

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

Complaint no.:	1739 of 2021
First date of hearing:	08.07.2021
Date of decision:	16.05.2023

Kiran Yadav
R/o 241/2, Delhi Road, Near Telephone Exchange,
Gurugram

Complainant

Versus

1. M/s Ansal Phalak Infrastructure Pvt. Ltd.
Office address: 115, Ansal Bhawan 16, Kasturba Gandhi
marg, new delhi-110001
2. Mr. Astik Mani Tripathi (Director)
3. Mr. Rakesh Goel (Director)
4. Mr. Ashish Sharma (Director)
5. Mr. Shazan Ali (Director)
6. Mr. & Mrs. Roni Soni (Director)
7. Mr. Keshav Ahuja (Director)
8. Mr. Jatin Chopra (Director)
9. Mr. Mohan Kumar (Director)
Address for service: 206, B Wing, 2nd floor, Naurang
House-21, Kasturba Gandhi Marg, Ned Delhi-110001

Respondents

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

Shri Rahul Yadav (Advocate)
Shri Deeptanshu Jain (Advocate)

Complainant
Respondents

ORDER

- The present complaint dated 23.04.2021 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 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 as provided 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

- The particulars of unit details, 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	"Sovereign Floors, Essencia", Sector- 67, Gurugram
2.	Nature of project	Residential Plotted Colony
3.	RERA registered/not registered	Registered vide registration no. 336 of 2017 dated 27.10.2017 valid upto 31.12.2019
4.	DTPC License no.	21 of 2011 dated 24.03.2011
	Validity status	23.03.2019
	Name of licensee	Mangat Ram & others
	Licensed area	28.556 acres
5.	Unit no.	E-2194, First Floor [page 27 of complaint]

6.	Unit area admeasuring	1394 sq. ft. [page 27 of complaint]
7.	Allotment letter	13.05.2011 [page 20 of complaint]
8.	Builder buyer agreement	23.08.2011 [page 23 of complaint]
9.	Building plan approval	Not placed on record
10.	Possession clause	<i>Subject to clause 5.2 and further subject to all the buyers of the dwelling units in the said sovereign floors, esencia, making timely payment, the company shall endeavour to complete the development of residential colony and the floor as far as possible within 30 months with an extended period of 6 months from the date of execution of this floor buyer agreement or the date of sanction of the building plans whichever falls the later.</i>
11.	Due date of possession	23.08.2014 [calculated from date of BBA i.e., 23.08.2011 as the date of building plan is not known + 6 months grace period allowed being unqualified]
12.	Total sale consideration	₹ 66,14,800/- [pg. 58 of complaint]
13.	Amount paid by the complainant as per sum of receipts	₹ 20,19,445/- [pg. 53-57 of complaint]
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered

B. Facts of the complaint.

3. The complainant pleaded the complaint on the following facts:

- a. That the complainant is a law-abiding citizen and is residing at the above-mentioned address. That the respondent no. 1 is a company which is duly incorporated under the provisions of the Companies Act, 1956 having its registered office at the address given above and respondent no. 2 to 9 are respectively the whole time director, chairman, managing director and directors of the respondent no. 1 and are fully liable and responsible for the day to day affairs, act, conduct, behavior and work of the respondent no. 1 as the whole business of the respondent no. 1 has been managed and carried out by the respondent no. 2 to 9.
- b. That the respondent no. 1 is engaged in the business of real estate and is a land developer company which purchased the land from the landowners and after developing it, sell the developed units in the form of commercial spaces, office space, shops, flats, apartment etc. to the purchasers.
- c. That in the due course of their business, the respondents have launched a residential project namely "ESENCIA", Sector-67, Gurugram. That the complainant was allotted a residential dwelling unit floor no. E2194FF, first floor in sovereign floors "ESENCIA", Urban Estate, Sector 67, having super area of 1394 sq. ft, vide allotment letter dated 13.05.2011 issued by opposite party, for a total sale consideration of ₹ 63,36,000/-.
- d. That at the time of booking assurance was given to complainants that the respondent no. 1 is an accomplished and renowned builder and has expertise, know-how and experience in the business of real estate development, construction of multi-storied housing & commercial complexes, infrastructural development, civil

construction and other related works. That further assurance has been given to complainant that the respondent no.1, have executed several projects successfully in the national capital region and other parts of India in time and have commenced or is engaged in commencement of numerous projects in real estate inter-alia development of integrated township/housing/complexes/multi-storied buildings at various sites in India and has already undertaken the conceptualization, designing, construction and development of such projects.

- e. That complainant signed agreement on dated 23.08.2011 with respondent no. 1 for purchase of a floor/unit and vide the said agreement complainant was allotted a residential dwelling unit floor no. E2194FF, first floor in sovereign floors "ESENCIA", Urban Estate, Sector 67, having super area of 1394 sq. ft, for a total sale consideration of ₹ 63,36,000/-.
- f. That as per clause 5, sub-clause 5.1 of the floor buyer agreement, the time of handing over of the possession was 30 months (2.5 years) from the date of execution of floor buyer agreement of the said residential dwelling unit/floor to complainants, and as per the said sub-clause of the said floor buyer agreement, there was a grace period of 06 months after expiry of 30 months, if the builder i.e. opposite party no. 1, could not deliver the possession within 30 months.
- g. That in this regard, it is submitted that the respondents, have got unilaterally provisions in the said agreement dated 23.08.2011 regarding time of handing over possession and penalty clause thereon, and compensation in failure to deliver possession in time

to complainants; favorable to respondents, and disadvantage to complainants, which complainants are having right to challenge the same at appropriate/competent court of law.

- h. That the said period of 30 months expired in the month of February 2014 and the grace period of 06 months expired in the month of August 2014. That the total amount which was to be paid by complainant as per agreement dated 23.08.2011 to respondents for the said floor was ₹ 63,36,000/- and till date complainant has paid an amount of ₹ 20,19,445/- as was demanded by the respondents.
- i. That as per clause 5, sub-clause 5.4 of the floor buyer agreement, complainant is entitled to receive penalty, after expiry of 30 months and further grace period of 06 months and 90 Days i.e., 3 months, for delay in handing over of the possession of the said floor, as per schedule mentioned in clause 5, sub-clause 5.4, can claim penalty @ Rs. 10 per sq. ft. of the super area of the dwelling unit per month for the period of default.
- j. That the possession was to be delivered to complainant in August 2014, after expiry of the said extended period of 06 months and 90 days; but till date, complainant has not been handed over possession of the above-mentioned floor, so complainant is entitled to receive penalty amount from the opposite parties as per the clause mentioned above.
- k. That complainant has visited office of respondents, mentioned above, to know the exact date for delivery of possession of the said flat, but complainants got evasive replies regarding the handing over of the possession.

1. That the respondents have also not performed their part of obligation according to the terms and conditions of the agreement as the respondents had not given the possession of the property to complainant within the fixed time period of 30 months. Further the respondents are also under the legal obligation to pay the compensation amount @ Rs. 10/- per sq. ft. to complainant of the super area of their unit as per the terms of the aforesaid agreement dated 23.08.2011.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:
 - a. Direct the respondent to refund entire amount paid by the complainant along with the interest @ 10.25% p.a.
5. Any On the date of hearing, the authority explained to the respondents/promoters 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 the respondent.

6. Notice to the promoter/respondent through speed post and through e-mail address (ansalapireraharyana@gmail.com) was sent; the delivery report of which shows that delivery was completed. Despite service of notice, the promoter/respondent has failed to file a reply within stipulated time period. However, the respondent represented through Adv. Deeptanshu Jain on behalf of the respondent company have marked attendance on 10.08.2022 and the respondent did not file the reply within the stipulated time. This is clear evidence that the service was completed. In view of the above vide order dated 15.09.2021 the defence of the respondent was struck off.

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, 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, 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) 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 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. (Supra) and 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*** 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.

F.I. Direct the respondent to refund entire amount paid by the complainant along with the interest @ 10.25% p.a.

13. In the present complaint, the complainant intends to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest @ 10.25% p.a. Sec. 18(1) of the Act is reproduced below for ready reference: -

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building. -

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

14. Clause 5.1 of the BBA dated 23.08.2011 provides for the handing over of possession and is reproduced below for the reference:

"Subject to clause 5.2 and further subject to all the buyers of the dwelling units in the said sovereign floors, esencia, making timely payment, the company shall endeavour to complete the development of residential colony and the floor as far as possible within 30 months with an extended period of 6 months from the date of execution of this floor buyer agreement or the date of sanction of the building plans whichever falls the later."

15. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the

complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

Admissibility of grace period: The promoter has proposed to hand over the possession of the apartment within a period of 30 months plus 6 months from date of agreement or date of building plan whichever is later. The due date of possession is calculated from date of BBA i.e., 23.08.2011 as the date of building plan is not known. The period of 30 months expired on 23.02.2014. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period of 6 months in the possession clause accordingly, the grace period of 6 months is allowed to the promoter being unqualified. Accordingly, the due date of possession comes out to be 23.08.2014.

16. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid along with interest at the prescribed rate. However, the allottee intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

17. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
18. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **16.05.2023** is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
19. 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.

20. 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...."

21. 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"

22. 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 wishes 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.
24. The authority hereby directs the promoter to return the amount received by him i.e., ₹ 20,19,445/- 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*.

G. Directions of the authority

25. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):
 - i. The respondent/promoter is directed to refund the entire amount of ₹ 20,19,445/- paid by the complainant along with prescribed

rate of interest @ 10.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 from the date of each payment till the date of refund of the deposited 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.
- iii. The respondent is further directed not to create any third-party rights against the subject unit before the full realization of paid-up amount along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainant.

26. Complaint stands disposed of.

27. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.05.2023