



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

Complaint no.	:	1169 of 2022
Date of complaint	:	31.03.2022
Date of order	:	15.11.2023

1. Sohan Lal, 2. Neenu Sharma, Both R/o: 0804, Coral Heights, Ramprastha Greens, Sector-7, Vishali, Gaziabad-201010.	Complainants
Versus	
M/s Ninaniya Estates Limited Regd. office: Prism, Tower-A, 6 th Floor, Sector-2, Gwal Pahari, Faridabad Road, Haryana-122003.	Respondent
CORAM:	
Ashok Sangwan	Member
APPEARANCE:	
Complainants in person	Complainants
Sonu Tewatia and Shagun Singla (Advocates)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	"Prism portico", Sector- 89, Gurugram.
2.	Project area	5.5 acres
3.	Nature of the project	Commercial Complex
4.	DTCP License no.	179 of 2008 dated 02.05.2017 Valid upto 10.10.2018
5.	Name of licensee	Ninaniya Estates Pvt. Ltd.
6.	Unit no.	PPRS-FA-10, 1 st floor (page 26 of complaint)
7.	Unit area admeasuring	300 sq. ft. (page 26 of complaint)
8.	Memorandum of understanding	of 09.09.2014 (page 19 of complaint)
9.	Allotment letter	29.08.2014 (page 15 of complaint)
10.	Date of execution of agreement to sell	09.09.2014 (page 23 of complaint)
11.	Possession Clause	5.1 36 months from the date of start of construction or from the BBA whichever is later. (page 30 of complaint)
12.	Assured return clause mentioned in Mou dated 09.09.2014	2 & 3 Developer shall give an investment assured return of Rs.27,997/- per month w.e.f. 01.04.2015 in arrears till

		the date of possession of the said unit is handed over to the buyer. (page 20 of complaint)
13.	Due date of possession	09.09.2017 (calculated from the date of execution of buyer's agreement in absence of any document regarding date of start of construction)
15.	Total sale consideration	Rs.28,91,400/- (as per payment schedule on page 45 of complaint)
16.	Amount paid by the complainant	Rs.26,07,780/- (as per payment receipts on page 17-18 of complaint)
18.	Occupation certificate /Completion certificate	Not on record
19.	Offer of possession	Not offered

B. Facts of the complaint:

3. The complainants have made the following submissions: -

- I. That the complainants were allotted a shop bearing no. FA-10, having 300 sq.ft. super area in the project of the respondent named "Prism Portico" at Sector-89, Gurugram vide allotment letter dated 29.08.2014. Thereafter, a buyer's agreement was executed between the parties on 09.09.2014 for a total sale consideration of Rs.28,91,400/- and they have paid an amount of Rs.26,07,780/- against the same in all.
- II. That as per clause 5.1 and 5.2 of the agreement, the possession was to be offered within 36 months from the date of execution of agreement and/or the start of construction whichever is later. Further, an MoU dated 09.09.2014 was executed between the parties wherein it was agreed that the respondent would give an investment assured return of Rs.27,997/- per month w.e.f. 01.04.2015 in arrears till the date of

possession of the said unit is handed over to the buyer. However, the respondent has neither handed over possession of the shop/unit nor paying monthly assured return to the complainants from November 2019.

- III. That the complainants have purchased the unit with all their hard-earned money without making any default in the payment to the respondent. However, the respondent has failed to deliver the possession of the unit till date. Therefore, the complainants are no longer wishing to continue in the project as there is no certainty about the delivery of possession and they cannot be compelled to wait for an indefinite period. Hence, the present complaint.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):
- a) Direct the respondent to refund the paid-up amount alongwith prescribed rate of interest.

D. Reply by respondent:

5. The respondent vide reply dated 30.01.2023 contested the complaint on the following grounds:
- i. That the complainants, only after carefully strategizing and manipulating the clauses of the buyer's agreement and stating false statements, have filed the present complaint.
- ii. That the complainants came to the officials of the respondent for booking a unit in one the most coveted projects of the respondent company and paid the booking amount accordingly after submitting an application form.
- iii. That it is further submitted that on one hand the complainants are relying on particular clauses of the agreement and on the other hand they are

- submitting that the terms of agreement are illegal and amount to unfair trade practices.
- iv. That the complainants have come before the Authority with un-clean hands. That the complaint has been filed by the complainants just to harass the respondent and to gain the unjust enrichment. Moreover, the complainants have already received a sum of Rs.8,11,913/- towards the payment of assured return in respect of the unit in question. Thus, the complainants are not entitled for the relief which they are seeking by the way of the present complaint.
 - v. That it is pertinent to mention that the present complaint is not maintainable before the Hon'ble Real Estate Regulatory Authority as it is crystal clear from reading the complaint that the complainants are not 'Allottees', but are 'Investors', who are only seeking assured return from the respondent, by way of present complaint, which is not maintainable under the provisions of the Act of 2016.
 - vi. That the present complaint is an arm-twisting method employed by the complainants to fulfil the illegitimate, illegal and baseless claims so as to get benefit from the respondent. Thus, the present complaint is without any basis and no cause of action has arisen till date in favour of the complainants and against the respondent and hence the complaint deserves to be dismissed.
 - vii. That clause 5.2 of the buyer's agreement clearly in explicit terms states that the estimated time of the completion of the project may change due to force majeure or by the reasons beyond the control of the company and if there is any alteration in the timeline of the completion of the project, it was beyond the control of the respondent owing to the following reasons:



- Policies regarding availability of FAR based on various factors/ grounds and conditions including TOD and TDR.
- Revised taxation policies including GST, Brokerage Policies.
- Environmental restrictions such as use of untreated water and frequent stoppage of construction due to pollution control measure on environment etc.
- Increase in the cost of construction material.
- Two stage process of environmental clearance which takes 2 to 3 years.
- Labour strikes and shortage of construction workers, construction material and even the contractor hired for the construction works was not performing as per the scope of the project work and the Respondent had to send constant reminders to the contractor regarding slow pace of work and workforce deployed, which was resulting in timeline alterations for the timely completion of project.
- Statutory construction bans across the NCR region during the winter season, resulting in slow down of the project.
- Many investors in the project had defaulted in timely payment of instalments due to which it became difficult for the respondent to adhere to the timelines for the completion of the project.
- The connecting roads to the project were not timely acquired by the Government authorities, thus the construction equipment, raw material and labour ingress became a difficult task. The same was a major component which led to the changed timelines in the completion of the project since the construction and development works became slow and delayed.



- Demonetisation also resulted in delaying the timely completion of project.
 - Outbreak of the novel-corona virus is also the major factor which leads to the alteration in the timeline for the completion of project.
- viii. It is most respectfully submitted that the complainants had wilfully agreed to the terms and conditions of the buyer's agreement and now at a belated stage is attempting to wriggle out of the obligation imposed by the said mutually agreed agreement terms by the filing the instant complaint before this Authority.
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 those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

7. The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands 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

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district.

Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee's as per 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 of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
11. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(C), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** and 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 case 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 objections raised by the respondent:

F.I Objection regarding the complainant being investor.

13. The respondent has taken a stand that the complainants are investors and not consumer, therefore, they are not entitled to the protection of the Act and 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 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 it 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 buyer's agreement, it is revealed that the complainants are buyers and paid total price of Rs.26,07,780/- to the promoter towards purchase of an unit 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;"

14. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement, it is crystal clear that the complainants are allottees 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 a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 000600000010557 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 allottees being investor are not entitled to protection of this Act also stands rejected.

F.II Objections regarding force majeure.

15. The respondent/promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as ban on construction, demonetisation, COVID-19, GST law etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in



question was to be offered by 09.09.2017. Moreover, time taken in governmental clearances cannot be attributed as reason for delay in project. Also, there may be cases where allottees have not paid instalments regularly but all the allottees cannot be expected to suffer because of the default on part of few allottees. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainants.

G.I To refund the entire amount deposited alongwith prescribed rate of interest.

16. The complainants intends to withdraw from the project and are seeking return of the amount paid by them 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)



17. Clause 5.1 of the suites buyer's agreement provides for handing over of possession and is reproduced below:

5. COMPLETION AND POSSESSION

5.1 "That the Company shall complete the construction of the said Unit within 36 months from the date of execution of this Agreement and/or from the start of construction whichever is later and Offer of possession will be sent to the Allottee subject to the condition that all the amounts due and payable by the Allottee by the stipulated date as stated in Annexure - II attached with this agreement including sale price, maintenance charges, security deposit, stamp duty and other charges etc. have been paid to the Company. The Company on completion of the construction shall apply for completion certificate and upon grant of same shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues."

18. **Due date of handing over possession:** As per clause 5.1 of the buyer's agreement, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 36 months from the date of execution of agreement and/or from the date of start of construction. However, no document has been placed on record vide which the date of start of construction can be ascertained. Thus, in this case, the due date has been calculated from the date of execution of buyer's agreement. The buyer's agreement was executed between the parties on 09.09.2014. Therefore, the due date of possession comes out to be 09.09.2017.

19. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the prescribed rate of interest 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.

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., 15.11.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.
22. 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 5.1 of the agreement to sell dated form executed between the parties on 09.09.2014, the possession of the subject unit was to be delivered within a period of 36 months from the date of execution of buyer's agreement which comes out to be 09.09.2017. Therefore, the due date of handing over of possession is 09.09.2017.
23. Keeping in view the fact that the complainant/allottees 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.

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24. The due date of possession as per agreement for sale as mentioned in the table above is **09.09.2017** and there is delay of 4 years 6 months and 23 days on the date of filing of the complaint. The authority has further, observes that even after a passage of more than 9 years (from the date of execution of agreement) till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottees by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the unit which is allotted to them and for which they have paid a considerable amount of money towards the sale consideration. 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 intends 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.
25. 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 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 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. (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."

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 agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as the allottees wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.

28. 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 them 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 after adjusting the amount/assured return paid by respondent, if any, within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the Authority:

29. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:
- i. The respondent/promoter is directed to refund the entire amount i.e., Rs.26,07,780/- received by it from the complainants 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 after adjusting the amount/assured return paid by respondent, if any.
 - 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 respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of complainant-allottees.

30. Complaint stands disposed of.
31. File be consigned to the registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 15.11.2023



HARERA
GURUGRAM