

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

Complaint no. : 301 of 2023
Date of complaint : 03.02.2023
Order pronounced on: 07.02.2024

Sneh Lata Atri,
R/o: - House No. 1181, Sector-21,
Gurgaon, Haryana - 122016.

Complainant

Versus

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

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Gurnoor Sandhu (Advocate)
None

Complainant
Respondent

ORDER

1. The present complaint dated 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 provision of the Act or the Rules and regulations made there under or to the allottee 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	"Raheja Atharva", Sector 109, Gurugram, Haryana
2.	Project area	14.812 acres
3.	Nature of the project	Residential Group Housing Colony
4.	DTCP license no. and validity status	257 of 2007 dated 07.11.2007 valid up to 06.11.2017
5.	Name of licensee	Brisk Construction Pvt. Ltd and 3 others
6.	RERA Registered/ not registered	Registered vide no. 90 of 2017 dated 28.08.2017
7.	RERA Registered valid up to	5 years from the date of revised environment clearances
8.	Unit no.	Shop no.1 (Page no. 28 of complaint)
9.	Unit area admeasuring	449 sq. ft. (super area) (Page no. 42 of the complaint)
10.	Date of execution of agreement to sell	06.10.2015 (Page no. 46 of the complaint)
12.	Possession clause	<p>4.2 Possession Time and Compensation</p> <p><i>"That the developer shall endeavors to give possession of the Apartment to the Allottee within 36 from the date of the execution of this Agreement and after providing necessary infrastructure in the sector by the Government, but subject to force majeure, circumstances and reasons beyond the control of the developer/company....."</i></p> <p>[emphasis supplied] (Page no. 33 of the complaint)</p>
13.	Due date of possession	06.10.2018 [Note: - 30 months from the date of agreement i.e., 20.02.2010]



14.	Total sale consideration as per BBA at page 49 of complaint	Rs.55,45,150/-
15.	Amount paid by the complainants	Rs.58,41,328/- (As per applicant ledger at page no. 50 of the complaint)
16.	Occupation certificate	Not obtained
17.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That the respondent approached the complainant for buying a shop in the Convenient Shopping Block of their newly floated project named 'Raheja Atharva', in Sector 109, Gurugram, Haryana. Accordingly, on 09.06.2015, the complainant booked a shop having super area of 449.0 sq.ft. in said project by paying a booking amount of Rs.3,00,000/- towards part payment of the aforesaid shop. Thereafter an agreement to sell for the shop bearing no. 02 was executed between the parties and the same was duly notarized on 06.10.2016.
- II. That as per clause 4 of the agreement to sell, the possession of the aforesaid shop was to be handed over to complainant within 36 months from the date of execution of the said agreement, which has not been handed over till date.
- III. That in compliance of the payment schedule annexed with the complaint, the complainant duly paid the respective sums of money as and when they were due as per the said schedule and the complainant had paid a total sum of Rs.58,41,328/- to the respondent towards the payment for the aforesaid shop by 22.09.2016.
- IV. That on 22.09.2016, the complainant had erroneously paid an amount in excess of the aforesaid payment schedule i.e., to the tune of Rs.6,77,469/-. The said fact was intimated by the complainant to



respondent through e-mail and the same was duly admitted by it stating that the excess amount shall be refunded to her and assured that it shall pay 9% interest w.e.f. January 2017. However, till date neither the said excess amount has been refunded nor the respondent has paid any interest as assured by it.

- V. That despite a lapse of considerable time, the respondent had failed to initiate the construction process at the site where the shop in question was to be constructed. Therefore, the complainant made a number of calls to the customer care office of respondent. However, post November 2017, they stopped responding to complainant's call also. Therefore, an e-mail dated 15.05.2020, was sent to respondent wherein, it was apprised that the 36-month period within which the respondent was bound to give possession of the shop in question has lapsed and there is no sign of construction activity on the site. Accordingly, it was requested to the respondent to respond to the complainant's concern and resolve the same.
- VI. That despite of the aforesaid assurance given by respondent and lapse of a period of more than two years, till date no positive response has been received from the respondent's end regarding redressal of the grievances of the complainant as was assured vide respondent's e-mail dated 21.05.2020.
- VII. That the complainant was accordingly constrained to cause a legal notice dated 11.07.2022 to be addressed to the respondent through its Advocate which was duly served to the respondent, intimating that the respondent has received the entire payment in respect of the said shop and it has failed to deliver possession of the said flat to the complainant. By way of the said legal notice, the respondent was called upon to refund the amount of Rs. 58,41,328/- paid by the complainant



towards the shop in question along with interest @18% p.a. along with compensation and damages for harassment and humiliation that she has been subjected to at the hands of respondent. However, the complainant has received no response to the legal notice addressed by the Advocate of the complainant to the respondent.

- VIII. The even thereafter i.e., upon sending the aforesaid legal notice, the complainant contacted the representatives of the respondent company telephonically to inquire about the status of her repeated requests to refund the money paid by her. However, to utter disappointment of complainant, no positive response was ever received from the respondent's side.
- IX. That on account of delay in construction of the project and handing over of possession of the apartment in question to the complainant, the complainant is left with no other option but to approach this Hon'ble Authority seeking directions to refund the total amount paid by the complainants to the respondent along with interest.

C. Relief sought by the complainant: -

4. The complainant has sought following relief(s).
- Direct the respondent to refund the money paid by the complainant till date i.e., Rs.58,41,328/-along with interest.
5. On the date of hearing, the authority explained to the respondent /promoter on the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. Despite due service of notice and even after giving specific directions vide order dated 25.10.2023 and 03.01.2024, the respondent has failed to file a reply in the matter. It shows that the respondent is intentionally



delaying the procedure of the court by avoiding filing of the written reply. Therefore, vide proceeding dated 03.01.2024, the defence of the respondent was ordered to be struck off for not filing reply. The respondent has again failed to put in appearance before the Authority on proceedings dated 07.02.2024. Hence, the complaint is being decided as per documents available on record and submission made by the complainant.

7. 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 and submissions made by the complainant.

E. Jurisdiction of the authority

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

9. 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.

E. II Subject-matter jurisdiction

10. 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) 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.

11. 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.
12. 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."

13. 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 relief sought by the complainants.

F.I. Direct the respondent to refund the money paid by the complainant along with interest.

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

15. The clause 4.2 of the agreement to sell dated 06.10.2015 provides for handing over of possession and is reproduced below:

4.2 Possession Time and Compensation

That the Developer shall endeavor to give possession of the said Unit to the Allottee within thirty-six (36) months from the date of the execution of this Agreement and after providing necessary infrastructure in the sector by the Government, but subject to force majeure, circumstances and reasons beyond the control of the Developer/Company....."

16. 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 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 allottee that even a single default by the allottee in making payment as per the plan may make the possession clause irrelevant for the purpose of allottee 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 timely delivery of subject unit and to deprive the allottee of his 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 allottee is left with no option but to sign on the dotted lines.

17. **Due date of handing over possession and admissibility of grace period:** As per clause 4.2 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 36 months from the date of execution of agreement to sale. The buyer's agreement has been executed between the parties on 06.10.2015 (page 46 of complaint). Therefore, the due date of possession comes out to be 06.10.2018.
18. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund of the amount paid by her alongwith interest at prescribed rate. However, the allottee intends to withdraw from the project and is seeking refund of the amount paid by her 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.

19. 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.
20. 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., 07.02.2024 is **8.85%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.85%**.
21. 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 4.2 of the agreement to sell dated form executed between the parties on 06.10.2015, the possession of the subject unit was to be delivered within a period of 36 months from the date of execution of buyer's agreement which comes out to be 06.10.2018.
22. Keeping in view the fact that the allottee/complainant wishes to withdraw from the project and is 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 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 she 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....."

24. 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. reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others (supra)** it was observed as under:

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."

25. 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 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 allottee, as she 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.

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 refund of the entire amount paid by her 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*.

G. Directions of the authority

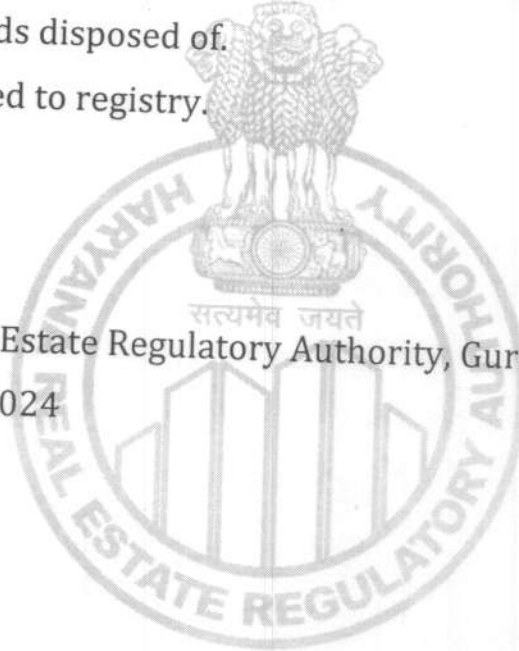
27. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondent/promoter is directed to refund the entire amount i.e., Rs.58,41,328/- received by it from the complainant 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.



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- 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. Even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee/complainant.
28. Complaint stands disposed of.
29. File be consigned to registry.



(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 07.02.2024

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