

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

Complaint no.: 8114 of 2022
Date of decision: 10.04.2024

Shashi Bhushan
R/o: - Flat no. 1503, Tower-G, Jm Florence,
Techzone-4, Bishrakh, G.B.Nagar, U.P-201306

Complainant

Versus

M/s ADTV Communications Pvt Ltd.
Office address:- 115, Ansal Bhawan, 16, K.G Marg,
New Delhi-110001.

Respondent

CORAM:

Shri Ashok Sangwan

Member

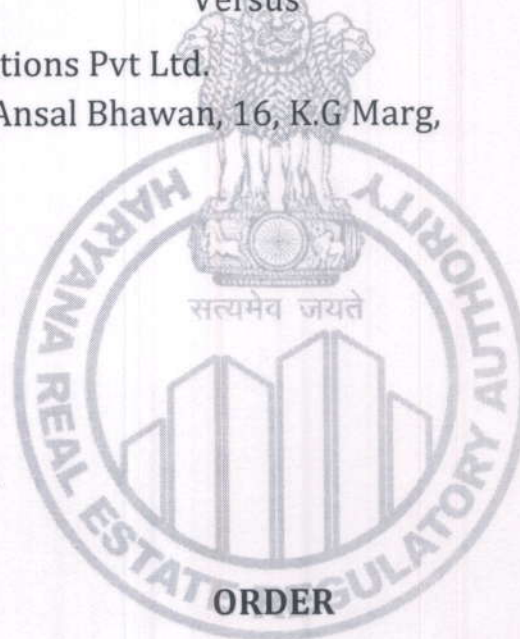
APPEARANCE:

Shri AnuRuddha Singh

None

Complainant

Respondent



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 as provided 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. Project and unit related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	"Aloha-Gurgaon", Sector-57, Gurugram.
2.	Nature of project	Group housing
3.	RERA registered	Not registered
4.	Allotment letter	24.07.2020 (As on page no. 16 of complaint)
5.	Unit no.	Apartment no.-002, Floor-ground, Tower-B-4 Along with 2 covered parking + club membership (As on page no. 21 of complaint)
6.	Unit area	3000sq.ft. [Super-area] (As on page no. 21 of complaint)
7.	Date of execution of buyer's agreement dated	27.07.2020 (As on page no. 19 of complaint)
8.	Possession clause	Clause 10 SCHEDULE FOR POSSESSION OF THE SAID PREMISES: <i>The possession of the said premises is likely to be delivered by the Company to the Allottee within 24 months of the execution of this agreement,</i>



		<p>subject to force majeure circumstances, & on receipt of all payments punctually as per agreed terms and on receipt of complete payment of the basic sale price and other charges due and payable up to the date of possession according to the Payment plan applicable to the Allottee. If, however, the completion of construction is delayed due to force majeure eventualities, as described herein, the Company shall be entitled to avail a reasonable extension of time for handing over possession of the said premises to the Allottee. At given time, before possession, if the Allottee cancels his allotment, in that event the company shall refund the entire amount paid by the Allottee, after deducting 10% of amount as administrative charges, within 60 days of receipt of cancellation letter from the Allottee.</p> <p>[Emphasis supplied] (As on page no. 25 of complaint)</p>
09.	Due date of possession	27.07.2022
10.	Total consideration	Rs.1,35,12,000/- (As on page no. 37 of complaint)
11.	Total amount paid by the complainant	Rs. 1,1,50,000/- [Self payment of Rs.29,00,000/- + Rs.85,00,000/- Loan amount]
12.	Tri-partite agreement [Rs.85,50,000/- out of Rs.95,00,000/- transferred to respondent]	18.08.2020



13.	Legal notice from complainant to the respondent seeking refund.	06.04.2022 18.04.2022 [Amended legal notice] (AS on page no. 66 of complaint)
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint: -
- I. That the complainant booked an apartment in the project named "Aloha Gurgaon" of the respondent M/s ADTV Communications Pvt. Ltd (Earlier known as M/s AEZ Infratech Pvt. Ltd.) and an apartment bearing no. 002, on ground floor in Tower B-4 having super area admeasuring 3000 sq. ft. was allotted to the complainant vide allotment letter dated 24.07.2020 under the construction linked plan (CLP).
 - II. Thereafter, a builder buyer agreement was executed between the complainant and the respondent on 27.07.2020. As per clause 10 of the agreement, the respondent promised to deliver the apartment within 24 months from the date of execution of the agreement i.e 27.07.2022 but failed to do so.
 - III. That the complainant has paid a sum of Rs.1,14,50,000/- which is approximately 85% of the total cost of the abovementioned apartment. Out of which Rs.85,50,000/- has been disbursed by the Indian Overseas Bank to the respondent and Rs.29,00,000/- through self-payment by the complainant.
 - IV. That it is pertinent to mention here that the complainant booked this apartment under the "Subvention Scheme - No EMI till possession". As



per this payment plan the complainant had to pay 20% of the apartment's sale consideration from its own sources and remaining 75% was to be disbursed by the bank or other financial institution. It was intimated to the complainant that the aforesaid unit was ready to move and will shortly be delivered.

- V. Accordingly, the Indian Overseas Bank has disbursed the loan of Rs.85,50,000/- and the interest and PRE - EMI's towards the said loan was to be borne by the respondent till possession of the unit is handed over to the complainant. The respondent has not been making payment of PRE-EMIs since January 2022 and failed to perform its contractual obligation after getting the money into its account in a single shot.
- VI. That the complainant has sent a legal notice dated 06.04.2022 and an addendum to legal notice dated 18.04.2022 to the respondent and the bank i.e., Indian Overseas Bank, intimating about the cancellation/surrender of unit by the complainant and expressing that it is no longer liable to pay the EMI, interest or principal or any kind whatsoever to the Bank. As per the Tri-Partite Agreement it was agreed that in case of cancellation/surrender of allotment for any reason whatsoever, the respondent shall be liable to pay the complete loan amount to the bank.
- VII. The respondent refused to pay the EMI's demanded by the bank and in response to which bank sent legal notices *u/s 13(2) of the SARFAESI Act 2002* the complainant with for the recovery of the due amount. The bank after its SARFAESI notice being replied by the complainant got frustrated and sent a Legal Notice U/S 13(3-A) of SARFAESI ACT 2022, vehemently denying all the contentions raised by the complainant. The bank in its



notice dated 06.05.2022 threatened the complainant to initiate proceedings under section 13(4) of the above said act and to issue the name and photo of the complainant as defaulter in the newspapers if it fails to clear the outstanding dues of Rs.85,28,777/-.

VIII. On 09.08.2022 the bank issued a possession notice stating that the "General public must be cautious while dealing with the property mentioned as Apartment bearing No. 002, on Ground Floor in Tower B-4 having super area admeasuring 3000 sq. ft. in the project "Aloha Gurgaon" as the said bank have charge on the said property".

IX. That the complainant received a legal notice dated 18.10.2022 for the payment of Rs.88,87,399/- from the bank but it is to be noted that it was booked on 14.12.2022 and it was received on 19.12.2019 as per tracking report. The bank has again started sending legal notices to the complainant who is already under so much financial and mental pressure due to conduct of the respondent. Therefore, the complainant in the matter is humbly requesting the Authority to order the respondent to return the money of the complainant and settle the loan account with the bank.

C. Relief sought by the complainant: -

4. The complainant has sought following relief(s)

- I. Direct the respondent to refund the amount of Rs.29,00,000/- paid by the complainant along with interest.
- II. Direct the respondent to reimburse/settle the total loan amount of Rs.85,50,000/- along with applicable interest to the Indian Overseas Bank.

D. Reply filed by the respondent



5. The present complaint has been filed on 13.01.2023 and the reply on behalf of the respondent has not been received till date. Despite proper service of notice, no written reply has been filed nor did anyone appear on behalf of the respondent. Keeping in view the interest of the allottee's, the Authority vide order dated 25.10.2023 directed that the respondent be served by way of substituted service i.e by way of publication in the newspaper. Accordingly, the requisite notice was issued in the newspaper "Business Standard"(English edition) dated 14.12.2023 and "Business Standard"(Hindi Edition) dated 14.12.2023. Despite proper service of notice the respondent neither filed the written reply nor appeared before the Authority. Accordingly, the respondent is proceeded ex-parte and the defence of the respondent is struck off.
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 and submission made by the parties.

E. Jurisdiction of the authority

7. 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

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram



District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

(4) 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;

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 complainants 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. (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."

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.

F. Findings on the relief sought:

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

15. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him 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)

16. Clause 10 of the agreement provides for handing over of possession and is reproduced below:

"10. SCHEDULE FOR POSSESSION OF THE SAID PREMISES:

*The possession of the said premises is likely to be delivered by the Company to the Allottee **within 24 months of the execution of this agreement**, subject to force majeure circumstances, & on receipt of all payments punctually as per agreed terms and on receipt of complete payment of the basic sale price and other charges due and payable up to the date of possession according to the Payment plan applicable to the Allottee. If, however, the completion of construction is delayed due to force majeure eventualities, as described herein, the Company shall be entitled to avail a reasonable extension of time for handing over possession of the said premises to the Allottee. At given time, before possession, if the Allottee cancels his allotment, in that event the company shall refund the entire amount paid by the Allottee, after deducting 10% of amount as administrative charges, within 60 days of receipt of cancellation letter from the Allottee.*

[Emphasis supplied]

17. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. 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 fulfilling formalities and



documentations etc. as prescribed by the promoter 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 clause in the buyer's agreement 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 mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

18. **Admissibility of refund along with prescribed rate of interest:** The allottee 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.

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., 10.04.2024 is **8.85%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.85%**.

21. The definition of term 'interest' as defined under section 2(za) of the Act provides that 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 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—

- (i) 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;*
- (ii) 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;"*

22. On consideration of the documents available on record and submissions made by the complainant regarding contravention of provisions of the Act, 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 10 of the agreement dated 27.07.2020, the possession of the subject apartment was to be delivered within a period of 24 months from the date of execution of the floor buyer agreement. The due date is calculated 24 months from date of the agreement dated 27.07.2020. Accordingly, the due date of possession is 27.07.2022.



23. That a tri-partite agreement was executed between the complainant, respondent and the bank i.e., Indian Overseas bank on 18.08.2020 whereby the bank sanctioned an amount of Rs.95,00,000/- and disbursed Rs.85,00,000/- to the respondent on 24.08.2020 (as per the payment receipt on page no. 48 of complaint). According to the tri-partite agreement dated 18.08.2020 the respondent had to pay Pre-EMIs till the offer of the possession, but he failed to comply with its obligations causing undue hardships to the complainant. The complainant has paid Rs. 29,00,000/- towards the total sale consideration of the unit and Rs.85,50,000/- was paid by the bank. Due to the non compliance of the respondent in paying the Pre-EMIs, the bank issued notices to the complainant and on 09.08.2022 the unit was taken over by the bank under the proceedings of SARFAESI Act, 2002.
24. The occupation certificate/completion certificate of the project where the unit is situated has not been received by the respondent. Moreover, on 18.08.2022, as per the newspaper article at page no. 102 of the complaint the tower in which the subject unit was situated has been demolished by the DTCP due to construction in the stilt area by the respondent. Thus, at present the unit stands demolished and does not exist. The bank has again started sending notices to the complainant in lieu of the loan amount.
25. The authority is of the view that the respondent/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 and also, to pay the Pre-EMIs to the bank. Accordingly, the promoter is liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received 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 him 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 deposit till its realization within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*. Further, the respondent/promoter is directed to clear the loan amount first and then pay the remaining amount to the complainant. The respondent was also liable to pay Pre-EMI to the bank in terms of the Tri-partite agreement.


E. 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 paid-up amount i.e., Rs.1,14,50,000/- 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 realization of the amount.
- ii. Out of the total amount so assessed, the amount paid by the bank/financial institution shall be refunded first and the balance amount along with interest will be refunded to the complainant. Further, the respondent is directed to provide the No Objection Certificate to the complainant after getting it from the bank/financial institution.
- iii. 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.
- iv. The respondent builder is directed not to create third party right against the unit before full realization of the amount paid by the complainant. If any transfer is initiated with respect to the subject unit, the receivable from that property shall be first utilized for clearing dues of the complainant-allottee.
28. The complaint stands disposed of.
29. File be consigned to registry.

Dated: 20.03.2024


(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram