BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 5749 of 2022
Order pronounced on : 14.08.2024

Gunjan Malhotra
R/o:- WZ530A, SF, ST No-27,
Shivnagar, Delhi-11058. **Complainant**

Versus

M/s ATS Realworth Pvt. Ltd
Address:- 711/92, Deepali, Nehru Place,
New Delhi-110019. **Respondent**

CORAM:
Shri Ashok Sangwan **Member**

APPEARANCE:
Ms. Daggar Malhotra (Advocate) Complainant
Sh. Dhruv Gupta Respondent

ORDER

1. The present complaint 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 29 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 the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	"ATS Grandstand Phase-1", Sector-99-A, Village-Gopalpur, Gurugram.
2.	Project Area	2.62 acres
3.	Nature of project	Residential
4.	DTCP license no.	37 of 2013 dated 02.06.2024
5.	RERA registered	Registered 06 of 2018 dated 02.01.2018
6.	Unit no.	2224 , Tower-2/ 8052, Tower-8 (As on page no. 22 of complaint)
7.	Application Form	13.10.2019 (As on page no. 20 of complaint)
8.	Welcome letter	17.10.2019 (As on page no. 28 of complaint)
9.	Builder Buyer Agreement	Not executed

11.	Possession clause	Not available
12.	Due date of possession	17.04.2023 [Calculated 36 months from the date of issuance of welcome letter i.e., 17.10.2019 + 6 months on account of Covid-19]
13.	Total sale consideration	Rs.84,74,250/-
14.	Total amount paid by the complainant	Rs.8,98,000/- [As on page no. 44 of complaint)
15.	Occupation certificate	Not obtained
16.	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 approached the respondent regarding the booking of a residential unit/apartment in the project "ATS Grandstand" situated in Sector-99A, Gurugram. The complainant was desirous of booking a unit in Tower 8 but the respondent informed that bookings of the said were to open in a couple of months and further informed that the complainant could book a unit in Tower-2 at present and later that booking would be shifted to Tower -8. Accordingly, the complainant, believing the above representations and assurances made an application for booking in the Application Form dated 13.10.2019 wherein the Complainant mentioned one unit each in Towers 2 and 8 in the alternative as the Complainant was assured that her booking in Tower 2 would be shifted to the unit mentioned in Tower 8 once the

bookings were opened. The unit in Tower 2 being apartment no.2262. The complainant made a total payment of Rs.8,98,000/- vide two cheques being the booking amount as required by the respondent and the same were duly encashed by the respondent also an acknowledgment of receipt of the said amount was elucidated in the respondent's email dated 15.10.2019. The respondent in the said email also mentioned both the unit numbers in Tower2 and Tower 8 in alternative of each other. The total sale consideration of the apartment was Rs.84,74,250/- Therefore, the respondent took more than 10% of the total cost of the unit as booking amount before signing of the BBA, being a violation of Section 13(1) of the Act.

II. That the complainant was informed after the booking amount was paid, the future payments were to be made as per the 30% 40% 30% construction-linked payment plan, the same was mentioned in the Application form as well. Later, the respondent unilaterally changed the payment plan to time- linked vide letter dated 17.10.2019. Vide the said letter, the respondent once again only confirmed the receipt of payments made by the complainant and specifically mentioned that booking will be confirmed once the Agreement to Sell is executed and not before that. Therefore, no confirmation of allotment was sent by the respondent to the complainant.

III. Once again vide email dated 11.02.2020, the respondent only confirmed the payment of booking amount and failed to share any allotment letter or agreement. Vide email dated 11.02.2020, the respondent sought payment of another 10% of the total cost and deceitfully stated that once the next 10% are paid, the payment would be linked with RERA.

IV. That the complainant followed-up regarding her booking and requested

for an Allotment letter and Agreement to Sell but all in vain. The respondent informed the complainant that the booking would be shifted to Tower -8 as soon as the bookings were opened for that tower concealing the fact that the respondent had not received RERA registration for Tower-8. The complainant was left feeling defrauded at the hands of the respondent and accordingly wrote an email dated 01.06.2020 regarding the above false assurances and also mentioned about the failure on the part of the respondent to send the Allotment Letter and agreement for the current unit even after taking more than 10% of the total sale consideration. The said email was duly received but the respondent did not respond to the same therefore, compelling the complainant to send another email on 13.07.2020 reiterating the above, and further requesting for an appropriate solution or refund of her money.

V. That, the respondent finally responded to the emails of the complainant vide an email dated 14.07.2020 wherein the respondent bluntly refused to refund the money stating that an application for refund cannot entertained as per the respondent company's policy and furthermore, threatened to forfeit the entire amount paid by the complainant till date. Shocked by the above response of the respondent, the complainant vide email dated 18.07.2020 asked for an appropriate solution or otherwise refund the amount paid

VI. Once again, the complainant sent emails dated 22.08.2020 and 21.12.2021 to the respondent but all in vain. The respondent failed to reply the emails till date. Accordingly, vide email dated 22.02.2022, the complainant requested for refund of her hard-eared money. Instead, the respondent started demanding more than 10% of the consideration

amount without even sharing a Builder-Buyer Agreement/agreement to Sell. The said wrongful demand was first made by the respondent on 11.02.2020 and later vide demand letter dated 13.07.2022.

VII. Further, there was no allotment letter confirming allotment of unit made by the respondent in the favour of the complainant and no Builder Buyer Agreement has been signed. The Respondent never shared a Builder Buyer Agreement with the Complainants and has already taken more than 10% at the time of booking and now seeks for more than 10% payment from the Complainants without any BBA which is clear violation of Section 13(1) of the Act. The Respondent has threatened the Complainant of cancellation and forfeiture in the event of non-payment, whereas, the Complainant had on account of failure on the part of the Respondent to share any BBA/ATS, Allotment Letter and other above-mentioned illegalities on the part of the Respondent, had already sought for refund.

VIII. Furthermore, there was no confirmed allotment in the favour of the Complainant till date and the Complainant had only paid an advance booking amount to the Respondent. There is no dispute that the Complainant had merely made an application to the respondent for booking of a unit in the project of latter i.e., respondent and paid a sum of Rs.8,98,000/- as booking amount being more than 10% of the total sales consideration as sought by the respondent. The complainant is therefore entitled to seek refund of the booking amount so paid by her to the respondent.

C. Relief sought by the complainants:

4. The complainant has sought following relief(s):

a) Direct the respondent to refund the amount of Rs.8,98,000/- paid by the complainant to the respondent alongwith interest from the date of payment in respect of the said unit.

b) Direct the respondent to pay litigation costs to the tune of Rs.50,000/-

5. The respondent/promoter put in appearance through its Advocate and marked attendance on 10.05.2023, 20.09.2023 and 20.12.2023 respectively. Despite specific directions, it failed to comply with the orders of the Authority by not filing the reply. It shows that the respondent was intentionally delaying the procedure of the court by avoiding to file written reply. Therefore, in view of order dated 13.03.2024, the defence of the respondent was struck off.

6. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and written submissions made by the complainant.

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)(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;*

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.

10. 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. 2020-2021 (1) RCR (c) 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."

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.

D. Findings on the relief sought by the complainant:

D.I Direct the respondent to refund the entire paid-up amount along with interest at the prescribed rate.

14. In the present complaint, 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. However, as no BBA has been executed between the parties therefore the due date of possession cannot be ascertained. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained then a reasonable time period of 3 years has to be taken into consideration. It was held in matter ***Fortune Infrastructure v, Trevor d' lima (2018) S SCC 442 : (2018) 3 SCC (civ) 1*** and then was reiterated in ***Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725 :-***

> *"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered"*

15. Accordingly, the due date of possession is calculated as 3 years from the date of issuance of welcome letter i.e., 17.10.2019. If we calculate 3 years from 17.10.2019, it comes out to be 17.10.2022. . Further, as per **HARERA notification no.9/3-2020** dated 26.05.2020, an extension of 6 months is granted for the projects having completion date on or after 25.03.2020. The completion date of the aforesaid project in which the subject unit lies is 17.10.2022 i.e., after 25.03.2020. Therefore, an extension of 6 months is to be given over and above the due date of

handing over possession in view of notification no. 9/3-2020 dated 26.05.2020, on account of force majeure conditions due to outbreak of Covid-19 pandemic. Therefore, the due date of handing over possession comes out to be 17.04.2023.

16. **Admissibility of refund along with prescribed rate of interest:** The complainant 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.*

16. 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.

17. 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., 14.08.2024 is **9 %.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11 %.**

18. In the present complaint, the complainant initiated a booking for a unit in the "ATS Grandstand Phase-I" project located at Sector-99-A, Gurugram. The complainant submitted the application form for the allotment of the

unit on 13.10.2019. Although the complainant expressed interest in a unit within Tower-8, the respondent informed her that bookings for Tower-8 had not yet commenced. Instead, she was advised to book a unit in Tower-2, with the assurance that this booking could later be transferred to Tower-8. The complainant proceeded with the application for unit no. 2262 of Tower-2, which was to be shifted to unit no. 8052 of Tower-8, with a total area of 1750 sq. ft. The respondent confirmed this booking via email dated 15.10.2019. Subsequently, on 17.10.2019, the respondent issued a welcome letter to the complainant, acknowledging receipt of Rs.8,98,000/- through cheque nos. 305996 and 876059, both dated 13.10.2019. Further correspondence from the respondent, dated 11.02.2020, acknowledged the complainant's payment of 10% of the total sale consideration as a booking amount and requested an additional 10% of the total sale consideration to be paid in order to process the payment with the relevant Authority. The relevant part of the e-mail is reproduced below:

" Dear Mam
Greetings from ATS
Hope you are doing fine
It is to inform you that you had booked one unit of 1750sq ft in our project ATS Grand Stand where we have confirm you that ***you had make payment of 10% as booking amount***
Also we would like to confirm that after making further 10% payment your payment would be linked with RERA and you have to make payment accordingly.
Regards
Ashish"

[Emphasis supplied]

19. The complainant repeatedly requested the respondent to execute the Builder Buyer Agreement and issue the allotment letter in her favor, given that she had already paid 10% of the booking amount. Alternatively, the complainant requested a refund of the amount paid.

The respondent, however, failed to address the execution of the Agreement or the issuance of the allotment letter.

20. Under Section 13(1) of the Act, 2016, the promoter is restricted from accepting more than ten percent of the unit's cost as an advance payment or application fee from the allottee without first entering into a written agreement for sale. The relevant section is reproduced below:

> *" Section 13 No deposit or advance to be taken by promoter without first entering into agreement for sale-*
>
> *(1) A promoter shall not accept a sum more than ten percent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force."*

21. The promoter has failed to fulfill the initial requirements, namely the execution of the Builder-Buyer Agreement and the issuance of the allotment letter in favor of the complainant even though the complainant has already paid more than 10 % of the total sale consideration of the unit. Consequently, the promoter is liable to refund the amount received for the unit, along with interest at a prescribed rate, as the allottee has opted to withdraw from the project. This liability is without prejudice to any other remedies available to the allottee.

22. Accordingly, the non-compliance of the mandate contained in section 13(1) 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., @11% 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.II Direct the respondent to pay litigation charges of Rs.50,000/.

23. The complainant is seeking the above mentioned relief w.r.t. compensation. The Hon'ble Supreme Court of India in Civil Appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Ltd. V/s State of UP & Ors.(supra')*** has held that an allottee is entitled to claim compensation and litigation charges under Sections 12, 14, 18 and Section 19 which is to be decided by the adjudicating officer as per Section 71 and the quantum of compensation and litigation expense shall be adjudged by the adjudicating officer having due regards to the factors mentioned in Section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation and legal expenses. Therefore, the complainant may approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the Authority:

24. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016.

i. The respondent/promoter is directed to refund the amount paid by the complainant i.e., Rs.8,98,000/- along with interest at the rate of 11% 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 realisation.

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.

25. Complaint stands disposed of.

26. File be consigned to the registry.

Ashok Sangwan
Member
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 14.08.2024