

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

Complaint no.	4738 of 2022
Date of filing complaint:	30.06.2022
Dat of decision:	29.11.2023

1. Harleen Chopra 2. Bharat Chopra Address:- Plot No. 129 Ground Floor Pocket 1 Sector 23 Dwarka New Delhi	Complainants
Versus	
BPTP Limited Address:- 14, 3rd Floor Next Door Parklands Sector 76 Faridabad Haryana	Respondent

CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Shri Siddharth Karnawat (Advocate)	Complainants
Shri Harshit Batra (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 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, 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	"Pedestal", Sector- 70A, Gurugram
2.	Nature of project	Residential
3.	RERA registered/not registered	Not Registered
4.	DTPC License no.	15 of 2011 dated 07.03.2011
	Validity status	04.04.2025
5.	Unit no.	B-84-FF [As per page no. 29 of complaint]
6	Unit measuring	1080 sq. ft. [As per page no. 29 of complaint]
7	Allotment Letter	28.11.2013
8	Date of execution of Floor buyer's agreement	29.11.2013 (Page no. 21 of complaint)
9	Possession clause	5. Possession 5.1 The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser(s) within a

		<p>Commitment Period. The Seller/Confirming Party shall be additionally entitled to a Grace Period of 180 days after the expiry of the said Commitment Period for making offer of possession to purchaser(s).</p> <p>1.4 "Commitment Period" shall mean, subject to, Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC). Stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 36 months from the date execution of Floor Buyer's Agreement.</p>
10	Due date of possession	29.11.2016 (Calculated from the execution of BBA)
11	Sale consideration	Rs. 85,00,000/- (As per page no. 19 of complaint)
12	Total amount paid by the complainant	Rs. 82,75,597/-
13	Occupation certificate dated	Not obtained

14	Offer of possession	Not offered
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B. Facts of the complaint:

3. The complainants have made the following submissions in the complaint:

- i. That the Complainants in the year 2013 were looking to purchase a residential property, and the Complainants were approached by the Respondent for purchasing a Unit in the residential colony/project being developed by the Respondent named Pedestal @ 70A' situated at Sector-70 & 70A, Gurugram, Haryana [hereinafter referred to as the "Project"]. Based on the various representations made by the Respondent, the Complainants booked a Unit in the Project of the Respondent by paying an amount of Rs. 9,00,000/- as booking amount on 25.07.2013. Subsequently, the Complainants were allotted a 2BHK + Study Unit bearing No. B-84-FF, having a super area of 1080 sq. ft. [hereinafter referred to as the "Unit"] in the Project of the Respondent vide Allotment Letter dated 28.11.2013. That the total consideration of the Unit is Rs. 98,02,773/-.
- ii. That the Complainants continuously followed up with the Respondent through telephonic calls and office visits, for execution of the Buyer's Agreement. However, the Respondent executed the Buyer's Agreement dated 29.11.2013 [hereinafter referred to as the "Agreement"] only after a substantial delay from the date of booking. That the Agreement contained various one-sided, unilateral and arbitrary clauses however the

Complainants could not negotiate any of them since the Respondent had by then collected a substantial amount towards the consideration of the Unit and any disagreement thereof would have led to cancellation of the Unit and forfeiture of the earnest money i.e., 15% of the total cost of the Unit as per Clause 1.11 of the Agreement. Thus, the Complainants had no other option but to sign on the dotted lines.

- iii. That the Complainants had booked the Unit under a Subvention payment plan whereby the Respondent was obligated to make pre-EMI payments to the Bank in lieu of the Complainants till the offer of possession. That in order to avail the said Subvention payment plan and in order to make timely payments to the Respondent, the Complainants have availed a home loan of Rs. 76,53,189/- from ICICI Bank. That ICICI Bank has disbursed an amount of Rs. 67,56,292/- to the Respondent towards consideration of the Unit.
- iv. That despite collecting a substantial amount towards construction of the Unit, the Respondent utterly failed to provide regular updates of the status of construction to the Complainants. That the Complainants were shocked to find that as on the promised date of possession i.e. May, 2017 the Project was far from completion. The entire purpose of booking the Unit has been utterly frustrated due to the inordinate delay in providing possession of the Unit. That despite an inordinate delay of more than 4 years from the promised date of possession as per the Agreement, the Respondent has failed to offer possession of the Unit till date.

- v. That the Complainants had booked the Unit in the year 2013, and despite the lapse of 9 (nine) years from the date of booking, the Respondent has failed to offer possession of the Unit. That in *Fortune Infrastructure & Anr. v. Trevor D'Lima & Ors., [(2018) 5 SCC 442]* the Hon'ble Supreme Court held that a person cannot be made to wait indefinitely for possession of the flat allotted to him and is entitled to seek refund of the amount paid by him, along with compensation.
- vi. That the Complainants are bona fide buyers and have made the booking based on the representations and assurances given by the Respondent of providing timely possession of the Unit. That the possession of the Unit was promised to be offered by 28.05.2017. Despite an inordinate delay of almost 5 years from the promised date of possession, the construction status of the Project is still at a nascent stage. Thus, the Complainants seek refund of the amount paid by them along with prescribed interest. Hence, the present Complaint.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):
- i. Direct the respondents to refund the entire paid-up amount along with interest at the prescribed rate.

D. Reply by respondents:

5. The respondents by way of written reply made following submissions:
- i. That the Complainants have approached this Authority for redressal of their alleged grievances with unclean hands, i.e. by not

disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of decisions has laid down strictly, that a party approaching the Court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the Respondent but also against the Court and in such situation, the Complaint is liable to be dismissed at the threshold without any further adjudication.

- ii. It is submitted that the Relief(s) sought by the Complainants are unjustified, baseless and beyond the scope/ambit of the Agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is submitted that the Complainants have entered into the said Agreement with the Respondent with open eyes and are bound by the same. It is further submitted that the relief(s) sought by the Complainants travel way beyond the four walls of the Agreement duly executed between the parties. It is submitted that the Complainants while entering into the Agreement has accepted and is bound by each and every clause of the said Agreement, including Clause-6 which provides for delayed penalty in case of delay in delivery of possession of the said Floor by the Respondent.
- iii. It is further submitted that the detailed reliefs claimed by the Complainants go beyond the jurisdiction of this Authority under the Real Estate (Regulation and Development) Act, 2016 and

therefore the present Complaint is not maintainable qua the reliefs claimed by the Complainants. In this regard, reference may be made to Section-74 of the Indian Contracts Act, 1872, which clearly spells out the law regarding sanctity and binding nature of the ascertained amount of compensation provided in the Agreement and further specifies that any party is not entitled to anything beyond the same.

- iv. It is further submitted that having agreed to the above, at the stage of entering into the Agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the Agreement, the Complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the '*Doctrine of Aprobate & Reprobate*'. In this regard, the Respondent reserves its right to refer to and rely upon decisions of the Hon'ble Supreme Court at the time of arguments, if required. Therefore, in light of the settled law, the reliefs sought by the Complainants in the Complaint under reply cannot be granted by this Authority.
- v. That the Complainants have alleged that the Respondent have delayed the Project and even in terms of the Agreement whereby the Respondent had agreed to handover possession within 36 months from the execution of the Floor Buyer's Agreement, there has been a huge delay. That the Complainants have sought refund with interest and compensation on the pretext that there is delay in possession and that there has been a financial loss caused to them. In this context, it is reiterated that in view of the fact that the Respondent is bearing the pre-EMI Interest till possession, no

financial loss has been caused to the Complainants. In fact, the Complainant has been continuing in the project with a profit motive and after having sought the benefit of a substantial sum of money, *malafidely* seeks refund with interest, when interest over the loan amount is already being given to the Complainant. That under no circumstance whatsoever, double payment of interest can be made to the Complainant at the cost of the Respondent.

- vi. As is apparent from the submissions made hereinabove, there is no delay in offering possession to various allottees of the Floors, including the Complainants herein as the Complainants have also agreed by way of the Agreement that subject to force majeure and compliance of all terms and conditions, the Respondent shall endeavor to offer possession within 36 months from the date of execution of Agreement with an additional grace period of 180 days. It is further submitted that, in case of delay, Respondent vide Clause-6 of the Agreement also agreed to pay compensation in case, of delay in offering possession. It is further submitted that the construction was also affected on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It is submitted that vide its order NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the Respondent.

- vii. Further, the Environment Pollution (Prevention and Control) Authority, EPCA, expressing alarm on severe air pollution level in Delhi-NCR issued press note vide which the construction activities were banned within the Delhi-NCR region. The ban was commenced from 31/10/2018 and was initially subsisted till 10/11/2018 whereas the same was further extended till 12/11/2018.
- viii. That the construction of the project was going on in full swing, however, the changed norms for water usage, not permitting construction after sunset, not allowing sand quarrying in Faridabad area, shortage of labour and construction material, liquidity crunch and non-funding of real estate projects and delay in payment of instalments by customers etc. were the reasons for delay in construction and after that Government took long time in granting necessary approvals owing to its cumbersome process. Furthermore, the construction of the unit was going on in full swing and the Respondent was confident to handover possession of the units in question. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), from past 2 years construction came to a halt and it took some time to get the labour mobilized at the site. It was communicated to the Complainants vide email dated 26.02.2020 that the construction was nearing completion and the Respondent was confident to handover possession of the unit in question by March 2020. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), construction came to a halt, and it took some time to get the labour mobilized at the site.

- ix. Thus, the possession timelines mentioned the Floor Buyer's Agreement stands diluted. The Complainant and the Respondents have reciprocal promises under the Agreement. That it is a matter of fact and record that time was of the essence as evident from Clause 7 of the Agreement. However, the Complainant miserably failed in making the timely payment. As has been noted above, the Complainants have gravely defaulted in making the payments. Over and above the reminder notices issued to the Complainants, the default of the Complainant is also evident from the fact that the said payment requests incorporate the previous outstanding demands. That it is a well-known fact that the delays caused by the allottees in making the payment have a direct and proportionate effect on the timely completion of the project. That not only was the Respondent facing circumstances beyond their control through the directions of NGT and other authorities but were also facing the harsh effects of the non-timely payment.
- x. That in light of the defaulting conduct of the Complainants, the present case needs to be differentiated from the cases where due and complete payments have been made by the allottee. That the rights of the Respondents need to be viewed, as being derived from the Agreement and the Act. Hence, in such facts and circumstances, no refund should be allowed.
- xi. That as noted above, the Respondent is paying the Pre-EMI till offer of possession and till date, has made a total payment of Rs. 8,88,577/- in this regard. The Complainant, acting in gross

malafide, has sought refund at the present instance along with interest. It is reiterated that the 'interest over the loan taken' i.e., PRE-EMI is already being paid by the Respondent. This payment of PRE-EMI has been enjoyed by the Complainants without any demur. That under no circumstance can refund be granted to the Complainant after having also enjoyed(ing) the benefit of payment of Pre-EMI. That it is a settled position in law that either party cannot land in a benefiting position, at the cost of the other party, in case the contract falls through. Accordingly, the PRE-EMI paid by the Respondent needs to be adjusted at this instance, as well.

6. 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 those undisputed documents and written submissions made by the parties and who reiterated their earlier version as set up in the pleadings.

E. Jurisdiction of the authority:

7. The plea of respondent regarding lack of jurisdiction of Authority 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.1 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 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.

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.

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. 2020-2021 (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*** 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."

Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases 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 Objections regarding force majeure.

11. The respondents-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 National Green Tribunal to stop construction, non-payment of instalment by allottees, and Covid- 19. The plea of the respondent regarding various orders of the NGT and demonetisation and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was 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. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because 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.

F. II. Objection regarding delay in completion of construction of project due to outbreak of Covid-19.

12. The Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020* dated 29.05.2020 has observed as under:

69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

13. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 29.11.2016. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself

and for the said reason, the said time period cannot be excluded while calculating the delay in handing over possession.

G. Entitlement of the complainants for refund:

G.I Direct the respondent to refund the entire paid-up amount along with interest at the prescribed rate.

14. In the instant case, the BBA for the subject unit was executed on 29.11.2013. According to the agreement, the due date of possession comes out to be 29.11.2016. However, the occupation certificate for the tower where complainant's unit is situated not received. Keeping in view the fact, and hence the complainants are entitled for full refund.
15. 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....."

16. 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

17. 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 him in respect of the unit with interest at such rate as may be prescribed.
18. The authority hereby directs the promoter to return the amount received by it i.e., Rs. 82,75,597/- with interest at the rate of 10.75% (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*.


H. Directions of the Authority:

19. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of 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/promoter is directed to refund the amount received by it i.e., Rs. 82,75,597/- 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 amount. The amount of Pre-EMI which is already paid by the respondent may be deducted/adjusted from the refundable amount, 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.

20. Complaint stands disposed of.

21. File be consigned to the registry.


Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.11.2023