HARERA
GURUGRAM

OHARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM
हरियाणा भू–संपदा विनियामक प्राधिकरण, गुरुग्राम

New PWD Rest House, Civil Lines, Gurugram, Haryana नया पी.डब्ल्यू.डी. विश्राम गृह. सिविल लाईंस. गुरुग्राम. हरियाणा

**BEFORE S.C. GOYAL, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM**

Complaint No. : 199/2018
Date of Decision : 28.01.2020

Mr. Shaukat Ali
R/o H No.656, Sector 21-C, Faridabad **Complainant**

V/s

M/s Ramprastha Promoters and Developers Pvt. Ltd.
C-10, C Block Market, Vasant Vihar, New Delhi-110017

Respondent

Argued by:

For Complainant **Ms. Shivali, Advocate**

For Respondent **Mr. Dheeraj Kapoor, Advocate**

ORDER

This is a complaint under section 31 of the Real Estate(Regulation and Development) Act, 2016 (hereinafter referred to Act of 2016) read with rule 29 of the Haryana Real Estate(Regulation and Development) Rules, 2017(hereinafter referred as the Rules of 2017) filed by the complainant for refund of an amount of Rs. 71,31,942/- deposited with the respondent for booking of a flat/unit No.1203, 12th floor, Tower-B in its residential project known as "RISE", situated in Sector-37, Gurugram

28/1/2020

on account of violations of obligations of the promoter under section11 (4)(a) of Real Estate(Regulation and Development) Act, 2016. Before taking up the case of the complainant, th reproduction of the following details is must and which are as under:

Project related details		
I.	Name of the project	"RISE"
II.	Location of the project	Sector-37, Gurugram, Haryana
III.	Nature of the project	Residential (construction link plan)

Unit related details		
IV.	Unit No. / Plot No.	1203,
V.	Tower No. / Block No.	Tower B
VI	Size of the unit (super area)	1765 sq.ft.
VII	Size of the unit (carpet area)	-DO-
VIII	Ratio of carpet area and super area	-DO-
IX	Category of the unit/ plot	Residential
X	Date of booking	17.3.2012
XI	Date of execution of BBA (copy of BBA be enclosed as annexure 1)	31.05.2012
XII	Due date of possession as per BBA	January 2016
XIII	Delay in handing over possession till date	More than 4 years
XIV	Penalty to be paid by the respondent in case of delay of	As per clause 15 (a) of ABA

28/11/2022

	handing over possession as per the said ABA	

Payment details		
XV	Total sale consideration	Rs. 80,39,525/-
XVI	Total amount paid by the complainant till date	Rs. 71,31,942/-

2. It is the case of the complainant that he booked a residential unit measuring 1765 square feet in the project of the respondent known as "RISE" located in Sector-37, Gurugram on 17.03.2012 for a total sale consideration of Rs.80,39,525/-. An Apartment Buyer Agreement was executed between the parties on 31.05.2012. It was provided in that agreement that the possession of the allotted unit would be delivered to the complainant by September, 2015 with a grace period of 120 days i.e. January 2016. It is further the case of the complainant that he made various payments totalling to Rs.71,31,942/- with the respondent. Though, the time for possession of the allotted unit was January 2016 but that period has also expired. Despite that the respondent failed to offer possession of the allotted unit to him. A number of communications were exchanged between the parties and vide which the dead line for completion of the project was fixed as 31.12.2017 and later-on 30.06.2018. So, in this way, the respondent failed to adhere to the schedule of completion of the project. Thus, the complainant was left with no other alternative but to file a complaint against the respondent seeking refund of the deposited amount besides interest and other charges.

3. But the case of the respondent as set up in the reply is that though the complainant booked a residential unit in its project mentioned above, but it was denied that he was to be handed over its possession by January

2016. It was also pleaded that the complainant failed to make payment regularly and committed default in the same. In fact, the complainant alongwith other allottees are defaulters and did not deposit the amount due with the respondent. Despite that the respondent continued with the construction of the project in which the unit of the complainant is located and is going on to complete the construction and apply for getting occupation certificate likely to be issued soon. It was further pleaded that respondent has already made a declaration in terms of section 4 (2) (1) (c) of RERA Act, 2016 for completion of the project by 30.06.2020. It is also proved in the Apartment Buyer Agreement that in case the respondent failed to complete the construction of the apartment within the committed period, then it would pay delayed possession charges @ Rs.5/- per square feet per month of the super area and the complainant is bound by the terms and conditions of that document. It was also pleaded that due to certain circumstances beyond the control of the respondent, the construction of the project could not be completed.

4. Various preliminary objections were also taken with regard to maintainability of the complaint in the present form before this forum, cause of action and the claim petition being false and frivolous.

5. After hearing both the parties and perusing the case file, the learned the Authority vide its order dated 25.10.2018 directed the respondent to hand over possession of the allotted unit to the complainant by 30.06.2019 besides allowing him interest at the prescribed rate from the due date till 25.10.2018 by 10th of every month till handing over the possession. Feeling aggrieved with the same, the respondent filed an appeal before the Appellate Tribunal and who vide orders dated 20.07.2019 set aside that order and directed this forum to proceed further in accordance with law with liberty

28/1/20

to the complainant to amend his complaint in order to bring it within the parameters of form CAO as provided under rule 29 of RERA Rules 2017.

6. After that both the parties put in appearance, they filed their respective pleadings and reiterated the pleas as taken earlier. An Additional plea was also taken by the respondent with regard to maintainability of the complaint before this forum after amendment of rules 2017 with effect from 12.09.2019.

7. I have heard the learned counsel for both the parties and who reiterated their position as stated above.

8. Some of the admitted facts of the case are that the complainant booked a residential unit with the respondent on 17.03.2012 for a total sale consideration of Rs. 80,39,525/- and ABA Annexure-2 was executed between the parties on 31.05.2012. It was provided in that document that the possession of the allotted unit would be delivered to the complainant by September 2015 with a grace period of 120 days i.e. January 2016. The complainant continued to deposit the amount with the respondent under the construction linked payment plan and deposited a total sum of Rs.71,31,942/-. But, the respondent failed to complete the project within the stipulated period and offer of possession of the allotted unit to the complainant by the due date. It is the case of the complainant that allotment of residential unit was made by the respondent under the construction linked payment plan and in that hope he continued to make payment on different dates. But despite that possession of the allotted unit was not delivered within the stipulated period and even giving new dead line i.e. 31.12.2017 and June, 2018 as per e-mails dated 20.10.2016 and 28.02.2017. So, in such a situation, the complainant is entitled to seek refund of the amount deposited besides interest. Reliance in this regard has been placed

28/1/20

on the ratio of law laid down in case titled as **Mrs. Deepa Rajwani and another versus Ramprastha Promoters and Developers Pvt. Ltd. in complaint No.113/2019 decided on 26.08.2019,** decided by the State Commission Delhi and wherein the refund of the deposited amount was allowed to the complainant with interest to be paid within two months. Thus, it has been argued on behalf of the complainant that when there is inordinate delay in handing over possession of the allotted unit to the complainant, then he is entitled to seek refund of the amount besides interest and compensation.

9. But on the other hand, it has been pleaded on behalf of the respondent that though the pleas of the complainant for possession and delayed interest charges and interest accrued after due date were allowed by the learned Authority vide orders dated 25.10.2018 but that order was set aside by the Hon'ble Appellate Tribunal in an appeal filed by it and a direction was given to this forum to proceed further in accordance with law. So, in pursuance of those directions, the complainant filed an amended complaint in form CAO in conformity with Rule 29 of RERA Rules 2017 on 22.10.2019. However, it is pleaded that the complaint filed in this regard is not maintainable. Secondly, the complainant was allotted a residential unit under the construction linked payment plan. He alongwith other allottees committed default in making payments. Despite crunch of funds and various other factors such as short supply of building material, shortage of labour, restraint orders passed by the Punjab & Haryana High Court directing the respondent not to extract ground water, the construction work is going on and to be completed soon. Thirdly, the complainant is a speculative investor who had a motive and an intent to make quick profit from the allotment of the said apartment from the process of allotment. Since he failed to resell the apartment due to recession, so, he could not make payment in time and filed

this complaint on frivolous grounds. Lastly, the project of the respondent in which the complainant has been allotted a unit is almost complete and is going to be completed in June, 2020. So, an order of refund cannot be passed in such cases as the basic purpose of the RERA Act, is to encourage the real estate activities and not to discourage them. If refund of the deposited amount is allowed, then, the very purpose of RERA Act 2016 would be defeated and the project of the respondent like other projects would collapse creating chaotic circumstances for building activities and the real estate sector.

10. The first limb of arguments advanced on behalf of the respondent is with regard to maintainability of the complaint post amendment of rules. It is pleaded that after the amendment of rules w.e.f. 12.09.2019, the complaint filed before this forum is not maintainable and it can only be filed after an inquiry is conducted by the learned Authority as per rule 28(2). It is also pleaded that as per Rule 29 of the amended Rules, the relief for refund and compensation can only be adjudicated once an inquiry has been conducted by the Authority in terms of Rule 28. Though the complainant filed an amended complaint as per direction of the Hon'ble Appellate Tribunal but the same is not maintainable in view of amended rules. Even a number of cases pending before this forum for refund of the amount deposited by various allottees were disposed of and a direction was given for transfer of those complaints with the Registry for further action. The amended rules are prospective in nature and as per law, the amended complaint can only be filed before the Authority and not before this forum. Reliance in this regard has been placed on the ratio of law laid down in cases of Manohar Damecha Vs Lavasa Corporation Limited III(2016)CPJ3189(NC), G.J Raja Vs Tejraj Surana Manu/SC/1002/2019 and G.J Raja Vs Tejraj Surana SPL(Cr) No.3342/2019 decided on 15.04.2019 wherein it was held that is that unless

Chd 28/11/2019

contrary intention appears, a legislative is presumed not to be intended to have a retrospective operation. There is no dispute about the ratio of law laid down in the above mentioned cases. However, the complaint filed by the complainant seeking refund of the amount deposited with the respondent with regard to allotted unit is very much maintainable. Firstly, the amended rules of 2019 came into force w.e.f. 12.09.2019 and the amended complaint was filed on the directions of the Hon'ble Appellate Tribunal on 22.10.2019. Secondly, the filing of an amended complaint is continuation of the previous complaint filed before the Authority as the case **was transferred** to this forum. Thirdly, as per rule 5(3) of General Clause Act, 1897 any enactment/statue have a perspective effect unless and until as stipulated in the statue and not retrospective effect. There is nothing in the enactment of 12.09.2019 which provides that the same shall have retrospective effect. A reference in this regard may be made to ratio of law laid down in cases of Keshavan Madhava Menon Vs State of Bombay, AIR 1951 SC 128, Commissioner of Income Tax, Orissa Vs Dhadi Sahu (1992) SCR 3 168, Monnet Ispat & Energy Vs Union of India & Ors (2012) 11 SCC 1, Videocon International Ltd Vs Securities and Exchange Board of India,(2015) 4 SCC 33 and Securities and Exchange Board of India Vs Classic Credit, 2017 SCConline SC 961 and wherein it was held that it is a cardinal principle of construction that every statute is *prime facie* prospective unless, it is expressly or by necessary implication made to have a retrospective operation. The legal maxim '**Nova constitution furturis forman imponere debet non practeritis',** i.e. a new law ought to regulate what is to follow, not the past. Moreover, it is well settled that the law which affects a change in the forum is not applicable to the pending action or proceedings unless, the intention to the contrary is clearly shown. Though the complainant sought refund of the amount deposited with the respondent but despite that the complaint

was disposed of on 25.10.2018 with a direction to give physical possession of the allotted unit besides delayed possession charges at the prescribed rate of interest i.e. 10.45% p.a. paying interest accrued thereon from 31.01.2016 till 25.10.2018 within a period of 90 days. That order was challenged before the Hon'ble Appellate Tribunal by the respondent and who vide orders dated 20.07.2019 allowed the same with following observations:

> **The order passed by this Tribunal and observations of the ld Authority in the impugned order will not prejudice the mind of the ld Adjudicating Officer qua rights of the parties on the merits of the case. The case is sent to the Adjudicating Officer, Gurugram for deciding the complaint filed by the respondent/allottee afresh in accordance with law. The ld Adjudicating Officer will allow the parties to amend their pleadings to bring it inconformity with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017.**

11. In pursuance of above mentioned orders passed by the Hon'ble Appellate Tribunal , the complainant filed an amended complaint with this forum on 22.10.2019. The main plea advanced on behalf of the respondent that in view of the amendments made in the rules by the State Government, the complaint filed by the complainant before this forum is not maintainable and the same being premature is liable to be dismissed. Though, he referred to a number of cases detailed above but the question for consideration arises whether the procedural amendment made in the law applies retrospectively or prospectively. A reference in this regard may be made to the provision of Rule 5(3) of the General Clause of 1897 which provides that any enactment of the statue shall have a prospective effect until and unless as stipulated in the statue. A perusal of the notification dated 12.09.2019 shows that the same came into effect from the date of publication in the Official Gazette on 12.09.2019. It is no where provided that the same shall have a retrospective. In case of Keshavan Madhava Menon Vs. State of Bombay and others(supra), it was held by the Hon'ble apex court of the land every statue is prime facie prospective unless, it is expressly or necessary implication made to have a retrospective operation. Then, in case **Neel Kamal Realtors Pvt Ltd & Anr Vs Union of India and others 2018(1)(Civil) 298(DB),** it was held by the Hon'ble Bombay High Court

28/1/20

that provisions of the Act of 2016 are retroactive in operation. So, taking into consideration these facts and the law of the land, this forum has very much jurisdiction to adjudicate this complaint received from the Hon'ble Appellate Tribunal and the same is very much maintainable.

12. The second plea advance on behalf of the respondent is that the complainant admittedly booked a residential unit under the construction linked payment plan on17.03.2012. An Apartment Buyer Agreement was executed between the parties on 31.05.2012. There is clause 15(a) of that document and the possession of the allotted unit was to be offered to the complainant by September 2015 with a grace period of 120 days. The complainant executed that document fully knowing its implications. Then due to various factors, such as delay in making payment by the complainant as well as other allottees, crunch of funds, short supply of construction material, labour, non-extraction of ground water and various restrained orders passed by the Hon'ble Punjab & Haryana High Court, the construction of the project in which the complainant was allotted a unit could not be completed. Moreover, the complainant is a speculative investor and who had a motive and intent to make quick profit from allotment of apartment through the process of sale of that unit. Since he failed to resell that apartment due to recession, so, could not make payment of the amount due and moved this forum seeking refund on frivolous grounds. But again, the plea advanced in this regard is devoid of merit. No doubt, the complainant was allotted a residential unit on 17.03.2012 but that was under the construction linked payment plan. He has already deposited a sum of Rs. 71,31,942/- out of total sale consideration of Rs.80,39,525/-. So, it cannot be said that he was defaulter alongwith other allottees and which led to delay in completion of the project. There may be certain other circumstances just as crunch of funds, shortage of construction material, labour and various orders passed by the Punjab & Haryana High Court but

28/11/20

that cannot said to be a hindrance in completion of the project and particularly when the same was to be completed as per clause 15 of Apartment Buyer Agreement by September 2015 with a grace period of 120 days i.e. by January 2016. In cases, of **Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghvan & Ors. 2019(2) RCR (Civil) 738 decided on 02.04.2019 by the Hon'ble apex court, Shalabh Nigam Vs. Orris Infrastructure Pvt Ltd and Anr. in Consumer Case No. 1702/2016 decided on 06.05.2019 by Hon'ble National Consumer Disputes Redressal Commission, New Delhi and Marvel Omega Builders Pvt Ltd and Anr. Vs. Shrihari Gokhale and Anr. in Civil Appeal No. 3207-3208 of 2019 decided on 30.07.2019** rendered by the Hon'ble Apex Court of the land, it was held that when the respondent/builder failed to complete the project in time and offer the possession of the allotted unit to the complainant as per the allotment letter or the apartment buyer agreement, then the allottee has a right to ask for refund, if the possession is inordinate delayed. So, the plea of the respondent that due fault of the complainant, the construction of the project and the allotted unit could not be completed is untenable.

13. It is also pleaded on behalf of the respondent that Apartment Buyer Agreement was executed between the parties on 31.05.2012 and the same was signed by the complainant out of his free will and consent. So, the court should be slow to interfere in its genuineness. Reliance in this regard has been placed on the ratio of law laid down in cases of **Rasheed Ahmad Usmani and Ors. Vs. DLF Ltd. and Ors. MANU/CF/0411/2019** decided on 02.07.2019 and **Pioneer Urban Land and Infrastructure Limited & Ors Vs Union of Indian & Ors , (Supra)** and wherein it was held that the consent given by a person shall be deemed to be a free and would be binding on the parties to the

28/1/20

contract unless it is shown by such person use of coercion, undue influence, fraud, mis-representation, mistake or duress when he signed that contract/settlement under those circumstances. Neither from the pleadings nor from any other document, it is evident that the complainant signed the Apartment Buyer Agreement under inducement, coercion or force. So, in such a situation, the complainant cannot wriggle out from the terms and conditions of ABA and are binding upon him. But again the plea advanced in this regard on behalf of the respondent is devoid of merit. In case of **Central Inland Water Transport Corportation Limited and Ors Vs. Brioja Nath Ganguly and Ors. (1986) 3SCC 156,** a contrary view was taken by the Hon'ble Apex Court of the land and observed as under: -

"**.... Our judges are bound by their oath to 'uphold the Constitution and the laws'. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the laws. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties, who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can, visualize the different situations which can arise in the affairs of mean. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation f the parties or**

28/1/20

not. It will apply to situations in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form, or to accept a set of rules as part of the contract, however, unfair unreasonable and unconsicionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction .... These cases can neither be enumerated nor fully illustrated. This court must judge each case on its own facts and circumstances" A similar view was taken by a Division Bench of the Hon'ble Bombay High Court in case **Neel Kamal Realtors Suburban Pvt. Ltd. & anr. Vs. Union of India and others (supra)** and observed that **"agreements entered into which individual purchasers are invariably one sided, standard-format agreements prepared by the builders/developers and which are overwhelmingly in their favour with unjust clauses on delayed delivery time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."** So, the plea advanced in this regard on behalf of the respondent qua binding effect of Apartment Buyer Agreement between the parties is untenable.

14. Lastly, the respondent took a plea that the construction of the project in which the complainant was allotted unit is going to be

28/11/20

completed very soon and they would be offered possession. Moreover, the Learned Authority has also extended the dates for the completion of the project namely "RISE" situated in Sector 37-D, Gurugram and the due date for the same is 30.06.2020. So, if there is any delay, then the same should not be attributed to it. But again the plea argument advanced in this regard are devoid of merit. Though, a deadline for completion of the project has been given as 30.06.2020 but the same does not automatically extend the period to complete the project and the same is not binding on the complainant. A similar situation arose for consideration in case **Neel Kamal Realtors Suburban Pvt, Ltd. & anr. Vs. Union of India and others (supra)** before a Division Bench of the Hon'ble Bombay High Court and later on followed by the Hon'ble Appellate Tribunal in case M/s **Magic Eye Developers Pvt. Ltd. versus Ishwar Singh Dahiya, in appeal No.173/2019 decided on 17.12.2019** wherein it was observed that a declaration given by the promoter under section 4 (2) (1) (c) of the Act has categorically laid down that the provisions of the Act will not re-write the clause of completion or handing over of the possession mentioned in the agreement for sale. Thus, the contention of the respondent for fixing a new dead line for handing over a possession of the allotted unit of the complainant with extension of the project under the Act of 2016 is not helpful to escape from the penal provisions of law. So, the complainant is legally entitled to seek refund of the amount deposited with the respondent and could not be allowed to wait indefinitely and particularly when there is no evidence on behalf of respondent qua the pace and stage of construction of the project in which he has been allotted a unit by it. So, findings on this issue are returned accordingly.

28/11/20

15. Thus, in view of my discussion above, the complaint filed by the complainant is hereby order to be accepted. Consequently, he has entitled to seek refund of sum of Rs. 71,31,942/- besides interest at the prescribed rate i.e. 10.20% per annum from the date of each payment till the date of actual payment from the respondent. The complainant shall also be entitled to a sum of Rs. 20,000/- as compensation inclusive of litigation expenses.

16. The amount mentioned above shall be paid to the complainant by the respondent within a period of 90 days from the date of this order and failing which legal consequences will follow.

17. File be consigned to the registry.

28 .01.2019

(S.C. Goyal)
Adjudicating Officer,
Haryana Real Estate Regulatory Authority
Gurugram 28-1-2020