

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

Order reserved on: 02.05.2023
Date of pronouncement of order: 08.08.2023

Sekhar Ramadurai

R/O B-1/408, 4th Floor, Satyam Apartment, B-20,
Vasundra Enclave, New Delhi- 110096

Complainant

Versus

Neo Developers Pvt. Ltd.

Registered office at: 32-b, pusa road, New Delhi

Also, At: 1507, tower D, Global Business Park
Gurugram (hr)

Respondent

CORAM:

Shri Ashok Sangwan

Shri Sanjeev Kumar Arora

Member

Member

APPEARANCE:

None

Shri Pankaj Chandola

Advocate for the complainant

Advocate for the respondent

ORDER

1. The present complaint dated 09.03.2022 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 there under 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:

S. N.	Particulars	Details
1.	Name of the project	"Neo Square", Sector 109, Gurugram
2.	Nature of the project	Commercial
3.	Project area	2.71 acres
4.	DTCP license no. and validity status	102 of 2008 dated 15.05.2008 valid upto 14.05.2024
5.	RERA Registered/ not registered	109 of 2017 dated 24.08.2017 valid upto 23.08.2021 plus 6 months of extension due to COVID-19 = 23.02.2022
6.	Allotment Letter	01.10.2012 (Page 22 of the complaint)
7.	Date of execution of Apartment Buyer's Agreement	06.03.2013 (Page 32 of complaint)

8.	Unit no. and area	Shop no. 34, Ground floor, tower B admeasuring 565 sq. ft. (super area) (As per BBA at page 34 of complaint)
9.	Possession clause	<p>5.2 That the company shall complete the construction of the said building/complex within which the said space is located within 36 months from the date of execution of this agreement or from the start of construction whichever is later and apply for grant of completion/occupancy certificate. The company on grant of occupancy/completion certificate shall issue final letters to the allottee who shall within 30 days, thereof remit all dues.</p> <p>5.4 That the allottee hereby also grants an additional period of 6 months after the completion date as grace period to the company after the expiry of the aforesaid period.</p>
10.	Date of start of construction	<p>The Authority has decided the date of start of construction as 15.12.2015 which was agreed to be taken as date of start of construction for the same project in other matters. CR/1329/2019</p> <p>It was admitted by the respondent in his reply that the construction was started in the month of December 2015.</p>
11.	Due date of possession	15.06.2019

		(Calculated as 36 months from date of start of construction i.e., 15.12.2015 plus 6 months of grace period as the same is unqualified)
12.	Basic sale consideration	Rs. 50,03,456/- (As per payment plan, page 53 of complaint)
14.	Amount paid by the complainant	Rs. 41,96,903/- (As stated by the complainant)
15.	Occupation certificate /Completion certificate	Not obtained
16.	Offer of possession	Not offered
17.	Reminder Letters	04.10.2017, 23.10.2017, 04.12.2017, 26.12.2017, 18.12.2018
18.	Cancellation Letter	09.01.2019 (Page 73 of reply)

B. Facts of the complaint

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

- i. That the Original Allottee applied for a unit/Shop in the project of the Respondent called "NEO Square" situated at Sector 109, Gurgaon. That relying upon the assurances and representations of the Respondent, the Original Allottee got provisionally allotted shop bearing no. 34 on Ground Floor measuring 565 sq. ft. in the above said project.

- ii. The Original Allottees paid an initial amount of Rs. 7,69,942/- towards booking and the same was acknowledged through vide cheque no. 399539 Receipts no. 000040 and 000039 dated 28.07.2012 issued in favour of Respondent Company. The Original Allottee received a booking letter from the Respondent Company.
- iii. That the Shop Buyer's Agreement for unit/ shop no. 34 was executed between the Original Allottee and Respondent after a considerable delay of 1 year for a total sale price of Rs. 50,03,456/-. According to clause 5.2 of the Shop Buyer's Agreement, the possession was required to be delivered within 36 months from the date of execution of the Shop Buyer's Agreement with an additional grace period of 6 months, i.e., on or before 23.07.2016.
- iv. The Complainant in order to see the status of his project tried to contact the respondent but respondent never provide the satisfactory answers or response to the complainant and thereafter the complainant sent an E mail to the respondent dated 24.12.2021 but no response/revert from the respondent side.
- v. The Original Allottee endorsed the Shop Buyer's Agreement for the above mentioned unit dated 23.01.2013 in favour of the present Complainant. That after timely payment against each and every demand letter, the Complainant was hoping that they will get possession of their apartment as per the delivery date provided in the Agreement. Unfortunately, on regularly visiting the site, it was realized by the Complainant that the construction on the site was not as per the construction plan. This fact was brought to the

knowledge of the Respondents repeatedly through personal visits, letters, phone calls and E-mail but the Respondent merely assured that the delivery of the apartment would be given as per the dates specified in the Agreement without making any substantive progress. However, despite several assurances, the Respondent failed/neglected to deliver the possession of the Commercial shop in time.

- vi. That after losing all hope from the Respondent in terms of getting possession and the interest on the delay in delivery period of more than 6 years since 23.07.2016 and having shattered the dreams of a proper and timely delivery of the Shop as per the Buyer's Agreement, the Complainant approached this Hon'ble Authority for redressal of his grievance

C. The complainant is seeking the following relief:

4. The complainant has sought the relief(s):
- (i) Direct the Respondent to hand over the possession of the said unit/ Shop with the amenities and specifications as promised in all completeness without any further delay and not to hold delivery of the possession for certain unwanted reasons much outside the scope of ABA along with interest.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:
- i. That At the outset, in around 2012 the Complainant herein learned about the project launched by the Respondent titled as 'Neo Square' (herein referred to as 'Project') situated at Sector 109,



Gurgaon and approached the Respondent repeatedly to know the details of the said project. The Complainant further inquired about the specification and veracity of the project and was satisfied with every proposal deemed necessary for the development of the project.

- ii. That after having a keen interest in the project constructed by the Respondent the Complainant desired to book a unit and applied for the same. Accordingly, *vide* Provisional Allotment Letter dated 01.10.2012 the Complainant along with Co-Allottee i.e., Mr. Ashish Bangera were were provisionally allotted a shop bearing no. 34 on Ground Floor admeasuring 565 sq. ft. in the Project of the Respondent. The Complainant was aware of each and every term of the application and agreed to sign without any protest any demur.
- iii. That it was mutually decided between the Complainant and the Respondent that timely payment of instalments was the essence of the BBA dated 06.03.2013 and the same is recorded in Clause 4.4 of the BBA. Furthermore, it was also agreed by the parties in Clause 4.6 that the Respondent is not obligated to send demand notices or reminders regarding the payments to be made by the Complainant. The Complainant was obligated to make regular payments as per the Payment Schedule on his own volition. However, for ease of the Complainant, the Respondent sent demand notices and repeated reminders, to clear the outstanding dues. That it is pertinent to mention that the Complainant despite receiving multiple demand

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letters and reminder letters failed to make payments on time. Clause 4.4 and Clause 4.6 of the BBA dated 06.03.2016 are reproduced hereinbelow for the convenience of the Hon'ble Authority:

"Clause 4.4: That the timely payment of instalments as stated in Payment Plan (Annexure-I) and applicable stamp duty, registration fee, maintenance charges, service tax, BOCW Cess, and other charges and taxes payable under this Agreement and/or law as and when demanded is the essence of this Agreement."

"Clause 4.6: That it is clearly agreed and understood by the Allottee that it shall not be obligatory on the part of the Company to send demand notices/ reminders regarding the payments to be made by the Allottee as per Payment Plan (Annexure -I)..."

iv. It is submitted that the Complainant has not paid the instalments since 29.09.2017 despite receiving repeated reminders. A table is being provided herein below for showing the instalments which were not paid by the Complainant till date:

S.No.	Demand/Reminder Letter Date	Milestone	Amount
i.	04.10.2017 (1 st reminder)	On Start of Floor Below Top Floor	Rs. 5,91,967/-
ii.	23.10.2017 (2 nd reminder)	On Start of Floor Below Top Floor	Rs. 5,91,967/-
iii.	08.11.2017	On Start of Top Floor	Rs. 11,02,008/-



iv.	04.12.2017 reminder)	(1 st	On Start of Top Floor	Rs. 11,02,008/-
v.	26.12.2017 reminder)	(2 nd	On Start of Top Floor	Rs. 11,02,008/-
vi.	18.12.2017		On Start of External Glazing/Finishing	Rs. 5,92,462/-

- V. That despite sending multiple Demand Letters/ Reminder Letters the Complainant has only paid Rs. 41,96,903/- towards the total sale consideration of the unit. That there exist vast outstanding amounts to the tune of Rs. 18,43,056/- inclusive of EDC/IDC, GST, VAT, and Interest etc., that stands due and payable on part of the Complainant till date. That in the light of the facts mentioned herein, the Complainant cannot be allowed to take benefit of his own wrongs. Therefore, the Complaint ought to be dismissed right at the very outset.
- VI. That by not making timely payment of instalments the Complainant has violated the duties of an allottee provided under Section 19 (6) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the "RERA Act, 2016"). That as per Section 19 (6) of the RERA Act, 2016, it is the duty of the Allottee to make timely payments in the manner as agreed between the parties and within the time specified in the agreement signed between the Allottee and the Builder/Promoter. That Section 19 (6) of the RERA Act, 2016 is reproduced hereinbelow for the convenience of the Hon'ble Authority:



Section 19 (6): "Every Allottee, who has entered into an agreement or sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any".

VII. That in the present case, the Complainant has not obliged its duties as per the Buyers' Agreement and further has not made the payments as per the agreed time period. In these circumstances, the Complainant is estopped from raising any allegations against the Promoter as the Complainant himself is in default. Furthermore, not making timely payments have hampered the construction timeline and the progress of the Project of the Respondent.

VIII. That in Clause 4.5 of the BBA it was expressly agreed by the Complainant that he shall comply with the terms and conditions of the BBA dated 06.03.2013 and make timely payment of instalments, and if he fails to comply, then in that scenario the Respondent shall be at liberty to forfeit the earnest money and cancel the allotment of the Complainant. That Clause 4.5 of the BBA is reproduced hereinbelow for the convenience of the Hon'ble Authority:

Clause 4.5: "That it shall be incumbent on the Allottee to comply with the terms of payments and/or other terms and conditions of this Agreement failing which the Company shall be at liberty to forfeit the entire amount of earnest money i.e., 10% of BSP + Brokerage to be deducted if paid any and interest on delayed payments and whereupon this Agreement shall stand cancelled and the allottee shall be left with no lien, right, title, interest or claim of whatsoever nature in the said space. The Company shall thereafter be



free to resell and/or deal with the said space in any manner whatsoever at its sole discretion. The amount(s), if any, paid over and above the earnest money along with the processing fee, any interest paid, due or payable, any other amount of a non-refundable nature including brokerage paid by the Company to the Broker (in case of booking done through a broker) shall not be refunded to the Allottee. The Company shall have first lien and charge on the said space for all its dues and other sums payable by the Allottee to the Company under this Agreement.

- IX. It is reiterated herein that that the Complainant is a habitual defaulter. That despite receiving multiple demand letters/ reminder letters the Complainant failed to make timely payments. That upon not receiving the amounts as per demands raised from the Complainant after 29.09.2017 the Respondent was left with no other option and was constrained to send a cancellation letter dated 09.01.2019 wherein the allotment of the Complainant was cancelled.
- X. It is most respectfully submitted that without prejudice and without accepting the averments of the Complainant, even if it assumed that Complainant have any cause of action subsisting, then the cause of action had accrued on 09.01.2019 i.e., the date on which the cancellation letter was issued and the present complaint has been filed on 09.03.2022 i.e., after the expiry of more than 3 years. Hence, the present complaint has been filed beyond the prescribed period of limitation and hence the complaint is barred by law of limitation and should be dismissed outrightly by this Authority. It is noteworthy to mention herein that no fresh or continuous cause of



action subsists beyond 3 years of the accruing of the right to sue. In the present case there is no fresh or continuous cause of action which subsists after 09.01.2022.

6. 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

7. 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

8. 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

9. 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:

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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 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.
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(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."

12. 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 hand over the possession of the said unit/ shop with the amenities and specifications as promised in all completeness without any further delay and not to hold delivery of the possession for certain unwanted reasons much outside the scope of aba along with interest.

13. The complainant was allotted Shop no. 34, Ground floor, tower B admeasuring 565 sq. ft. (super area) in the project " , Neo Square", Sector 109" by the respondent builder for a basic sale consideration of Rs. 50,03,456/- and he paid a sum of Rs. 41,96,903/- which is approx. 83% of the basic sale consideration. A buyer's agreement dated 06.03.2013 was executed between parties with regard to the allotted unit and the due date for completion of the project and offer of possession was fixed



on 15.06.2019. The complainant failed to pay amount due against the allotment unit.

14. As per 4.5 the terms of the builder buyer agreement the complainant was liable to make the payment as per the payment plan and the relevant clauses of the builder buyer agreement are reproduced under for ready reference:

Clause 4.5: "That it shall be incumbent on the Allottee to comply with the terms of payments and/or other terms and conditions of this Agreement failing which the Company shall be at liberty to forfeit the entire amount of earnest money i.e., 10% of BSP + Brokerage to be deducted if paid any and interest on delayed payments and whereupon this Agreement shall stand cancelled and the allottee shall be left with no lien, right, title, interest or claim of whatsoever nature in the said space. The Company shall thereafter be free to resell and/or deal with the said space in any manner whatsoever at its sole discretion. The amount(s), if any, paid over and above the earnest money along with the processing fee, any interest paid, due or payable, any other amount of a non-refundable nature including brokerage paid by the Company to the Broker (in case of booking done through a broker) shall not be refunded to the Allottee. The Company shall have first lien and charge on the said space for all its dues and other sums payable by the Allottee to the Company under this Agreement."

15. The respondent issued many reminders i.e., 04.10.2017, 23.10.2017, 04.12.2017, 26.12.2017, 18.12.2018 and thereafter, issued cancellation letter to the complainant. The Occupation Certificate for the project of the allotted unit is not obtained. It is evident from the above mentioned facts that the complainant paid a sum of Rs. 41,96,903/- against basic sale consideration of Rs. 52,26,250/- of the unit allotted to him on



01.10.2012. The complainant has failed to adhere to the terms and conditions of the builder buyer agreement. The respondent cancelled the unit of the complainant with adequate notices. Thus, the cancellation of unit is valid.

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

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the



earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."

17. Keeping in view, the aforesaid legal provision, the respondent/promotor directed to refund the paid-up amount after deducting 10% of the basic sale consideration and shall return the amount along 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 cancellation i.e., 09.01.2019 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

18. 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):
- The respondent is directed to refund the paid-up amount of Rs. 41,96,903/- after deducting 10% of the basic sale consideration of Rs. 50,03,456/-with interest at the prescribed rate i.e., 10.75% on



such balance amount , from the date of cancellation i.e., 09.01.2019 till the actual date of refund.

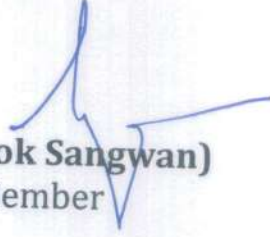
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

19. Complaint stands disposed of.

20. File be consigned to registry.


(Sanjeev Kumar Arora)

Member


(Ashok Sangwan)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.08.2023