

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

Complaint no. :	1941 of 2022
Date of complaint :	27.04.2022
Date of order :	27.09.2023

Amit Vaid,
R/o: - 1701, Tower-12,
Valley View Estate, Gwal Pahari,
Gurugram, Haryana-122003.

Complainant

Versus

Ninaniya Estates Limited
Office at: 278/3, Shri Krishna Nagar,
Old Delhi Road, Gurugram, Haryana-122001.

Respondent

CORAM:

Ashok Sangwan

Member

APPEARANCE:

Virender Singh (Advocate)

Vijay Kumar (AR)

Complainant

Respondent

HARERA
ORDER
GURUGRAM

1. The present 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 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 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	Prism Portico, Sector 89, Gurgaon
2.	Project area	5.06 acres
3.	Nature of the project	(Commercial complex)
4.	DTCP license no. and validity status	179 of 2008 dated 11.10.2008 Valid upto 10.10.2018
5.	Name of licensee	Ninaniya Estates Ltd.
6.	RERA Registered/ not registered	Unregistered
7.	Unit no. as per BBA dated 15.07.2017	322, 3 rd floor (page 51 of complaint)
8.	Unit area admeasuring as per BBA dated 15.07.2017	770 sq. ft. (super area) (page 51 of complaint)
9.	Date of execution of agreement to sell executed between original allottee and respondent for unit no. 403, 4 th floor in "Prism Suites" Project	22.07.2011 (page 19 of complaint)
10.	Endorsement of unit no. 403, 4 th floor in complainant favour on	02.05.2012 (Page 37 of the complaint)
11.	Exchange of endorsed unit i.e., 403, 4 th floor with unit in question vide buyer's agreement dated	15.07.2017 (page 50 of complaint)
12.	Possession clause	5 Completion and possession 5.1 "That the company shall complete the construction of the said unit within 40 months from the date of execution of this

		<i>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...."</i>
13.	Due date of possession	15.11.2020 (calculated from the date of execution of buyer's agreement)
14.	Basic sale consideration	Rs.34,82,500/- (Page 51 of the complaint)
15.	Amount paid by the complainant	Rs.37,01,971/- (as alleged by complainant on page 5 of complaint)
16.	Occupation certificate /Completion certificate	Not yet obtained
17.	Offer of possession	Not offered
18.	Legal notice for surrendering the unit	08.03.2022 (page 59 of complaint)

B. Facts of the complaint:

- I. That the original allottee named Mrs. Savita Singhal had entered into a suites buyer's agreement dated 22.07.2011 for the property/suites bearing no. -403 on 4th Floor having super area of approx. 770 sq. ft. in the project named "Prism Executive Suites" situated at Gwal Pahari, Sector- 2, Gurgaon .
- II. That thereafter in the year 2012, Mrs. Savita Singhal and the complainant had entered into an agreement to sell and subsequently on 02.05.2012 an endorsement was made in favour of the complainant.
- III. The representatives of respondent informed and assured the complainant that the construction of the project will commence

within a period of 2 months i.e. maximum by the end of March and the possession of the unit will be handed over within a period of 36 months. Thus, believing upon the representations and assurances, the complainant started making initial payments for the said shop/unit and had paid a sum of Rs. 37,01,971/- as per the demands raised by it from time to time.

- IV. That since the respondent failed to handover the possession of the unit as it had not even stated the construction, it offered another unit in its another project to the complainant with the assurance of timely handing over of possession. As the money of the complainant was already struck, thus he had no option but to agree to the words of the respondent. Thereafter, on 15.07.2017, a buyer's agreement was executed between the complainant and the respondent vide which a unit bearing no. 322, 3rd floor having 700sq.ft. super area was allotted in his favour in the project named "Prism Portico" at Sector 89, Gurugram and the paid-up amount of previous unit was adjusted in the subsequent unit.
- V. That the complainant time to time contacted the officials of the respondent to know the status of the construction of the project but they always assured that the possession will be given on time without any delay and default i.e. within a period of 40 months. Further if there is any default then it will compensate as per the buyer's agreement.
- VI. That the respondent has failed to give possession on time as agreed. Therefore, the complainant visited the site in the month of January, 2022 and was shocked to see that the construction of the project was being carried out in a very slow pace and the project is far away from

the completion. Therefore on seeing the conduct of the respondent the complainant was constrained to send a legal notice through his counsel for demanding the refund of paid amount. However, the respondent neither responded to the said letter, nor refunded the amount paid. Hence, the present complaint is being filed before this Authority.

C. Relief sought by the complainant:

3. The complainant has sought following relief(s):
1. Direct the respondent to refund paid-up amount along with interest.

D. Reply by respondent:

4. Despite due service and putting in appearance through AR, the respondent company failed to file any written reply even after several opportunities given. Therefore, the defence of the respondent was struck off vide proceeding 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 complainant at a later stage.
10. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the

regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

11. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has complete jurisdiction to decide the complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainant:

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

12. The complainant intends to withdraw from the project and is seeking return of the amount paid by him 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)

13. Clause 5.1 of the buyer's agreement provides for handing over of possession and the same is reproduced below: -

5.1 "That the company shall complete the construction of the said unit within 40 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...."

14. Therefore, on considering the above mentioned clause, the due date of possession comes out to be 15.11.2020 and the complaint seeking refund has been filed before this Authority on 27.04.2022. Further, the complainant has also sent a legal notice to the respondent on 08.03.2022 seeking refund of the amount paid on contraventions of the terms of BBA by it, but as no positive response was received from it. So, the complainant has filed the present complaint.

15. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund of the amount paid by him 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.

16. 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.
17. 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., 27.09.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.
18. 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 buyer's agreement executed between the parties on 15.07.2017, the possession of the subject unit was to be delivered within a period of 40 months from the date of execution of buyer's agreement which comes out to be 15.11.2020.
19. Keeping in view the fact that the allottee/complainant 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 plot 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.
20. The due date of possession as per agreement for sale as mentioned in the table above is 15.11.2020 and there is delay of 1 year 5 months

and 12 days on the date of filing of the complaint. The authority has further, observes that even after a passage of more than 2.10 years till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to him and for which he has paid a considerable amount of money towards the sale consideration. It is also pertinent to mention that complainant has paid almost 100% of basic sale consideration till 2017. 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 allottee 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.

21. 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 allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has 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.....”

22. 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.”*

23. 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 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 allottee, as the allottee 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.

24. 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

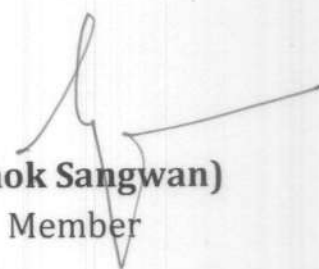
respondent is established. As such, the complainant is entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @10.75% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G. Directions of the authority

25. 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/promoter is directed to refund the paid-up amount of Rs.37,01,971/- received by it from the complainant 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.
 - 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 complainant and even if, any transfer is initiated with respect to subject unit, the

receivables shall be first utilized for clearing dues of complainant-
allottee.

26. Complaint stands disposed of.
27. File be consigned to registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 27.09.2023



HARERA
GURUGRAM