

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

Complaint no.: 8046 of 2022
Date of filing: 24.01.2023
Order pronounced on: 21.12.2023

1. Vinod Kumar Sibal

2. Neelam Sibal

Both R/O: - C-II/21-B, Lawrence Road, Keshavpuram,
Delhi-110035

Complainants

Versus

M/s Sepset Properties Pvt. Ltd.

Regd. Office at: - 11th floor, Paras Twin Towers,
Sector-54, Gurugram

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Vinod Kumar Sibal

Shri Himanshu Singh

Complainant in person
Counsel for the 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.No.	Particulars	Details
1.	Name of the project	"Paras Dews", Sector- 106, Gurugram
2.	Nature of project	Group Housing Colony
3.	RERA registered/not registered	Registered 118 of 2017 dated 28.08.2017
4.	DTPC License no.	61 of 2012 dated 13.06.2012
	Validity status	12.06.2020
	Name of licensee	Sepset Properties
	Licensed area	13.76 acre
5.	Unit no.	03, Tower-E, 4 th floor, (Page no. 15 of complaint)
6.	Unit measuring	1385 sq. ft. (Page no. 15 of complaint)
7.	Date of execution of Floor buyer's agreement	30.05.2013 (Page no. 40 of reply)
8.	Possession clause	3. Possession <i>3.1 Subject to Clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the Seller and any restraints restrictions from any courts/ authorities and subject to the Purchaser(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 having complied with all provisions. formalities, documentation, etc. as prescribed by the Seller, whether under this Agreement or otherwise, from time to time, the Seller proposes to hand over the possession of the Apartment to the Purchaser(s) within a period of 42 (Forty-Two) months with an</i>

		<p><i>additional grace period of 6 (six) Months from the date of execution of this Agreement or date of obtaining all licenses or approvals. The commencement of construction, whichever is later, subject to Force Majeure. The Purchaser(s) agrees and understands that the Seller shall be entitled to a grace period of 90 (ninety) business days, after the expiry of grace period, for offer to hand over the possession of the Apartment to the Purchaser.</i></p>
9	Environment clearance	06.09.2013 (page 29 of reply)
10	Due date of possession	06.09.2017 (Calculated from the date of environment clearance i.e. 06.09.2013 being later including grace period) (Grace period of six months is allowed being unqualified and unconditional)
11.	Total sale consideration	Rs.1,02,75,946/- plus taxes (As per page no. 25 of reply)
12.	Total amount paid by the complainant	Rs.88,88,014/- (as page no. 26 of reply)
13.	Occupation certificate dated	26.04.2023 (page 22 of reply)
14.	Offer of possession	28.04.2023 (page 76 of reply)

B. Facts of the complaint

3. The complainant has made the following submissions: -

- a) That the complainants booked a residential unit no. T-B/0403, 2BHK in towers E & F, 4th floor admeasuring 1385 sq. ft. in the respondent's project namely "Paras Dews", Sector 106, Gurugram, Haryana for a basic sale



consideration of Rs.98,76,450/- and the buyer's agreement for the said unit was executed on 30.05.2013 between the parties.

- b) That the complainants paid Rs.88,88,014/- against the sale consideration. The payment for the subject unit was to be made according to the construction linked payment plan and all the payments were made by the complainants as per the demands raised by the respondent.
- c) That despite paying all the payments as raised by the respondent the respondent failed to deliver the possession of the said unit within the agreed time period. The inordinate delay in handing over possession of the unit clearly amounts to deficiency of service on account of the respondent and the complainants have rightly claimed to withdraw from the project and claim total refund of amount along with other interest and compensation as per section 18 of Real Estate (Regulation and Development) Act, 2016.

C. Relief sought by the complainants.

4. The complainants have sought following relief:
- i. Direct the respondent to refund the total amount paid by the complainants along with the prescribed rate of interest.

D. Reply by the respondent.

5. The respondent contested the complaint on the following grounds:-
- a) That the complainants approached the authority for redressal of the alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case and by distorting and misrepresenting the actual factual situation with regard to several aspects. The complainants are not consumer and had purchased the subject unit for the purpose of investment. Further, they have not been successful in selling the subject

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unit at a premium rate in the market and have filed the present complaint to avoid outstanding dues against the subject unit.

- b) That the complainants have only paid Rs.88,88,014/- for the subject unit against the total sale consideration of Rs.1,07,53,73/- and respondent has obtained the occupation certificate on 26.04.2023 from the competent authority.
- c) That the possession of the subject unit was to be handed over to the complainants in terms of clauses 3.1 and 3.2 of the builder buyer agreement dated 30.05.2013 which clearly provide that subject to the complainant complying with all the terms of the builder buyer agreement and making timely payments of the instalments as and when they fall due. The respondent proposed to offer the possession of the unit within a period of 51 months (42 month + grace period of 6 month plus 90 days) of the date of execution of the apartment buyer's agreement or date of obtaining all licences or approvals for commencement of construction, whichever is later, subject to force majeure. Moreover, all the approvals for commencement of the construction work were received towards the end of 2013 and construction work commenced in January 2014.
- d) That the respondent has suffered due to the breaches committed by the complainants since the said respondent has continued with the construction of the apartment despite the complainants not paying the complete consideration. Due to the failure of the complainants in paying the complete consideration, the respondent has suffered immense monetary hardship.
- e) That the Hon'ble Supreme Court, through an order dated 04.11.2019, imposed a blanket stay on all construction activity in the Delhi-NCR region, affecting the respondent's project which led to a significant reduction in construction activity for a considerable period. Similar stay orders were

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also issued in the preceding years, 2017-2018 and 2018-2019, resulting in long-term halts in construction activities. The pandemic of Covid-19 also had devastating effect on the worldwide economy, particularly on the industrial sector, including the real estate sector, which is heavily dependent on its labour force. Government-imposed lockdowns resulted in a complete stoppage of all construction activities in the NCR area until July 2020. The labour force employed by the respondent was forced to return to their hometowns, leading to a severe shortage of labour. The respondent has been unable to employ the necessary labour for the completion of the project.

6. All other averments made in the complaint were denied in toto.
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 submission made by the parties.

E. Jurisdiction of the authority

8. 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

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

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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)(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.

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 complainants 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.*** SCC Online SC 1044 decided on **11.11.2021** 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 matter of **M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)**, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Finding on objections raised by the respondent

F.I. Objection regarding the complainants being investors.

14. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondents also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondents are correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

15. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

F.I. Objection regarding the force majeure.

16. The respondent-promoter raised the contention that, the Hon'ble Supreme Court vide order dated 04.11.2019, imposed a blanket stay on all construction activity in the Delhi- NCR region and the respondent was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period and other similar orders during the winter period 2017-2019. A complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban the concerned labours left the site and they went to their native villages and look out for work in other states, the resumption of work at site becomes a slow process and a steady pace of construction realized after long period of it. It is pertinent to mention here that flat buyer's agreement was executed between the parties on 30.05.2013 and as per the terms and conditions of the said agreement the due date of handing over of possession comes 06.09.2017 which is way before the abovementioned orders. 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.

17. Further, the respondent-promoter has raised the contention that the construction of the project was delayed due to reasons beyond the control of the respondent such as COVID-19 outbreak, lockdown due to outbreak of such pandemic and shortage of labour on this account. The authority put reliance judgment of 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 (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020** dated 29.05.2020 which has observed that-

"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."

18. In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 06.09.2017. The respondent 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 is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainants.

G.I Direct the respondents to refund the total amount paid by the complainants along with the prescribed rate of interest.

19. That the complainants booked a unit 03, Tower-E, 4th floor in the project of the respondent namely, "PARAS DEWS" admeasuring super area of 1385 sq.

ft. for an agreed sale consideration of Rs.1,02,75,946/- against which complainants paid an amount of Rs.88,88,014/- and the respondent has failed to hand over the physical possession till date. That the complainants intend to withdraw from the project and are seeking refund of the paid-up amount as provided under the section 18(1) of the Act. Sec. 18(1) proviso reads as under:

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 of 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)

20. As per clause 3.1 of the agreement provides for handing over of possession and is reproduced below:

3.1 Subject to Clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the Seller and any restraints restrictions from any courts/ authorities and subject to the Purchaser(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 having complied with all provisions, formalities, documentation, etc. as prescribed by the Seller, whether under this Agreement or otherwise, from time to time, the Seller proposes to hand over the possession of the Apartment to the Purchaser(s) within a period of 42 (Forty-Two) months with an additional grace period of 6 (six) Months from the date of execution of this Agreement or date of obtaining all licenses or approvals. The commencement of construction, whichever is later, subject to Force Majeure. The Purchaser(s) agrees and understands that the Seller shall be entitled to a grace period of 90 (ninety) business days, after the expiry of grace period, for offer to hand over the possession of the Apartment to the Purchaser.

21. On consideration of the abovementioned clause, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 3.1 of the agreement dated 30.05.2013, the possession of the subject unit was to be delivered within a period of 42 months with an additional grace period of 6 months from the date of execution of the agreement or date of obtaining all licenses or approvals. The due date is calculated 48 months from date of environment clearance i.e.,06.09.2013 being later. Accordingly, the due date of possession comes out to be 06.09.2017 and there is a delay of more than 5 years on the date of filing of complaint to handover the possession of the allotted unit.
22. The occupation certificate/part occupation certificate of the buildings /towers where allotted unit of the complainants is situated was received after filing of complaint by the complainants for return of the amount received by the promoter on failure of promoter to complete or unable to give possession of the unit in accordance with the terms of the buyer's agreement. The complainants have already wished to withdraw from the project.
23. Further, vide proceedings dated 26.10.2023, the counsel for the respondent stated at bar that occupation certificate in respect of the tower of the subject unit has been obtained on 26.04.2023 from the competent authority and offer of possession has been made on 28.04.2023 to the complainants and is willing to handover the possession of the allotted unit after payment of outstanding amount due towards the complainants. Though the complainants, wished to withdraw from the project and demands refund of the paid-up amount received by the promoter/respondent 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 buyer's agreement.

24. Keeping in view the fact that the allottee/complainants 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.
25. **Admissibility of refund at prescribed rate of interest:** The complainants are seeking refund amount at the prescribed rate of interest on the amount already paid by them. However, allottees intends to withdraw from the project and is seeking refund of the amount paid by him 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.*
26. 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.
27. 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., 21.12.2023 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

28. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

29. 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. 2021-2022(1) 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 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."

30. 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 promoters are liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by them in respect of the unit with interest at such rate as may be prescribed.

31. The authority hereby directs the promoter to return the amount received by it i.e., Rs.88,88,014/- with interest at the rate of 10.85% (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

32. 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 of Rs.88,88,014/- paid by the complainants along with prescribed rate of interest @ 10.85% p.a. from the date of each payment till the actual date of refund of the deposited amount as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.
- II. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.

III. The respondent is further directed to 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 complainants and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottees-complainants.

33. Complaint stands disposed of.

34. File be consigned to registry.

Dated: 21.12.2023


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory
Authority, Gurugram