

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

Complaint no. :	179 of 2021
Date of pronouncement:	23.02.2024

Mohit Chopra

R/o Acacia 1, flat no. 41, Vatika City, Sector 49, Sohna Road, Gurugram

Complainant

Versus

M/s Advance India Projects Ltd..

Office address: The Master Piece, Golf Course Road, Sector-54, Gurugram-122002.

Respondent

CORAM:

Shri Sanjeev Kumar Arora

Member

APPEARANCE:

Mr. Abhishek Rao (Advocate)

Complainant

Mr. M. K Dang (Advocate)

Respondent

ORDER

1. The present complaint dated 13.01.2021 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 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 as provided 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. Project and unit related details

2. The particulars of the project, the amount of 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	"AIPL Joy Central"
2.	Project location	Sector 65, Gurugram
3.	Project type	Commercial complex
4.	Application dated	25.10.2017 [pg. 31 of complaint]
5.	Allotment letter	21.11.2017 [pg. 31 of complaint]
6.	Unit No.	1010, 1 st Floor [pg. 31 of complaint]
7.	Revised unit no	FF/062 (As mentioned in account statement on pg 39 of compliant)
8.	Unit Area	277.52 sq. ft. (super area) [pg. 31 of complaint]



9.	Date of agreement for sale	Not executed
10.	Possession clause	<p>Clause 40 of application form</p> <p><i>Subject to the aforesaid and subject to the applicant not being in default under any part of this agreement including but not limited to the timely payment of the total price and also subject to the applicant having complied with all formalities or documentation as prescribed by the company, the company endeavours to hand over the possession of the unit to the applicant within a period of 48 (forty eights) months, with a further grace period of 6 (six) months, from date of commencement of the excavation work at the project site and this date shall be duly communicated by the company to the applicant.</i></p> <p>(Emphasis supplied)</p> <p>[page 39 of the reply]</p>
11.	Date of start of excavation	Not available on record
12.	Due date of possession	<p>25.04.2022</p> <p>[Note: Due date is calculated from date of application form as date of excavation is not provided by both the parties]</p> <p><i>Grace period is allowed.</i></p>



13.	Total sale consideration	Rs. 52,94,415.55/- [As per statement of account dated 12.03.2020. on pg. 39 of complaint]
14.	Amount paid	Rs. 20,47,815/- [As per statement of account dated 12.03.2020. on pg. 40 of complaint]
15.	Assured return start date	Rs. 15,237/- payable from 21.12.2017 [As per the email received from the respondent -promoter dated 11.01.2018 annexed at pg. 43 of complaint]
16.	Reminders dated	20.02.2020 & 01.03.2020
17.	Pre termination letter	22.04.2020 [annexure R3, pg. 53 of the reply]
18.	Intimation of termination	10.07.2020 [annexure R3, pg. 53 of the reply]
19.	Occupation certificate	24.12.2021 [As per website of DTCP]
20.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:
- The complainant had booked a unit in the project named 'AIPL Joy Central' of the respondent at Sector 65, Gurugram, Haryana and paid a booking amount of ₹500,000/- on 25.10.2017. The complainant was allotted commercial unit bearing no. 1010, first

floor vide allotment letter dated 21.11.2017 having an approx. super area of 277.52. sq. ft., at a basic sale price of ₹16,651 per sq. ft. along with other charges and taxes. The total sale consideration for the said unit was fixed for ₹52, 94,249/-. Thereafter various demands were raised by the respondents towards the cost of the aforesaid unit but despite repeated request of the complainant the respondent failed to execute builder buyer agreement till date. That the complainant had paid a sum of ₹15,47,815/- on 20.12.2017.

- b. That respondent changed the unit allotted to the complainant from 1010 to 062 without any prior intimation of the change in layout plan wherein the complainant had already paid the preferential location charges to the respondents. That the respondent failed to issue any formal letter regarding the change in the unit initially allotted to the complainant.
- c. That the respondent kept on raising the demands for next instalment without executing the builder buyer agreement and further, to the complainant utter shock and surprise the complainant receives an email for pre termination of the said unit for non-payment of the second instalments on 23.04.2020.
- d. That the complainant is still willing to make the payment of second instalment on the execution of the builder buyer agreement.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
 - a. Direct the respondent to withdraw its termination notice and re-instate the said unit to the complainant.

- b. Direct the opposite parties/ respondent to execute builder buyer agreement.
 - c. Direct the respondent to re-allocate the preferential location unit no. 1010 instead of 062 since the complainant paid the preferential location charges for the same and the respondents changed it without any prior approval/ intimation.
 - d. Direct the opposite parties/ respondent to pay interest @15% per annum compounded quarterly on the amount of ₹20,47,804/- being the amount deposited by the complainant with the opposite parties/respondents from the respective date of payments made by the complainant till date on which the arrears are paid to the complainant.
 - e. Direct the respondent to pay an assured return on the said amount received by the respondent till date.
 - f. Direct the opposite party to pay a sum of ₹5,00,000/- towards damages for the physical and mental torture, agony, discomfort and undue hardship caused to the complainant and the complainants' family as a result of the above acts of omissions on part of the opposite parties/respondents.
 - g. Direct the opposite parties/ respondents severally and jointly to pay a sum of ₹2,00,000/- to the complainant towards the cost of litigation.
5. On the date of hearing, the authority explained to the respondent/ promoters about 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. The respondent by way of written reply made the following submissions:

- a. That the complainant, after checking the veracity of the project namely, AIPL Joy Central, Sector 65, Gurugram had applied for allotment of a unit vide the booking application form. The complainant agreed to be bound by the terms and conditions of the documents executed by him.
- b. That based on it, the respondent vide its allotment offer letter dated 21.11.2017 allotted to the complainant unit no. 1010 having tentative super area of 277.52 sq. ft. for a sale consideration of ₹52,94,249.05/-. That as per the terms of the allotment, it was agreed that time is the essence with respect to the due performance by the complainant under the agreement and more specially timely payment of instalments towards sale consideration and other charges, deposits and amounts payable by the complainants. It is important to mention here that it was acknowledged by the complainant that the unit was purchased not for the purpose of self-occupation and use by the complainant but was for the purpose of leasing to third parties.
- c. The complainant had purchased the said unit on assured return basis and they used to get the same every month from the respondent. The complainant has already earned huge amount as assured return from the respondent. The complainant had chosen the said unit for investment as they were interested in getting return on their investment. As per the terms of the allotment offer

letter, the payment of the assured return by the respondent was subject to the complainant making payment towards the total sale consideration on time.

- d. That the complainant had understood that there could be changes/alterations, revision or modifications in the layout plans, building plans and/or drawings by the competent authority or for technical reasons or otherwise required by the respondent in the best interest of the project and that the complainant would not have any object to the same and would abide by such changes. It was agreed vide clauses 12,14 and 15 of schedule 1 of the booking application form that in the event there is any change in the unit's location, the same would be acceptable to the complainant.
- e. That on account of revision in the building plan, the respondent had invited objections from all the allottees of the project in question. The respondent had invited objections from the complainant vide its letter dated 21.11.2019. However, no objections were received from the complainant and the unit of the complainant was changed as per the terms of the booking application form from 1010 to FF/062. The said change in unit was intimated to the complainant and the same is evident from a bare perusal of the emails attached by the complainant along with the present complaint.
- f. Despite being aware that timely payment of the instalment amount is the essence of the allotment, the complainant defaulted in making payment towards the demanded amount. The respondent had sent a payment demand to the complainant on 04.12.2020. However, the complainant miserably failed to make any payment towards the



demanded amount despite reminders dated 20.02.2020, 01.03.2020 and pre-termination letter dated 22.04.2020. It was intimated to the complainant vide the pre- termination letter that in case the due amount is not remitted by the complainant, the respondent would be in such case constrained to terminate/cancel the application/allotment of the unit and forfeit the earnest money along with other non-refundable amounts in terms of the application.

- g. That the complainant paid no heed to the continuous follow-ups done by the respondent and the respondent was constrained to terminate the allotment vide termination letter dated 10.07.2020 as per clauses 24 and 52 of schedule 1 of the booking application form and the complainant is now left with no rights, lien or titled in the unit in question.
- h. That the complainant is a real estate investor who had made the booking with the respondent with the sole intention of earning quick profit in a short span of time. However, on account of slump in the real estate market, the complainant deliberately failed to fulfil its contractual obligations of making payments towards the instalment demands and have now filed the present baseless, false and frivolous amended complaint in order to unnecessarily harass, pressurize and blackmail the answering respondents to submit to its unreasonable and untenable demands. The complaint is liable to be dismissed with heavy costs payable to the respondent by the complainant.

7. Copies of all relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submissions made by parties.
8. Written arguments on behalf of complainant & respondent have been filed in 22.12.2023 & 03.01.2024 respectively and the authority have taken cognizance of the same.

E. Jurisdiction of the authority

9. The plea of the respondents 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.

E. I Territorial jurisdiction

10. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by the 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 completed territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

11. 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

12. 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.
13. 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. (Supra) 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."

14. 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 the complainant being investor

15. 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 respondent 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 observes that the respondent is 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. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of ₹ 20,47,815/-to the promoter towards purchase of an apartment in its project. 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;"

16. 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". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** have also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant.

G.I. Direct the respondent to withdraw its termination notice and re-instate the said unit to the complainant.

G.II. Direct the opposite parties/ respondent to execute builder buyer agreement.

17. The complainant was initially allotted unit no. 1010, 1st floor, admeasuring 277.52 sq. ft. in the project "AIPL Joy Central" Sector 65 by the respondent-builder for a total sale consideration of ₹ 52,94,415.55/- and he had paid a sum of ₹ 20,47,815/- which is approx. 38.67% of the sale consideration. Thereafter the said unit was changed to 062, 1st floor arbitrarily by the respondent without any prior consent of the allottee. No buyer's agreement was executed between parties with regard to the allotted unit even after the numerous mails written by the complainant requesting the respondent to execute the same. The respondent issued demand letter as per the payment plan and subsequently issued reminder letters. Upon failure of complainant to pay the outstanding dues the respondent issued pre-termination letter dated 22.04.2020 followed by the cancellation letter dated 10.07.2020.
18. Before illustrating upon the further issues it would be right to give findings upon the validity of the cancellation letter. The complainant in its complaint has pleaded that the complainant wrote numerous mails to the respondents for executing the BBA after the allotment letter was issued to the complainants.
19. Whereas the respondent in its reply clearly states that as per the allotment it was agreed that time is the essence with respect to the due performance by the complainant more specifically timely payment of installments towards the sale consideration.

20. The authority after consideration of the payment plan shared by the respondent vide email dated 29.11.2017 observes that the complainant was entitled to pay ₹4,46,428.58/- at the time of booking and thereafter an amount of ₹13,81,973.09/- within 90 days of booking i.e., till 25.01.2018 and the complainant in the present matter has paid an amount of ₹20,47,815/- by 20.12.2017 which is well within the time and thereafter the next installment for an amount of ₹ 20,47,809/- was to be paid within 18 months of booking i.e., by 25.04.2019. Further, the respondent on 04.02.2020 issued the demand letter for an amount to be paid within 18 months from the date of booking. Thereafter the respondent issued reminder letters, pre-termination and then finally cancelled the unit vide letter dated 10.07.2020. The good conduct of the respondent can also be traced from the proceedings dated 08.12.2023 wherein it was stated by the respondent's counsel that even after issuance of cancellation they offered 4-5 units to the complainants but those were not acceptable to the complainants. Accordingly, the authority opines that since the payment plan agreed by the parties was time linked and the respondent cancelled the unit after issuance of reminder letters, therefore, the authority declares the said cancellation letter dated 10.07.2020 as valid in eyes of law and is hereby upheld.
21. However, the fact that the respondents have not refunded any amount after certain deduction to the complainant even after issuance of termination letter w.r.t. the subject unit; accordingly, the complainant's rights to refund remains intact.

22. Keeping in view the regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, as farmed:

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."

23. Keeping in view the aforesaid facts and legal position, the request of the complainant for refund against the said allotted unit is allowed by the authority after forfeiture of the 10% of the earnest money of basic sale price cannot be said to be wrong or illegal in any manner.
24. The respondent is directed to refund the paid-up amount of ₹20,47,815/- along with the interest at the prescribed rate i.e., 10.85% after deducting the earnest money which shall not exceed the 10% of the basic sale consideration of ₹46,21,152.03/-. The refund should have been made on the date of cancellation i.e., 10.07.2020. Accordingly, refund is allowed from the date of surrender till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017.

G.III. Direct the respondent to re-allocate the preferential location unit no. 1010 instead of 062 since the complainant paid the preferential

location charges for the same and the respondents changed it without any prior approval/ intimation.

G.IV. Direct the opposite parties/ respondent to pay interest @15% per annum compounded quarterly on the amount of Rs. 20,47,804/- (rupees twenty lakhs forty-seven thousand eight hundred and four only) being the amount deposited by the complainant with the opposite parties/respondents from the respective date of payments made by the complainant till date on which the arrears are paid to the complainant.

G.V. Direct the respondent to pay an assured return on the said amount received by the respondent till date

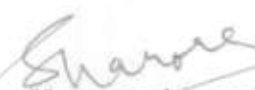
25. In view of the findings w.r.t. the relief no. 1 by the authority the above mentioned reliefs stands redundant.

H. Directions of the authority

26. 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):

- a. The respondent is directed to refund the paid-up amount of ₹20,47,815/- along with the interest at the prescribed rate i.e., 10.85% after deducting the earnest money which shall not exceed the 10% of the basic sale consideration of ₹46,21,152.03/-. The refund should have been made on the date of cancellation i.e., 10.07.2020. Accordingly, refund is allowed from the date of surrender till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017.
- b. 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

27. The complaint stands disposed of.
28. File be consigned to registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 23.02.2024



HARERA
GURUGRAM