



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

Complaint no.	:	254 of 2023
Date of Complaint	:	09.02.2023
Date of Decision	:	16.08.2024

Kanta Lamba (Through her Legal Heirs) 1. Amitabha Kakar R/o: J-6, 1 st floor, Saket, South Delhi-110017 2. Deepali Chatrath R/o: J-59, 2 nd floor, Saket, South Delhi-110017		Complainants
Versus		
M/s Ninaniya Estates Limited Regd. office: 160, Karni Vihar, Ajmer Road, Near Rawat Mahila College, Jaipur, Rajasthan- 302021.		Respondent
CORAM:		
Shri Sanjeev Kumar Arora		Member
APPEARANCE:		
Shri Sandeep Nagar		Complainants
None		Respondent

ORDER

1. The present complaint 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 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 allottees 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:

S. N.	Particulars	Details
1.	Name of the project	"Prism portico", Sector- 89, Gurugram.
2.	Project area	5.5 acres
3.	Nature of the project	Commercial Complex
4.	DTCP License no.	179 of 2008 dated 02.05.2017 Valid upto 10.10.2018
5.	Name of licensee	Ninaniya Estates Pvt. Ltd.
6.	Unit no.	PPES-317 & 318, 3 rd floor (page 64 of complaint)
7.	Unit area admeasuring	2100 sq. ft. (page 64 of complaint)
8.	Date of buyer's agreement	04.04.2018 (page 62 of complaint)
9.	Date of start of construction	Not mentioned
10.	Possession Clause	5. That the Company shall complete the construction of the sad unit within 40 months from the date of execution of this Agreement and/or from the start of construction whichever is later and Offer of possession will be sent to the Allottee subject to the condition that all the amounts due and payable by the Allottee by the stipulated date as stated in Annexure-II.....
11.	Due date of possession	04.10.2021



		(04.04.2021+6 months grace period of covid-19)	
12.	Total sale consideration	Rs.1,07,24,700/- (as per payment schedule on page 64 of complaint)	
13.	Amount paid by the complainants	Rs.95,48,000/- (as per ledger account on page 88 of complaint)	
14.	Occupation certificate /Completion certificate	Not on record	
15.	Offer of possession	Not offered	

B. Facts of the complaint:

3. The complainants have made the following submissions: -

- I. That the complainants booked two units/office space being units no. 504 and 505 in project Prism Executive Suites, Prism Tower at Sector-3, Gwal Pahari, Faridabad Road, Gurugram, Haryana 122003. The complainants made a payment of Rs. 70,00,000/- dated 24.02.2012 for an amount of 35,00,000/- each.
- II. That the complainants and respondent entered into memo of understanding both dated 03.03.2012 qua units no. 504 and 505 in the mentioned project for the monthly assured returns of Rs. 70,000/- each month for both units.
- III. That the respondent builder issued allotment letters dated 16.03.2012 qua units no. 504 and 505 in project Prism Executive Suites, Prism Tower at Sector-3, Gwal Pahari, Faridabad Road, Gurugram, Haryana 122003. The respondent builder issued payments receipts both dated 16.03.2012 for an amount of Rs. 35,00,000/- each totaling Rs. 70,00,000/- (Rupees Seventy Lacs Only).

- IV. That the complainants and respondent exchanged previously allotted units being 504 and 505 in project Prism Executive Suites, Prism Tower at Sector-3, Gwal Pahari, Faridabad Road, Gurugram, Haryana 122003 with units bearing no. 317 and 318, office space on 3rd floor in Prism Portico Sector 89, Pataudi Road, Gurugram, Haryana and builder buyer agreement dated 04.04.2018 was executed by the parties.
- V. That the complainants and respondent entered into memo of understanding both dated 04.04.2018 qua units no. 317 and 318 in the mentioned project for the monthly assured returns of Rs. 84,700/- (including TDS) each month for both units.
- VI. That the complainants sent a legal notice to respondent builder asking for the refund of entire paid amount due to breach of contract.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):
- Direct the respondent to refund the paid-sale consideration amount of ₹95,48,000/- to the complainants along with interest at the prescribed rate of interest from 04.04.2018 till the full refund of amount.
 - Direct the respondent to pay the complainants dues of agreed monthly assured returns of ₹25,94,859/- along with interest at the prescribed rate of interest.
 - To grant the cost of litigation of ₹1,00,000/-.
5. The present complaint was filed on 09.02.2023. The authority sent notice which is duly served to the respondent-builder to appear and argue in the matter but on hearing dated 04.08.2023, 10.11.2023, 23.02.2024, 24.05.2024 no one on behalf of the respondent appeared. It shows that the

respondent was intentionally delaying the procedure of the court by avoiding to file written reply. Therefore, the authority assumes/ observes that the respondent has nothing to say in the present matter and accordingly the authority on the proceedings dated 23.02.2024 proceeds with the case exparte.

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 those undisputed documents and submissions made by the parties.

D. Jurisdiction of the authority:

7. The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent 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.

D. 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.

D. II Subject matter jurisdiction

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee's 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 promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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. 2021-2022(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*** and 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 case mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

E. Findings on the relief sought by the complainants.

I. Direct the respondent to refund the paid-sale consideration amount of ₹95,48,000/- to the complainants along with interest at the prescribed rate of interest from 04.04.2018 till the full refund of amount.

II. Direct the respondent to pay the complainants dues of agreed monthly assured returns of ₹25,94,859/- along with interest at the prescribed rate of interest.

13. The complainants 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)

14. Clause 5.1 of the buyer's agreement provides for handing over of possession and is reproduced below:

5. COMPLETION AND POSSESSION

5.1 "That the Company shall complete the construction of the said Unit within 40 months from the date of execution of this Agreement and/or from the start of construction whichever is later and Offer of possession will be sent to the Allottee subject to the condition that all the amounts due and payable by the Allottee by the stipulated date as stated in Annexure - II attached with this agreement including sale price, maintenance charges, security deposit, stamp duty and other charges etc. have been paid to the Company. The Company on completion of the construction shall apply for completion certificate and upon grant of same shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues."

15. **Due date of handing over possession:** As per clause 5.1 of the buyer's agreement, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 40 months from the date of execution of agreement and/or from the date of start of construction. However, no document has been placed on record vide which the date of start of construction can be ascertained. Thus, in this case, the due date has been calculated from the date of execution of buyer's agreement. The buyer's agreement was executed between the parties on 04.04.2018. Therefore, the due date of possession comes out to be 04.04.2021.
16. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the unit within 40 months from the date of execution of

buyer's agreement. The buyer's agreement was executed between the parties on 04.04.2018. Therefore, the due date of possession comes out to be 04.04.2021. **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/due date on or 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. So, in such case the due date for handing over of possession comes out to 04.10.2021.

17. **Admissibility of refund along with prescribed rate of interest:** The complainants is seeking refund the amount paid by them at the prescribed rate of interest 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.

18. 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.
19. 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., 16.08.2024 is **9.10%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%**.

20. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule **28(1)**, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 5.1 of the agreement to sell dated form executed between the parties on 04.04.2018, the possession of the subject unit was to be delivered within a period of 40 months from the date of execution of buyer's agreement which comes out to be 04.04.2021. Moreover, the grace period of 6 months in lieu of Covid-19 is allowed. Therefore, the due date of handing over of possession is 04.10.2021.
21. Keeping in view the fact that the complainants/allottees 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.
22. The due date of possession as per agreement for sale as mentioned in the table above is **04.10.2021**. The authority, observes that even after a passage of more than 6 years (from the date of execution of agreement) till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottees by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the unit which is allotted to them and for which they have paid a considerable amount of money towards the sale

consideration. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottees intends to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.

23. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent /promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

".... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

24. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) 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:

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of

the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

25. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees 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 promoter is liable to the allottees, as the allottees wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.
26. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @11.10% 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 after adjusting the amount/assured return paid by respondent, if any, within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

III. To grant the cost of litigation of ₹1,00,000/-.

27. The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-

6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation 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 shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

F. Directions of the Authority:

28. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:
- i. The respondent/promoter is directed to refund the entire amount i.e., Rs.95,48,000/- received by it from the complainants along with interest at the rate of 11.10% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount after adjusting the amount/assured return paid by respondent, if any.
 - ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
 - iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants and even if, any



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transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of complainant-allottees.

29. Complaint stands disposed of.
30. File be consigned to the registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 16.08.2024



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