

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

Complaint no. : 5468 of 2022
Date of complaint : 05.08.2022
Date of decision : 24.01.2024

1. Poornima Khurana,
2. Chander Prabha,
Both R/o - H.No. 1073, Sector-19, Part-2,
HUDA, Kaithal, Haryana-136027.

Complainants

Versus

M/s Raheja Developers Limited.
Regd. Office at: W4D, 204/5, Keshav Kunj,
Western Avenue, Cariappa Marg, Sainik Farms,
New Delhi- 110062.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Complainant in person
Garvit Gupta (Advocate)

Complainants
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 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 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	"Raheja's Maheshwara", Sector 11 & 14, Sohna, Gurugram, Haryana
2.	Project area	9.23 acres
3.	Registered area	3.752 acres
4.	Nature of the project	Group housing complex
5.	DTCP license no. and validity status	25 of 2012 dated 29.03.2012 valid up to 28.03.2018
6.	Name of licensee	Ajit Kumar and 21 others
7.	RERA Registered/ not registered	Registered vide no. 20 of 2017 dated 06.07.2017
8.	RERA registration valid up to	5 Years from the date of revised Environment Clearance
9.	Unit no.	A-703, 7 th floor, Tower/block- A (page 67 of complaint)
10.	Unit area admeasuring	1630.33 sq. ft. (gross area) (page 67 of complaint)
11.	Date of execution of agreement to sell	14.12.2016 (page 66 of complaint)
12.	Possession clause	<i>21. The company shall endeavour to complete the construction of the said apartment within Forty-Eight (48) months plus/minus Twelve (12) months grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later but subject to force majeure, political disturbances, circumstances cash flow mismatch and reason beyond the control of the company.</i>

		<p><i>However, in case the company completes the construction prior to the said period of 48 months plus 12 months grace period the allottee shall not raised any objections in taking the possession after payment of Gross Consideration and other charges stipulated hereunder. The company on obtaining certificate of occupation and use for the building in which said apartment is situated, by the competent authorities shall hand over the said apartment to the allottee for his occupation and use and subject to the allottee having complied with all the terms and condition of the agreement to sell....."</i></p>
13.	Grace period	Allowed being unqualified.
14.	Due date of possession	14.12.2021 (Note: - 48 months from date of agreement i.e., 14.12.2016 + 12 months grace period)
15.	Total sale consideration as per applicant ledger dated 16.04.2020	Rs.77,10,675/- (page 92 of complaint)
16.	Amount paid by the complainant	Rs.43,02,106/- [As per applicant ledger dated 16.04.2020 on page 93 of complaint]
17.	Occupation certificate /Completion certificate	Not received
18.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainants have made the following submissions: -

- I. That the complainants were allotted a unit bearing no. A-703, 7th Floor having tentative gross area of 1630.33 sq.ft. in the project of the respondent named "Raheja's Maheshwara" at Sector-11 and 14, Sohna, Gurugram vide agreement to sell dated 14.12.2016 for a total sale consideration of Rs.77,10,675/-.

- II. That the complainants have paid a sum of Rs.43,02,102/- to the respondent against the said sale consideration. However, despite receipt of considerable amount against the sale consideration, the possession of the unit has not been handed over to the complainants till date.
- III. That as per clause 21 of the agreement, the respondent had promised to handover possession of the unit within 48 months plus 1 year grace period from the date of execution of the agreement.
- IV. That the payment plan for the subject unit was under subvention payment plan and as per tri-partite agreement, the respondent has to pay the pre-EMI installments to the bank until possession handover to the allottees. However, the respondent has stopped paying pre-EMI's to the bank from September 2019 onwards. Therefore, the complainants were forced to close the subvention loan account. Accordingly, they have paid the pending pre-EMI's amounting to Rs.2,73,552/- from the period September 2019 to August 2020 to the bank.
- V. That the pre-EMI's paid by the allottees are not applicable for the Income Tax rebate, so they have suffered huge financial loss including the financial burden of monthly rent.
- VI. That due to default on part of the respondent to handover the possession of the unit to the complainants within the timelines provided in agreement, the complainants vide email dated 16.09.2019 made a request to the respondent to refund the entire paid-up amount alongwith interest, but in vain. Hence, the present complaint.
- C. Relief sought by the complainants:**
4. The complainants have sought following relief(s).

- i. Direct the respondent to refund the paid-up amount along with prescribed rate of interest per annum.
5. The respondent/promoter put in appearance through Advocate and marked attendance on 04.10.2022 and 01.02.2023. Despite giving specific directions it has failed to comply with the orders of the authority. It shows that the respondent is intentionally delaying the procedure of the authority by avoiding filing of the written reply. Therefore, vide proceeding dated 23.08.2023, the defence of the respondent was struck off for not filing reply.
6. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents as well as written submission made by the complainants.

D. Jurisdiction of the authority

7. The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I Territorial jurisdiction

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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.

D.II Subject-matter jurisdiction

9. 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) The promoter shall-

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

Section 34-Functions of the Authority:

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

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
11. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (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."

12. 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.

E. Findings on the relief sought by the complainants.

E.I Direct the respondent to refund the amount paid by the complainants along with prescribed rate of interest.

13. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other

remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

14. As per clause 21 of the agreement to sell provides for handing over of possession and is reproduced below:

*21. The company shall endeavour to complete the construction of the said apartment within **Forty-Eight (48) months plus/minus Twelve (12) months grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later but subject to force majeure, political disturbances, circumstances cash flow mismatch and reason beyond the control of the company.** However, in case the company completes the construction prior to the said period of 48 months plus 12 months grace period the allottee shall not raised any objections in taking the possession after payment of Gross Consideration and other charges stipulated hereunder. The company on obtaining certificate of occupation and use for the building in which said apartment is situated, by the competent authorities shall hand over the said apartment to the allottee for his occupation and use and subject to the allottee having complied with all the terms and condition of the agreement to sell....."*

15. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. 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 allottees that even a single default by the allottees in making payment as per the plan may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its

meaning. The incorporation of such a clause in the agreement to sell by the promoter is just to evade the liability towards the 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 his dominant position and drafted such a mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

16. **Due date of handing over possession and admissibility of grace period:** As per clause 21 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 48 months plus/minus 12 months grace period of the date of execution of the agreement or environment clearance and forest clearance, whichever is later. The buyer's agreement was executed between the parties on 14.12.2016. However, no document with regard to EC, FC has been placed on record. Therefore, the Authority is taking these 48 months from date of execution of the buyer's agreement i.e., 14.12.2016. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 12 months to the promoter at this stage. Thus, the due date for handing over of possession comes out to be 14.12.2021.
17. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them in respect of the subject unit with interest at prescribed rate 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.

18. 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.
19. 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., 24.01.2024 is **8.85%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.85%**.
20. 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 21 of the agreement to sell, the due date of possession comes out to be 14.12.2021 for the reasons quoted above.
21. Further, as per loan account statement under subvention dated 19.09.2020 annexed with the complaint, it is evident that the said loan account of the complainants is clear of all the dues and has been closed in the accounts of the bank.
22. Keeping in view the fact that the complainant/allottees wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the

date specified therein. The matter is covered under section 18(1) of the Act of 2016.

23. The due date of possession as per agreement for sale as mentioned in the table above is 14.12.2021. The authority observes that even after a passage of more than 2.1 years till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottees by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the unit which is allotted to it. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottees intend to withdraw from the project and are well within the right to do the same in view of section 18(1) of the Act, 2016.

24. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

"... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project.....".

25. 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."*
26. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale under section 11(4)(a). The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as they wish 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.
27. 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 complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @10.85% 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*.

E. II Direct the respondent to refund the pre-EMI's paid by the complainants to bank due to breach of tripartite agreement by respondent under subvention plan.

28. The complainants have submitted that the unit in question was booked under subvention payment plan and a tripartite agreement was executed between the complainants, respondent and the bank vide which the respondent had to pay the pre-EMI installments to the bank until possession handover to the allottees, in reference to clause 4(I)(m) & (q) of the tripartite agreement. However, due to default on part of the respondent in paying the pending pre-EMI's, the complainants have paid due pre-EMI's from the period of September 2019 to August 2020, amounting to Rs.2,73,552/- to the bank to close the subvention loan account. Clause 4(I) (m) & (q) of the tripartite agreement is reproduced as under for ready reference:

m. "The Owner/Developer hereby acknowledges and agrees to indemnify and keep indemnified the Allottee/ Borrower towards any the compensation or loss if any paid by Allottee / Borrowers) to the Bank due to non-adherence of construction schedule by the Owner/ Developer as specifically mentioned in Schedule - B."

q. "The Owner/ Developer undertakes and agrees that in case of any failure on the part of Owner/ Developer whatsoever to allot/ hand over the possession of the said Flat to the Allottee/ Borrowers) as per allotment terms, the Owner / Developer shall immediately refund total money so received from the Allottee/ Borrower(s) and/ or from the Bank with interest to the Bank to the extent of its outstanding dues."

29. After bare perusal of the clauses mentioned above, the Authority is of view that the aforesaid clause does not specify as to how the promoter is liable to pay pre-EMI installments to the bank. Moreover, there is no document available on record to substantiate their claim. Therefore, in



view of the above, the claim of the complainants w.r.t refund of pre-EMI's paid to the bank stands rejected.

F. Directions of the authority

30. 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 entire amount i.e., Rs.43,02,106/- received by it from the complainants along with interest at the rate of 10.85% 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.

31. Complaint stands disposed of.

32. File be consigned to registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 24.01.2024