

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

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| Complaint no. : | 4183 of 2022 |
| Date of filing complaint: | 15.06.2022 |
| First date of hearing: | 06.09.2022 |
| Order reserved : | 10.05.2023 |
| Date of pronouncement : | 16.08.2023 |

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| Sh. Rakesh Jain S/o Sh. Prakash Chand Jain R/O: 172B Carriappa Marg, Sainik Farm, M B Road , New Delhi 110062 | Complainant |
| Versus | |
| M/s ATS real Estate Builders Private Limited Regd. office: 711/92, Deepali Nehru Place, New Delhi South Delhi-110019 | Respondent |

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| CORAM: | |
| Shri Ashok Sangwan | Member |
| APPEARANCE WHEN ARGUED: | |
| Sh. Manoj Yadav (Advocate) | Complainant |
| Ms. Yamini proxy counsel | Respondent |

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project 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 and delay period, if any, have been detailed in the following tabular form:

| S. No. | Heads | Information |
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| 1. | Name and location of the project | "ATS Marigold", Sector 89A, Gurugram |
| 2. | Nature of the project | Residential Group Housing |
| 3. | Project area | 11.125 acres |
| 4. | DTCP License | 87 of 2013 dated 11.10.2013 valid till 10.10.2017 |
| | Name of the licensee | Dale Developers Private Limited & Gabino Developers Pvt. Ltd. |
| 5. | HRERA registered/ not registered | Registered vide no. 55 of 2017 dated 17.08.2017 valid till 31.07.2021 |
| 6. | Allotment letter dated | 22.08.2014 (As per page no. 59 of complaint) |
| 7. | Date of execution of apartment buyer's agreement | 13.11.2014 (As per page no. 27 of complaint) |
| 8. | Unit no. | 6062 on 06 th floor, tower 06 (As per page no. 59 of complaint) |
| 9. | Super Area | 2650 sq. ft. (As per page no. 59 of complaint) |
| 10. | Total consideration | Rs. 1,76,43,750 /- (As per page no. 58 of complaint) |



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| | | Rs. 1,59,00,000 /- (BSP) (As per page no. 57 of complaint) |
| 11. | Total amount paid by the complainant | Rs. 65,95,829/- (As alleged by the complainant on page no. 26 and as per total of receipts on page no. 60-64 of complaint) |
| 12. | Possession clause | Clause 6.2 <i>(The Developer shall endeavour to complete the construction of the Apartment <u>within 42 (forty-two) months from the date of this Agreement, with the grace period of 6 (six) months ie. ("Completion Date")</u>, subject always to timely payment of all charges including the basic sale price, stamp duty, registration fees and other charges as stipulated herein. The Company will send possession Notice and offer possession of the Apartment to the Applicant(s) as and when the Company receives the occupation certificate from the competent authority(ies)..)</i> |
| 13. | Due date of possession | 13.11.2018 (Calculated from the date of the agreement i.e.; 13.11.2014 + grace period of 6 months) Grace period of 6 months is allowed |
| 14. | Occupation Certificate | Not obtained |
| 15. | Offer of possession | Not offered |

B. Facts of the complaint:

3. That the respondent purported to have obtained license bearing no. 87 of 2013 dated 11.20.2013 from Director General of Town and Country Planning (DGTCP), Haryana and purported to have entered into a development agreement with the land owners for the development of the project land, launched a group housing scheme known as "ATS MARIGOLD" in Sector 89-A Gurgaon, Haryana on a land parcel admeasuring 11.125 acres approximately.
4. That the project was widely advertised by the respondent and on seeing the lucrative advertisements, the allottees approached the desk office and sale office of the respondent to inquire about the project. Its officials and brokers made various lucrative representations and promised that the unit in the project will be delivered within 42 months hereof. On the basis of these representation and the promises, the complainants applied for unit in the above housing project vide an application dated 01.07.2014 and paid booking amount. After few days the complainant was allotted unit bearing no. 6062 in tower-6 vide allotment letter dated 22.08.2014.
5. That thereafter, the respondent sent a builder buyer's agreement which was to be signed and returned to the respondent. The total consideration of the respective apartments was fixed by the respondent and was to be paid in accordance with a fixed payment schedule. Vide individual buyer's agreement, the respondent promised to handover the possession of the apartment within 42 months from the date of execution of the agreement. Based on the payment plan the he paid regular installments.

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6. That some of the clauses in the buyer's agreement were one sided. The complainant had to sign already prepared documents. Despite the fact that some of the clauses contained therein were totally unreasonable and were in favor of the respondent only. It is pertinent to mention here that at the time of applying for the apartment/flat and payment of application money, the buyer's agreement was not shown to the complainant. Even there was a gap of substantial period between the date of application and signing of buyer's agreement. It was a fixed set of papers, which was asked to be signed by the complainant and no modification was entertained by the respondent. If any request to change the one sided clauses is made, it was told that the buyer's agreement has to be signed as it is and in case it is not acceptable then the allotment will stand cancelled and earnest money will be forfeited. That it is pertinent to mention here that prior to the signing of the buyer agreement, the respondent in blatant violation of the statutory provisions already collected Rs. 45,90,000/- from the complainant which constituted approximately 26% of the sale consideration.
7. That as per clause 6.2 of the buyer's agreement, the respondent was bound to give possession of the unit to the complainant within 42 months from execution of the agreement, which stands already expired on 30.03.2018. However, it has not handed over the possession of the unit till date. The complainant paid the entire sum as and when demanded by the respondent but it has not fulfilled his promise to handover the possession of the flat within the promised time. That it is also pertinent to mention here that

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since the respondent has not completed the construction and applied for occupancy certificate by 30.03.2018, the respondent is not entitled for the benefit of the grace period.

8. That the complainant regularly visited the site but was surprised to see that the construction was never in progress. No one was present on the site to address the queries of the complainant. Despite taking most of the amount towards the consideration, the respondent deliberately not constructed the apartment. The site seemed to be an abandoned piece of land with only a skeleton structure of semi constructed building. Despite a delay of many months/years, the construction of the unit is still not completed. The respondent is deficient in renderings services and after extracting most of the money from him and likely has deliberately stopped the construction of the unit.
9. That the subject unit was booked with the specific purposes of using it as home for his family. Due to the aforesaid acts and omissions on part of the respondent, the complainant is suffering from disruption to their living arrangements, mental torture, and agony and also continue to incur severe financial losses.
10. That as per the clause 6.3 of the buyer's agreement drafted by the respondent, it incorporated that in case of any delay, the respondent shall pay to the complainant, a compensation at the rate of Rs.5/- per sq. ft. per month for the period of the delay. It could be seen from clause 6.3

incorporated by the respondent is one-sided buyer's agreement and has offered to pay a meagre sum of Rs.5/- per square feet for every month of delay. If we calculate the amount in terms of financial charges, it comes to approximate @ 0.9% per annum rate of interest. Even these charges are to be paid after 42 months of period that is taken by the respondent to construct the unit as per the buyer's agreement. This shows that it has found a cheap source of funding the commercial/residential projects from the hard-earned savings and borrowed money of innocent residential buyers. The respondent is raising funds at the interest rate of mere 0.9% per annum and that too with initial 42 months of interest free duration. Therefore, the respondent is liable to pay compensation in the form of interest from the date of each payment till the time the amount is actually returned to the complainant.

11. That the complainant has to incur huge expenses and waste valuable time in visiting the office of the respondent as well as in writing letters/emails for no fault of complainant, and of no avail. At the time of sale of the flat, it gave rosy pictures and made false promises to the complainant and cheated him by not giving possession as agreed in the agreement and till this date. However, it has miserably failed to comply with its contractual obligations of handing over possession of the subject unit and even after several months, it has not completed the entire construction work, which is a clear-cut case of "deficiency in service" on the part of the respondent.

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12. That the respondent has caused inordinate and extraordinary delay to initiate and construct the planned milestones of the project and the construction of the project has not been completed despite lapse of many months. The complainant repeatedly tried to contact the respondent to enquire about the construction status of the project but could not get any satisfactory reply. However, it used to make false claims that the construction was going on at the construction site and always avoided any plausible reply and kept on delaying the matter on one pretext or the other. Seeing the conduct of the respondent, the complainant have now lost all faith in the project of the respondent. The complainant do not now wish to use the apartment as a residence for themselves, even if the respondent delivers the possession of the same to him in future. Hence, he wish to withdraw from the project and want return of the entire money paid to it along with the compensation in the form of interest at the prescribed rate from the date of each payment till the date of refund. The complainant could not be forced to take possession after the promoter has defaulted on the committed date of possession by more than 4 years. That the complainant in the facts of the instant case and in light of the recent judgment of the Apex court cannot be made to wait for the possession and are entitled to refund of their money along with compensation in the form of interest.

C. Relief sought by the complainant:

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

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- i. Direct the respondent to refund the amount paid by the complainant along with interest at the prescribed rate.
14. The present complaint was filed on 16.06.2022 in the Authority. On 10.05.2023, the counsel for the respondent put in appearance and stated at bar that the copy of reply has already been supplied to the complainant and the said fact was duly confirmed by the complainant. The complainant has also filed written submissions dated 18.11.2022 in the Authority whereas the respondent sought short adjournment for filing of reply in the Authority. The said request was allowed with a specific direction to file the reply in the Authority within two weeks. However, despite specific directions and providing an opportunity of being heard, no written reply has been filed by the respondent. Thus, keeping in view the opportunity given to the respondent and the fact that despite lapse of one year the respondent has failed to file copy of reply in the registry, the defence of the respondent is struck off.
15. Vide proceedings of even date, the complainant also submitted that case of the complainant is fully covered under **CR/4732/2020 titled as Ambrish Bajaj Vs ATS Real Estate Builders Private Limited decided on 25.07.2022** and laid emphasis on para 25 and 36 of said order. The Authority observes that para 25 and 36 of said order decided on 25.07.2022. It includes plea of respondent w.r.t force majeure circumstances and findings of the Authority thereon. The relevant para(s) of the order dated 25.07.2022 is reproduced hereunder :-

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F.III Objection regarding force majeure conditions:

36. The respondent- promoter alleged that period over and above such grace period of 6 months be allowed on account of force majeure conditions. The respondents-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as demonetization, shortage of labour, various orders passed by NGT and weather conditions in Gurugram and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 27.05.2015 and as per terms and conditions of the said agreement due date of handing over of possession along with 6 months grace period comes out to be 27.05.2019. The events such as demonetization and various orders by NGT in view of weather condition of Delhi NCR region, were for a shorter duration of time and were not continuous where as there is a delay of more than three years even after due date of handing over of possession and there is nothing on record that the respondent has even made an application for grant of occupation certificate. Hence, in view of aforesaid circumstances no period more than specified grace period of 6 months can be allowed to the respondent-builder. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F.IV Objection regarding delay in completion of construction of project due to outbreak of Covid-19

37. The Hon'ble Delhi High Court in case titled as **M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020** dated 29.05.2020 has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."

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In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 27.05.2019. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession

16. Keeping in view the findings of Authority in **CR/4732/2020** titled as **Amrish Bajaj Vs ATS Real Estate Builders Private Limited** decided on **25.07.2022** and the fact that the reply of the respondent has been struck off in the instant complaint, no grace or leniency can be given to the respondent except for grace period of 6 months as provided under clause 6.2 of agreement dated 13.11.2014 being unqualified.
17. Copies of all the relevant documents have been filed and placed on 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.

D. Jurisdiction of the authority:

18. 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

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

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)(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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 promoter, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.

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.

E. Entitlement of the complainant for refund:

E.I Direct the respondent to refund the amount paid by the complainant along with interest at the prescribed rate.

19. The project detailed above was launched by the respondent as group housing complex and the complainant were allotted the subject unit in tower 06 on 22.08.2014 against basic sale consideration of Rs. 1,59,00,000/-. It led to execution of apartment buyer's agreement between the parties on 13.11.2014, detailing the terms and conditions of allotment, total sale consideration of the allotted unit, its dimensions, due date of possession, etc. A period of 42 months along with grace period of 6 months was allowed to the respondent for completion of the project and that period has admittedly expired on 13.11.2018. It has come on record that against the basic sale consideration of Rs. 1,59,00,000/- the complainant has paid a sum of Rs. 65,95,829/- to the respondent constituting 41.48% of basic sale consideration.
20. The complainant-allottee raised a concern that despite payment of more than 40% of consideration and passing of due date of handing over of possession in 2018, the respondent-builder has failed to handover the possession of the subject unit. Thus, keeping in view the fact that the allottee-complainant wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on his failure to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016. The due date of possession as per agreement for sale as mentioned in the table above is **13.11.2018** and there is delay of 03 years 07 months 02 days on the date of filing of the initial complaint i.e. 15.06.2022.

21. 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 amount towards the sale consideration.
22. Further in the judgement of the Hon'ble Supreme Court of India in the cases of *Newtech Promoter and Developers Private Limited Vs State of U.P. and Ors. (2021-2022(1)RCR(Civil),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

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

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). 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 wish 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.

23. 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.

The Authority hereby directs the promoter to return the amount received by him i.e., **Rs. 65,95,829/-** with interest at the rate of 10.75 % (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

F. Directions of the Authority:

24. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:
- i) The respondent /promoter is directed to refund the amount i.e. **Rs. 65,95,829/-** received by him from the complainant along with



interest at the rate of 10.75 % p.a. 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.

- 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.

25. Complaint stands disposed of.

26. File be consigned to the registry.



(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.08.2023

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