

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

Complaint no. : 4840 of 2022  
Date of complaint : 14.07.2022  
Date of order : 23.10.2024

Bhaskar Das,  
R/o: - 13/29A, 3<sup>rd</sup> Floor, Block-13,  
Moti Nagar, New Ramesh Nagar, Delhi-110015.

**Complainant**

Versus

M/s KNS Infracon Private Limited.  
**Registered Office at:** - 517A, Nariman Manzil, 23,  
Barakhamba Road, Connaught Place, New Delhi.

**Respondent**

**CORAM:**  
Ashok Sangwan

**Member**

**APPEARANCE:**  
Ajay Kumar (Advocate)  
Rishabh Jain (Advocate)

Complainant  
Respondent

**ORDER**

1. This 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 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 under the provision of the Act or the Rules and regulations made thereunder or to the allottee as per the agreement for sale executed *inter se*.



**A. Unit and project related details**

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

S. No.	Heads	Information
1.	Project name and location	'Capital Gateway, Sector-111, Gurugram
2.	Project area	10.462 acres
3.	Nature of the project	Residential
4.	DTCP license no. and validity status	34 of 2011 dated 16.04.2011 valid upto 15.04.2024
5.	Name of licensee	KNS Infracon Pvt. Ltd. and others
6.	RERA registered/ not registered	Registered vide regd. No. 12 of 2018 dated 10.01.2018
7.	Unit no.	203, 2 <sup>nd</sup> floor, tower B (pg. 24 of complaint)
8.	Date of execution of buyers' agreement	21.08.2017 (pg. 21 of complaint)
9.	Payment plan	Construction linked
10.	Total sale consideration	Rs. 1,46,55,178/- (pg. 24 of complaint)
11.	Total amount paid by the complainant	Rs.93,00,000/- (as per ledger account dated 31.03.2024 at page 3-4 of application dated 09.10.2024 and admitted by the counsel for the complainant vide proceedings dated 16.10.2024]
12.	Due date of delivery of possession as per possession clause 2.1 (within 48 months from the date of sanction of building plan which is 07.06.2012) (Grace period of 6 months is not allowed)	07.06.2016



13.	Occupation certificate	Not obtained
14.	Offer of possession	Not offered
15.	Legal Notice for refund	01.04.2019 (Annexure C-6)

**B. Facts of the complaint**

3. The complainant has made the following submissions: -

- I. That vide flat buyer agreement dated 21.08.2017, the complainant was allotted a flat bearing no. B-203, admeasuring 2102 sq. ft, 2nd Floor, Tower-B in the project of the respondent named "Capital Gateway", at Sector-111, Gurugram for a total sale consideration of Rs.1,46,55,178/- against which the complainant has paid an amount of Rs.1,29,50,000/- from time to time as per the demands of the respondent.
- II. That the respondent demanded more amount from the complainant without reaching to the milestone of the construction and forced him to take home loan from bank. The complainant, under pressure of the respondent took loan a sum of Rs.1,03,50,000/- from the bank which was directly paid to the respondent.
- III. That the complainant was not in condition to took this huge amount of loan from the bank for making a payment to the respondent, but the respondent requested that it will pay EMI of loan amount till the possession of flat, and the complainant left with no choice agreed for this request and avail loan from the bank, but the respondent fail to make regular payment of EMI and stop making payment of EMI last 4-5 months.
- IV. That due to unprofessional attitude and malafide intention of respondent, the complainant is facing various legal proceeding and



trauma with the bank due to no-payment of EMI and not able to concentrate on his work. That the bank also sent a notice for recovery and invocation of tripartite agreement to the respondent and requested it to invoke the said tripartite agreement and arrange to make the payment of complete loan amount, but the respondent never bother to respond to the bank to close the said loan amount.

- V. That as per clause 2 of the agreement, the possession of the unit was to be handed over within 24 months from the date of execution of the said agreement, but the construction work is very slow, and it is not looking to be complete within 2 year or near future.
- VI. That due to the above said reasons, the complainant has no option other than cancelling his booking and take refund with interest from the respondent. Therefore, the complainant sent a legal notice dated 28.03.2019 through his advocate for the refund of paid-up amount with interest, but the respondent chooses not to reply to the said legal notice.
- VII. That in view of the above said facts and circumstances of the case, the complainant is seeking refund of his paid amount with interest.

**C. Relief sought by the complainant:**

4. The complainant has sought following relief(s):
- I. Direct the respondent to refund the paid-up amount alongwith interest.
  - II. Direct the respondent to refund the loan amount to the bank.
  - III. Direct the respondent to pay litigation cost.

**D. Reply by the respondent.**

5. The respondent has contested the complaint on the following grounds:
- i. That the respondent had applied for environment clearance on 20.10.2011. However, the decision and issuance of certificate to the promoter/developer remained in abeyance for a long time due to



sudden demise of the Chairman of Environmental Impact Assessment (EIA) Committee in an unfortunate road accident. The developer finally got the environment clearance on 17.06.2013. Owing to this, the construction work of the project itself started late.

- ii. That the respondent had applied for the revision in building plans of the said project before the appropriate authority. However, for no fault of the respondent, the plans were approved by the department only after a delay of 2 years. Owing to this, the construction of project could not be started in a timely manner.
- iii. That the complainant in the present case is not a consumer rather an 'investor' who falls outside the purview of the Act, 2016 more specifically in view of the preamble of the Act, 2016 which states to protect the interest of the consumers.
- iv. That on 21.08.2017, the flat buyer's agreement was executed between the parties, wherein flat bearing no.203, 2<sup>nd</sup> Floor, B Tower was allotted to the complainant.
- v. That the structure of the said project in question is complete. Moreover, it is pertinent to state that the respondent has initiated the process for obtaining occupation certificate for Phase-I of the said project as all the construction and development activities are complete.
- vi. That for the reasons beyond the control of the respondent, the said project has been delayed. As a matter of fact, economic meltdown, financial crisis, delay in granting sanctions and approvals from the concerned government departments, sluggishness in the real estate sector, increase in cost of construction, default by allottees in making timely payments, multiple disputes between the workforce, labour and contractors resulting into shortage of labour and workforce and

change in contractors, non-availability of sufficient water for construction due to restrictions imposed by local administration, restricted construction activities towards protection of the environment as directed by the local administration and the NGT and moreover, obstruction in construction due to Covid-19 outbreak are some of the impeding reasons beyond the control of the respondent.

- vii. That simultaneously, the respondent is aware of the obligations and duties to complete the said project and that is why promoter approached the 'SWAMIH Investment Fund I' of SBICap Ventures Limited.
  - viii. That there is no further deficiency as claimed by the complainant against the respondent and no occasion has occurred deeming indulgence of the Hon'ble Authority. Hence, the present complaint is liable to be dismissed.
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**

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**

7. 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**

8. 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;

**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.

9. 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.

**F. Findings on the objections raised by the respondent.**

**F. I Objection regarding the complainant being investor.**

10. The respondent has taken a stand that the complainant is an investor and not a consumer. Therefore, he is not entitled to the protection of the Act and is not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. It is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise



*transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the agreement, it is crystal clear that the complainant is an allottee as the subject unit was allotted to him by the promoter. Further, the concept of investor is not defined or referred in the Act. Moreover, the Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. In view of the above, the contention of promoter that the allottee being investor is not entitled to protection of this Act stands rejected.

#### **F.II Objections regarding force majeure.**

11. The respondent/promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as delay on part of govt. authorities in granting approvals and other formalities, shortage of labour force in the NCR region, ban on the use of underground water for construction purposes, default by allottees in making timely payments, various orders passed by NGT, major spread of Covid-19 across worldwide, etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 07.06.2016. Moreover, time taken in governmental clearances cannot be attributed as reason for delay in project. Further, the events alleged by the respondent do not have any impact on the project being developed by the respondent. Furthermore,





some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

**F.II Objections regarding maintainability of complaint.**

12. The counsel for respondent vide written submissions dated 04.09.2024 has raised his contention that the complainant has no locus-standi in the matter as he has not paid a single penny from his pocket for purchase of the unit in question. Further, the complainant vide agreement to sell dated 20.09.2017 executed between the parties and one M/s Geemed Land and Building Developers Pvt. Ltd. has already sold the unit in question to M/s Geemed Land and Building Developers Pvt. Ltd. The respondent has submitted that the complainant has submitted five cheques bearing nos. 684008, 684004, 684009, 684010 and 684005 amounting Rs.30,00,000/- to the respondent towards part payment of the sale consideration against which it has issued receipts bearing nos. 8810, 8848, 8849, 8851 and 8856 respectively to him. The complainant initially holds encashment of aforesaid cheques stating that his account got blocked due to KYC issue. However, later on he had taken back those cheques quoting that he will issue fresh cheques of another bank account. The Authority observes that although the complainant has not invested a single penny from his bank account, but it is an admitted fact that the complainant has paid an amount of Rs.93,00,000/- through bank loan to the respondent towards the unit in question and as per the record the loan account of the complainant has not been closed till date and the amount still lies with the



respondent. Moreover, as far as objection w.r.t maintainability of complaint on the ground of agreement to sell dated 20.09.2017 is concerned, the Authority observes that vide proceedings dated 18.10.2023, the Authority after hearing both the parties at length has already held the complaint maintainable as there was no sale consideration mentioned in the said agreement to sell dated 20.09.2017 and no transfer paper of possession has been handed over by the complainant. Further, it is evident from the record that no such sale deed has been executed as stipulated in the said agreement and the property still stands in the name of the complainant. In view of the above, the objection of the respondent w.r.t maintainability of complaint stands rejected.

**G. Findings on the relief sought by the complainant.**

**G. I Direct the respondent to refund the paid-up amount alongwith interest.**

**G.II Direct the respondent to refund the loan amount to the bank.**

13. 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."*

14. Clause 2.1 of the apartment buyer's agreement dated 21.08.2017 (in short, agreement) provides for handing over of possession and is reproduced below:

**2.1 Possession**

*"Subject to clause 9 or any other circumstances not anticipated and beyond control of the first party/conforming party and any restraints/restrictions from any court/authorities and subject to the purchaser having complied with all the terms of this agreement including but not limited timely payment of total sale consideration and stamp duty and other charges and having complied with all provisions, formalities documentation etc. as prescribed by the **first party/conforming party proposes to handover the possession of the flat to the purchaser within approximate period of 48 months from the date of sanction of building plans of the said colony. The purchaser agrees and understands that the first party/conforming party shall be entitled to a grace period of 180 days after the expiry of 48 months for applying and obtaining OC in respect of the colony from the concerned authority..."***

*(Emphasis supplied)*

15. 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 allottees that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees 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 allottees of their 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 allottees are left with no option but to sign on the dotted lines.

16. **Due date of possession and admissibility of grace period:** The respondent/promoter proposed to hand over the possession of the said unit within a period of 48 months from the date of sanction of building plans. The building plans were approved on 07.06.2012. The said possession clause incorporates qualified reason for grace period/extended period of 6 months. Since possession clause 2.1 of the BBA incorporates qualified reason which provides a pre-condition that the entitlement of said grace period of 6 months is dependent of the situation of respondent applying for or obtaining occupation certificate from the competent Authority but as per the given facts it has failed to apply for occupation certificate to the competent authority within the stipulated time. Accordingly, the authority literally interpreting the same and disallows this grace period of 6 months to the promoter at this stage (inadvertently grace period of 6 months was allowed in proceedings dated 24.07.2024). Therefore, grace period of six months as per clause 2.1 of buyer's agreement is disallowed and not included while calculating the due date of handing over of possession. Hence, the due date for handing over of possession comes out to be 07.06.2016.
17. **Admissibility of refund at prescribed rate of interest:** The complainant is seeking refund of the amount paid by him at the prescribed rate of interest 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.*

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., 23.10.2024 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 documents available on record as well as submissions made by the parties, 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 2.1 of the buyer's agreement executed between the parties, the possession of the subject apartment was to be delivered within a period of 48 months from date of sanction of building plans. The date of sanction of building plan was 07.06.2012. Further, the grace period of 6 months is disallowed for the reason quoted above. As such the due date of handing over of possession comes out to be 07.06.2016. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to him and

for which he has paid a considerable amount of money towards the sale consideration.

21. Keeping in view the fact that the complainant/allottee wishes to withdraw from the project and is 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 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 allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has 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....."*

23. Further, 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. observed as under: -

*"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."*

24. 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 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. 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 by the promoter in respect of the unit with interest at such rate as may be prescribed.
25. 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 i.e. Rs.93,00,000/- 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 within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

26. The respondent shall get the complainant's loan account closed after settling the dues with the bank from the above refundable amount and thereafter, balance if any, shall be refunded to the complainant.

**G. III Direct the respondent to pay litigation charges.**

27. The complainant is seeking above mentioned 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. (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 regard 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 is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

**H. 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 function entrusted to the authority under section 34(f):
- i. The respondent/promoter is directed to refund the paid-up amount i.e. Rs.93,00,000/- received by it from the complainant 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.



- ii. The respondent is further directed to get the complainant's loan account closed after settling the dues with the bank from the above refundable amount and thereafter, balance if any, shall be refunded to the complainant.
- 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.
29. Complaint stands disposed of.
30. File be consigned to registry.

**(Ashok Sangwan)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram  
Dated: 23.10.2024

**HARERA**  
**GURUGRAM**