being unqualified)
11.	Environmental clearance	06.09.2013
12.	Total Sale consideration	Rs.1,18,87,200/- (as per payment plan on page no.61 of complaint)
13.	Total amount paid by the complainant	Rs.1,13,26,204/- (As alleged by complainant in his written submission and also as per statement of account on page no. 61 of reply)
14.	Occupation certificate dated	15.01.2019
15.	Offer of possession	24.01.2019

B. Facts of the complaint:

3. The complainant has made the following submissions: -

I. That the project named "PARAS DEWS" is 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 complainant booked a flat bearing no. T-C/0602 on 6th floor, admeasuring super area of 1760 sq. ft. vide an allotment letter dated 10.01.2013 for a total sale consideration of Rs.1,18,87,200/- and paid a sum of paid Rs.1,13,26,204/- in all. Thereafter, buyer's agreement was executed on 02.04.2013.

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 complainant inquired about the status of construction and other development work to be carried out by the respondent but it never shared any such information in gross violation of Sec 19(2) of RERA, Act, 2016.

V. That the respondent has illegally charged an amount of Rs.3,00,000/- for allotment of Car Parking Space exclusive of the basic consideration against the settled principle of law and natural justice.

VI. That the respondent kept on demanding payments from the complainant but never showed its willingness to complete the construction on time.

VII. That the complainant suffered losses or damages due to false and incorrect statement or commitment made by the respondent for delivering the possession of flat within stipulated time. Thus, the complainant is entitled to withdraw from the respondent's project to get the refund along with in terms Sec 18(1) of the RERA, Act, 2016.

VIII. That the respondent not only failed to construct the unit within the stipulated timeline as per BBA but also made major alterations in the layout plan without even having consent from the complainant.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):

I. To refund the entire paid-up amount of Rs.1,13,26,204/- (Rupees One Crore Thirteen Lac Twenty-Six Thousand Two Hundred and Four only) along with prescribed rate of interest.

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 contested the complaint by filing reply dated 26.10.2020 on the following grounds: -

i. That the complainant is 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, as 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 complainant in terms of clause 3.1 and 3.2 of

the buyer's agreement. The complainant has been himself guilty of not adhering to the payment schedule and made most of the payment 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 not maintainable and is premature since the project is a RERA registered project, having registration no. 118 of 2017 dated 28.08.2017, and in terms of the Registration Certificate the due date of completion is 31.07.2021 which has not arrived in the present case. Therefore, the present complaint merits outright dismissal.

iv. That the present complaint is infructuous and is not maintainable as the construction of Tower-B 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 complainant on 24.01.2019 with the demand for the remaining payment. However, the complainant has not only failed to make the payment of the due amount but filed the present complaint to harass the respondent.

v. That due to the failure of the complainant in paying the complete consideration, the respondent has suffered immense monetary hardships. Hence, it is most humbly prayed that this Hon'ble Authority ensures that the complainant 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.

vi. That the present complaint is not maintainable as the complainant has not filed the present complaint as per the correct form of the Haryana Real Estate (Regulation and Development) Rules, 2017.

vii. It is further submitted that the Hon'ble Authority does not have the jurisdiction to entertain the present complaint.

7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

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 allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11*****.....***(4) The promoter shall-***
> ***(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made***

thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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 complainant 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. The application for refund filed in the form CAO with the adjudicating officer and on being transferred to the authority in view of the judgement titled as ***M/s Newtech Promoters and Developers Pvt Ltd. Vs State of UP & Ors. (supra),*** the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case the allottee wishes to withdraw from the project on failure of the promoter to give possession as per agreement for sale irrespective of the fact whether application has been made in form CAO/ CRA. It has been deliberated in the proceedings dated 10.5.2022 in CR No. 3688/2021 titled Harish Goel Versus Adani M2K Projects LLP and observed that there is no material difference in the contents of the forms and the different headings whether it is filed before the adjudicating officer or the authority.

13. 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 respondents.

F.I Objection regarding the complainant being investor.

14. The respondents has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and entitled 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 respondents is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that 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 complainant is a buyer and paid total price of Rs.1,13,26,204/- 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;"*

15. 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 complainant is allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party

having a status of "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 allottee being an investor is not entitled to protection of this Act also stands rejected.

F.II Objection regarding premature filing of complaint.

16. Another contention of the respondent is that the complaint filed is premature, as the project is a RERA registered having registration number 118 of 2017, dated 28.08.2017, and in terms of the registration certificate, the due date of completion is 31.07.2021. However, going through possession clause 3.1 of the buyer's agreement as mentioned in the table, due date comes out to be 06.09.2017, whereas the present complaint has been received on 02.04.2019. Thus, the objection regarding premature filing of the complaint stands rejected.

F. III Objection regarding the delay in payments.

17. The objection raised by the respondent regarding delay in payment by allottee is totally invalid as he has already paid the amount of Rs.1,13,26,204/-, i.e., 95% against the total sale consideration of Rs.1,18,87,200/- to the respondent. The balance amount is payable on application of occupation certificate or the receipt of the occupation certificate. 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 has been made by the complainant in the instant case. Hence, the plea advanced by the respondent is rejected.

G. Findings on the relief sought by the complainant.

G.I To refund the entire amount deposited i.e., Rs.1,13,26,204/- by the complainant with prescribed rate of interest.

18. The complainant booked a flat bearing no. T-C/0602 on 6th floor, admeasuring super area of 1760 sq. ft. in the said project vide an allotment letter dated 10.01.2013 for a total sale consideration of Rs.1,18,87,200/- and the complainant has paid a sum of paid Rs.1,13,26,204/- in all.

19. The 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. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.

20. The due date of possession as per buyer's agreement as mentioned in the table above is 06.09.2017 and complaint has been received on 02.04.2019 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The OC was received on 15.01.2019 whereas, offer of possession was made on 24.01.2019. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made and demand for due payment was raised, then only, he filed a complaint before the authority.

21. 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 allottee's 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.

22. 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-allottee failed to exercise his right although it is unqualified one. Complainant has to demand and make his intentions clear that he wishes to withdraw from the project. Rather tacitly wished to continue with the project and thus made himself entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when 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.

23. In case allottees wish to withdraw from the project, the promoter is liable on demand to the allottees return of the amount received by the promoter with interest at the prescribed rate if promoter fails to

complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that allottees has to make intentions clear to withdraw from the project and a positive action on their part to demand return of the amount with prescribed rate of interest if they have not made any such demand prior to receiving occupation certificate and unit is ready then impliedly agreed to continue with the project i.e. they do not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and allottees shall be paid by the promoter interest at the prescribed rate for every month of delay. 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).***

24. The unit of the complainant was booked vide allotment letter dated 10.01.2013. The buyer's agreement was executed between the parties on 02.04.2013. There is a delay in handing over the possession as due date of possession was 05.09.2017 whereas the offer of possession was made on 24.01.2019 and thus, becomes a case to grant delay possession charges. The authority has observed that interest of every month of delay at the prescribed rate of interest be granted to the complainant-allottee. But now the peculiar situation is that the complainant wants to

surrender the unit and want refund. Keeping in view 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 11.01.202,*** it is concluded that if the complainant-allottee still wants to withdraw from the project, the paid-up amount shall be refunded after deduction as prescribed under the 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"

25. 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. Clause 12.6 of the said buyer's agreement reiterated 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."*

26. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.1,13,26,204/- after deducting 10% of the basic sale consideration of Rs.1,02,96,000/- 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 filing of this complaint i.e., 02.04.2019 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

27. Further, the complainant contended that the respondent has made significant alterations in the building plans of the project without having consent from the complainant-allottee. However, as per record available on the official website of Town & Country Planning, Haryana, it has duly approved the revised building plan of said licence vide its letter dated 07.10.2016, as no objection were received in respect of amendments made in the building plans. Hence, the contention of complainant stands rejected.

H. Directions of the authority

28. 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.1,13,26,204/- after deducting 10% of the basic sale consideration of Rs.1,02,96,000/- being earnest money along with

an interest @ 10.70% p.a. on the refundable amount, from the date of filing of this complaint i.e., 02.04.2019 till its realization.

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.

29. Complaint stands disposed of.

30. File be consigned to the registry.

(Sanjeev Kumar Arora)	(Ashok Sangwan)	(Vijay Kumar Goyal)
Member	Member	Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.04.2023