

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

Complaint no.	4200 of 2021
Date of complaint	08.11.2021
First date of hearing	24.12.2021
Date of decision	18.10.2023

Jyoti Dhingra & Vijay Kumar Malik R/O: 17/148, 4 th Floor, Subhash Nagar, Tagore Garden, Delhi. 10/602, Kendriya Vihar, Sector-56, Gurugram.	Complainants
Versus	
SS Group Pvt. Ltd. Registered address at Plot No. 77, SS House, Sector-44, Gurgaon, Haryana-122003.	Respondent

CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Mr. Gaurav Bhardwaj & Ms. Surbhi Bhardwaj Advocate	Complainants
Mr. Rahul Bhardwaj Advocate	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all



obligations, responsibilities, and functions under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project-related details

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

S. N.	Particulars	Details
1.	Name and location of the project	"The Leaf", Sector -85, Gurugram
2.	Nature of the project	Group Housing Complex
3.	Project area	11.093 acre
4.	DTCP license no.	81 of 2011 dated 16.09.2011 Valid upto 15.09.2024
5.	Name of licensee	Shiva Profins Pvt Ltd
6.	RERA Registered/ not registered	RERA registered 23 of 2019 dated 01.05.2019
7.	Unit no.	8A, 8 th floor, Building no. 6 (As per page no. 25 of the complaint)
10.	Unit area admeasuring (super area)	2600 sq. ft. (As per page no. 25 of the complaint)



12.	Date of execution of builder buyer agreement	03.12.2013 (Page no. 24 of complaint)
13.	Possession clause	8. Possession 8.1: Time of handing over the possession 8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation, etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty-six months from the date of signing of this agreement. The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months for applying and obtaining the occupation certificate in respect of the Group Housing Complex.
14.	Due date of possession	03.12.2016 (Calculated from the date of buyer's agreement)



15.	Total sale consideration	Rs. 1,44,89,000/- (As per page no. 46 of the complaint)
16.	Amount paid by the complainant	Rs. 37,61,372/- (As per page no. 46 of the complaint)
17.	Occupation certificate	09.05.2022
18.	Letter of cancellation	20.04.2022 (As per page no. 83 of the complaint)

B. Facts of the complaint:

3. The complainants are allottees within the meaning of Section 2(d) of The Real Estate (Regulation and Development) Act, 2016.
4. The respondent painted a rosy picture of the project in its advertisement making tall claims and representing that the project aims at providing residential apartments to be known as "THE LEAF".
5. Believing the representations of the respondent, on 18.08.2012 the complainants booked an apartment in the project of the respondent and paid an amount of Rs.12,00,000/- towards the booking of the said apartment bearing no- 8A 8th Floor, Building No. 6, admeasuring 2600 sq. ft. super Area with the total sale consideration of Rs. 1,44,89,000/- to the respondent. The Complainants on 10.09.2012 received a letter with a subject allotment of a residential apartment in the said project.
6. Thereafter the respondent kept on demanding payments without executing the builder-buyer agreement. The respondent delayed the execution of the BBA even after repeated requests from the



complainants. The respondent demanded Rs.42,42,067/- approx. without entering into a builder-buyer agreement which is a clear violation of the RERA Act. Subsequently, after many calls and reminders by the complainants, the respondent executed the builder-buyers agreement.

7. After executing the builder-buyer agreement, the respondent kept on demanding money on account of the purchase of the said unit despite having done no construction at the project site. As per the builder-buyer agreement, the due date for handing over possession was 03.03.2017, but till 01.07.2017 the said project was in its initial stage and nowhere near completion.
8. The complainants then approached the respondent to enquire about the completion of the project but no satisfactory reply was received by them resulting in the complainants requesting the respondent either to hand possession of the unit or to refund the said deposited amount but it clearly refused to refund the said amount and rather kept on sending the demand letters to the complainants and the respondent also threatened the complainants of forfeiting the deposited amount, left with no other option, the complainants stopped making payments to the respondent and kept on requesting the respondent to refund the deposited money.
9. On 29.04.2021 the complainants were shocked to receive a notice for cancellation of the BBA for the said unit no. 8A, Building-6 in the residential project on the ground of non-payment of remaining sale consideration despite knowing the fact that the respondent has clearly

failed to adhere to the representation, terms, and conditions of the agreement to sell.

C. Relief sought by the complainant:

10. The complainant has sought the following relief(s):

- i. Direct the respondent to refund the entire amount along with the prescribed rate of interest.

D. Reply by respondent:

11. The complainants had booked a unit in "THE LEAF" residential project situated in Sector-84-85, Gurgaon, Haryana vide a registration form dated 18.08.2012. Thereafter, complainants were allotted a unit 8-A, 8th Floor, located in Tower B-6, admeasuring 2600 sq.ft., on 10.09.2012 which was further finalized by executing the flat buyer agreement dated 03.12.2013 wherein, the total sale consideration of the unit was agreed at Rs. 1,44,89,000/-.
12. The construction of the project was within the timeline as stipulated in the flat buyer's agreement and accordingly, the complainants were supposed to pay the installments of the said unit by way of a construction-linked payment plan. However, the respondent from the very inception had to run after the complainants to clear the outstanding dues.
13. The respondent had to send them demand notices to clear the outstanding bills. From 2012 to 2021, i.e before the cancellation of the unit, the respondent sent numerous demand letters dated 29.09.2012, 08.10.2013, 27.06.2013, 26.08.2015, 11.12.2015, 05.04.2016, 14.03.2017, 14.04.2018 to the complainants.

14. The complainants till the issuance of the final demand letter have only paid Rs. 37,61,372/- towards the total sale consideration amounting to Rs. 1,44,89,000/- which only accounts for approx. 20% of the total sale consideration. Both the parties agreed as per the terms and conditions and the complainants were well aware that "time being the essence" and the total sale consideration was to be paid according to the construction-linked plan.
15. The last payment towards the agreed sale consideration was made on 19.09.2013 amounting to Rs. 3,00,000/- and since then no payment, however, has been made by the complainants. The respondent continuously sent numerous demand letters to clear the outstanding dues but the respondent's request fell on deaf ears of the complainants which clearly reflects that the complainants were in clear breach of the terms and conditions of the flat buyer agreement.
16. That there is huge a outstanding amount due from the complainants, and hence the unit was cancelled by a letter dated 20.04.2022.
17. The respondent has suffered huge financial loss due to such wilful defaulters. Several allottees have defaulted in timely remittance of payment of installments which was an essential, crucial, and indispensable requirement conceptualization and development of the project in question. Despite there being a number of defaulters in the project, the respondent itself infused a huge amount of funds into the project.
18. The respondent shall be entitled to relief from this Hon'ble Authority for the breach in the terms and conditions of the flat buyer's agreement by the complainants. As per Clause 1.2(f) of the flat buyer's agreement,



the respondent is entitled to forfeit the earnest money as well as the brokerage along with the taxes and interest.

19. As per the clause 15 of the flat buyer's agreement, the complainants were made aware that he/she shall perform and comply with all covenants and obligations required to be performed or complied.
20. It is further pertinent to mention that the Building-6 where the allotted unit is situated is complete and occupation Certificate has already been obtained.
21. The complainants are investors and had booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slump in the real estate market, the complainants have filed the present purported complaint to wriggle out of the agreement. The complainants do not come under the ambit and scope of the definition of an allottee under section 2(d) of the Act, as the complainant is an investor and booked the unit in order to enjoy good returns from the project.

E. Jurisdiction of the authority:

22. The plea of the respondents regarding lack of jurisdiction of Authority is rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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 the entire Gurugram District

for all purposes 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

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per the agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities, and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance with the obligations cast upon the promoters, the allottees, and the real estate agents under this Act and the rules and regulations made thereunder.

So, given 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.

F. Findings on the objections raised by the respondent:

F.I. Objection regarding complainants being an investor.

23. The respondent has taken a stand that the complainants are investors and not consumers, therefore, they are not entitled to the protection of the Act thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to: protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon Careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and they have paid a total price of Rs. 27,99,009/- to the promoter towards the purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

24. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed

between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having the status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in **appeal no. 0006000000010557** titled as **M/s Srushti Sangam Developers Pvt Ltd. Vs. Sarvapriya Leasing (P) Ltd. and anr.** has also held that the concept of investors is not defined or referred to in the Act. Thus, the contention of the promoter that the allottees being investors are not entitled to protection of this act also stands rejected.

G. Entitlement of the complainant for refund:

G.I Direct the respondent to refund the amount deposited by the complainant along with interest at the prescribed rate.

25. The complainants were allotted Flat no. 8A on the 8th floor, Tower 6 in the project "The Leaf", Sector 85, Gurugram, Haryana by the respondent/builder for a total consideration of Rs. 1,44,89,000/-. The possession of the unit was to be offered within 36 months plus a 90-day grace period from the date of the execution of the buyer's agreement. Hence, the due date of possession comes out to be 03.12.2016. It has come on record that against the total sale consideration of Rs. 1,44,89,000/-, the complainants have paid a sum of Rs. 37,61,372/- to the respondent. The complainants contend that since the project was nowhere near completion, they stopped making the payments. On the

other hand, the respondent contends that the complainants did not follow the terms of the agreement and defaulted on payment demands raised by it. The complainants have placed on record a cancellation letter dated 29.04.2021 by which the respondent has canceled the allotment, though the respondent has not placed any such document. However, later on, the respondent again issued a cancellation letter dated 20.04.2022. It is the view of the Authority that the said cancellation letter dated 29.04.2021 is not valid as no notices were sent to the complainants in that regard. Further, the earlier cancellation letter dated 29.04.2021 was revoked by the issuance of the latest cancellation letter dated 20.04.2022. Since the cancellation letter dated 20.04.2022 was issued after the filing of the instant complaint i.e. on 08.11.2021, the said cancellation cannot be termed as valid in the eyes of law, and therefore the complainants are entitled to a full refund. Hence, in case allottees wish to withdraw from the project, the promoter is liable on demand to return the amount received by the promoter with interest at the prescribed rate if it fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale. This view was taken by 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 the case of ***M/s Sana Realtors Private Limited & other vs. Union of India & others SLP (Civil) (supra)*** wherein it was observed as under: -

"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”.

- 26. Admissibility of grace period:** the promoter in clause 8.1(a) of the agreement between the parties has stated that an additional grace period of 90 days shall be available to it for applying and obtaining the occupation certificate in respect of the group housing complex. The respondent-promoter contended that it shall be provided a grace period of 90 days. However, the Authority is of the view that the grace period shall not be available to it as there has been a massive delay in the completion of the project and the same period was not utilized in obtaining the completion certificate.
27. 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 the agreement for sale under section 11(4)(a) of the Act. The promoter has failed to complete or is 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. Accordingly, the promoter is liable to the allottees, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by

respondents/promoter in respect of the unit with interest at such rate as may be prescribed.

28. It is contended on behalf of the respondent that after completing the project, it obtained the occupation certificate from the competent authority. But the complainants have already surrendered the unit by filing the present complaint on 08.11.2021, therefore the complainant cannot be forced to continue with the project. There has been an inordinate delay in the project which cannot be condoned. Thus in such a situation, the complainants cannot be compelled to take possession of the unit and they are well within the right to seek a refund of the paid-up amount.
29. Keeping in view the fact that the allottees/complainants wishes to withdraw from the project and is demanding a return of the amount received by the promoter in respect of the unit with interest on the 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.
30. 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 complainants are entitled to a refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 8.75% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as of 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.

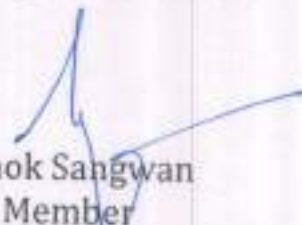
H. Directions of the Authority:

31. Hence, the authority hereby passes this order and issues the following directions under Section 37 of the Act to ensure compliance with obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016.

- i. The respondent/promoters are directed to refund the amount i.e., Rs.37,61,372/- received by it from the complainants/allottees 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 amount.
- ii. A period of 90 days is given to the respondents to comply with the directions given in this order failing which legal consequences would follow.

32. Complaint stands disposed of.

33. File be consigned to the registry.



Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.10.2023