

ORDER (DILBAG SINGH SIHAG-MEMBER)

Above captioned complaints have been taken up together for disposal since they pertain to same project of the respondents and facts and grievances in both cases are similar. For passing this order, facts of complaint no.259 of 2018 have been taken into consideration.

2. While perusing the case file, it is observed that complainant booked an apartment in the year 2010 in respondent's project namely, ESS VEE APARTMENTS, Sector-20, Panchkula. Total sale consideration of the apartment was ₹68,31,000/- against which complainant had paid ₹48,23,700/, out of which an amount of ₹26,25,000/- had been claimed to be paid in cash whereas remaining amount of ₹21,98,700/- was paid through cheque, details of the same has been given at page 5 of the complaint book. Copies of receipts are also annexed at Annexure C-2(colly). Apartment buyer agreement was executed between both parties on 30.12.2010. Accordingly, apartment bearing no.302, 3rd Floor in Tower G was allotted to the complainant. Copy of apartment buyer agreement is attached at Annexure C-3. As per clause 32 of apartment buyer agreement, respondent was under obligation to hand over possession within 36 months i.e up to 06.12.2013. However, till date, no possession has been offered nor construction has been completed at site. Rather project has been abandoned from last five to six years. Therefore,

complainant prays for refund of the amount along with permissible interest as per Rule 15 of HRERA Rules 2017.

3. On the other hand, respondent in his written submissions has admitted booking of apartment and the payments of ₹21,98,700/- which were paid through cheque. Whereas respondent disputed an amount of ₹26,25,000/- which according to complainant, was paid in cash. He further submitted that delay in completion of the project was not intentional, rather, project got delayed on account of non-payment of the due amounts by large number of allottees. Respondent had paid all enhanced EDC and IDC dues to the State Government. He had full intention of completing the project and hand over possession of completed apartments to the allottees accordingly. He sought time up to 30th of September, 2019 for completing the project and handing over of possession to the complainants/allottees.

4. These cases were heard 25 times earlier. Authority has gone through the written as well as oral submissions made by both parties. Admittedly, complainant had booked the apartment in the year 2010 and made payment of ₹48,23,700/- against total sale consideration of ₹68,31,000/- to the respondent. An amount of ₹26,25,000/- had been alleged to be paid in cash and remaining amount of ₹21,98,700/- was paid through cheque. Flat-buyer agreement was executed on 30.12.2010. Clause 32 of the agreement stipulates that possession will be offered within 36 months from the date of execution of

apartment buyer agreement i.e up to 30.12.2013. Till date, project has not been completed even after receiving substantial amount from the complainants/allottees. Further, respondent had also denied payment of ₹26,25,000/- which was alleged to be paid in cash by the complainant. To prove his case, complainant had produced before the Authority a pen drive which allegedly contained transcript of his conversation with Mr Vinod Bagai, Managing Director of the respondent company and his personal diary containing date wise details of amounts paid in cash. Complainant had also relied upon hand written receipts issued by the Managing Director of respondent company Mr. Vinod Bagai.

5. After consideration of the arguments put forth by both parties and examination of documents produced by the complainant, Authority found it appropriate to compare hand writing and voice sample of the Managing Director of the respondent company from a government agency namely CFL Chandigarh and FSL, Madhuban considering respondent ~~had~~ no objection in doing the same. The above said issues were discussed in detail vide orders dated 25.09.2018 passed by the Authority. The same are reproduced below for ready reference:

1. For resolving the dispute on the point whether or not the complainant has actually paid a sum of Rs. 26,25,000/- in cash to the promoter Shri Vinod Baghai, this Authority issued certain directions to the parties vide its previous order dated 19.09.2018, with a view to permit the complainant to prove the disputed payments on the basis of hand written receipts issued to him by

Shri Baghai and on the basis of his oral conversation held with Shri Baghai and recorded in a electronic device.

2. However, before taking further steps in the matter, it has become necessary for the Authority to deal with an application which is today filed by respondent with a prayer that the Authority shall direct the complainant to provide the respondent documents, which are mentioned in the application as under: -

- i) Copy of complete recorded conversation of one hour 17 minutes;
- ii) The Income Tax Returns, balance sheets, computation and any other documents submitted to the Income Tax Department from the year 2009 to till date along with the C.A. Certificate to this effect reflecting the payments of Rs. 52,50,000/- in cash;
- iii) PAN of the complainants.

3. The Authority on perusal of the application finds that the respondent is demanding the above documents for initiating proceedings under the provisions of the Indian Penal Code, Income Tax Act and other relevant laws against the complainant for his alleged act of having created false and fabricated evidence in his favour regarding payment of cash amounts and also for committing tax evasion. Demand for above documents with such a purpose at a stage when complainant has initiated the process of voice matching and handwriting comparison for proving his case, in the opinion of the Authority, is a subterfuge aimed at intimidating and desisting the complainant from pursuing the present complaint. The respondent on the basis of averments pleaded in the complaint filed with this Authority can approach the law enforcing agencies viz. the police department and the income tax department for appropriate action. There is no embargo on the rights of such agencies to collect all such evidence as is proper and necessary for the purpose of taking action under the Indian Penal Code and the Income Tax Act. So, no direction on the part of this Authority is required for the complainant to supply the demanded documents.

4. That apart, the recorded conversation on the last date of hearing was played in the court room in the presence of Shri Baghai. After hearing the recorded conversation for some time, he had voluntarily denied his alleged voice in the conversation. He did not insist at that time for playing and hearing of the entire conversation and had agreed to give his sample voice. If a copy of complete recorded conversation is now delivered to him before taking sample of his voice, it will provide an occasion for him to



manipulate his voice at the time of taking sample, by speaking sentences forming part of his voice in the alleged conversation in a manner different from the accent he used in the alleged conversation. The voice sample obtained will then not be the actual and genuine sample of his voice. For this reason as well, the Authority will not permit supply of the recorded conversation to the respondent before his voice sample is taken in the laboratory. So, the application seeking supply of documents is dismissed.

5. Pursuant to the directions given to him vide order passed on 19.09.2018, the complainant has today informed the Authority that voice matching test is carried out by Central Forensic Laboratory (CFL) situated in Sector-36, Chandigarh. He further states that as per the information gathered by him, the experts themselves will take the voice sample with the help of sophisticated scientific instruments available in the laboratory.

6. Shri Vinod Baghai, the promoter, who on the last date of hearing while disputing his alleged voice in the recorded conversation, has stated that he would have no objection for giving sample of his voice. So, the Authority has decided to issue directions to Shri Vinod Baghai to appear in the laboratory for the purpose of recording his sample voice. The date on which the experts would record his sample voice shall be ascertained by the complainant and he shall convey it to Shri Baghai by sending SMS on his mobile and a message at his e-mail as well. Shri Baghai shall appear in the Central Forensic Laboratory on the date so conveyed to him for recording his sample voice.

7. The complainant is also directed to deliver all the original electronic devices and the evidence, which are in his possession, directly in the office of Central Forensic Laboratory (C.F.L), Sector-36, Chandigarh for carrying out the voice matching test. The expert conducting the test in CFL shall to be his identification mark on the evidence/devices in respect of which test is conducted and shall send the same to this Authority alongwith his report on voice matching. A copy of this order be also sent to the Central Forensic Laboratory, Sector-36, Chandigarh with a request that the complainant shall be intimated, atleast two weeks in advance, the date on which the voice sample is to be collected so that he can inform Shri Baghai to be present on that date for giving sample voice.

8. The Authority is also directing the respondent to appear before the Central Forensic Laboratory, Sector-36, Chandigarh on the date intimated to him by the complainant. Parties are

further directed to fully cooperate with the Officers of Central Forensic Laboratory for conducting the required test. Failure on the part of either of the party to cooperate in any manner will invite such adverse inference as permissible under law.

9. The original buyer's agreement, original payment receipts allegedly issued by the respondent in his own hand and original entries of personal diary which are allegedly bearing initials of Shri Baghai, have been today produced by the complainant. Respondent's learned counsel has produced the original application obtained from the complainant for the purpose of allotment of residential apartment in the project. For the purpose of maintaining identity of documents produced as referred herein before, the Authority has marked the original buyer's agreement as S-1, original application form as S-2, original payment receipts as D-1, D-2, D-3, D-4, D-5 and personal diary's entries as D-6 alongwith disputed initials mark in round circle with red ink.

10. Shri Baghai on the last date of hearing has admitted that he had filled the blank columns of allotment application and buyer's agreement. So, his writing appearing on application form and buyer's agreement can be safely used as his sample writing for the purpose of comparison with his disputed writing. The documents containing disputed writing and initials alongwith the original documents bearing admitted writing of Shri Baghai, shall, therefore, be sent to Handwriting and Finger Print Bureau, Madhuban, District Karnal for conducting necessary tests at the expenses of the complainant.

11. The Director, Handwriting and Finger Print Bureau is accordingly requested to get the necessary tests conducted and to send his report to the Authority on the following points:-

- i) Whether the hand writing appearing on disputed receipts mark D-1 to D-5 are in the hand of the same person in whose writing the columns documents mark S-1 and S-2 have been filled in.
- ii) Whether the initials marked in round circle with red ink on diary's entries mark D-6 are identical with any portion of signatures or the initials appearing on buyer's agreement (S-1) at places mark in round circle.

12. The ADO (Petition) shall dispatch the relevant documents alongwith forwarding letter to the Director, Handwriting and Finger Print Bureau, Madhuban under a sealed registered cover. A copy of this order and a copy of of the forwarding letter be also supplied to the complainant who shall contact the office of

Handwriting and Finger Print Bureau, Madhuban for depositing the required fee directly in the said bureau.

13. Case is adjourned to 08.11.2018 for awaiting reports.

6. In compliance of the above said orders, the case was sent to Central Forensic Laboratory(CFL), Sector 36 Chandigarh for voice matching and Finger Print Bureau(FSL), Madhuban for hand writing testing of Mr. Vinod Bagai, Managing Director of respondent company.

7. Despite taking various opportunities, Mr. Vinod Bagai, Managing Director of respondent company had failed to appear before Central Forensic Laboratory for giving voice sample. Therefore, adverse inference was taken by the Authority vide order dated 31.10.2019 and it was presumed that disputed telephonic conversation is of no other person than Mr. Vinod Bagai.

8. Further, Finger Print Bureau, Madhuban had sent hand writing report on 09.06.2021 and the same was taken on record. Copy of the same has been supplied to both parties. Observation regarding hand writing matching has been made by Finger Print Bureau, Madhuban. Relevant part of which is reproduced below:

“There is no divergence observed between standard and questioned writings and the aforesaid similarities in writing habits are significant and sufficient and can not be attributed to accidental coincidence and when considered collectively, they lead to the opinion that the person who wrote red enclosed standard writings stamped and marked A10 to A14, S6 to S10

also wrote the red enclosed questioned writings similarly stamped and marked Q8 to Q12.”

9. Main averment of the complainant as made in the written complaint is that project is nowhere near completion nor likely to be completed in near future. There is already inordinate delay of nine years in completion of the project. Therefore, he prayed for refund of his entire paid money along with interest as per Rule 15 of HRERA Rules 2017.

10. Since complainants are seeking relief of refund of the amount already paid to the respondent for purchase of apartment in respondent's project, present cases were being adjourned because jurisdiction of this Authority to adjudicate upon relief of refund sought by complainants was subjudice before Hon'ble Supreme Court in SLP No. 13005 of 2020 titled as M/S. SANA Realtors Pvt. Ltd. vs. Union of India and SLP No. 13238 – 13256 of 2020. Although no specific stay was granted in respect of present respondent promoter, Authority by way of abundant caution had decided not to deal with such matters for the time being and decided to await outcome of the SLPs relating to Haryana matters pending before Hon'ble Apex Court. Now the law laid down by Hon'ble Apex Court in U.P. matters in appeal No(s) 6745-6749 of 2021 - M/s Newtech Promoters and Developers Pvt. Ltd. Versus State of UP and other matters, has been further clarified by Hon'ble High Court in CWP No. 6688 of 2021 and other connected matters, therefore, the

Authority has passed a resolution no.6705-6709 dated 14.01.2022 which has been hosted on the website of the Authority. Relevant part of aforesaid resolution is reproduced as below:

“4. The Authority has now further considered the matter and observes that after vacation of stay by Hon’ble High Court vide its order dated 11.09.2020 against amended Rules notified by the State Government vide notification dated 12.09.2019, there was no bar on the Authority to deal with complaints in which relief of refund was sought. No stay is operational on the Authority after that. However, on account of judgment of Hon’ble High Court passed in CWP No. 38144 of 2018, having been stayed by Hon’ble Supreme Court vide order dated 05.11.2020, Authority had decided not to exercise this jurisdiction and had decided await outcome of SLPs pending before Hon’ble Apex Court.

Authority further decided not to exercise its jurisdiction even after clear interpretation of law made by Hon’ble Apex Court in U.P. matters in appeal No(s) 6745-6749 of 2021 - M/s Newtech Promoters and Developers Pvt. Ltd. Versus State of UP and others etc. because of continuation of the stay of the judgment of Hon’ble High Court.

It was for the reasons that technically speaking, stay granted by Hon’ble Apex Court against judgment dated 16.10.2020 passed in CWP No. 38144 of 2018 and other matters was still operational. Now, the position has materially changed after judgment passed by Hon’ble High Court in CWP No. 6688 of 2021 and other connected matters, the relevant paras 23, 25 and 26 of which have been reproduced above

5. Large number of counsels and complainants have been arguing before this Authority that after clarification of law both by Hon’ble Supreme Court as well as by High Court and now in view of judgment of Hon’ble High Court in CWP No.(s) 6688 of 2021, matters pending before the Authority in which relief of refund has been sought should not adjourned any further and should be taken into consideration by the Authority.



Authority after consideration of the arguments agrees that order passed by Hon'ble High Court further clarifies that Authority would have jurisdiction to entertain complaints in which relief of refund of amount, interest on the refund amount, payment of interest on delayed delivery of possession, and penal interest thereon is sought. Jurisdiction in such matters would not be with Adjudicating Officer. This judgment has been passed after duly considering the judgment of Hon'ble Supreme Court passed in M/s Newtech Promoters and Developers Pvt. Ltd. Versus State of UP and others etc.

6. In view of above interpretation and reiteration of law by Hon'ble Supreme Court and Hon'ble High Court, Authority resolves to take up all complaints for consideration including the complaints in which relief of refund is sought as per law and pass appropriate orders. Accordingly, all such matters filed before the Authority be listed for hearing. However, no order will be passed by the Authority in those complaints as well as execution complaints in which a specific stay has been granted by Hon'ble Supreme Court or by Hon'ble High Court. Those cases will be taken into consideration after vacation of stay. Action be initiated by registry accordingly."

11. In view of above resolution, since no specific stay has been granted by Hon'ble Supreme Court or by Hon'ble High Court in present matters, Authority decides to proceed further for adjudication of the complaints.

12. In view of above facts, Authority found that respondents have clearly conceded that they have neither completed the project nor they are in a position to complete the same on account of reasons beyond their control. Respondent have been repeatedly not been fulfilling the promises given to the complainants and to this Authority as well. While getting registration of the

project in 2018, assurance of handing over possession to allottees was given by the year 2019. But even not a single brick has been laid in the project for last five to six years. Respondent has been making false promises without any intention of fulfilling them. His credibility in the market is fully eroded. As a result, he will not be able to generate funds for investment in the project.

13. Besides, it is clear from the report received from Finger Print Bureau, Madhuban that disputed hand writing is of no other person than Mr. Vinod Bagai. So, respondent could not deny the payment of ₹48,23,700/- paid by complainants for booking of their apartments. For all practical purposes, this is a failed project and as per provisions of Section 18 of the Act, relief of refund as sought by the complainants deserves to be granted. Accordingly, Authority grants relief of refund to the complainant along with interest as per Rule 15 of HRERA Rules, 2017 from the respective dates of making payment till the actual realization of the amount.

14. Accordingly, Authority directs the respondent to refund the entire principal amount of ₹48,23,700/- to the complainants along with interest as per Rule 15 of HRERA Rules 2017. Authority got calculated from its Accounts Branch, the interest payable to the complainants which works out to ₹45,36,962/-. This interest has been calculated from the date of making payments to the complainants up to the date of passing this order at the rate provided in Rule 15 of the RERA Rules 2016 i.e. 9.30% at the time of passing this order.

15. Now, respondent has to pay total amount of ₹93,60,662/- (₹48,23,700/- principal amount + ₹45,36,962/- interest) to the complainant within a period prescribed under Rule 16 of HRERA Rules i.e. 90 days.

16. **Disposed of.** Files be consigned to record room after uploading of this order on the website of the Authority.



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(RAJAN GUPTA)
CHAIRMAN



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(DILBAG SINGH SIHAG)
MEMBER