



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

Complaint no.	3062 of 2021
Date of complaint	05.08.2021
First date of hearing	03.09.2021
Date of decision	23.08.2023

Madhududan Parikh & Madhvi Parikh R/O: 32B-Tower-1, M3M Golf estate, Gurugram, Haryana.	Complainants
Versus	
SS Group Pvt. Ltd. Registered address at: Plot No. 77, SS House, Sector-44, Gurgaon, Haryana-122003.	Respondent

CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Shri Suryansh Advocate	Complainant
Mr. Dhruv Dutt Sharma Advocate	Respondent

ORDER

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

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

A. Unit and project-related details

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

S. N.	Particulars	Details
1.	Name and location of the project	"The Leaf", Sector -85, Gurugram
2.	Nature of the project	Group Housing Complex
3.	Project area	11.093 acre
4.	DTCP license no.	81 of 2011 dated 16.09.2011 Valid up to 15.09.2024
5.	Name of licensee	Shiva Profins Pvt Ltd
6.	RERA Registered/ not registered	RERA registered 23 of 2019 dated 01.05.2019
7.	Unit no.	2B, 2nd floor, Building no. 1 (As per page no. 17 of the complaint)
10.	Unit area admeasuring (super area)	1620 sq. ft. (As per page no. 17 of the complaint)





12.	Date of execution of builder buyer agreement	23.08.2013
13.	Possession clause	<p>8. Possession</p> <p>8.1: Time of handing over the possession</p> <p>8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation, etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty-six months from the date of signing of this agreement. The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months for applying and obtaining the occupation certificate in respect of the Group Housing Complex.</p>
14.	Due date of possession	23.08.2016 (Calculated from the date of buyer's agreement)



15.	Total sale consideration	Rs. 92,62,800/- (As per page no. 18 of complaint)
16.	Amount paid by the complainant	Rs. 74,68,361 /- (Page no. 54 of the complaint)
18.	Occupation certificate	09.05.2022
19.	Offer of possession	12.05.2022

B. Facts of the complaints:

3. The complainants were approached by the respondent for purchasing a unit in the residential colony/project being developed by the respondent named 'The Leaf' situated at SS City, Sector-85, Gurugram, Haryana. Based on the various representations made by the respondent, the complainants booked a unit by paying an amount of Rs. 7,50,000/- as booking amount on 01.08.2012.
4. That after a delay of 1 year from the date of booking and after collecting a substantial amount of Rs. 18,17,029/- from the complainants, the respondent executed the Flat buyer's agreement dated 28.08.2013. That the agreement contained various one-sided, unilateral, and arbitrary clauses.
5. It is stated that in terms of Clause 8.1(a) of the agreement, the respondent was liable to deliver the possession of unit to the complainants within 36 months from the date of signing of the agreement, along with the grace period of 90 days. Thus, the possession of the Unit was promised to be offered by November 2016.
6. The complainants made timely payments to the respondent as and when the demands were being raised towards consideration of the unit. The

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complainants have paid an amount of Rs. 74,36,589/- to the respondent as of May 2018 and till date.

7. The complainants diligently followed up with the respondent to ascertain the status of the construction of the project and further sought an affirmative date of completion of the construction and offer of possession of the unit. However, the opposite party utterly failed to provide the status of the construction of the project despite collecting a substantial amount towards consideration of the unit.
8. It is stated that in view of the considerable delay, the complainants terminated the agreement with the respondent vide an e-mail dated 24.07.2019 and sought a refund of the entire principal amount paid by them along with interest at the rate of 10.35% per annum. However, the respondent failed to refund the amount paid by the complainants to date.

C. Relief sought by the complainants:

9. The complainants have sought the following relief(s):
 - i. Direct the respondent to refund the entire amount along with the prescribed rate of interest.

D. Reply by respondent:

10. No such agreement, as referred to under the provisions of the 2016 Act and 2017 Haryana Rules, has been executed between the respondent and the complainant. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is the flat buyer's agreement, executed much prior to coming into force of the 2016 Act.



11. That the complainants have miserably and wilfully failed to make payments in time in accordance with the terms of the flat buyer's agreement. The complainants have frustrated the terms and conditions of the flat buyer's agreement, which were the essence of the arrangement between the parties.
12. Due to several force majeure conditions, the project got delayed, the same are as follows;
- (i) That the Municipal corporation of Gurugram vides direction dated 14.10.2019 bearing Memo No. MCG/ADMC/2019 imposed a complete ban from 11.10.2019 to 31.12.2019 on the construction activities in Gurugram.
 - (ii) Environment Pollution (Prevention and Control) Authority for NCR vides direction dated 01.11.2019 bearing EPCA-R/2019/L-53 imposed a complete ban from 01.11.2019 to 05.11.2019.
 - (iii) Hon'ble Supreme Court vide its order dated 04.11.2019 in the matter bearing W.P (C) No. 13029/1985 also banned the construction activities in Delhi NCR
 - (iv) Even in the year 2018, vide Notification No. EPCA- R/2018/L-91 and EPCA-R/2018/100 periodic bans on construction were imposed.
 - (v) Due to the outbreak of Covid 19, there was an acute shortage of laborers, and even the HRERA, Gurugram vide order dated 26.05.2020 declared Covid 19 as a calamity under the Force Majeure clause.
13. There is a huge outstanding amount to be paid by the allottees, which has resulted in the alleged delay in handing over possession to the allottees.

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Due to the money crunch created by the allottees by not making timely payments and in order to meet the gap for the cost of completion of the project arising on account of non-payment/default in payment of installments by the allottees, the company approached SWAMIH INVESTMENT FUND - I (Special Window for Completion of Construction of Affordable and Mid-Income Housing Projects) which has been formed to complete construction of stalled, RERA registered residential developments that are net-worth positive and requires last mile funding to complete construction. The SWAMIH INVESTMENT FUND - I vide their letter dated 23.07.2020 has sanctioned an initial amount of Rs. 110 Crores to complete the project.

14. As per clause 8.3(b), the flat buyer(s) have to give their intention to terminate the agreement by a written notice within a period of 90 days in case the respondent fails to deliver possession of the flat within a period of 51 months from the date of signing of the agreement. In case the flat buyer(s) fail to give a notice within the time limit as aforesaid then he/she/it shall not be entitled to terminate this agreement and shall continue to be bound by the provisions of this agreement. It is a matter of record that in the present case, the complainants did not exercise their right as per the terms of the agreement, and as such the complainants are not entitled to refund of the amount deposited.

E. Jurisdiction of the authority:

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



E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

Section 11(4)(a)

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

Section 34-Functions of the Authority:

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

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.

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F. Findings on the objections raised by the respondents:

F.I Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

16. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.
17. The authority is of the view that the provisions of the Act are quasi-retroactive to some extent in operation and would be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction is still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules, and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situations in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 and which provides as under:

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"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

18. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

19. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under



various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F.II Objections regarding force Majeure.

20. 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 orders passed by the Hon'ble SC to stop construction, notification of the Municipal corporations Gurugram, Covid 19, etc. The plea of the respondent regarding various orders of the SC, etc., and all the pleas advanced in this regard are devoid of merit. The orders passed by SC banning construction in the NCR region were for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Thus, the promoter-respondent cannot be given any leniency on the basis of aforesaid reasons and it is a well-settled principle that a person cannot take benefit of his own wrong.

G. Entitlement of the complainant for refund:

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

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21. The complainant was allotted Flat no. 2B on the 2nd floor, in the project "The Leaf", Sector 85, Gurugram, Haryana by the respondent/builder for a total consideration of Rs. 92,62,800/-. The possession of the unit was to be offered within 36 months plus a 90-day grace period from the date of the execution of the buyer's agreement. Therefore, the due date of possession comes out to be 23.08.2016. It has come on record that against the total sale consideration of Rs. 92,62,800 /-, the complainants have paid a sum of Rs.74,68,361/- to the respondent. However, the complainants contended that despite this, the unit was not offered to them. Hence, in case allottees wishes to withdraw from the project, the promoter is liable on demand to return the amount received by the promoter with interest at the prescribed rate if it fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale. This view was taken by the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited vs. State of U.P. and Ors. (supra)** reiterated in the case of **M/s Sana Realtors Private Limited & other vs. Union of India & others SLP (Civil) (supra)** wherein it was observed as under: -

"The unqualified right of the allottees to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottees, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottees/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the

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Act with the proviso that if the allottees does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed”.

22. **Admissibility of grace period:** the promoter in clause 8.1(a) of the agreement between the parties has stated that an additional grace period of 90 days shall be available to it for applying and obtaining the occupation certificate in respect of the group housing complex. The respondent-promoter contended that it shall be provided a grace period of 90 days. However, the Authority is of the view that the grace period shall not be available to it as there has been a massive delay in the completion of the project and the same period was not utilized in obtaining the completion certificate.
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 allottees as per the agreement for sale under section 11(4)(a) of the Act. The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by respondents/promoter in respect of the unit with interest at such rate as may be prescribed.
24. It is contended on behalf of the respondent that after completing the project, it obtained the occupation certificate from the competent authority on 09.05.2022 and offered possession of the allotted unit to the complainant on 12.05.2022. However, the complainant already

surrendered the unit by filling the present complaint on 05.08.2021, therefore the complainant cannot be forced to continue with the project as there has been an inordinate delay in the project which cannot be condoned. Thus in such a situation, the complainant cannot be compelled to take possession of the unit and he is well within his right to seek refund of the paid-up amount.

25. Keeping in view the fact that the allottee/complainant wish to withdraw from the project and are demanding a return of the amount received by the promoter in respect of the unit with interest on the failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.

26. 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 a refund of the entire amount paid by him at the prescribed rate of interest i.e., @ 8.75% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as of date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the Authority:

50. Hence, the authority hereby passes this order and issues the following directions under Section 37 of the Act to ensure compliance with

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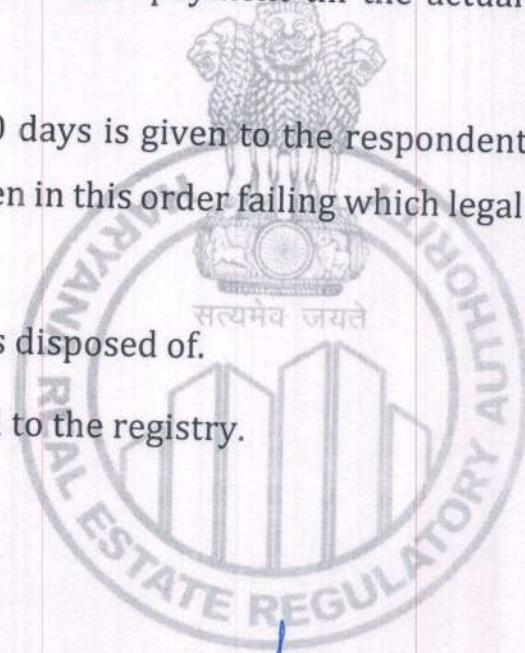


obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016.

- i. The respondent/promoters are directed to refund the amount i.e., Rs.74,68,361/-received by them from the complainant/allottee along with interest at the rate of 10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.
- ii. A period of 90 days is given to the respondents to comply with the directions given in this order failing which legal consequences would follow.

51. Complaint stands disposed of.

52. File be consigned to the registry.



Ashok Sangwan

Haryana Real Estate Regulatory Authority

Dated: 23.08.2023