

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

Complaint no.	:	6761 of 2022
Date of filing complaint:		13.10.2022
First date of hearing:		17.01.2023
Date of decision	:	11.07.2023

1. 2.	Sh. Rohit Asthana S/o Dr. B.P. Asthana Smt. Divya Asthana W/o Sh. Rohit Asthana R/O: E-277, Kamla Nagar, Agra, Uttar Pradesh- 282004	Complainants
Versus		
	M/s Ashiana Dwellings Private Limited Regd. office: 3H, Plaza M6, Dist. Center Jasola, New Delhi- 110025	Respondent

CORAM:		
Shri Ashok Sangwan		Member
Shri Sanjeev Kumar Arora		Member
APPEARANCE:		
Ms. Aparna Tripathi (Advocate)		Complainants
Sh. Anmol Kumar (Advocate)		Respondent

ORDER

- The present complaint has been filed by the complainant/allottees 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 allottees 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 complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.no.	Particulars	Details
1.	Name of the project	Ashiana Mulberry, Sector-2, Gurgaon (Phase-I)
2.	Project type	Group Housing Project
3.	RERA registered/not registered	Registered vide registration no. 44 of 2017 dated 11.08.2017
	Validity status	30.06.2020
4.	DTPC License no.	16 of 2014 dated 10.06.2014
	Validity status	09.06.2014
	Licensed area	10.25 acres
	Name of licensee	Ashiana Dwellings Private Limited
5.	Provisional allotment dated	Not provided on record
6.	Agreement for sale	19.09.2018 (As per page no. 32 of complaint)
7.	Unit no.	C-908 on 09 th floor, tower T2 (As per page no. 38 of complaint)
8.	Unit area admeasuring	1210 sq. ft. (Super area) (As per page no. 38 of complaint)
9.	Possession clause	Clause 7.1 of agreement



		<p>Subject to receipt of Occupation certificate within 60 Days from the date of application, the promoter assures to handover the possession of the Apartment along with parking (if applicable) by 30th June 2019 plus a grace period of 6 months as per agreed terms and conditions unless there is delay due to "force majeure. Court orders, Government policy/ guidelines, decisions affecting the regular development of the real estate project. If, the completion of the Project is delayed due to the above conditions, then the Allottees agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the Apartment. The Promoter shall be deemed to have completed the construction as per agreed schedule if application for grant of Occupancy Certificate is filed within the schedule given above.</p>
10.	Due date of possession	<p>30.12.2019 (Calculated as per clause 7.1 of agreement : 30.06.2019 + 6 months) Grace period of 6 months is allowed</p>
11.	Payment plan	Subvention linked payment plan
12.	Total sale consideration	Rs. 64,12,950/- (As per payment plan on page no. 60 of complaint)
13.	Amount paid by the complainants	Rs 66,07,874/- (As per applicant ledger dated 03.01.2023 on page 62 of reply)
14.	Reminders issued by respondent asking complainant to make	24.04.2019, 22.08.2019, 31.03.2020, 31.03.2020, 15.03.2021 and 19.02.2021



	payment towards dues	(As per page no. 88-116 of reply)
15.	Email seeking Handover of possession and if the same is not given, then arrangement for refund shall be made.	04.04.2022 (As per page no. 77 of complaint)
16.	Date of filing of complaint seeking refund	13.10.2022
17.	Occupation certificate	02.11.2022 (As per page no. 189-191 of reply)
18.	Offer of possession	03.11.2022 (As per page no. 192 of reply)

B. Facts of the complaint:

3. That the respondent advertised itself as a very ethical business group that lives onto its commitments in delivering its housing projects as per promised quality standards and agreed timelines. It further assured to them that it has already secured all the necessary sanctions and approvals from the appropriate government authorities for the construction and completion of the said real estate project.
4. That the respondent was well aware of the fact that in today's scenario looking at the status of the construction of housing projects in India, especially in NCR, the key factor to sell any dwelling unit is the delivery of completed house within the agreed and promised timelines. The respondent; therefore, used this tool, which is directly connected to the emotions of gullible consumers and always represented in its marketing

plan that the subject unit would be delivered within the agreed timelines and allottees would not suffer hardship of paying rent along-with the installments of home loan like in the case of other developers in market.

5. That, somewhere in the month of April 2018, the respondent through its marketing executives and advertisement through various medium and means approached the complainants with an offer to invest and buy an apartment in the proposed residential project of the respondent, by the name and style of "ASHIANA MULBERRY PHASE- I" situated at Sector-2, Village Sohna, Gurgaon. It further assured that the allotment letter and apartment buyer agreement would be issued to them within one week of booking.
6. That relying upon the assurances and promises made by the respondent, on 03.06.2018, they booked a residential unit /apartment bearing no. C-908 on 09th floor, having carpet area of 697.83 Sq. in tower- T2 along-with exclusive right of usage for (1) No. reserved covered car parking having basic sales price (BSP) Rs. 52,03,000/- in the proposed project of the respondent and paid booking amount of Rs. 3,00,000/- . and the same was acknowledged by the respondent by way of receipt of even date. It was again assured that it would deliver /handover the possession of the dwelling unit to the complainants by December 2018.
7. That the respondent assured the complainants that it would issue the allotment letter at the earliest and maximum within one week, she will get the allotment as a confirmation of the allotment of said residential

apartment in their name. However, the respondent in utter contravention of its own terms, despite their repeated requests and reminders of the complainants.

8. That the respondent instead of issuing allotment letter to the complainants has executed an agreement for sale on 19.09.2019. However, in the said agreement for sale, the respondent arbitrarily has increased a total price of the allotment to Rs. 64,12,950/-, without explaining any charges thereon and despite assurance that there would be no increment in the sale price of the said apartment; therefore, the respondent has violated its own terms and promises as were given at the time of approaching the complainants.
9. That, while executing the agreement for sale in favour of the complainants giving its assurance that the possession of the allotted apartment shall be given by the respondent to the complainants by 30.06.2019 plus a grace period of 6 months, which comes to December 2019. It is pertinent to mention here that the complainants had chosen the subvention scheme plan. The respondent misusing its dominant position had coerced and pressurized them to sign the arbitrary, illegal and unilateral terms of the said agreement and when they objected to those arbitrary terms and conditions of the said agreement and refused to sign the same, it threatened to forfeit the amount already paid by them as sale consideration in respect of the said apartment and threatened to cancel their booking. The complainants had no other option and found themselves helpless.

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10. That they borrow the money for buying the said flat and this intention was being conveyed to the respondent, on which it suggested that it has tie-up with HDFC Bank Ltd., and if they take advance (loan) from other bank, then the respondent would cancel their booking. They were left with no other option but to obtain loan from HDFC Bank, which is having nexus with respondent to cheat innocent persons like complainants, thus, obtained a loan worth Rs. 50,00,000/- and the said HDFC Bank at the behest of respondent also forced the complainants to sign arbitrarily terms and conditions of the HDFC Bank.
11. That, as per the terms and conditions of the buyer's agreement, it was agreed and undertaken by bank that it would keep continue to pay the amount of loan to the respondent until and unless it delivers the possession to them, as they have opted for the subvention scheme plan and the respondent was under legal obligation to pay the pre-EMIs to the bank until and unless it delivers the possession to the complainants but respondent in utter contravention and violation of its own term stopped paying the pre-EMIs to the bank even without offering possession of the said apartment. When respondent stopped paying pre-EMIs to the bank, the bank started taking /receiving the amount of pre-EMIs from the account of complainants, which came to the knowledge of the complainants when they receive message on 15.04.2019 from their banker in this regard, till then they paid pre-EMI of around Rs. 14,09,464/-.



12. That, even after elapsing the period of more than 36 months, there is no sign of construction over the said project. The respondent with a common intention to grab their hard-earned money kept assuring and promising them that it would deliver the said unit well within time period as framed by respondent and the project site still lying vacate at spot.
13. That, despite umpteen efforts and requests made by the complainants to the respondent, neither the respondent refunded the amount paid by them nor handed over the possession. They have also requested the respondent through e-mail, whereby it was requested to handover/deliver the possession of the subject unit booked by them, as the time, as was given by the respondent, has already been exhausted.
14. That, as per the ledger account issued by respondent on the request of complainants, as on the date of filing of present complaint they have already paid an amount of Rs. 66,07,874/- and no amount of the total sale consideration is left to be paid on their part.
15. That, in the said agreement, the respondent assured and promised the complainant to handover the possession of the subject unit by 30.06.2019 with a grace period of 6 months i.e. by 30.12.2019. But it kept extracting the money from them but has yet not offered the possession of the subject unit. They tried their level best to reach the representatives of the respondent to seek a satisfactory reply but all in vain. They requested the respondent to deliver the subject unit citing the extreme financial and mental pressure

they were going through, but it never cared to listen to their grievances and left them with the sufferings and pain.

16. That the respondent has not completed the construction of the said project till now and they have not been offered the possession of the said unit despite all promises done and representation made by it and has violated the terms and conditions of the agreement.
17. That the complainants faced all these financial burdens and hardships out of their limited income resources, only because of respondent's failure to fulfil its promises and commitments. Failure of commitment on the part of respondent has made the life of complainants miserable socially as well financially as all their personal financial plans and strategies were based on the date of delivery of possession as agreed by the respondent. Therefore, it forced them to suffer grave, severe and immense mental and financial harassment with no fault on their part. Apart from this, they have been paying rent for their rented accommodation out of their limited income along-with pre-EMIs to the banker.

C. Relief sought by the complainants:

18. The complainants have sought following relief(s):
- Direct the respondent to refund the amount of Rs. 66,07,874/- to the complainants.
 - Direct the respondent to pay the interest at the rate of 24% compounded quarterly.



iii. Direct the respondent to refund the amount of pre-EMI Rs. 14,09,464/- to the complainants.

19. On the date of hearing, the authority explained to the respondent/promoter about the contravention 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 respondent:

The respondent by way of written reply made following submissions

- a. That on 03.06.2018 the complainants out of their own free will and volition approached the respondent, applied and booked a unit bearing number C-908 on the 9th floor of tower-T2 having super built up area of 1210 sq. ft. in the respondent's project namely "Ashiana Mulberry Phase-I" situated at Sector-02, Sohna, Gurgaon, Haryana. They opted for pre-EMI subvention plan in order to make the payments of all the installments.
- b. Thereafter, an agreement for sale dated 14.09.2018 was executed between the parties. It is submitted that the said agreement also contained the schedule of payment plan and they were under an obligation to adhere to the said payment plan. The agreement for sale under schedule "C" provides the schedule of payments and clause 7.1(ii) provides the date of possession of unit as 30.12.2019 (30.06.2019 plus 6 months grace period).
- c. That the total sale consideration of the said unit as per clause 1.2 of the agreement was Rs. 72,57,052/- including taxes, out of which the



respondent has received a sum of Rs. 66,07,874/- including taxes till date. Thus, a sum of Rs. 6,49,178/- still remains outstanding which the complainants have failed to pay qua the allotment of the said unit.

- d. That the complainants were under an obligation to adhere to the payment plan opted. Nevertheless, they have defaulted to adhere to the payment plan. It is most respectfully submitted before the Authority that despite receiving various due payment reminders dated 12.10.2018, 09.11.2018, 04.12.2018, 19.12.2018, 07.01.2019, 23.01.2019, 21.02.2019, 12.03.2019, 24.04.2019, 17.05.2019, 03.07.2019, 17.07.2019, 22.08.2019, 31.03.2020, 19.02.2021 and 15.03.2021 through email and otherwise sent by the respondent demanding the outstanding payments, they have failed to adhere to the said payment plan opted. Hence, the complainants have violated the clause 1.9 and 1.10 of the agreement for sale. There is no iota of doubt that the said act of the complainants is highly deplorable and amounts to breach of terms of the agreement for sale. It would not be amiss to state that since they have failed to make the payment of the due installments in terms of the payment plan as opted thus, they have violated the terms of the agreement. They were well aware that timely payment of the installments and outstanding dues is the essence of the contract, which duly finds mention in clause 5.2 of the agreement.
- e. That as per clause 7.1(ii) of said agreement, the respondent never promised the complainants to handover the possession of the unit on



30.06.2019 plus grace period of 6 months from the date of execution of agreement. The said clause clearly states that the respondent company shall handover the possession subject to application made for grant of occupation certificate and on receipt of the same shall offer possession of the said unit. Further, clause 7.1(iii) of the agreement enumerates the "force majeure" clause wherein it has been laid down that completion period shall automatically be deemed to be extended if the delay in completion of construction of the project has occurred due to force majeure or circumstances beyond its control.

- f. That the factors like non-availability of construction materials, electric power slow down, scarcity of water etc., are the substantial reasons which led to the delay in completing the construction of the project. Additionally, the construction of the project was stopped by Hon'ble National Green Tribunal pertaining to the factors of poor air quality. It is pertinent to point out here that due to stoppage of construction work, it may take another month's time to remobilize the construction work at project site. Thus, the calculation of period of completion for which the construction work was stopped shall be treated as zero period.
- g. That as per the terms of the agreement and the RERA registration, subject to timely payment by the allottees as well as subject to force majeure, the construction of the unit was to be completed by 30.06.2019 plus 6 months grace period unless there is delay due to "force majeure", court order etc. It is pertinent to mention herein that the construction of



the project was stopped several times during the year 2017, 2018, 2019 and 2020 by the order of EPCA, HSPCB, NGT and the Hon'ble Supreme Court of India. Due to the increase in the level of pollution in the NCR region, the Hon'ble Supreme Court vide its order dated 14.11.2019 passed in the matter of "**MC Mehta Vs Union of India & Others**" bearing **Writ Petition (c) No. 13029/1985** imposed complete ban on construction and excavation work across the National Capital Region from 04.11.2019, which was ultimately lifted on 14.02.2020. Ban on construction caused irreparable damage to the delivery timelines and the real estate developers' finances as the respondent was not able to undertake any construction work during the aforesaid period and the same was beyond the control of the respondent. Furthermore, the impact of Covid-19 pandemic has been felt throughout the globe and more particularly by Real Estate Industry. The pandemic completely disrupted the supply chain of the respondent therefore the delay if any, is not attributable to the respondent herein.

- h. That in order to curb down the air pollution the Environment & Pollution (Prevention & Control) Authority, for National Capital Region, has reviewed the urgent action that needs to be taken for the implementation of the Graded Response Action Plan (GRAP) vide it's notification dated EPCA-R/2020/L-38 dated 08.10.2020 and has imposed ban on the use of diesel generator set with effect from 15.10.2020, which has further led to delay in the construction being raised. That even after the delay caused in making the payment various orders of the EPCA, HSPCB and the Apex

Court, the respondent has finished the construction work of the project and has received the occupation certificate on 02.11.2022 from the Director General, Town & Country Planning Department, Chandigarh.

- i. That thereafter, the respondent vide letter dated 03.11.2022 addressed to the complainants and intimated them that their unit is ready for possession and the respondent company has received the occupation certificate dated 02.11.2022. In furtherance, it also persuaded them to accept the possession of the unit by making the payment of outstanding amounts which included Rs. 99,283/- towards delayed payment as mentioned in annexure I and II and comply with the requisite formalities annexed as annexure III and IV of letter dated 03.11.2022. However, they never responded to the said Letter.
- j. That the respondent always kept them updated with respect to the development of surrounding area as well as of construction of the project and further repetitively apprised them about the factors which having a visible adverse impact on the Real Estate Industry.
- k. That the money received from the complainants/allottees has been utilized towards the construction of the project/unit and the instant complaint is an afterthought and has been filed with the ulterior motive to avoid the contractual obligation and earn wrongfully from the respondent.
- l. That the complainants are seeking refund, interest and compensation without placing on record substantial evidentiary proof. It is relevant to



mention here that the Hon'ble Supreme Court in a number of judgments has held that compensation for delay is to be the loss incurred by the customer and in the instant case the complainants have failed to provide proof for the same. On the contrary it is the respondent who has incurred loss due to the omissions on part of the complainants. In light of the present facts, the complainants have sought for refund of the amount deposited only upon filing the captioned complaint even though the respondent had issued the letter dated 03.11.2022 intimating that the unit of the complainants is ready for possession since the respondent has received the occupation certificate dated 02.11.2022 and persuading them to clear the outstanding dues. However, since they have never expressed their willingness to withdraw from the project, the complainants are not entitled for reliefs prayed. Further, the complainants have prayed for reliefs which otherwise have to be claimed in a suit for damages and recovery, after paying appropriate court fee. That in order to avoid the payment of court fee, they have raised a dispute of a civil nature, which requires elaborate evidence to be led and which cannot be adjudicated upon under the summary jurisdiction of the Authority as the dispute between the parties involves complicated questions of facts and law, which necessarily entail the leading of copious evidence.

- m. That it is essential to shed light on the fact that the complainants have applied for the allotment of the unit as an investment and not for personal use of the complainants which is abundantly clear and evident

from their conduct. Admittedly, they have invested in the unit with intent to have monetary gains by way of reselling the unit to a higher bidder at an appreciated value. Thus, in view of the constant precedents upheld by various Real Estate Regulatory Authorities across the country, the present complaint is not maintainable wherein, it is held unanimously that the Investors of real estate projects are not entitled to relief from Authority.

20. 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.

E. Jurisdiction of the authority:

21. The plea 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

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

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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 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 promoter, the allottees 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 complainants at a later stage.

22. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*** SCC Online SC 1044 decided on ***11.11.2021*** and followed in ***M/s Sana Realtors Private Limited & others V/s Union of India & others 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."

23. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. And M/s Sana Realtors Private Limited & others V/s Union of India & others (supra)**, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the amount paid by him

F. Findings on objections raised by the respondent.

F.I Objection regarding the complainants being investor.

24. It is pleaded on behalf of respondent that complainants are investor and not consumer. So, they are not entitled to any protection under the Act and the complaint filed by her under Section 31 of the Act, 2016 is not maintainable. It is pleaded 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 respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a

statute and states the main aims and 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 he 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 buyer's agreement, it is revealed that the complainants are buyer and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of the term allottees under the Act, and the same is reproduced below for ready reference:

"Z(d) 'allottees' 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."

25. In view of above-mentioned definition of allottees as well as the terms and conditions of the buyer's agreement executed between the parties, it is crystal clear that the complainants are allottees as the subject unit allotted to them by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottees' 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) Ltd. 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 allottees being investors are not entitled to protection of this Act also stands rejected.

F.II Objection regarding delay due to force majeure circumstances

26. The respondent-promoter has raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the National Green Tribunal, Environment Pollution (Prevention & Control) Authority. Since there were circumstances beyond the control of respondent, so taking into consideration the above-mentioned facts, the respondent be allowed the period during which his construction activities came to stand still, and the said period be excluded while calculating the due date. But the plea taken in this regard is not tenable. The due date for completion of project is calculated as per clause 7.1 of agreement. Though there have been various orders issued to curb the environment pollution, but these were for a short period of time. So, the circumstances/conditions after that period can't be taken into consideration for delay in completion of the project.
27. The respondent-promoter has raised the contention that the construction of the project was delayed due to reasons beyond the control of the respondent such as COVID-19 outbreak, lockdown due to outbreak of such pandemic and shortage of labour on this account. The authority put reliance judgment of 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 which 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."

28. 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 30.12.2019. 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

F.III Objection regarding non-payment by the complainants.

29. The respondent-builder submitted that the complainant-allottees has failed to make timely payment towards consideration of allotted unit. Despite issuance of various notices, it never came forward to make payment towards due installments. The Authority observes that the subject unit was booked under subvention linked payment plan and he has already paid an amount of Rs. 66,07,874/- towards sale consideration of Rs. 64,12,950/-

which constitutes more than 100% of sale consideration as specified under payment plan annexed with buyer's agreement; which is a considerable amount. Further, it has offered the possession of the subject unit only on 03.11.2022 i.e. much after passing of due date of handing over of possession i.e. 30.12.2019. Thus, the plea of the respondent is not tenable.

G. Findings on the relief sought by the complainants

Relief sought by the complainants:

G.I Direct the respondent to refund the amount of Rs. 66,07,874/- to the complainants.

G.II Direct the respondent to pay the interest at the rate of 24% compounded quarterly.

G.III Direct the respondent to refund the amount of pre-EMI Rs. 14,09,464/- to the complainants.

30. The aforesaid reliefs are being taken together being inter-connected.

31. The project detailed above was launched by the respondent as residential complex and the complainants were allotted the subject unit bearing no. C-908 on 9th floor of tower T3 vide agreement for sale dated 19.09.2018; further detailing area, payment plan and other terms and conditions of allotment. As per clause 7.1 of the said agreement executed between the parties, the possession of the subject apartment was to be delivered by 30.06.2019 along with grace period of 6 months. Such grace period of 6 months is allowed being unconditional. It has come on record that the complainants have paid an amount of Rs. 66,07,874/- towards sale consideration of Rs. 64,12,950/- which constitutes more than 100% of sale consideration as specified under payment plan annexed with buyer's agreement.

32. The respondent took plea that the project of the respondent was delayed due to force majeure circumstance and default on behalf of the complainant resulting in issuance of various reminders but the same was not tenable and has already been discussed in detail above. Another plea taken by the respondent-builder is that it has already offered the possession of the subject unit on 03.11.2022 after obtaining occupation certificate from the competent authority on 02.11.2022.
33. The Authority observes that 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 a case where the allottees have been requesting the promoter for refund of his amount after the due date and before the OC was obtained. The request of the allottees met with deaf ears and promoter failed to refund the amount along with interest even after the right of allottees to claim such refund of an amount paid with interest at prescribed rate from the promoter under section 19(4) of the Act and the promoter was obligated under section 18(1) to return the amount along with interest at prescribed rate on demand to the allottee and allottee having clearly wished to withdraw from the project on account of promoter's failure to complete and 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.



34. The due date of possession as per agreement for sale as mentioned in the table above is 30.12.2019 and there is delay of 02 years 09 months 13 days on the date of filing of the complaint i.e. 13.10.2022. 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 (Supra)*** observed as under:

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

35. 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 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 allotment letter or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as they 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.

36. This is without prejudice to any other remedy available to the allottees including compensation for which they 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. 66,07,874/- 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 each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid.* जयते

37. Further, as submitted by the complainants that it has made payment of pre-EMI as per the arrangement between the complainants, respondent and bank. Therefore, out of amount so assessed, the respondent is entitled to deduct the amount paid by it towards pre-EMI.

H. Directions of the Authority.

38. 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/promoter is directed to refund the amount i.e. Rs. 66,07,874/- received by it from the complainants along with interest at the rate of 10.70% p.a. as prescribed under rule 15 of the Haryana

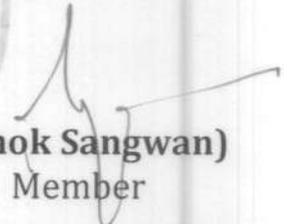
Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.

- ii. It is further directed that out of amount so assessed, the respondent is entitled to deduct the amount paid by it towards pre-EMI.
- iii. A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

39. Complaint stands disposed of.

40. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.07.2023

HARERA
GURUGRAM