



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

Order reserved on: 19.07.2023
Date of pronouncement of order: 04.10.2023

1. Sushil Kumar Rathi
2. Neeraj Sandhu

Address:- H.no 342/15 Hans Enclave Gurugram.

Complainants

Versus

Capital Heights Pvt. Ltd.

Address:- Ground Floor, The Cityspace,
Village- Maidawas, Golf Course Ext. Road, Sector-
66, Gurugram

Respondent

CORAM:

Shri Ashok Sangwan

सत्यमेव जयते

Member

APPEARANCE:

Shri Krishan Yadav
Shri Ishaan Singh proxy Counsel

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 02.11.2022 has been filed by the complainants 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. Project and unit related details

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

Sr. No.	Particulars	Details
1.	Name of the project	Residences 360, Sector-70A
2.	Total area of the project	27.7163 acres
3.	Nature of the project	Group housing
4.	DTCP license no.	16 of 2009 dated 29.05.2009
	Validity of license	28.05.2024
	Name of licensee	Vibhore Home Developers Pvt. Ltd. And 6 others
5.	HRERA registered/ not registered	Not registered
6.	Unit no.	CR-02/11-02, Tower-CR-02, 11 th floor
7.	Unit measuring	1900 sq. ft.
8.	Provisional Allotment letter dated	06.05.2013 (Page 15 of reply)
9.	Date of execution of buyer's agreement	Not Executed
10.	Possession clause	17. <i>Subject to Force Majeure, and further subject to all of the Apartment</i>



<p>(taken from the different file in the same project and developed by the same promoter in the case bearing no. 5371 of 2022)</p>	<p>holders/ Applicant(s) of the Project, having complied with all its obligations under the terms and conditions of this Provisional Allotment and the Applicants) not being in default under any part of this Provisional Allotment including but not limited to the timely payment of the Sale Consideration and other charges and also subject to the Applicant(s) having complied with all formalities or documentation as prescribed by the Company, the Company proposes to hand over the possession of the Apartment to the Applicant within a period of 36 (thirty-six) months from the date of commencement of construction i.e. casting of the raft of the entire project, and this date shall be duly communicated to the Applicant(s) ("Commitment Period"). The Applicant(s) further agrees and understands that the Company shall additionally be entitled to a period of 180 (one hundred eighty) business days ("Grace Period"), after the expiry of the Commitment Period to allow for any contingencies or delays in obtaining the occupation/completion certificate etc., of the Project from the concerned Authorities/ departments. The Applicant(s) understands and agrees that the Company shall be entitled to an additional grace period</p>
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		<p>of 90 (ninety) business days ("Additional Grace Period"), after the expiry of the Grace Period, for offering to handover the possession of the Apartment to the Applicant(s).</p> <p>(Emphasis supplied)</p>
11.	Date of start of construction dated	15.03.2013 (Page 19 of the reply)
12.	Due date of possession	15.03.2016
13.	Total consideration	Rs. 1,18,95,900/-
14.	Total amount paid by the complainant	Rs. 33,37,669/-
15.	Occupation certificate	26.10.2021 (Page 50 of reply)
16.	Offer of possession	Not offered
17.	Demand letter issued on	05.01.2022, 01.12.2021
18.	Final notice	03.02.2022
19.	Cancellation letter dated	01.06.2022 (Page 15 of the reply)

B. Facts of the complaint

3. The complainants made the following submissions in the complaint:

- i. That the complainants booked a Flat in "Residences 360" at sector 70-A Gurugram on 23rd January 2013, Haryana. The basic price of the flat was Rupees



11,895,900/- which included One car parking and excluded PLC, EDC, IDC, Community Centre Membership charges and IFMS etc.

- ii. That the respondent had committed/promised to give possession of the flat within 3 years from the date of booking date but till date, the respondent has failed to give the possession to the complainant. That the said project has been stalled since 2013 for almost 10 years and still the amenities and construction work remains incomplete thus "not ready for possession".
- iii. That the complainant has paid a total of Rs. 33,37,669/- till date the details of which are as follows - a sum of Rs 1,00,000/- on 23-01-2013 through cheque no. 003038 (Kotak Mahindra Bank), a sum of Rs 22,07,669/- on 21-03-2013 through credit note as Adjustment Against Brokerage, a sum of Rs 5,30,000/- on 18-04-2013 through cheque no 611668 (SBI) a sum of Rs 5,00,000/- (Rupees Five Lakh only) on 18-04-2013 through cheque no 611669 (SBI).
- iv. Thus the total amount paid by the Complainant is Rs 33,37,669/-. That the said project was stalled since 2013 for almost 10 years and still the amenities and construction work remains incomplete thus "not ready for possession". The internal work is still incomplete in bits and pieces and the external development work like development of parks, community centre still remains incomplete.

- v. That the builder buyers agreement draft which was provided by the respondent to the complainant was lopsided and only pertaining to the welfare of the respondent. That the complainants on many occasions visited the office of the respondent with respect to discussing the builder buyers agreement but the respondent threatened the complainant with dire consequences saying that the complainant will have to sign the lopsided agreement or the respondent would not give either the flat or the money deposited till now back to the complainant. The respondent also further added that the courts cannot come to the rescue of the complainant, and he did not have any way out of this but to sign the lopsided agreement.
- vi. That despite the repeated requests and reminders, the builder did not pay any heed to the complainant about the making of the builder buyers agreement. That this categorically shows the malafide intension of the respondent to cheat the complainant. That the respondent sent a cancellation letter dated 01-06-22 to the complainants to harass and pressurise the complainant in order to get the lopsided builder buyers agreement signed. That the complainants sent a reply to the cancellation letter of the respondent on 15-07-2022 through courier and expressed his disagreement.
- vii. That further because of the inordinate delay in completion of the project the applicant wishes to get



the refund of the amount paid by him as the project has been delayed beyond a reasonable period and is also entitled to get interest for delay in possession on the amount paid by him to the respondent as the same represent the return on earning/amount utilized by the builder/respondent and as held by this authority in the matter of **Sanju Jain Versus TDI.**

viii.

That the Hon'ble NCDRC in **SHALABH NIGAM Versus ORRIS INFRASTRUCTURE PVT. LTD. & ANR. CONSUMER CASE NO. 1702 OF 2016** has held that the allottee can seek refund if there is an inordinate delay of more than one year in the delivery of possession. Due to the delay in possession of the flat, the complainant has suffered huge mental stress, harassment, and monetary loss as loss of rental, income, interest on his funds.

C. The complainants are seeking the following relief:

4. The complainant has sought the relief(s):

- (i) Direct the respondent to refund the entire amount paid by the complainants to the respondent along with prescribed rate of interest.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:

- i. That at the very outset, it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The Complainants have misdirected themselves in filing the above-captioned



complaint before this Ld. Authority as the reliefs being claimed by the Complainants cannot be said to fall within the realm of jurisdiction of this Authority. Since the allotment has already been cancelled vide cancellation letter dated 01.06.2022 and the OC was received way back in 2021. It is pertinent to mention here that for the fair adjudication of grievances as alleged by the Complainants, detailed deliberation by leading the evidence and cross-examination is required, thus only the Civil Court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication.

- ii. That presently, the Authority is not the right forum for the relief sought by the Complainants as there is no question of a refund to be given in view of the catena of judgments passed by the Real Estate Regulatory Authority, Gurugram. That the Complainants are attempting to seek an advantage from the slowdown in the real estate sector and are trying to seek an undue advantage by concealing the true facts.
- iii. That the Complainants have themselves violated the obligations as set forth in Section 19 of the RERA Act and have further breached their duty as allottees by not paying the consideration amount set to be paid as per the payment plan, which was duly informed and accepted by the Complainants. The present complaint has been filed by the Complainants by hiding the true facts of the present case and by placing half-baked truths before the Hon'ble Authority. Thus, the present complaint ought to be outrightly dismissed with heavy costs.



- iv. That the Complainants are habitual defaulters and they have failed to make various payments as per the various demand letters, as per the agreed payment plan. It is most pertinent to submit that, despite numerous opportunities, reminders, and additional chances, the Complainants have failed to fulfil their promise of paying the total consideration amount as mutually agreed upon and thus, with no fault on the part of the Respondent, thus resulting is cancellation of the provisional allotment vide letter dated 01.06.2022.
- v. That the Respondent have failed to disclose that despite repeated reminders from the Respondent Company, the Complainants failed to clear the dues timely. That it is humbly submitted that the Complainants are regular defaulters and on account of non-payment of due instalments the allotment was terminated even before filing of the present complaint vide Cancellation Notice dated 01.06.2022.
- vi. That the Respondent issued the cancellation letter on 01.06.2022 after being tired of waiting for due payments from the Complainants. Moreover, the Complainants only repeatedly requested for time to make payments in terms of the agreed payment plan. The request of the Complainants was accepted and due opportunity was granted to the Complainants for making due payments. After which a letter for cancellation of allotment was then sent to the Complainants on 01.06.2022.
- vii. It is submitted that when the above-mentioned reminders, opportunity, and several chances were given to the Complainants, the Respondent was legally entitled to cancel the allotment on

account of non-payment of due instalments and to forfeit the earnest money, however, as a gesture of goodwill, instead of forfeiting the earnest money paid by the Complainants against the subject matter unit, the Respondent agreed to grant some time to the Complainants to make due payment and thus only after waiting for 9 years since booking, did the Respondent Company finally cancelled the unit of the Complainants. It is pertinent to mention that the Complainants have committed breach of understanding arrived at between the parties and failed to make any payment towards the unit.

viii. That the Complainants have come before the Hon'ble Authority with unclean hands. The complaint has been filed by the Complainants just to harass the Respondent and to gain unjust enrichment. The actual reason for filing the complaint stems from the change in financial valuation of the Respondent estate sector in the past few years and the allottee malicious intention to earn some easy money.

ix. It is humbly submitted that the tower in which the unit of the Complainants is situated is complete in all respects. Moreover, the Respondent has received the Occupation Certificate from the Director General, Town and Country Planning, Chandigarh, Haryana, vide letter dated 26.10.2021. The Respondent Company's commitment towards the completion of the project is not to be disregarded. In the matter titled *Neelkamal Realtors Suburban Pvt, Ltd. and Anr. Versus Union of India and Others, Writ Petition No. 2711 of 2017*, the Hon'ble High Court of Judicature at Bombay, in Para 152 held



"152. It needs to be emphasized that RERA law is not to be considered as anti-promoter. It is a law for regulation and development of real estate sector. Under the scheme of RERA, the promoter's interests are also safeguarded and there is a reason for the same. Unless a professional promoter making genuine efforts is not protected, then very purpose of development of real estate would be defeated."

Thus, in this regard, it is pertinent to mention that the Respondent Company was facing umpteen roadblocks in construction and development work on its project that were beyond the control of the Respondent.

x. That since the hurdles faced by the Respondent company were beyond its control, hence no fault can be found qua the Respondent. That it is extremely imperative to bring to the notice of this authority that the alteration in the timeline for the development of the project was due to external, unseen, and unavoidable reasons and that there was no delay on the part of the Respondent company.

xi. That it further submitted that out of the Total Sale Consideration of Rs. 1,35,11,400/- the Complainant has admittedly paid Rs. 33,37,669/- (inclusive of taxes). That further the Respondent has sent numerous demand letters as well as reminders to the Complainants on 15.07.2014, 10.10.2014, 10.11.2014, 25.11.2014, 01.01.2015, 05.01.2015, 01.05.2015, 20.03.2016, 01.06.2016, 20.06.2016, 01.12.2021, 05.01.2022, 03.02.2022 on various other dates, asking the Complainants to make payment of the due amount but having no positive result, the Respondent ultimately on 01.06.2022 cancelled the unit. That without prejudice to the any rights of the Respondent it is submitted that in the present case if



the Authority allows the prayer of refund in favour of the Complainants then it is a matter of right of the Respondents that relief under Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulation, 11(5) of 2018 be made applicable, and the Respondent be directed to refund after deduction of earnest money @ 10% of total sale consideration.

xii. That it is brought to the knowledge of the Hon'ble Authority that the Complainants are guilty of presenting untrue facts and are attempting to hide the true colour of the intention of the Complainants. That further the hurdles faced by the Respondent Company in the execution of the development activities were duly informed to the Complainants, and nothing was hidden by the Respondent Company.

xiii. Hence, the complaint is liable to be dismissed with the imposition of an exemplary cost for wasting the precious time and efforts of the Authority. That the present complaint is an utter abuse of the process of law, and hence deserves to be dismissed.

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

E. Jurisdiction of the authority

7. The respondent has raised a preliminary submission/ objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding the rejection of the complaint on ground of jurisdiction stands rejected. 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, Haryana 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 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 as per provisions of section 11(4)(a) of the Act 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 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."

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 complainants/allottees. ✓



- F. I Direct the respondent to refund the entire amount paid by the complainants to the respondent along with prescribed rate of interest.
13. The complainant was allotted unit no. CR-02/11-02, Tower-CR-02, 11th floor in the project "Residences 360, Sector-70A" by the respondent-builder for a sale consideration of Rs. 1,18,95,900/- and she paid a sum of Rs. 33,37,669/- which is approx. 28% of the sale consideration. A builder buyer's agreement is not executed between parties with regard to the allotted unit. So, the due date of possession is calculated from the date of start of construction i.e., 15.03.2013, and handover possession of the same comes out to 15.03.2016. The complainant failed to pay the amount due against the allotment unit.
14. The respondent issued reminders and final notice i.e., 03.02.2022 and thereafter, issued cancellation letter to the complainants on 01.06.2022. The Occupation Certificate for the project of the allotted unit was granted on 26.10.2021. It is evident from the above mentioned facts that the complainants paid a sum of Rs. 33,37,669/- against sale consideration of Rs. 1,18,95,900/- of the unit allotted to them 06.05.2013. The respondent cancelled the unit of the complainants with adequate notices. Thus, the cancellation of unit is valid.
15. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

"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."

16. Keeping in view, the aforesaid legal provision, the respondent/promotor directed to refund the paid-up amount after deducting 10% of the sale consideration and shall return the amount along with interest at the rate of 10.75% (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 cancellation i.e., 01.06.2022 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

17. 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. 33,37,669/- after deducting 10% of the sale consideration of Rs. 1,18,95,900/- with interest at the prescribed rate i.e., 10.75% on such balance amount, from the date of cancellation i.e., 01.06.2022 till the actual date of refund.



- 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 Planning branch of the authority is directed to initiate Suo-moto cognizance against the respondent/promoter for non-registration of the project under this Act and separate proceeding shall be initiated against the respondent under section 59 of the Act.
19. Complaint stands disposed of.
20. File be consigned to registry.

Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 04.10.2023

Complaint no. 6731 of 2022

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 Planning branch of the authority is directed to initiate suo-moto cognizance against the respondent/proponent for non-registration of the project under this Act and separate proceeding shall be initiated against the respondent under section 59 of the Act.

- 19. Complaint stands disposed of
- 20. File be consigned to registry

[Signature]
 Member
 District Registration Authority

Haryana Registration Authority
 District Registration Authority