

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

Complaint no.	4009 of 2021
Date of filing complaint	06.10.2021
Date of Decision:-	26.05.2023

Ms. Aditi Diwan D/o Arvind Lal Diwan R/o: White House Katha Mill, Shivpuri, Madhya Pradesh-473531	Complainant
Versus	
M/s Ninaniya Estates Ltd. Head Office at: 278/3, Shri Krishna Nagar, Old Delhi Road, Gurgaon, Harayana-122001 Also: Having its Corporate Office at: Prism Tower, Tower A, 6th Floor, Sector 2, Gwal Pahari, Gurgaon Faridabad Road, Gurgaon, Haryana-122003	Respondent

CORAM:	
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Shri Harmeet Grover (Advocate)	Complainant
Shri Ayush Gupta Proxy (Advocate)	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 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 complainant, 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 and location of the project	"Prism Portico", Sector 89, Gurugram
2.	Project area	5.05 acres
3.	DTCP License no.	179 of 2008 dated 11.10.2008 and valid upto 10.10.2018
4.	Name of licensee	Ninaniya Estate Ltd.
5.	RERA Registered/ not registered	Unregistered
6.	Application form	25.01.2016
7.	Executive Suites Unit no.	722, 7 th floor (As per BBA on page 61 of complaint)
8.	Unit area admeasuring (super area)	1650 sq. ft. (As per BBA on page 61 of complaint)





10.	Buyers' agreement	03.06.2016 (As per BBA on page 59 of complaint)
11.	Allotment Letter	N/A
12.	MoU for assured return	03.06.2017 (Page 82 of complaint)
13.	Possession Clause	5.1 That the Company shall complete the construction of the said Unit within 40 months from the date of execution of this agreement and/or from the start of construction whichever is later and Offer of possession will be sent to the Allottee subject to the condition that all the amounts due and payable by the Allottee by the stipulated date as stated in Annexure II attached with this agreement including sale price, maintenance charges, security deposit, stamp duty and other charges etc. have been paid to the Company. The Company on completion of the construction shall apply for completion certificate and upon grant of same shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues.

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14.	Due date of possession	03.10.2019 Due date of possession is calculated from the date of execution of BBA in absence of the date of start of construction.
15.	Total sale consideration	Rs. 99,00,000/- (BSP) (As per BBA on page 62 of complaint)
16.	Amount paid by the complainant	Rs. 88,89,994/- (As stated by the complainant)
17.	Occupation certificate	Not obtained
18.	Offer of possession	Not offered
19	Assured return clause	Clause 6 of MoU: The developer shall pay the Assured Investment Return @ Rs. 68,750/- (Rupees Sixty-Eight Thousand Seven Hundred Fifty only) per month on or before 01st of every month after the expiry of the month for which it shall fall due w.e.f. 01-May-2017, till the possession of a fully furnished Suite under reference is handed over to the Buyer. In the event of delay in payment of aforesaid Assured Investment Return by the Developer to the Buyer, the Developer shall be liable to pay a penal interest of 18% p.a. over and above the amount of assured return.

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B. Facts of the complaint:

- i. That the respondent through various means, which being billboards, advertisements, online presence etc. claims to be a leading Real Estate Development Enterprise, which is/ has developing/ developed various Housing Projects, IT Parks, Hotels, Commercial Spaces etc. The respondent offered the complainant a suite apartment in a project complex, which being Unit No. 706, admeasuring 825 Sq. Feet, on Floor No.7, in Prism Hotel and Suites, Gwal Pahari, Sector 2, Gurgaon Faridabad Road, Gurgaon, Haryana. That the Respondent claimed that above mentioned complex shall be a premium project and offered the same at the rate of Rs. 10,000/- per sq. feet.
- ii. That on faith, beliefs, and representations of the Respondent, on 25.01.2016, a document under the style of 'Application Form', as provided by Respondent, was signed by Complainant, wherein Ms. Aditi Diwan was the Applicant, and Mrs. Gita Diwan was the Co-applicant. That the said Application Form, along with a self-attested copy of the Pan Card, Passport of the Applicant (viz. Ms. Aditi Diwan) and cheque for an amount of Rs. 84,54,806/- was handed over to the Respondent.
- iii. That the complainant were conveyed by the respondent to pay 95 per cent towards agreed amount along with taxes at the time of booking and 5 per cent was payable upon the grant of possession of the said Suite. That in pursuance of the same, a cheque, drawn upon HDFC Bank, dated 25.01.2016, bearing No.000052, for an amount of Rs.



- 84,54,806/- in favour of Ninaniya Estates Limited, was handed over to the Respondent by the Complainant and the same was debited from the bank account of the Complainant.
- iv. That out of the said payment made through the cheque, Rs. 78,37,500/- was the 95% payment made towards the agreed amount for the Suite, whereas the rest of Rs. 6,17,306/- was for the purposes of certain taxes, as per what was conveyed by respondent to the complainant. A Receipt bearing No. 422, having Customer Code: PES-706, for an amount of Rs. 84,54,806/- received from the Respondent in favour of complainant on 27.01.2016.
- v. That on 05.02.2016, a document titled as 'Suites Buyer's Agreement', which essentially being an Agreement to Sell, was executed between respondent and the complainant, for the purposes of the abovementioned property.
- vi. That on 05.02.2016, a memorandum of understanding was also entered into between the respondent and the complainant, wherein respondent, agreed to pay an investment assured return of Rs. 78,375/- per month to the Complainant, starting from 07.02.2016 onwards, till date the procession of the Suite, as booked by the complainant, is handed over. That the said 'Investment on Return' concept, was a key feature of the marketing campaign for the purposes of the project in question.
- vii. That in the month of May 2016, the respondent contacted the complainant and informed her that the building complex, which had been so booked by the complainant, and for which 95% payment was

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- already made, had hit a roadblock and that the assured payment/
Rental would be only Rs.41,250/-. That the respondent offered the
complainant to shift and convert her booking from the original suite
No. 706, admeasuring 825 Sq. Ft. to another Suite, which was to be in
another building complex, being located at Pataudi Road i.e. Prism
Portico, Sector-89, Pataudi Road, Gurgaon, Haryana.
- viii. That the respondents offered the complainant a new suite, which
being executive suite Unit No. 722A, admeasuring 1650 Sq. Ft. at the
rate of Rs. 6,000 per Sq. Ft., making the total sale consideration for
the same to be Rs. 99,00,000/-. That the Respondent demanded
another Rs. 4,35,188/- from the complainant, which would make up
83% of the total sale consideration towards the new Suite, as had
been offered the Respondent. The balance payment for the same was
to be made by the Complainant upon the grant of possession.
- ix. That a memorandum of understanding (MoU), dated 03.06.2017,
subsisting on the terms of investment assured return was executed
between the respondent and the complainant. That in terms of the
MoU dated 03.06.2017, the Respondent, was bound to pay the
Complainant an assured Return on Investment to the tune of Rs.
68,750/- (inclusive of TDS), starting from the back date of
01.05.2017.
- x. That in pursuance of the abovementioned payment, after adjusting
certain taxes, the Respondent, concluded the total payment so made
to be Rs. 82,50,000/- against the total sale consideration of Rs.
99,00,000/- . That in terms of the MoU dated 03.06.2017, both the





Respondent and the Complainant agreed to a compulsory unconditional sale-back guarantee, wherein the Respondent would buy back the Unit No. 722A at Rs. 82,50,000/- on 01.05.2020.

- xi. It is pertinent to note that the payment of Assured Returns, as per the MoU, have been sporadic and faulty *ab initio*, wherein the complainant had contacted the Respondent on numerous occasions for the same. The said payments, as made by the respondent was almost never on time, and sometimes, came with a delay of almost 4-5 months, not to speak of how the cheques, that were issued by the respondent, also happened to bounce time and again, causing grave harassment to the complainant.
- xii. That the respondent defaulted upon his commitment, wherein respondent was to pay a monthly assured return. The last payment that has been so made by respondent was in the month of January 2019, and after then, 30 months have lapsed, but not a single penny has been so paid by the respondent, which is in total breach of the respondent's obligations.
- xiii. That the total amount due, in term of assured return on investment vide MoU dated 03.06.2016), which being from the month of February, 2019 to July, 2021 i.e. 30 months, comes up to be Rs. 20,62,500/-
- xiv. That the said project was to be completed by Respondent, on or before May, 2020, as has been provided under the buyer's agreement, but as of till date, there does not exists even a semblance of

completion, and, by prudence, it can surely be concluded that the said project, as it stand today, cannot be completed in the near future too.

- xv. That a Legal Notice dated 07.07.2021 was sent to the Respondent, asking for a refund of the monies paid, along with damages and interest, but the same did not elicit any response.

C. Relief sought by the complainant:

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

- i. Direct the respondent to refund an amount of Rs. 88,89,994/- along with interest at the prescribed rate.
- ii. Direct the respondent to pay compensation and litigation cost of Rs. 2,55,000/-

4. The authority issued a notice dated 18.10.2021 of the complaint to the respondent by speed post and also on the given email address at umangtayagioffice@gmail.com. The delivery reports have been placed in the file. Despite service of notice, the respondent has not filed reply to the complaint within the stipulated period. Accordingly, in view of the order dated 24.03.2023, the defence of the respondent was struck off.

5. 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 those undisputed documents and written submissions made by the complainant and who reiterated their earlier version as set up in the pleadings.



E. Jurisdiction of the authority:

6. 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

7. 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

8. 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 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 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. Entitlement of the complainant for refund:

F.I Direct the respondent to refund an amount of Rs. 88,89,994/- along with interest at the prescribed rate.

F.II Direct the respondent to pay compensation and litigation cost of Rs. 2,55,000/-.

12. Admittedly, the complainant is an allottee of the respondent in its project detailed above for a sum of Rs. 99,00,000/-. A buyer's agreement in this regard dated 03.06.2016 and MOU dated 03.06.2017 was executed between the parties setting out the terms, conditions of allotment, payment plan, dimensions of the unit and due date of offer of possession after completion of the construction of the project and payment of assured returns etc. It is not disputed that at the time of MOU, the complainant paid a sum of Rs. 88,89,994/- to the promoter. The promoter agreed to pay to the complainant a sum of Rs. 68,750/- per month w.e.f. from 01.05.2017 till the possession of a fully furnished



Suite under reference is handed over to the Buyer. The due date for completion of the project and offer of possession of the allotted unit was agreed upon as 40 months from the date of buyer's agreement or date of start of construction, whichever is later. Due date of possession is calculated from the date of execution of BBA in absence of the date of start of construction which comes out to be 03.10.2019. Thus, in such a situation when the due date for completion of the project and offer of possession of the allotted unit has already expired on 03.10.2019, the complainant is entitled to seek refund of the paid-up amount besides interest.

13. Keeping in view the fact that the allottee-complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter 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.
14. The due date of possession as per agreement for sale as mentioned in the table above is 03.10.2019 and there is delay of almost 2 years on the date of filing of the complaint.
15. 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 considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in **Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021**

"" The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

16. 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 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

17. 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



with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the Authority:

20. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters 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 entire amount of Rs. 88,89,994/- paid by the complainant after deduction of assured return amount already been paid by the respondent to the complainant, 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 date of 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.
 - iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainant and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainant.



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21. Complaint stands disposed off.
22. File be consigned to the registry.


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 26.05.2023



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