



HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	2539 of 2022
Date of filing:	19.09.2022
Date of first hearing:	01.02.2023
Date of decision:	08.11.2023

Rajesh Kumar, S/o Sh. Chandan Singh,
R/o House no.HE-103A, Phase 9,
Sector- 63, SAS Nagar, Mohali, Punjab- 160062

....COMPLAINANT

VERSUS

M/s Konark Rajhans Estates Pvt. Ltd.,
through its Director
Regd. Office: Village Kot, Sector-14, Panchkula Extension-II,
District Panchkula, Haryana.

....RESPONDENT

CORAM: **Dr. Geeta Rathee Singh** **Member**
 Nadim Akhtar **Member**

Present: Adv. Arjun Kundra, counsel for complainant.
 Adv. Vivek Sheoran, counsel for respondent through VC.

ORDER (DR. GEETA RATHEE SINGH - MEMBER)

1. Present complaint was filed on 19.09.2022 by the complainant under Section 31 of the Real Estate (Regulation & Development) Act, 2016 (for short Act of 2016) read with Rule 28 of the Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

A. UNIT AND PROJECT RELATED DETAILS

2. The particulars of the unit booked by complainant, the details of sale consideration, the amount paid by the complainant and details of project are detailed in following table:

S.No.	Particulars	Details
1.	Name of the project	Asha Panchkula, Sector-14, village Kot, Panchkula Extension II.
2.	Unit no.	Shop no.2, ground floor
3.	Area	217 sq. ft.
4.	RERA registered/ not registered	Registered Reg. no.- 173 of 2017 dated 29.08.2017



5.	Date of booking application	24.11.2016
6.	Date of allotment	22.12.2016
7.	Date of Flat/ Builder Buyer Agreement	31.03.2017
8.	Deemed date of possession (36+6)	30.09.2020 As per clause 9.2, the company endeavoured to complete the construction of said complex in which the said unit is located within a period of 36 months with a grace period of 6 months, and subject to Force Majeure circumstances from the date of execution of the agreement in accordance with the approval plans and specifications see and accepted by the allottee.
9.	Basic sale price	Rs.18,15,422/-
10.	Total sale consideration	Rs.19,53,000/-
11.	Amount paid by complainant	Rs.4,41,875/-
12.	Offer of possession	Not offered

B. FACTS OF THE CASE AS STATED IN THE COMPLAINT:

3. That complainant booked a shop on 24.11.2016 by paying a booking amount of Rs.30,000/-. The said application was accepted and complainant was allotted retail shop no.2 on ground floor vide allotment letter dated

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22.12.2016. Total sales consideration of the plot was fixed at Rs.19,53,000/- including additional charges towards EDC, IDC and IFMS. Both parties signed builder buyer agreement on 31.03.2017 before which complainant had made substantial payment of Rs.2,41,875/- to respondent company. Complainant disputes terms of builder buyer agreement being arbitrary and consisting of unilateral terms. It is submitted that when complainant protested to such terms, he was threatened with cancellation of allotment and forfeiture of the amount already paid. Thus, seeing the loss of any leverage the complainant signed the builder buyer agreement.

4. That as per clause 9.2 of the builder buyer agreement, possession was to be delivered within a period of 36 months, further extendable by a period of 6 months from the date of agreement. Therefore, deemed date of possession in this case is 30.09.2020 (36+6 months). It is submitted that respondent has miserably failed to complete construction and development of commercial building within the prescribed time frame and didn't offer possession of the unit.
5. That till date, the complainant has made payments of Rs.4,41,875/- to the respondent company in the following manner:



Sr. no.	Receipt no.	Receipt date	Amount (Rs.)	Cheque no.	Cheque date
1.	222	24.11.2016	30,000/-	666369	23.11.2016
2.	223	07.12.2016	2,11,875/-	458873	07.12.2016
3.	360	29.05.2017	2,00,000/-	NEFT	29.05.2017
	Total	-	4,41,875/-	-	-

Such can be confirmed from the receipts at page no.66-68 of the complaint.

6. That it is pertinent to mention that progress at the site has been little, and upon seeing failure on part of respondent to complete the project in due time, complainant has asked for refund of his hard-earned money along-with applicable penalty from respondent on several occasions via e-mails dated 21.09.2018, 18.04.2019, 01.03.2021, 03.03.2021 and 13.08.2022 but there was no positive response.
7. That respondent is acting in an unfair manner and in its reply to e-mail dated 03.03.2021, threatened the complainant with forfeiture of tens of thousands of rupees for no fault of the complainant.
8. That factum of abandonment of project was discussed in meeting that took place between management and allottees of shops , wherein representatives of respondent expressed their inability to confirm possession date.
9. That complainant suffers from 70% permanent disability in right leg and his plight is only aggravated by conduct of respondent. Therefore, complainant

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prays for refund along with permissible interest as per Rule 15 of HRERA Rules, 2017 framed under RERA Rules, 2016, on the ground that respondent has not completed the project even after lapse of 7 years from the date of booking and it is not likely to be completed in near future due to mismanagement.

C. RELIEF SOUGHT:

10. In view of the facts mentioned above, complainant prays for the following relief(s):-

- a) Direct the respondent to refund the entire amount paid till date i.e. Rs. 4,41,875/- to the complainant along with interest as prescribed in Rule 15 of HRERA Rules on the amounts from the respective dates of deposit till its actual realization within 90 days as per section 18(1) of the Real Estate (Regulation and Development) Act, 2016;
- b) Any other relief/direction which the Hon'ble Authority deems fit as per the facts and circumstances of the matter.

D. REPLY:

11. The respondent vide its reply dated 27.04.2023, submitted that the captioned complaint is not maintainable as builder buyer agreement clearly provides a binding arbitration clause. It is further submitted that respondent had never refused to hand over possession of commercial shop booked by the



complainant in the Project "Asha Panchkula" to complainant. That construction work is presently carried on in full swing at project site and it would be offering possession of the booked project in near future.

12. That respondent submits that complainant has been demanding payments made by him on a recurring basis, without paying the instalments due as per the payment schedule. Respondent had stated that it had never refused to deliver the possession and construction work is going on at an advanced stage. It is further stated that completion of project was tentative and possibility of delay on part of respondent cannot possibly provide a cause of action for delay. Besides, there are several factors which contributed to the delay including, economic meltdown, lockdown due to Covid-19 pandemic, sluggishness in the real estate sectors, defaults committed by the allottees in making timely payments of the instalments and obligation of the Government/HUDA to provide necessary infrastructural facilities like electricity, water, sewage and road upto periphery for the said project. Thus respondent are entitled to avail extension of time and delay cannot be attributed to them solely.
13. The respondent submits that as per mandate of the constitution bench of the Hon'ble Supreme Court in the case of *Chand Rani v. Kamal Rani, 1993(1) SCC 519 and other decisions namely, Gomathinayagam Pillai v.*



Palaniswami Nadar, 1967(2) SCC 227 and Govind Prasad Chaturvedi v. Hari dutt Shastri, 1977(2) SCC 539, it is held that fixation of period within which contract has to be performed does not make the stipulation as to time, the essence of the contract and when a contract relates to a sale of immovable property, it will normally be presumed that time is not the essence of the contract. Therefore, the respondent submits that no question of refunding arises with any form of interest.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT AND RESPONDENT:

14. The counsel for complainant reiterated the facts of the case as stated in the complaint. Ld. counsel further submitted that the project is still incomplete, and respondent is not in a position to complete the project and deliver possession of the same any time soon. Ld. counsel appearing on behalf of respondent admitted the fact that respondent is not in a position to hand over possession in near future and is ready and willing to refund the amount paid after deduction of applicable taxes.
15. Ld. Counsel for respondent also raises issue qua non-joinder of other co-applicants, namely Mr. Ramesh Kumar ad Mrs. Roshni in the array of parties as complainant. The same was denied by ld. counsel for complainant as wrong. He submits that it has been stated in the complaint itself that



earlier the shop was co-allotted in name of Mr.Ramesh Kumar and Mrs.Roshni, which was subsequently endorsed and nominated/transferred solely in the name of the present complainant. He further submitted that respondent in its reply never objected to the said fact as stated in the complaint, in-fact mentioned that such fact need no reply. This implies that respondent has specifically admitted endorsement and nomination/transfer in the name Mr.Rajesh Kumar (the present complainant). Furthermore, ld.counsel for complainant stated that authenticity of such endorsement can be seen from the allotment letter dated 22.12.2016, builder buyer agreement dated 31.03.2017, payment receipts dated 24.11.2016, 07.12.2016 and 29.05.2017 which clearly bear the endorsement and the nomination/transfer in the name of Mr.Rajesh Kumar (the present complainant).

16. Ld. Counsel for the complainant submitted that present complaint is squarely covered by law settled in the recent decisions of this Hon'ble RERA Authority Panchkula- regarding same project of the present builder in which this Hon'ble Authority was pleased to allow full refund along-with interest in case titled: **Rekha Bhardwaj V Konark Rajhans Estates Pvt. Ltd.- Complaint no 418 of 2022 dated 29.11.2022**. Thus, present complaint be disposed off in terms of above mentioned judgement.



F. ISSUES FOR ADJUDICATION:

17. Whether complainant is entitled to refund of the deposited amount along with interest in terms of Section 18 of Act of 2016?

G. OBSERVATIONS OF THE AUTHORITY:

18. The Authority has gone through rival contention and documents placed on record. It is admitted by both parties that complainant was allotted shop no.2, on ground floor in project of respondent namely, 'Asha Panchkula' for a total sale consideration of Rs.19,53,000/- vide allotment letter date 22.12.2016; builder buyer agreement was signed between respondent and complainant along-with Mr. Ramesh Kumar ad Mrs. Roshni as co-allottees.
19. During course of hearing, Ld.counsel for respondent orally averred that complaint deserves to be dismissed for non-joinder of parties as names of Mr. Ramesh Kumar ad Mrs. Roshni are referred to as co-allottees in builder buyer agreement. Also payment receipts attached and relied upon by complainant also mentions name of afore-mentioned co-allottees. However on perusal of reply submitted by respondent, it is observed that respondent nowhere in its reply had denied the fact that complaint is not maintainable due to non-joinder of parties. Further, in builder buyer agreement annexed as C-2 at page 65, it is clear that shop in question was transferred solely in name of the complainant by way of endorsement, meaning thereby that it is



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respondent itself who had allowed and acknowledged the fact that shop stands allotted in name of complainant. Furthermore, respondent has not challenged the endorsement at last page of said builder buyer agreement (pg. no.65 of BBA). Thus, the oral averment of respondent regarding non-maintainability of complaint on grounds of non-joinder of parties deserves to be dismissed in limine.

20. The respondent has also taken an objection that the complaint is not maintainable as there is an "arbitration clause" in builder buyer agreement and any dispute if so-ever shall be decided through arbitration. In this regard Authority observes that generally, if the flat-purchase agreement has an arbitration clause, then as per Section 8 of the Arbitration and Conciliation Act, arbitration becomes mandatory. However, provisions of RERA Act 2016 are said to override it being a special statute. The disputes pertain to developer delaying the possession of the flat & the claims are for the refund. Section 18 of RERA act provides for expedited refunds but the buyer, if so chooses, can or cannot execute the Arbitration Agreement is a question of law.
21. The Authority is of the opinion that jurisdiction of the Authority cannot be fettered by the existence of an arbitration clause in the agreement as it may be noted that Section-79 of the RERA Act bars the jurisdiction of civil



courts about any matter which falls within the purview of this Authority, or the Real Estate appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, Section-88 of the RERA Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the Authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly on *National Seeds Corporation Ltd. v. M. Madhusudhan Reddy and Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the Authority would not be bound to refer parties to Arbitration even if the agreement between the parties had an arbitration clause.

Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short the Real Estate Act)", Section 79 of the said Act reads as follows-


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"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

*It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in *A. Ayyaswamy (supra)* the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act*

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56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated land of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section B of the Arbitration Act."

22. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the application form, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629- 30/2018 in civil appeal no. 23512-23513 of 2017*** decided on 10.12.2018 has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be



binding on all courts within the territory of India and accordingly, the Authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength of an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

Furthermore, Delhi High Court in 2022 in ***Priyanka Taksh Sood V. Sunworld Residency, 2022 SCC OnLine Del 4717*** examined provisions that are "Pari Materia" to Section 89 of RERA act; e.g. Section 60 of Competition Act, Section 81 of IT Act, IBC, etc. It held "there is no doubt in the mind of this court that giving a purposive interpretation to Sections 79, 88 and 89 of the RERA Act, there is no bar under the RERA Act from application of concurrent remedy under the Arbitration & Conciliation Act,



and thus, there is no clash between the provisions of the RERA Act and the Arbitration & Conciliation Act, as the remedies available under the former are in addition to, and not in supersession of, the remedies available under the Arbitration & Conciliation Act.” Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.

23. Therefore, in view of the above judgements and considering the provisions of the Act, the Authority is of the view that complainants are well within right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and Real Estate (Regulation and Development) Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this Authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.
24. Furthermore, as per clause 9.2 of builder buyer agreement, the possession of shop was to be delivered within a period of 36 months, further extendable by a period of 6 months from the date of the agreement subject to force majeure conditions. The respondent has taken a plea that the time for delivery of



possession as provided in clause 9.2 was tentative and subject to force majeure conditions. Respondent has stated that due to certain form of conditions like economic meltdown, lockdown due to Covid-19 pandemic, sluggishness in the real estate sectors, defaults committed by the allottees in making timely payments of the instalments and obligation of the Government/HUDA to provide necessary infrastructural facilities like electricity, water, sewage and road upto periphery for the said project, project could not be completed within time. However, it is noted that respondent has merely made statements with respect to force majeure conditions causing delay in construction and handing over the possession. Respondent has failed to place on record any document supporting his contentions. It is also pertinent to mention that the builder buyer agreement was executed on 31.03.2017 and 36 months from the said date comes out to be 31.03.2020 which is only 7 days after nationwide lockdown was imposed (24.03.2020). Even if this grace period of 6 months on account of covid-19 is granted to respondent, then also respondent was obliged to hand over possession by 30.09.2020. However, it is a matter of fact that till date possession has not been handed over. In such circumstances, complainant/allottee is demanding refund of amount paid along-with interest.

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25. Furthermore in view of opinion stated by Hon'ble Supreme Court in Civil Appeal No. 6745-6749 of 2021 titled as "*M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of U.P & Ors.*", it has been highlighted that the allottee has an unqualified right to seek refund of the deposited amount if delivery of possession is not done as per terms agreed between them. Para 25 of this judgment is reproduced below:

"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."



This decision of the Supreme Court settles the issue regarding the right of an aggrieved allottee such as in the present case seeking refund of the paid amount along with interest on account of delayed delivery of possession. Thus, in terms with the judgment and in view of above facts and records placed, Authority finds it to be fit case for allowing refund in favor of complainants. As per Section 18 of Act, interest shall be awarded at such rate as may be prescribed. The term 'interest' is defined under Section 2(z) of the Act which is as under:

(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;



Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is 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 (NCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public".

26. 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. 01.11.2023 is 8.75%. Accordingly, the prescribed rate of interest will be MCLR+2% i.e. 10.75%.
27. Accordingly, respondent will be liable to pay the complainants interest from the date amounts were paid by him till the actual realization of the amount. Hence, Authority directs respondent to refund to the complainants the paid amount of ₹4,41,875/-/- along with interest at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development) Rules, 2017 i.e., at the rate of SBI highest marginal cost of lending rate (MCLR) + 2 % which



as on date works out to 10.75% (8.75% + 2%) from the date amounts were paid till the actual realization of the amount. Authority has got calculated the total amount along with interest at the rate of 10.75% till the date of this order and said amount works out to ₹ 7,60,796/- as per detail given in the table below:

Sr. No.	Principal Amount	Date of payment	Interest Accrued till 08.11.2023 (in Rs.)	TOTAL (in Rs.)
1.	30000/-	24.11.2016	22451/-	52451/-
2.	211875/-	07.12.2016	157751/-	3,69,626/-
3.	200000/-	29.05.2017	138719/-	338719/-
Total	4,41,875/-	-	3,18,921/-	7,60,796/-

The said receipts in relation to the above amounts are verified and accepted by the Authority which are attached with the complaint at page no.66-68.

H. DIRECTIONS OF THE AUTHORITY:

28. Taking into account above facts and circumstances, the Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:



- (i) Respondent is directed to refund the entire amount of **Rs.7,60,796/-** to the complainant.
- (ii) A period of 90 days is given to the respondent to comply with the directions given in this order as provided in Rule 16 of Haryana Real Estate (Regulation & Development) Rules, 2017 failing which legal consequences would follow.
- (iii) The complaint is accordingly **disposed of**. File be consigned to Record room after uploading order on the website of the Authority.



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NADIM AKHTAR
[MEMBER]



.....
DR. GEETA RATHEE SINGH
[MEMBER]