

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

Complaint no.: 5824 of 2019
Date of filing of complaint: 06.12.2019
Ordre reserved on: 19.04.2023
Order pronounced on: 05.07.2023

1. Mrs. Raj Arora
2. Mr. Ajay Kumar Arora
Through its GPA Holder

1. Mr. Anupam Kumar Arora
2. Mrs. Shikha Arora

Both RR/o: - House No. H-14, Ground floor, Jangpura
Extension, New Delhi- 110014

Complainants

Versus

M/s Raheja Developers Limited.

Regd. office: W4D, 204/5, Keshav Kunj, Western Avenue,
Sainik Farms, New Delhi- 110062

Corporate Office at: - Raheja Mall, 3rd floor, Sector- 47,
Sohna Road, Gurugram- 122001

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Sh. Apoorva Jain (Advocate)

Sh. Garvit Gupta (Advocate)

**Complainants
Respondent**

ORDER

1. This 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 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 provisions 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 details

2. The particulars of unit, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Raheja Sampada", Sector-92&95, Gurugram.
2.	Project area	17 acres
3.	Nature of the project	Residential group housing colony
4.	DTCP license no. and validity status	216 of 2007 dated 05.09.2007 valid till 04.09.2019
5.	Name of licensee	NA Buildwell Pvt. Ltd
6.	RERA Registered/not registered	Unregistered
7.	Date of execution of flat buyer agreement	19.08.2010 [Page no. 63 of the complaint]
8.	Unit no.	T2-045, 4 th floor, tower-2 [Page no. 65 of the complaint]
9.	Unit measuring	1572 sq. ft. [Super area]



10.	Possession clause	<p>4.2 Possession Time and Compensation</p> <p><i>That the Seller shall sincerely endeavor to give possession of the Unit to the purchaser within thirty-six (36) months from the date of the execution of the Agreement to sell and after providing of necessary infrastructure specially road sewer & water in the sector by the Government, but subject to force majeure conditions or any Government/ Regulatory authority's action, inaction or omission and reasons beyond the control of the company. The company on obtaining certificate for occupation and use by the Competent Authorities shall hand over the Unit to the Purchaser for this occupation and use and subject to the Purchaser having complied with all the terms and conditions of this application form & Agreement To sell. In the event of his failure to take over and /or occupy and use the unit provisionally and/or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be liable to compensation @ Rs.7/- per sq. ft. of the super area per month as holding charges for the entire period of such delay....."</i></p>
11.	Due date of possession	19.08.2013

		[Note: - 36 months from date of agreement i.e., 19.08.2010]
12.	Payment plan	Installment payment plan [Page no. 83 of the complaint]
13.	Basic sale consideration	Rs.46,05,708/- [As per payment plan page no. 83 of the complaint]
14.	Total sale consideration	Rs.53,92,896/- [As per applicant ledger page no. 108 of the complaint]
15.	Total amount paid by the complainants	Rs.51,57,292/- [As per customer ledger dated 17.12.2020 page 77 of complaint]
16.	Details of Occupation Certificate if any	Date of OC granted, if any, by the competent Authority: Dated 11.11.2016 Block/Tower for which OC obtained-tower- 2 [Downloaded from the website of tpharyana.gov.in]
17.	Date of notice of possession	07.02.2017 [page no. 88 of the complaint]

B. Fact of the complaint

3. The complainants have made the following submissions: -

- I. That the complainants had approached the respondent in the month of February 2010, for purchasing an apartment in their upcoming

- project in sector 92&95, Gurugram named as "Raheja Sampada". That as per the demand raised by it on 08.03.2010, the complainants had made the first payment of Rs.3,57,630/-, as booking amount of the unit T2-045 in the said project, via cheque No. 043800.
- II. That on 19.08.2010, the flat buyer's agreement was signed and agreed between Mrs. Raj Arora (mother of the complainant) w/o of Girdhari Lal Arora and Ajay Kumar Arora (brother of the complainant) S/o of Girdhari Lal Arora and the respondent. The transfer of the above-mentioned unit to the complainants was requested by original allottees i.e., Mrs. Raj Arora and Mr. Ajay Kumar Arora, which was duly accepted by the respondents via letter dated 28.09.2012 in the favour of the complainants.
- III. That as per the condition laid down in the aforesaid flat buyer agreement, it was agreed by the respondent that they shall hand over the possession of the said apartment to the complainants within a period of 36 months from the date of agreement to sell, thereby the due date of possession on 19.08.2013.
- IV. That on 07.02.2017, they had received a notice of possession from the respondent, stating that the apartment is ready to be handed over to the complainants whereas after the physical verification of the same, the complainants observed that still lot of work is pending on part of the respondent/promoter thus making it uninhabitable.

- V. That on 26.07.2018, a special power of attorney was executed as per which, the complainants, authorized by Mrs. Raj Arora. (Mother of Anupam Kumar Arora and Mother-in-law of Shikha Arora), as their true and lawful attorney in respect of the apartment bearing No. T2-045 in the group housing society of Raheja's Sampada.
- VI. That as per the ledger received by E-mail on 04.09.2018, they have made all the instalments to the respondents, in accordance with the above stated flat buyer agreement. The complainants had no outstanding dues. Thereafter, they received an email by the respondent on 19.11.2019, stating that the "final finishing work is pending in the unit, and they shall inform about the completion of the same.
- VII. That there was change of various e-mails between both the parties, wherein they raised concerns over the apartment not being ready for habitation even though they received the possession letter for the same, the respondent has agreed that there is lot of pending work left to be done in the apartment and accepted that it would take some time for them to complete the remaining work, thereby withdrawing their letter for possession.

C. Relief sought by the complainants:

4. The complainants sought following relief(s):

- I. Direct the respondent to refund the amount of Rs.53,97,283/- paid by the complainant to the respondent along with prescribed rate of interest.
 - II. Direct the respondent to pay a sum of Rs.1,00,000/- to the complainants towards the cost of litigation.
5. The respondent/promoter put in appearance through company's A.R & Advocate and marked attendance on 13.09.2022, and 14.12.2022. Despite specific directions respondent failed to comply with the orders of the authority. It shows that the respondent is intentionally delaying the procedure of the court by avoiding to file written reply. Therefore, in view of order dated 19.04.2023, the defence of the respondent was struck off.
6. Copies of all the relevant documents have been filed and placed on the record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents as well as written submissions made by the complainants.

D. Jurisdiction of the authority

7. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D. I Territorial jurisdiction

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.

D. II Subject matter jurisdiction

9. 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) 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 complainants 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. 2020-2021 (1) RCR (C), 357 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.

E. Findings on the relief sought by the complainants

- E.1 Direct the respondent to refund the amount of Rs.53,97,283/- paid by the complainant to the respondent along with prescribed rate of interest.**

13. The complainants were allotted unit no T2-045, 4th floor in tower T2 in the project "Raheja Sampada" by the respondent builder for a total consideration of Rs.53,92,896/- and he paid a sum of Rs. 51,57,292/- which constitutes 95% of total consideration. On 19.08.2010, the flat buyer's agreement was signed and agreed between the Mrs. Raj Arora (mother of the complainant) w/o of Girdhari Lal Arora and Ajay Kumar Arora (brother of the complainant) S/o of Girdhari Lal Arora and the respondent. The transfer of the above-mentioned unit to the complainants was requested by original allottees i.e., Mrs. Raj Arora and Mr. Ajay Kumar Arora, which was duly accepted by the respondents via letter dated 28.09.2012 in the favour of the complainants, and the due date for completion of the project and offer of possession was fixed on 19.08.2013.
14. 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. The due date of possession as per buyer's agreement was 19.08.2010 and the allottees in this case have filed this complaint on 06.12.2019 after possession of the unit was offered to them after obtaining occupation certificate by the promoter. The OC was received on 11.11.2016 whereas the offer of possession was made on 07.02.2017. The complainants through filing of compliant dated 06.12.2019 requested the respondent that they wish to withdraw from the project and made a request for refund of the paid-up amount on its failure to give possession

of the allotted unit in accordance with the terms of buyer's agreement. On failure of respondent to refund the same, they have filed this complaint seeking refund.

15. The right under section 18(1)/19(4) accrues to the allottees on failure of the promoter to complete or 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. If allottees have not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to them, it impliedly means that the allottees tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottees interest for the money they have paid to the promoter is protected accordingly and the same was upheld by 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; that: -

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.*
16. 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. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure 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. But the complainant/allottees failed to exercise the right although it is unqualified one. The complainants have to demand and make their intention clear that they wish to withdraw from the project. Rather, tacitly wished to continue with the project and thus made themselves entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottees invest in the project for obtaining the allotted unit and on delay in completion of the project and

when the unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

17. This view is supported by the judgement of Hon'ble Supreme Court of India in case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Civil appeal no. 5785 of 2019)*** wherein the Hon'ble Apex court took a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate and also in consonance with the judgement of Hon'ble Supreme Court of India in case of ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors (Supra)***.
18. The above said unit was allotted to complainants on 19.08.2010. There is a delay in handing over the possession as due date of possession was 19.08.2013 whereas, the offer of possession was made on 07.02.2017 and thus, becomes a case to grant delay possession charges. The authority observes that interest of every month of delay at the prescribed rate of interest be granted to the complainant/allottees in case the delay in handing over of physical possession of the allotted unit. But now, the

peculiar situation is that the complainants want to surrender the unit and want refund. Keeping in view of the aforesaid circumstances that the respondent-builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, and judgment of *Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.202*, it is concluded that if the complainant/allottees still want to withdraw from the project, the paid-up amount shall be refunded after deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018.

19. 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.

20. Further, clause 3.6 of the buyer's agreement, talks about cancellation /withdraw by allottee. The relevant part of the clause is reproduced as under: -

3.6 Earnest Money

That the Allottee agrees and accepts that in the event Allottee fails to pay the sale consideration/ installment(s) along with interest even after 90 days from the due date of payment of the outstanding amount or withdrawal of the application by Allottee or failure by the Allottee to sign and return to the Company flat Buyer Agreement on Company's standard format within thirty (30) days from the date of its dispatch by the Company or breach of any of the terms and conditions of Agreement by Allottee, the Company reserves its right to forfeit the earnest money, deduct the interest on delayed payments and brokerage/commission paid, if any, by the Company for such booking, as per rules and cancel the allotment. The remaining balance amount shall be refunded to the Allottee after the said

apartment is allotted to some other intending buyer, without any interest and compensation thereof. After cancellation of allotment the Allottee shall have no charge, lien or claim of any nature whatsoever on the said Apartment and the Company will be entitled to resale the same. The dispatch of Cheque of refund by registered post/speed-post to the last address available with the company, shall be full and final discharge of all the obligations on the part of the Company or its employees and the Allottee will not raise any objection or claim on the Company after this. The Company may at its sole discretion condone the breach caused by Allottee and may revoke cancellation of the allotment provided that the apartment has not been allotted/re-allotted to any other person till the date of restoration and the Allottee agrees to pay the unearned profits (difference between the booking price and prevailing sales price) in proportion to total amount outstanding on the date of restoration and subject to such additional conditions/ undertaking as may be decided by the Company, In any case, the method of restoration shall remain unchanged even in case of any dispute or litigation between the parties. However, it is agreed between the parties that the Company shall adjust the payments received from the Allottee first towards the interest due, if any, and then towards the sale consideration. The Company may at its sole discretion waive the breach by the Allottee in not making payments as per the payment plan, but such waiver shall not mean any waiver in the interest amount and the Allottee has to pay the full amount of interest due."

21. It is evident from the above mentioned facts that the complainants paid a sum of Rs.51,57,292/- against basic sale consideration of Rs.46,05,708/- of the unit allotted. There is nothing on the record to show that the respondent acted on the representations of the complainant. Though the amount paid by the complainants against the allotted unit is more than the basic sale consideration, but the respondent/promoter was bound to act and respond to the pleas for surrender/withdrawal and refund of the paid-up amount.

22. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainants against

the allotted unit and is directed to refund the same in view of the agreement to sell for allotment by forfeiting the earnest money which shall not exceed the 10% of the basic sale consideration of the said unit as per payment schedule and return the balance amount along 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 surrender/filing of complaint i.e., 06.12.2019 till the actual realization of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

23. 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 is directed to refund the paid-up amount of Rs.51,57,292/- after deducting 10% as earnest money of the basic sale consideration of Rs.46,05,708/- with interest at the prescribed rate i.e., 10.70% on the balance amount, from the date of surrender/filing of the compliant i.e., 06.12.2019 till the actual realization of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

- 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.


24. Complaint stands disposed of.

25. File be consigned to registry.

Dated: 05.07.2023



HARERA
GURUGRAM



(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram