

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

Complaint no. : 710 of 2019
First date of hearing: 02.05.2019
Date of decision: 23.02.2023

Kishan Loiwal
Address: - B1, Suncity Sector-54
Gurugram-122003

Complainant

Versus

1. M/s Ninaniya Estates Ltd.
Address:- Prism Tower-A, 6th floor, Gwalpahrai,
Sector-2, Gurugram
2. Sanjeev Real Estate
Address:- U.G.F., Suncity Arcade, Suncity Sector-54,
Gurugram -122003

Respondents

CORAM:
Shri Vijay Kumar Goyal

Member

APPEARANCE:

Complainant in person with Shri Sridhar Advocate for the complainant
Ggar proxy counsel
None Advocate for the respondent

ORDER

1. The present complaint dated 18.02.2019 has been filed by the complainant 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 allottee as per the agreement for sale executed inter se.

A. Project and unit related details

2. The particulars of the project, the details of 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:

Sr. No.	Particulars	Details
1.	Name of the project	"Prism Tower" Gwal Pahrai, Sector 2 Gurugram Faridabad Road, Gurugram.
2.	Total area of the project	20876.97 sq. Yds.
3.	Nature of the project	Five-star hotel complex
4.	Registered/not registered	Not registered
5.	Unit no.	606, 6 th floor,
6.	Area of the unit	825 sq. ft. (Covered area)
7.	Provisional allotment	14.01.2011
8.	Date of execution of buyer's agreement	22.07.2011
9.	Possession clause	4. <i>The Promoter/Developer shall complete the building and hand over the possession of the Prism Suites to the Buyer at the earliest</i>

		<p><i>possible date, subject always to various Prism Suites buyers making timely payment, Force Majeure causes, availability of essential items for construction, change of policy by the Governmental Agencies and Local Authorities and other causes beyond the control of the Promoter/Developer (No penalty to the Developer in this case). In case the building is not completed within 36months / indefinitely delayed, then it will be the Buyer's option whether accept the cancellation or claim back the amount paid with Interest @, 9% p.a. In case the project is delayed Due to gross negligence of the Promoter/Developer then post 36 months the Promoter/Developer will bear a penalty of Rs. 15 per Sq. Ft. Per month till the offer of possession.</i></p> <p><i>6. The Buyer shall be entitled to the possession of the Prism Suites only after amounts so payable under this Agreement are paid in full and NOC issued. An Undertaking from the Buyer to pay External Development Charges, Internal Development Charges demand received from the Promoter/Developer.</i></p>
10.	Due date of possession	22.07.2014
11.	Total sale consideration as per payment plan annexed	₹ 40,60,000/-

	with BBA	
12.	Total amount paid by the complainant as stated by the complainant	₹ 39,16,558/-
13.	Legal notice send by the complainant	25.01.2018
14.	Offer of possession	24.04.2017
15.	Occupation certificate	20.04.2017

B. Facts of the complaint

3. The complainant made the following submissions in the complaint:

- i. The complainant after the official representations and warranties was allotted suite no. 606 of the said project vide allotment letter dated 14.01.2011, by which time he had paid the amount of Rs. 5,00,000/- and was further required to pay a sum of Rs. 5,00,000/- within the next thirty days. by the time the buyers' agreement was executed 7 months later in July 2011, the complainant had already paid the sum of Rs. 14,21,690/- which amounts to 35% of the basic sale price and now incorporated heavy cancellation and forfeiture charges for opting out of this one sided agreement. Moreover, a mandatory parking slot provided for and charged by the allotment letter was, conspicuously, missing from the apartment buyer's agreement, which also now featured a heavily modified payment plan.

- ii. It may be noted that the flat buyer's agreement stated that the approvals for construction of the five-star hotel complex (a significant part of the representation upon which this purchase was predicated) was granted but approvals were still pending, the respondent no. 1s having applied for the same in February 2010. The RTI collected subsequently revealed that even the change in land use permissions were a grant in principle, while the respondent no. 1 marketed the same despite the approvals not being in place. Despite the fact that the approvals for the same were pending, the respondent no. 1 has, in total violation of the law, collected monies and represented that all the approvals were in place till this point.
- iii. The agreement further stipulated that the building is to be completed within 36 months. It may be noted that at the time of booking, the respondent represented that this 36 months would run from the date of booking, so, the possession should have been offered by Jan 2014. The possession was only offered on 24.04.2017, nearly three & a half years after the same was promised. Furthermore, in gross violation of the complainant's rights, the arbitrary and one-sided buyer's agreement stipulates terms such as a meagre delay penalty of Rs. 15/sq. foot per month in the event of a delay on the builder's part. On the other hand, in the event that the buyer defaults, he will be liable to pay an interest of 18% pa. on the outstanding amount. A legal notice sent to the respondent no. 1 on 25.01.2018. The legal notice also mentioned the Object failure of the respondent no. 1 to comply

with the specifications of the 5-star complexes as represented at time of booking. It is submitted that all payments were made duly to the respondent no. 1, except the amount to be paid at the time of possession as a payment of the same would bar the complainant from all recourse, as stipulated under the agreement. In fact the complainant has had to bear increased cost of service tax & vat and similar issues on registration charges due to delay in delivery. The complainant has made payments of monies amounting to the sum of Rs. 39,16,558/- till date. All throughout 2011-2017, correspondence was exchanged between the complainant and the respondent no. 1. This pertains to, in part, to the inability of the respondent no. 1 to comply with the timeline set by them. This includes emails asking as to the status of the said project, which were not adequately answered.

- vi. At the time when possession was offered, the complainant sought to examine the allotment and also inquired about the completion of necessary compliances such as the fire safety approval, operation of the 15 sewage treatment plant etc. To the shock and dismay of the complainant, the completed project was nothing compared to the tall promises made about a 5 star complex by the respondent no. 1. A reference may be made to the emails dated 24.05.2017-31.05.2017, where the complainant time and again requests clarifications as to the fact that several of the specifications were not met, and that the respondent no. 1 had failed to address delay interest due to the complainant for the delay. Furthermore, photographs taken of the unit during a site

visit, on 22.05.2017 would demonstrate that the unit was still far from complete. The unit was unfinished as well, and several of the appliances promised in the buyer's agreement including the dishwasher/washing machine, the televisions etc. were all missing. Photographs were shared with the respondent vide email dated 31.05.2017 asking them to offer possession only when the unit was ready.

- v. The complainant was also shocked to discover that the project being offered for possession was a far cry from the sales brochure promise of a 5 star complex. The latter clearly mentions that the facilities include "health club facilities with fully equipped unisex gym, Jacuzzi, dance & aerobics studio, club with lounge, kids Creche with TotLots, see- saws, baby slides..". the only facilities the complainant could see at the time of site visit was a tiny room with 2 treadmills, 1 cross trainer, 1 cable machine with some 10-12 nos. dumb-bell weights. Not only this, but the sales brochure mentions that the facilities for the suites include "Swimming Pool, Fitness Trails, Tennis Courts, Jogging Track, Kids Play Pool, Toddlers water play, Swings & 16 Climbing Frames, Adventure Play Zone, Cycle Track, Amphitheatre, Dog Walking Tracks, Restaurant, Videogame Room, Convenient shopping, Doctor on Call, Concierge on Call, Young Kids Club, Mini Club, Cooking piped Gas Supply, Wi-fi etc which were not there when the complainant visited the site. The respondent no. 1 on the other hand denied all the promises made in the brochure by saying that the same was misprinted. This amounts to a grave act of misrepresentation on

the part of the responded it is a fact that respondent 1 has in reality got approvals basis representation to authorities that it is developing a 5 star complex. It is also a fact that they have delivered maximum a 4 star grade property for the serviced suites project which not a 5 star one as represented to the complainant in the brochure. It may be noted here that the marketing activity of the respondent no. 1 pre-dates the approvals of the authorities in violation of law.

- vi. That the complainant approached the respondent multiple times for settlement on basis of their assurance that they wish to settle amicably out of court but the respondent attempt to wriggle out of the same for reasons known best to them alone. Left with no choice the complainant is constrained to approach the authority for the redressal of his grievances.

C. The complainant is seeking the following relief:

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

- (i) Direct the respondent to refund the entire amount paid by the complainant to the respondent amounting to Rs. 39,16,558/- along with interest as per section 19(4) read with rule 15 of the rules.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:

- i. That the present complaint is not maintainable in law or on facts. The provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'Act) are not applicable

to the project in question. The application for issuance of occupation certificate in respect of the apartment in question was made on 13.05.2017 i.e., well before the notification of the Haryana Real Estate Regulation and Development Rules 2017 (hereinafter referred to as the Rules) The occupation certificate has been thereafter issued on 20.04.2017. Thus, the project in question is not an "Ongoing Project" under Rule 2(1)(0) of the Rules. The project has not been registered under the provisions of the Act. This authority does not have the jurisdiction to entertain and decide the present complaint. The present complaint is liable to be dismissed on this ground alone.

- ii. That the present complaint is not maintainable in law or on facts. The complainant has filed the present complaint seeking compensation and refund for alleged delay in delivering possession of the apartment booked by the complainant. It is respectfully submitted that complaints pertaining to compensation and refund are to be decided by the adjudicating officer under Section 71 of the Real Estate Regulation and Development) Act, 2016 (hereinafter referred to as "the Act" for short) read with Rule 29 of the Haryana Real estate (Regulation and Development) Rules, 2017, (hereinafter referred to as "the Rules") and not by this authority. It is submitted that this authority, not being the adjudicating officer as alleged, lacks the jurisdiction to adjudicate upon the frivolous and fallacious issues advanced by the complainants. The present complaint is liable to be dismissed on this ground alone.

iii. That clause 4 of the buyer's agreement provides that the developer shall complete the building and hand over the possession of the prism suites to the buyer at the earliest possible date, subject always to various prism suites buyers making timely payment, force majeure causes, availability of essential items for construction, change of policy by government agencies and local authorities and other causes beyond the control of promoter/developer (no penalty to the developer in this case). In the present case, as already mentioned above, the delay in handing over the possession was due to the changes in the policies of the government and focal authorities which was beyond the control of the respondent and the same was conveyed to the complainant on various occasions and as per the clause 41) of the buyer's agreement dated 22.07.2011, complainant was aware about the fact that he cannot claim any penalty or compensation in regard to the delay on grounds mentioned in his clause. It is worthwhile to mention that despite all the delays the respondent has been able to complete few units and the authorities have also granted occupation certificate for the same including the tower where unit in question is situated.

iv. Due to the change in the policies of the Government and the local Authorities, there was a sudden hike in prices of the raw materials, increment in the taxes, even the IFMS charges were increased and all of sudden, the respondent no. 1 has to make several changes in the plan, so that the allottee do not suffer and the respondent No. 1 is able to complete the works at the

earliest possible time and offer possession to the allottee of the balance units.

- v. That the construction of the unit in question stands completed and the respondent is in receipt of the occupation certificate in respect of the same. Moreover, vide letter dated 24.04.2017 offer of possession of the apartment was made to the complainant. The complainant was called upon to complete certain formalities detailed in the said letter and also to make payment of outstanding amounts as set out in the statement of account annexed with the said letter that intimation of possession dated 18.04.2016 (and offer of possession letter dated 24.04.2017. However also duly served upon the complainant but the complainant, instead of doing the needful, has proceeded to institute the present false and frivolous complaint. It is submitted that as soon as the balance payment is remitted by the complainant and the necessary formalities are completed, the respondent shall hand over possession of the suite to the complainant.
- vi. That it is submitted that all the demands that have been raised by the respondent is strictly in accordance with the terms and conditions of the buyer's agreement duly executed and agreed to between the parties. There is no default or lapse on the part of the respondent. It is the complainant who has refrained till date from obtaining possession of the apartment by raising false and frivolous excuses. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The

allegations leveled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

8. Section 11(4)(a) of the Act 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.

9. 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
10. 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(Civil), 357 and reiterated in case of ***M/s Sana Realtors Pvt. Ltd. and other Vs. Union of India and other SLP(Civil) No. 13005 of 2020 decided on 12.05.2022*** 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.”

11. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases 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 relief sought by the complainant/allottee.

- F. I Direct the respondent to refund the entire amount paid by the complainant to the respondent amounting to Rs.39,16,558/- along with interest as per section 19(4) read with rule 15 of the rules.
12. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by it in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 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."

13. As per clause 4 and 6 of the flat buyer agreement dated 22.07.2011 provides for handing over of possession and is reproduced below:

4. *The Promoter/Developer shall complete the Building and hand over the possession of the Prism Suites to the Buyer at the earliest possible date, subject always to various Prism Suites buyers making timely payment, Force Majeure causes, availability of essential items for construction, change of policy by the Governmental Agencies and Local Authorities and other causes beyond the control of the Promoter/Developer (No penalty to the Developer in this case). In case the building is not completed within 36months / indefinitely delayed, then it will be the Buyer's option whether accept the cancellation or claim back the amount paid with Interest @, 9% p.a. In case the project is delayed Due to gross negligence of the Promoter/Developer then post 36 months the Promoter/Developer will bear a penalty of Rs. 15 per Sq. Ft. Per month till the offer of possession.*

6. *The Buyer shall be entitled to the possession of the Prism Suites only after amounts so payable under this Agreement are paid in full and NOC issued. An Undertaking from the Buyer to pay External Development Charges, Internal Development Charges demand received from the Promoter/Developer.*

14. 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.

15. 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. The allottee in this case has filed this application/complaint on 18.02.2019 after possession of the unit was offered to him on 24.04.2017 after obtaining occupation certificate on 20.04.2017 by the promoter. 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 to him and demand for due payment was raised then only filed a complaint before the authority. Though as per terms and condition of builder buyer agreement, the allottee/complainant is entitled to receive the paid-up amount from the respondent. Clause 4 (ii) of the builder buyer agreement is reproduce for ready reference:-

In case the building is not completed within 36months/indefinitely delayed, then it will be the Buyer's option whether accept the cancellation or claim back the amount paid with Interest @, 9% p.a.

16. A perusal of above-mentioned terms and condition shows that the complainant/allottee was given an option either to accept the cancellation or claim back the amount paid with interest @ 9% p.a. in case the building was not completed within 36 months (*indefinitely delayed*) . No doubt there is a delay in completion of the project of more than three years from the due date and the complainant could have exercised his option in view of the terms and condition detailed above but he remained MUM and waited for the completion of the

project and offer of possession. The complainant sends a legal notice to the respondent on 25.01.2018 for immediate handing over of possession of the allotted unit complete in all respect as represented at the time of entering into the agreement. Though filing of the complaint is not barred but full refund cannot be given in view of non-exercising of his right by the complainant in view of clause 4 (ii) of the builder buyer agreement.

17. Section 18(1) gives two options to the allottee if the promoter fails to complete or is 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:

- (i) Allottee wishes to withdraw from the project; or
- (ii) Allottee does not intend to withdraw from the project

18. The right under section 18(1)/19(4) accrues to the allottee 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 allottee has 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 him, it impliedly means that the allottee has 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 he has paid to the promoter are protected accordingly. 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

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."

19. Keeping in view, the request of the complainant, the respondent/promotor directed to refund the paid-up amount after deducting 10% of the sale consideration and shall return the amount along 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 filling of the complaint i.e. 18.02.2019 till the actual date of refund of the

amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.


G. Directions of the authority

20. 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 is directed to refund the paid-up amount of Rs. 39,16,558/- after deduction 10% of the sale consideration of Rs. 40,60,000/- with interest at the prescribed rate i.e., 10.70% on such amount from the date of filing of the complaint i.e., 18.02.2019 till the date of its actual 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.

21. Complaint stands disposed of.

22. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.02.2023