

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

Complaint no.	613/2018/873/2021
Date of filing of complaint	26.07.2018
Date of decision	29.10.2024

Mridula Parti and Partha Sarathi De R/O: D-99, (G.F), South City-II, Gurugram-122018, Haryana	Complainants
Versus	
M/S Microtek Infrastructures Pvt. Ltd. Regd. Office: Vatika City Point, 3 rd Floor, M.G. Road, Gurugram-122002 And H-41, Udyog Nagar, Main Rohtak Road, New Delhi-110041	Respondents

CORAM:	
Shri Arun Kumar	Chairman
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. Sukhbir Yadav (Advocate)	Complainants
Ms. Shriya Takkar and Ms. Smriti Srivastava (Advocates)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 complainant, 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	"Greenburg", Sector 86, Gurugram
2	Project area	14.643 acres
3	Nature of the project	Residential
4	DTCP license no. and validity status	104 of 20010 dated 03.12.2010
5	RERA Registered/ not registered	Not registered
6	Unit no.	602, 6 th floor, Tower-J
7	Unit area admeasuring	1480 sq. ft.

	Date of allotment letter	20.05.2015 (page 54 of complaint)
8	Date of execution of agreement to sell	21.05.2015 (Page 12 of complaint)
10	Possession clause	11 The Project Developer based on its present plans and estimates and subject to all just exceptions endeavours to complete construction and offer possession of the Said Building/Said Apartment within a period of Thirty Nine (39) months from the date of construction i.e., 1st October, 2013 unless there shall be delay or failure due to Force Majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total Price and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement.
13	Due date of possession	01.01.2017 (Calculated Thirty Nine (39) months from the date of construction i.e., 1st October, 2013)
14	Basic sale consideration	Rs 1,02,64,540/- (As per page no. 54 of complaint)
15	Amount paid by the complainant	Rs. 40,16,977/- (As alleged by the complainant)
17	Occupation certificate /Completion certificate	27.07.2017

		(page no. 2 of the written statement by the respondent)
18	Offer of possession	14.07.2018 (page no. 4 of the written statement by the respondent)

B. Facts of the complaint:

3. That the complainant is an NRI, an Australian Citizen. On her visit to India in may/june 2015 the complainant got persuaded by various advertisements in print as well as electronic media, the complainant booked an apartment bearing, floor no.6, Tower No.J-602 measuring 1480 sq ft. At the time of booking, the complainant had visited the office of the respondent no. 1 and it was assured and promised by the respondent no. 1, its directors, officials, employees etc. that the respondent no. 1 was a reputed builder and the material utilized in the said project is of very high quality, and that the possession of the flat would be handed over in January, 2017 i.e. within a period of 39 months from the date of construction i.e. 1st October 2013.(S.11(a)/Page19) of the apartment buyer's agreement.
4. That an apartment buyer's agreement was executed between the complainant and the respondent no. 1 on 21.5.2015 in respect of the said flat with basic sale price being at the rate of Rs. 6,935.50p. per square feet. The flat was purchased as per sub-vention plan and accordingly a 30% payment, amounting to Rs. 40,16,977/- was made via bank cheques/receipts as shown below:-

Amount (Rs)	Receipt No.	Date
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Rs. 24,80,481/-	MG/RPT/0594	01.06.2015
Rs. 15,00,000/-	MG/RPT/0592	20.05.2015
Rs. 22,032/-	MG/CTV/542	02.06.2015
Rs. 14,464/-	MG/CTV/0541	02.06.2015
Rs. 40,16,977/-	Total	

5. The complainant moved an application dated 25.04.2016, addressed to the Director, M/s Microtek Infrastructures Pvt. Ltd., requesting them to add the name of her brother, Mr. ParthaSarathi De, as a co-owner of the apartment, and submitted all the requisite documents in this regard. The company was pleased to accede to her request and accordingly made an endorsement on the reverse side of the allotment letter, dated 20.05.2015, recognizing and endorsing the above said two names as the co-owners of the apartment aforesaid.
6. That as per clause 11(a) of the apartment buyer agreement, the respondent no.1 was to deliver the said flat within thirty nine months (39) from the date of construction i.e. 1st October 2013 and, therefore, as per above said agreement, the possession of the flat was to be given on or before January 2017.
7. That, since the due date of delivery of the flat was January 2017, the complainant moved out from Australia with all her personal belongings in anticipation of the delivery of the above said flat and arrived in India in December, 2016. However, the respondent no.1 failed to honor their commitment, rendering the complainant homeless and without her

belongings shipped from Australia. So much so the respondents never kept the complainant informed about the stage of construction/status of the project. Consequently the personal belongings had to be consigned to a warehouse in Bangalore. As a result, the complainant was forced to take shelter at her brothers place at D-99, (G.F.), South City-II, Gurgaon and also incur huge bills for the goods kept in warehouse at Bangalore.

8. That the complainant has been suffering at the hands of the respondent No.1 as she is to live at her brother's house without her personal belongings, which is lying in a warehouse at Bangalore. That a period of over one and a half year has lapsed since the builder/project developer had promised to deliver the actual physical possession of the property to the buyers.

C. Relief sought by the complainant:

9. The complainant has sought following relief(s):
 - i. Direct the respondent to refund the entire amount paid by the complainant alongwith prescribed rate of interest.

D. Reply by respondent:

10. That the complaint filed by the complainants before the Authority is false, misconceived, erroneous, untenable in the eyes of law as well as on facts both. The complainants have misdirected themselves by filing the above untenable complaint before this Authority as the reliefs claimed by the complainants are beyond the jurisdiction of this Authority and the Authority cannot adjudicate upon the same. Since the Director Town & Country Planning Haryana issued occupation certificate vide letter

bearing Memo No. ZP-705/SD(BS/2017/17960) dated 27.07.2017 regarding the project in question after verifying about all the facts and as such the respondent was not required to get its project registered under the RERA Act before the Authority and the complaint is liable to be dismissed on this ground alone.

11. That in view of the fact that the building was ready for handing over the possession of the same to the prospective buyers after obtaining the occupation certificate. However, after that due to some unforeseen circumstances beyond the control of the respondent no.1 happened due to which some delay occurred in handing over the possession. The respondent no.1 was not anticipating any such problems would come in handing over the possession of the flats to the respective buyers including complainants as the respondent were sincerely, honestly and earnestly making all efforts to complete the project within time and were committed to deliver the same to the satisfaction of its purchasers/buyers.
12. That Fire Department, Haryana also issued a provisional NOC regarding the project on 19.7.2017 in respect of the various towers. As detailed above the Respondent applied for the occupation certificate in January, 2017 which was issued by Director, Town and Country Planning, Haryana on 27.7.2017 thereby authorizing the respondent to allow allottees to occupy the booked residential apartments after fulfilling certain requirements there under. That as per the provisional NOC dated 19-07-2017, issued by the Director, Fire Services (Haryana), Panchkula, the department put a new condition that first the respondent has to provide double staircase to each towers/buildings within one year from the date of approval of Hon'ble CM as mentioned in the said letter dated

19.07.2017. The respondent was put in utter surprise as there was no such policy earlier and they left with no other option but to construct an additional second staircase to the various towers of the Group Housing project "MICROTEK GREENBURG" including the tower wherein the flat of the complainants is constructed. Accordingly the respondents had to complete further civil work to this extent only by constructing second staircase. In view of this fact and construction of second staircase in the various towers of the project "MICROTEK GREENBURG" and the traffic movement therein being in clockwise direction, the respondents could not handover the possession of flats to its customers as there was a grave risk and danger to the safety and it may cause any mis-happening to the proposed residents. Moreover, the Chief Architect of the above referred Project "MICROTEK GREENBURG" has also issued its certificate dated 09-01-2017 in this regard.

13. The respondent had already applied for the Electricity connection on or about 30.12.2016. However, the installation of the same was delayed by the concerned department and ultimately the Electricity meter was installed on the above referred project site of "MICROTEK GREENBURG" on or about 20.08.2018 by DHBVN. Hence, the Respondents could not offer the possession of the flats to the buyers earlier in the absence of electric supply.
14. That the above circumstances were beyond the control of the respondents which was the reason for delay in offering the possession of the apartments to their respective buyers. The complainants filed present complaint on or after 18.07.2018. However, the letter for offer of possession dated 14.07.2018 was already sent to the complainants, to take

possession of the apartment after clearing all the balance dues and complete all the pending formalities, through courier on 16.07.2018 on the same address on which the original documents (after adding the name of her brother) were supplied to the complainant vide letter dated 06-07-2018 duly received by the complainant, but the complainants did not respond to the same. Though the respondents received copy of the complaint under reply much after the same on 24.07.2018. That even on 27-07-2018, the scanned copy of Letter for Offer of Possession dated 14-07-2018 was sent to the complainants through email provided by them.

15. That again on 28.07.2018, the copy of the letter for offer of possession dated 14.07.2018 was sent through Speed Post and Registered Post to the complainants, but the same were returned by the complainants after opening the envelope and going through the contents the letter of offer of possession dated 14.07.2018 willfully and knowingly with remarks "REFUSED TO ACCEPT".
16. That respondent no. 1 despite adverse market conditions, has completed the project and has offered the possession to the allottees. It is also relevant to mention herein that total 14 towers have been built by respondent no.1 and in total 738 apartments have been constructed by respondent no.1 and out of which only 117 apartments have been booked and despite that respondent no.1 has completed construction of all the apartments as per sanctioned building plan.
17. All other averments made in the complaint were denied in toto.
18. 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 submissions made by the parties.

E. Jurisdiction of the authority:

19. 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

20. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by the Town and Country Planning Department, the jurisdiction of the Real Estate Regulatory Authority, Gurugram shall be the entire Gurugram District for all purposes 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

21. 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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 promoter, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.

22. 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 complainant at a later stage.
23. 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 followed 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."

24. 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

G. Finding on the relief sought by the complainants.

G.I Direct the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest.

25. The complainant states that at Para 6 (Sl No. 31) of the reply, respondents have mentioned that an occupation certificate was granted to them on 27.07.2017. However, on scrutiny of the occupation certificate, it has been found that it does not have any mention of "Tower J" i.e. the tower which contains the unit of the complainants. It is pertinent to mention here that as per the respondent, the offer of possession was sent to the complainant on 14.07.2018, whereas, the said occupation certificate was obtained on 27.07.2017. Had it been the occupation certificate pertaining to the unit of the complainant there would not have been delay of 01 year in the offering of the possession. Hence, it is evident that the said occupation certificate was not pertaining to "Tower J" and respondents were not in a position to offer possession to the complainant.

26. The respondent builder states that the letter of offer of possession was sent to the complainant through speed post and registered post as well, but the same was wilfully and knowingly returned by the complainants after opening the envelope with remarks "REFUSED TO ACCEPT. The respondent further states that the occupation certificate for the subject unit was received on 27.07.2017. Only the nomenclature of the towers has been changed. The completion certificate of the project has also been

received. Both certificates have been supplied during the course of the proceedings.

27. The Counsel for the respondent further states that as per the provisional NOC dated 19-07-2017, issued by the Director, Fire Services (Haryana), Panchkula, the department put a new condition that first the respondent has to provide double staircase to each towers/buildings within one year from the date of approval of Hon'ble CM as mentioned in the said letter dated 19.07.2017. In view of this fact and construction of second staircase in the various towers of the project "MICROTEK GREENBURG" and the traffic movement therein being in clockwise direction, the respondents could not handover the possession of flats to its customers as there was a grave risk and danger to the safety and it may cause any mis-happening to the proposed residents.
28. The Authority deputed the Associate Executive Engineer to inspect the project and whether the occupation certificate for the subject unit had been obtained or not. It has come to the Authority's knowledge that the unit has been completed and the occupation certificate for the subject unit was issued on 27.07.2017.
29. The Authority observes that Section 18(1) of the Act, 2016, is applicable only in the eventuality where the promoter fails to complete or is unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is a case where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottee wishes to withdraw from the project and is

demanding refund of the amount paid by the complainant in respect of the unit with interest at the prescribed rate.

30. The due date of possession as per agreement for sale as mentioned in the table above is 01.01.2017. The occupation certificate for the unit of the complainant-allottees was obtained vide letter bearing Memo No. ZP-705/SD(BS/2017/17960) dated 27.07.2017 from the competent Authority. The allottees in this case has filed this complaint on 26.07.2018 after completion of project and offer of possession dated 14.07.2018. As per the section 19(10) every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be. In the present case, the complainants did not take the possession as they had objection to completion of the unit as well as demands which were raised by the respondent and have sought refund. It is pertinent to mention here that the allottees never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession and demand for due payment was raised, they filed a complaint before the Authority for refund.
31. The allottees have not exercised the right to withdraw from the project after the due date of possession was over, till the offer of possession was made to them. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Had the complainants wished to continue in the project, the consequences for delay provided in proviso to section 18(1) would come in force and the promoter would be liable to pay interest at the prescribed rate of every

month of delay till the handing over of possession. However, in the present matter, this is not the case.

32. 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. The judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure 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. The complainant has to demand and make his intentions clear that they wish to withdraw from the project. Rather tacitly they wished to continue with the project. It is observed by the authority that such withdrawal on considerations other than delay will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.
33. The authority has observed that the respondent-builder has offered possession of the unit on 14.07.2018 after obtaining occupation certificate on 27.07.2017 but the complainant wants to surrender the unit and refund the amount paid by him. Keeping in view the aforesaid circumstances, that the respondent builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, and judgment of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.2021***, it is concluded that the allottees were obligated to take possession of the unit.

34. However, in the present matter, the complainants do not wish to take possession of the unit. In the terms of clause 14 of the buyer's agreement executed between the parties on 25.05.2015, in case the allottee failed to take possession, the project developer shall have the right to cancel the said apartment and refund the payment after forfeiting the earnest money. the earnest money has been defined in the said agreement as 15% of the total price. It is noted that the buyer's agreement has been executed before the commencement of the Act, 2016.
35. However, the Hon'ble Apex court of the land in cases of *Maula Bux Vs. Union of India (1973) 1 SCR 928* and *Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136*, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as *Jayant Singhal and Anr. Vs. M/s M3M India Ltd.* decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money.
36. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"

37. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.40,16,977/- after deducting 10% of the sale consideration of Rs.1,02,64,540/- being earnest money along with an interest @ 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 on the refundable amount, from the date of filing of this complaint i.e., 26.07.2018 requesting for refund of the amount till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the Authority:

38. 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 is directed to refund to the complainants the paid-up amount of Rs.40,16,977/- after deducting 10% of the sale consideration of Rs.1,02,64,540/- as earnest money with interest at

the prescribed rate i.e., 11.10%, from the date of filing of this complaint i.e., 26.07.2018 till the date of realization of payment.

- ii. A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

39. Complaint stands disposed of.

40. File be consigned to the registry.


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member


(Arun Kumar)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.10.2024