BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1404 of 2022**
Date of complaint	:	**27.09.2022**
Date of decision	:	**04.10.2023**

Akshay Koul
R/o: - Lane no. 4-A, Adarsh Nagar,
Barni Road, Jammu-181123. **Complainant**

Versus

M/s Raheja Developers Limited.
Regd. Office at: Raheja Mall, 3rd floor,
Sector 47, Sohna Road, Gurugram-122018. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Sushil Yadav (Advocate) Complainant
Garvit Gupta (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 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. 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	"Raheja's Maheshwara", Sector 11 & 14, Sohna Master Plan Gurugram, Haryana
2.	Project area	9.23 acres
3.	Registered area	3.752 acres
4.	Nature of the project	Group housing complex
5.	DTCP license no. and validity status	25 of 2012 dated 29.03.2012 valid up to 28.03.2018
6.	Name of licensee	Ajit Kumar and 21 others
7.	RERA Registered/ not registered	Registered vide no. 20 of 2017 dated 06.07.2017
8.	RERA registration valid up to	5 Years from the date of revised Environment Clearance
9.	Unit no.	D-902, 9th floor, Tower/block- D
10.	Unit area admeasuring	1098.50 sq. ft.
11.	Allotment letter	28.10.2016 (As alleged by the complainant at page no. 8 of the complaint)
12.	Date of execution of agreement to sell	BBA annexed but not executed
13.	Possession clause	***21.*** *The company shall endeavour to complete the construction of* ***the said apartment within Forty-Eight (48) months plus/minus Twelve (12) months grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later*** *but subject to force majeure, political disturbances, circumstances cash flow mismatch and reason beyond the control of the company.*

		However, in case the company completes the construction prior to the said period of 48 months plus 12 months grace period the allottee shall not raised any objections in taking the possession after payment of Gross Consideration and other charges stipulated hereunder. The company on obtaining certificate of occupation and use for the building in which said apartment is situated, by the competent authorities shall hand over the said apartment to the allottee for his occupation and use and subject to the allottee having complied with all the terms and condition of the agreement to sell....."
14.	Grace period	Allowed being unqualified.
15.	Due date of possession	28.10.2021 (Note: - 48 months from date of first payment i.e., 28.10.2016 + 12 months grace period)
16.	Total sale consideration as per applicant ledger dated 05.04.2019	Rs.42,67,189/-
17.	Amount paid by the complainant	Rs.11,59,717/- [As per applicant ledger dated 05.04.2019]
18.	Occupation certificate /Completion certificate	Not received
19.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions: -

I. That the complainant booked a shop in the project named "Raheja Maheshwara" Sector-11 and 14, Sohna, Gurgaon. Thereafter, a unit bearing no. D902 in Tower -D, admeasuring 1098.50 sq.ft was

allotted to him in the said project vide allotment letter dated 28.10.2016, for a total sale consideration of Rs.42,67,189/- and he has paid an amount of Rs.11,59,717/- against the same in all. That after receiving the above payment for the said shop, the respondent did not send the signed copy of the builder buyer agreement.

II. That as per the terms of the BBA sent to the complainant, the project was to be delivered within 48 months from the agreement, however the same has not been handed over till date.

III. That the complainant has requested the respondent several times that he is not capable to continue with the project as it has failed to deliver the project for the last 6 years and has been retaining the huge amount of the complainant illegally and unlawfully without there being any justified cause.

IV. That due to this omission on the part of the respondent, the complainant has been suffering from disruption, mental torture, agony and also continues to incur severe financial losses.

V. That the complainant has requested the respondent several times on making telephonic calls and also personally visiting the office of the respondent either to deliver possession of the unit in question or to refund the amount along with interest on the amount deposited by the complainant, but respondent has flatly refused to do so. Thus, the present complaint.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).

i. Direct the respondent to refund the paid-up amount along with prescribed rate of interest per annum from the date of payment till realization.

5. The respondent/promoter put in appearance through its Advocate and marked attendance on 12.07.2022, 04.10.2022, 01.02.2023 and 12.07.2023 respectively. Despite specific directions, it failed to comply with the orders of the authority. It shows that the respondent was intentionally delaying the procedure of the court by avoiding filing of written reply. Therefore, in view of above, vide order dated 12.07.2023, the defence of the respondent was struck off.

6. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the complainant.

D. Jurisdiction of the authority

7. The authority has complete territorial and 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, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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 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. 2021-2022 (1) RCR (Civil), 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 complainant.

E. I Direct the respondent to refund the amount paid by the complainant along with prescribed rate of interest per annum from the date of payment till realization.

13. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by her in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. 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. As per clause 21 of the agreement to sell provides for handing over of possession and is reproduced below:

> 21. *The company shall endeavour to complete the construction of the said apartment within* ***Forty-Eight (48) months plus/minus Twelve (12) months grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later but subject to force majeure****, political disturbances, circumstances cash flow mismatch and reason beyond the control of the company. However, in case the company completes the construction prior to the said period of 48 months plus 12 months grace period the allottee shall not raised any objections in taking the possession after payment of Gross Consideration and other charges stipulated hereunder. The company on obtaining certificate of occupation and use for the building in which said apartment is situated, by the competent authorities shall hand over the said apartment to the allottee for his occupation and use and subject to the allottee having complied with all the terms and condition of the agreement to sell....."*

15. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing 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 reason beyond the control of the seller. The drafting of this clause and incorporation of such conditions are not only vague and uncertain

but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in making payment as per the plan may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession looses its meaning. The incorporation of such a clause in the agreement to sell by the promoter is just to evade the liability towards the 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 a mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

16. **Due date of handing over possession and admissibility of grace period:** As per clause 21 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 48 months plus/minus12 months ***grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later***. However, the said buyer agreement has not been executed between the parties, nor any document with regard to EC, FC has been placed on record. Therefore, the Authority is taking these 48 months from date of first payment being made by the complainant i.e., 28.10.2016. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 12 months to the promoter at this stage. Thus, the due date for handing over of possession comes out to be 28.10.2021.

17. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by her at the prescribed

rate of interest. However, the allottee intends to withdraw from the project and is seeking refund of the amount paid by her 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.*

18. 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.

19. 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., 04.10.2023 is **8.75%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%.**

20. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule **28(1),** the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 21 of the agreement to sell, the due date of possession comes out to be 28.10.2021 for the reasons quoted above.

21. 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.

22. The due date of possession as per agreement for sale as mentioned in the table above is 28.10.2021and there is delay of 5 months and 4 days on the date of filing of the complaint. The authority has further, observes that even after a passage of more than 1.11 years till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to it. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottees intend to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.

23. Moreover, 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 allottees 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.....".*

24. 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."*

25. 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 is 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 he 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.

26. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @10.75% p.a. (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.

F Directions of the authority

27. 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.11,59,717/- received by it from the complainant along with interest at the rate of 10.75% 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 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.

28. Complaint stands disposed of.

29. File be consigned to registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 04.10.2023