

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

Complaint no.	:	5433 of 2022
Date of complaint	:	18.08.2022
Date of order	:	20.09.2023

1. Vinod Kumar Goyal,  
R/o: - House No. 249, Sector 9,  
Faridabad, Haryana.
2. Manish Gupta,  
R/o House No. 1105, Sector 14,  
Faridabad, Haryana.

**Complainants**

**Versus**

Ninaniya Estates Limited  
**Office at:** 6<sup>th</sup> Floor, Prism Tower,  
Gwal Pahari, Gurgaon-Faridabad Road,  
Bandhwari, Haryana-122102.

**Respondent**

**CORAM:**

Ashok Sangwan

**Member**

**APPEARANCE:**

Ishaan Dang (Advocate)

Vijay Kumar (AR)

Complainant

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 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 allottees 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 complainants, 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	Five Star Hotel and Suites Complex, Gwal Pahari, Sector 2, Gurgaon-Faridabad Road, Gurgaon (India)
2.	Project area	20876.97 Sq. Yds.
3.	Nature of the project	Five-star hotel (Commercial complex)
4.	RERA Registered/ not registered	Unregistered
6	Unit no.	108, 1 <sup>st</sup> floor (page 26 of complaint)
7	Unit area admeasuring	770 sq. ft. (page 26 of complaint)
8.	Allotment letter	29.02.2012 (Page 21 of the complaint)
9.	Date of execution of agreement to sell	19.03.2012 (page 24 of complaint)
10.	Possession clause	<b>4 (i)</b> The Promoter/Developer shall complete the building and hand over the possession of the Prism Suites to the Buyer at the earliest possible date, subject always to various Prism Suites buyers making timely payment, Force Majeure causes, availability of essential items for construction, change of policy

		<p>by the Governmental Agencies and Local Authorities and other causes beyond the control of the Promoter/Developer (No penalty to the Developer in this case).</p> <p>(ii) <b>In case the building is not completed within 36 months / indefinitely delayed</b>, then it will be the Buyer's option whether accept the cancellation or claim back the amount paid with Interest @ 9% p.a.</p> <p>(iii) In case the project is delayed Due to gross negligence of the Promoter/Developer then post 36 months the Promoter/Developer will bear a penalty of Rs. 15 per Sq. Ft. Per month till the offer of possession.</p>
13	Due date of possession	19.03.2015 (calculated from the date of execution of buyer's agreement)
14	Basic sale consideration	Rs.51,97,500/- (Page 26 of the complaint)
15	Amount paid by the complainant	Rs.49,64,213/- (as per annexure-C6 on page 43 of complaint)
16	Occupation certificate /Completion certificate	N/A
17	Offer of possession	25.04.2017 (page 44 of complaint)
18	Consent letter for surrender dated	26.12.2017 (page 48 of complaint)

**B. Facts of the complaint:**

- I. That the officials of the respondent had approached the complainants to purchase a commercial unit/suite in the project named "Prism Executive Suites" at Sector 2, Gurgaon. Accordingly, they booked an executive suite in the said project vide application form/booking form dated 22.02.2012. Thereafter, vide allotment letter dated 29.02.2012, a suite bearing no. 108, having 770 sq.ft. super area, on 1<sup>st</sup> floor in the said project was allotted to them.
- II. That a builder buyer's agreement dated 19.03.2012 was executed between the parties regarding the said unit for a basic sale price of Rs.51,97,500/- exclusive of club membership charges and the complainants has made a payment of Rs.49,64,213/- in all.
- III. That as per clause 4 of the aforesaid buyer's agreement, possession of the said unit was to be offered to the complainants within a period of 36 months. However, the respondent cleverly and with malafide intention had intentionally omitted the milestone from which the aforesaid period of 36 months had to be calculated.
- IV. That the complainants were shocked to receive a call from an official of the respondent whereby the concerned official had informed them that it was planning to lease out the said unit along with other units to the hotel named "Golden Tulip" without taking their consent to the said lease arrangement.
- V. That moreover, even as per clause 9(a) of the buyer's agreement, it was agreed that the respondent would hand over possession of the said unit to the complainants and they would be entitled to use and occupy the said unit without any interference or hindrance. However, it had nowhere been mentioned in the aforesaid buyer's agreement

that the respondent would lease the suites in the said project to a third party or that it had any legal right to do so.

- VI. That the respondent was liable to handover possession of the said unit to the complainants on or before March, 2015 i.e., 36 months from the date of booking. However, possession of the said unit had been offered by it to the complainants only in the month of April, 2017 vide letter of offer of possession dated 25.04.2017. The respondent had also mentioned in the aforesaid letter that it had obtained the occupation certificate from the concerned statutory authority. However, even after multiple requests from the complainants, the respondent did not provide a copy of the occupation certificate to the complainants.
- VII. That it is submitted that as per Clause 4(iii) of the buyer's agreement, in case the respondent failed to offer possession of the said unit to the complainants within the stipulated period, in that event it would be liable to pay to the complainants penalty at the rate of Rs.15/- per square feet per month for every month of delay till the time the possession was offered to the complainants.
- VIII. That the complainants were shocked to receive a call from the official of the respondent that the respondent company had already finalized the handing over of the suites including the said unit to 'Golden Tulip' on lease and that the complainants had no choice but to surrender the said unit. The complainants vehemently objected to the same but were told outright that in case they did not grant his consent to surrendering the said unit to the respondent, in that event the respondent would proceed to forfeit the entire amount paid by the complainants to the respondent. The complainants had no choice but to give in to the unscrupulous and illegal demands of the respondent.

- IX. That thereafter, the complainants agreed to surrender the said unit to the respondent for a consideration amount of Rs.53,90,000/- which was to be paid by the respondent to the complainants on 14.11.2019. Consequently, the complainants had appended their signatures on a consent letter dated 26.12.2017. However, the respondent did not make payment of a single rupee to the complainants even after 14.11.2019. Therefore, the complainants kept chasing the officials of the respondent but to no avail. Moreover, the respondent failed to reply to the emails sent by the complainants with respect to the outstanding payment liable to be made by the respondent to the complainants as per the terms and conditions of consent letter dated 26.12.2017.
- X. That the respondent kept delaying the matter on various pretexts despite the repeated requests of the complainants. Thereafter, in January,2021 they received a payment of Rs.4,00,000/- from the respondent in part satisfaction of its liabilities towards the complainants.
- XI. That the complainants sent emails dated 14.09.2021, 14.12.2021 and 20.05.2022 calling upon the respondent to make payment of the amount which was liable to be paid to them by the respondent, but they did not receive any reply from it. Eventually, the complainants have been forced to approach the authority on account of the contractual and financial defaults committed by the respondent towards the complainants.

**C. Relief sought by the complainant:**

3. The complainant has sought following relief(s):

- I. Direct the respondent to refund paid-up amount along with interest.

**D. Reply by respondent:**

4. The respondent vide reply dated 17.08.2021 contested the complaint on the following grounds:
  - i. On proceeding dated 17.01.2023, Shri. Vijay Kumar AR appeared on behalf of the respondent company and was directed to file the reply within two weeks, i.e., by 31.01.2023 in the registry with a copy to the complainant subject to payment of Rs.5,000 to the complainant. But the respondent failed to comply with the orders of the authority by not filing a written reply within the time allowed. Therefore, the defence of the respondent was struced of vide order dated 18.07.2023.
5. 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.

**E. Jurisdiction of the authority:**

6. 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**

7. 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**

8. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 promoter, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.*

9. 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.

**F. Findings on the relief sought by the complainants:**

**F.I Direct to the respondent to refund the paid-up amount along with interest.**

10. The complainants intend to withdraw from the project and is 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. Section. 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)*

11. Clause 4(ii) of the buyer agreement provides for handing over of possession and the same is reproduced below: -

*4(ii) "In case the building is not completed within 36 months / indefinitely delayed, then it will be the Buyer's option whether accept the cancellation or claim back the amount paid with Interest @ 9% p.a."*

12. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application. 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. The incorporation of such clause in the suits buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused its dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines. However, the respondent has agreed that the possession of unit will be handed over to the buyers within a period of 36 months, but it has cleverly omitted to mention the milestone from which the aforesaid period of 36 months had to be calculated. Therefore, the due date has been 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** 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."*

13. In the instant case, the unit was provisionally allotted vide allotment letter dated 19.02.2012 and suites buyer's agreement was executed between the parties on 19.03.2012. In view of the above-mentioned reasoning, the date of signing of the buyer's agreement ought to be taken as the date for calculating the due date of possession. Therefore, the due date of handing over of the possession of the unit comes out to be 19.03.2015.
14. On considering the pleadings and documents available on record, it is found that the complainants have sent a consent letter dated 26.12.2017, vide which they gave their consent to surrender the unit at a consideration of Rs.53,90,000/- which was to be payable to them till 14.11.2019. The relevant para of the consent letter is reproduced as under for ready reference:

*"I am VINOD KUMAR GOYAL and MANISH GUPTA booked an Executive Suite Unit no. PES-108 in PRISM EXECUTIVE SUITES, Tower-C, Gwal Pahari, Sector -2 , Gurgaon Faridabad Road, Gurgaon, Haryana- 122003 with reference the same, I hereby giving you my consent for my unit/Suite to surrender at a consideration of INR 53,90,000/- (Rupees Fifty Three Lac Ninety Thousand only) after a period of 24 months i.e. on 14-Nov-19 And till 14-Nov-19, allow me for 7 days free stay per year in "Golden Tulip" Prism Suites, Subject to the availability provided by Golden Tulip Management.*

*You are requested to kindly take the necessary action for execution of the same."*

15. However, the respondent has failed to honour the terms of the consent letter dated 26.12.2017 in letter and spirit. As per the said consent letter duly executed between the parties, in lieu of the surrender of unit by the complainant, the respondent had merely refunded sum of Rs.4,00,000/- to the complainants till date and a balance amount of Rs.49,90,000/- is still payable by the respondent. The said consent letter was signed inter se parties in continuation of the buyer's agreement executed between them. Thus, the parties are bound by it, however, the respondent has failed to abide by the terms of the said consent letter.
16. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund of 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.*
17. 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.
18. 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., 20.09.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.

19. Keeping in view the facts mentioned above, the complainant/allottees are entitled to refund of the entire consideration amount of Rs.53,90,000/- in view of the consent letter for surrender dated 26.12.2017 alongwith prescribed rate of interest from the date committed by the respondent for making refund i.e., 14.11.2019 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.
20. The amount of Rs.4,00,000/- already paid to the complainants by the respondent as refund shall be adjusted towards the refundable amount payable by it.

**G. Directions of the Authority:**

21. 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):
- The respondent/promoter is directed to refund of the entire consideration amount of Rs.53,90,000/- in view of the consent letter for surrender dated 26.12.2017 alongwith prescribed rate of interest @10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 from the date committed by the respondent for making refund i.e., 14.11.2019 till the date of refund of the deposited amount.
  - The amount of Rs.4,00,000/- already paid to the complainants by the respondent as refund shall be adjusted towards the refundable amount payable by it.



**HARERA**  
**GURUGRAM**

Complaint No. 5433 of 2022

- iii. 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.
22. The complaints stand disposed of.
23. Files be consigned to the registry.

  
**(Ashok Sangwan)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram  
Dated: 20.09.2023



**HARERA**  
**GURUGRAM**