

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

Complaint no. : 6487 of 2022
Date of complaint : 30.09.2022
Date of order : 08.11.2023

Vikas Kapoor
R/o H. No. 1824, Sector-4,
Gurugram, Haryana-122001.

Complainant

Versus

M/s Ramprastha Promoters and Developers Pvt. Ltd.
Regd. office: 14, Sector-44 Road, Sector-44,
Gurugram, Haryana-122003.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Sanjeev Sharma (Advocate)
R. Gayatri Mansa (Advocate)

**Complainant
Respondent**

ORDER

1. This 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 provisions of the Act or the Rules and regulations made thereunder 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	"Ramprastha City", Sectors 37C and 37D, Gurugram, Haryana
2.	Project area	105.402 acres
3.	Nature of the project	Residential Colony
4.	DTCP license no. and validity status	128 of 2012 dated 28.12.2012 valid upto 06.04.2025
5.	Name of licensee	KNS Nirman
6.	RERA Registered/ not registered	Not registered
7.	Plot no.	Nursing home plot falling on 60-meter-wide road (Page no. 18 of the complaint)
8.	Unit area admeasuring	1195 sq. Yds. (approx. 0.25 acres) (Page no. 23 of the complaint)
9.	Memorandum of understating	22.01.2015 (Page no. 24 of the complaint)
10.	Addendum to Memorandum of understating	05.10.2018 (Page no. 23 of the complaint)
11.	Date of execution of plot buyer's agreement	N. A
12.	Possession clause	3.1 read with 3.2 Execution of sale deed: 3.1 "The parties agree to execute the sale deed on or before the expiry of (24) Twenty Four months from the date of Second Party making payment of Rs.82,12,500/- (Rs. Eighty Two Lakh, Twelve Thousand Five Hundred only) out of Total sale consideration or on or before 01/013/18 ("sale date"), whereby the first party shall transfer by way of sale the said land (reserved for Nursing Home



plot), free of all encumbrance. in favour of the second party. In the event the failure on the part of first party to execute the sale deed on or before the sale date, the second party shall be entitled either to the right of specific performance of this MOU or to receive refund of the all paid amounts. In case the second party fails to pay to the first party any amount of consideration in agreed manner, then, the first party shall have the option either to terminate this MOU without any notice and forfeit an amount equal to 12/1 of the total consideration or charge interest at the rate of per month on delayed payment or to seek specific enforcement of the MOU.

3.2 Subject to the receipt of Total consideration, the first party shall hand over vacant physical, peaceful possession of the said land to the Second Party which shall be acknowledged in the sale deed at the time of registry of the sale deed.

(as mentioned in MOU dated 22.01.2015)

4. That for Clause 3 (3.1) pertaining to time of handing over the possession and penalty, the following clause mentioned herein under shall substitute the one written in the MOU.

“Subject to terms in clause and subject to the allottee having complied with all the terms and condition of this agreement and the application and not being in default under any of the provisions of this agreement and compliances with all provisions, documentation etc. as prescribed by the RAMPRASTHA, RAMPRASTHA proposed to hand over the possession of the LAND from one year of the finalization of alignment of

		<i>the 60-meter road by Huda sector. The allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of One hundred and twenty (120) days, for applying and obtaining the ALL/ANY certificates required.</i> (as mentioned in addendum to MOU dated 05.1.2018)
13.	Due date of possession	22.01.2018 (calculated from the date of MOU) [Calculated as per <i>Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018</i>]
14.	Basic price of the plot	Rs.89,62,500/- [As per memorandum of understating at page no. 19 of the complaint]
15.	Amount paid by the complainant	Rs.82,50,000/- [As per submitted by complainant at page no. 6 of the complaint and admitted by the respondent in his reply]
16.	Occupation certificate /Completion certificate	Not received
17.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint: -

- I. That upon the representation and advertisement made by the respondent regarding its project named "Ramprastha City" at Sector-37-C and 37-D, Gurgaon, the complainant booked a nursing plot vide Memorandum of Understanding dated 22.01.2015 for a total sale consideration of Rs.89,62,500/- against which he has paid a sum of Rs.82,50,000/- in all.
- II. That as per clause 3 of the MOU, the respondent was to execute the sale deed in favour of the complainant on or before the expiry of 24 months from the

date when he makes the payment of Rs.82,12,500/- and thus, the complainant made the payment of Rs.82,50,000/- against the same from 27.01.2015 to 01.10.2015 to the respondent, but the sale deed was not executed by it in his favour even after expiry of the said period as agreed between the parties.

- III. That as per clause 2.2.3 of the MOU, the balance amount of Rs.7,50,000/- was to be paid at the time of handing over of possession or execution of sale deed and therefore, the complainant vide letters dated 04.08.2015, 29.02.2016 requested the respondent to grant some more time to make payments because the possession would be offered by the respondent on time, or the execution of the sale deed will take place on the specified manner by the respondent.
- IV. That the respondent very cleverly executed an addendum to the MOU on 05.10.2018, wherein it mentioned that the delay and changes in the erstwhile MOU dated 22.01.2015 has been done due to some changes and flaws by the HUDA along with certain readjustments to be made on the 60 meter road and etc. and as per clause 4 of the addendum, the possession would be handed over from one year of the finalization of alignment of the 60 meter road by HUDA. However, even after the delay from 2018, the possession of the plot has not been handed over till today. Therefore, the complainant has approached this Authority seeking possession of the plot in question along with delay possession charges at prescribed rate of interest. Further, the complainant also reserves his right to file separate complaint for compensation as and when required before the appropriate forum/ authority.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).
- i. Direct the respondent to hand over the possession of the unit/plot along with delay possession charges at prescribed rate of interest.

D. Reply by the respondent

5. The respondent contested the complaint on the following grounds: -
- i. That the complainant has approached the respondent in the year 2015 to invest in undeveloped agricultural land in one of the futuristic projects of the respondent located in Sector 37-D, Gurugram. The complainant fully being aware of the prospects of the said futuristic project decided to make an investment in the said project for speculative gains. Thereafter, the complainant paid a booking amount of Rs.10,00,000/- through cheque bearing no. 585378 dated 27.01.2015 towards booking in the said project. It was also specifically clarified that a specific plot shall only be earmarked once the zoning plans are approved.
 - ii. That the complainant has paid a total amount of Rs.82,50,000/- which is part or total consideration of the plot and the said payment was not full and final payment and further payments inter alia towards government dues on account of EDC/IDC charges were payable at the time of allotment of plot and execution of plot buyer agreement. Further, no date of possession has ever been mutually agreed between the parties and even at the time of booking, it was clearly agreed that a definite plot can be earmarked only once the zoning plans are approved by the Authority which is within the knowledge of the complainant.
 - iii. That the complainant was never interested in fulfilling the necessary obligation towards booking of the said plot as neither he made any requisite further payment for the plot nor he submitted any application for the same. Accordingly, the execution of the plot buyer's agreement was not done due to the complainant's own default. Therefore, the complainant was never interested in possession of property rather he has invested in the futuristic project for speculative gains.

- iv. That that the complainant is not a "Consumer" within the meaning of the Consumer Protection Act, 2019 as the sole intention of the complainant was to make investment in a futuristic project of the respondent only to reap profits at a later stage. The complainant is only an investor in the said project who has purchased the present property for the purposes of investments/commercial gain and the investor by any extended interpretation cannot mean to fall within the definition of a "Consumer" under the Consumer Protection Act, 2019. Therefore, the complaint is liable to be dismissed merely on this ground.
- v. That on the specific request of the complainant, the investment was accepted towards a futuristic project and no commitment was made towards any date of handover or possession since such date was not foreseeable or known even to the respondent. Further, the respondent had no certain schedule for the handover or possession as there are various hurdles in a futuristic project and hence no amount was received/demanded from the complainant towards development charges but he was duly informed that such charges shall be payable as and when demands will be made by the government.
- vi. That the complainant has concealed its own inactions and defaults since the very beginning. The complainant are at default due to non-payment of developmental charges, govt. charges (EDC & IDC), PLC and interest free maintenance security (IFMS).
- vii. That the reasons for delay are solely attributable to the regulatory process for approval of layout which is within the purview of the Town and Country Planning Department and beyond the control of the respondent.
- viii. That the respondent has applied for the mandatory registration of the project with the RERA Authority, but the same is still pending for which it cannot be held liable. Further, the project was delayed due to passing of an HT line over

the layout, road deviations, depiction of villages etc. which created hindrance in the progress of construction, meeting the agreed construction schedule and has resulted in unintended delay in timely delivery of possession of the plot for which it cannot be held accountable. However, the complainant despite having knowledge of happening of such force majeure eventualities has filed this frivolous, tainted and misconceived complaint in order to harass the respondent with a wrongful intention to extract monies. Therefore, the present complaint is not maintainable in its present form and ought to be dismissed with exemplary costs upon the complainant.

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 parties.

E. Jurisdiction of the authority

7. The authority has complete territorial and 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 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.

E. II Subject-matter jurisdiction

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

Section 11

.....

(4) The promoter shall-

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

Section 34-Functions of the Authority:

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

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent.

F.I Objections regarding the complainant being investor.

11. The respondent has taken a stand that the complainant is an investor and not a consumer and therefore, he is not entitled to the protection of the Act and 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 consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time, the 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 he 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 complainant is a buyer and paid total price of Rs.82,50,000/- to the promoter towards purchase of an apartment in the project of the promoter. 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;"

12. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is an allottee as the subject unit was allotted to him 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 a 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) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

F.II Objections regarding the circumstances being 'force majeure'.

13. The respondent contended that the project was delayed because of the 'force majeure' situations like delay on part of government authorities in granting approvals, passing of an HT line over the layout, road deviations and depiction of villages etc. which were beyond the control of respondent. However, no document in support of its claim has been placed on record by the respondent.

Hence, all the pleas advanced in this regard are devoid of merits. Further, the respondent vide clause 3.1 of the MOU dated 22.01.2015, agreed that it would execute the sale deed in favour of complainant within a period of 24 months after receipt of Rs.82,12,500/- out of the total sale consideration and even after the receipt of the said amount back in 2015, the possession has not been handed over to the complainant till date. Therefore, the respondent cannot take benefit of its own wrong and the objection of the respondent that the project was delayed due to circumstances being force majeure stands rejected.

G. Findings on the relief sought by the complainant.

G. I Direct the respondent to hand over the possession of the said unit/plot alongwith delay possession charges.

14. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"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, —

.....

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."

15. In the instant case, the complainant was provisionally allotted a unit/plot on the boundary of the 60 meter road vide MOU dated 22.01.2015. However, no specific plot number was allotted to the complainant even after receipt of considerable amount of money against the said allotment. No BBA to this affect has been executed between the parties.
16. That after the acceptance of the booking by executing an MOU, the respondent should have handed over the possession of the apartment within the reasonable time period. It can be said that in the matter of the reasonable time for delivery of possession would be 3-4 years from the booking of apartment.

In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract. Since possession clause has not been annexed in the file, the due date would be calculated keeping in view the judgment of the Hon'ble Supreme Court in the case of "**Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors.**" (12.03.2018-SC); **MANU/SC/0253/2018** wherein it was observed that:

"15. Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014."

17. In view of the above-mentioned reasoning, the date of signing of MOU dated 22.01.2015, ought to be taken as the date for calculating due date of possession. Therefore, the due date of handing over of the possession of the unit comes out to be 22.01.2018.
18. At the outset, it is relevant to comment on the present possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer and 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 him 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 loses its meaning. The incorporation of such a clause in the agreement to sell by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment

as to how the builder has misused his dominant position and drafted such a mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

19. **Payment of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate of interest. Proviso to section 18 provides 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 possession, at such rate as may be prescribed and it has been prescribed 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.

20. 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.
21. 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., 08.11.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.
22. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall

be liable to pay the allottee, in case of default. The relevant section is reproduced below:

“(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;”*

23. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **10.75%** by the respondent/promoter which is the same as is being granted to him in case of delayed possession charges.
24. The authority observes that as clause 3.1 read with clause 3.2 of the MOU dated 22.01.2015, it was agreed between the parties that the respondent would execute the sale deed in favour of complaint within a period of 24 months after receipt of Rs.82,12,500/- out of the total sale consideration. However, even after the receipt of the said amount back in 2015, the possession has not been handed over to the complainant till date.
25. Moreover, the occupation certificate/completion certificate of the project where the unit/plot is situated has still not been obtained by the respondents/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have 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

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indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

26. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others (Supra)***, it was observed as under: -

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."

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 allottee as per agreement 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 said MOU or duly completed by the date specified therein.
28. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit/plot to the complainant as per the terms and conditions of the MOU dated 22.01.2015 executed between the parties. Further, the authority observes that there is no document on record from which it can be ascertained as to whether the respondent has applied for occupation certificate/completion certificate or what is the status of construction of the project. Hence, this project is to be treated as on-going

project and the provisions of the Act shall be applicable equally to the builder as well as to the allottees.

29. 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 delay possession charges at the prescribed rate i.e., @10.75% p.a. w.e.f. 22.01.2018 till offer of possession plus 2 months after obtaining completion certificate/part completion certificate from the competent authority or actual handing over of possession, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

H. Directions of the authority

30. 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 hand over possession of the subject plot and pay interest to the complainant against the paid-up amount of Rs.82,50,000/- at the prescribed rate of 10.75% p.a. for every month of delay from the due date of possession i.e., 22.01.2018 till offer of possession plus 2 months after obtaining completion certificate/part completion certificate from the competent authority or actual handing over of possession, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules;
 - II. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;
 - III. The arrears of such interest accrued from 22.01.2018 till the date of this order shall be paid by the promoter to the allottee within a period of 90 days and the interest for every month of delay shall be paid by the

promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules;

31. Complaint stands disposed of.
32. File be consigned to registry.

Dated: 08.11.2023

(Ashok Sangwan)
Member

Haryana Real Estate
Regulatory Authority,
Gurugram



HARERA
GURUGRAM