

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

Complaint no. :	1810 of 2018
Date of filing complaint:	26.11.2018
First date of hearing:	21.02.2019
Date of decision :	29.07.2022

Sh. Sameer Sharma S/o Sh. Rakesh Sharma R/O: House no. 467/5, Sector-5, Gurugram, Haryana- 122001	Complainant
Versus	
M/s Adani M2K Projects LLP Regd. office: Adani House, Plot No.- 83, Sector- 32, Institutional area, Gurugram- 122001	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Nilotpal Shyam (Advocate)	Complainant
Sh. Prashant Sheoran (Advocate)	Respondent

ORDER

1. The present 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 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	Oyster Grande, Sec 102, Gurugram	
2	Nature of project	Group Housing Project	
3	RERA registered/not registered	Registered vide registration No. 37 of 2017 dated 10.08.2017	
		Valid up to	30.09.2024
4	DTPC License no.	29 of 2012 dated 10.04.2012	30 of 2012 dated 10.04.2012
	Valid up to	09.04.2020	09.04.2020
	Licensed area	19.238 acres	
	Name of licensee	Aakarshan Estates	
5	Unit no.	B-1901, 19 th floor [As per page 23 of the complaint]	
6	Unit area admeasuring	2579 sq. ft [As per page 23 of the complaint]	
7	Provisional allotment	01.01.2013 [As per page 23 of the complaint]	

8	Date of builder agreement	buyer	BBA is not executed Although respondent had sent 2 copies of BBA for signing the apartment buyer agreement on 01.05.2013 [Page 27 of the complaint] And again, a reminder dated 14.08.2013 and 25.10.2013 were sent to the complainant for signing of BBA [As per page 43 of the reply]
9	Commencement of construction	of	Not placed on record
10	Total sale consideration		Rs.1,67,30,868/- [As per page 83 of the complaint]
11	Amount paid by complainant	by the	Rs.34,00,000/- [As per receipts annexed at page no 22-28 of the complaint]
12	Possession clause		<i>The developer based on its present plans, estimates and subject to all just exceptions will endeavour to complete construction of the said apartment within a period of 48 months from the date of execution of this agreement or from the date of commencement of construction whichever is later with a grace period of 6 months subject to force majeure events....</i>
13	Due date of possession		Cannot be ascertain
14	Occupation certificate		20.12.2017 [As per page 18 of the reply]
15	Offer of possession		Not offered

16	Cancellation notice	18.11.2013 [As per page 50 of the reply]
17	Intimation of cancellation	27.02.2015 [As per page 51 of the reply]

B. Facts of the complaint:

3. That the respondent company through its representative approached the complainant and represented that residential project namely "Oyster Grande" (hereinafter referred to as "the project") situated at Sector 102/102(A), Gurgaon, Haryana, would effectively serve his residential purposes and boasted of various luxurious amenities such as world-class gym, ultra-luxury club, sanctuary etc.
4. That lured by these representations, the complainant vide application dated 18.10.2012 booked a unit in the project of the respondent and deposited booking amount of Rs. 12,00,000/- for an apartment measuring 1,861 sq. ft. with tentative super area as 2,579 sq. ft.
5. That vide allotment letter dated 01.01.2013 bearing apartment No. B-1901 in the project, the total net cost as per that letter was Rs. 1,67,30,868/- inclusive of car parking charges and other charges.
6. That the complainant paid the second installment to the respondent company of Rs. 15,00,000/- vide cheque bearing no. 080678 as per the payment plan.

7. That the complainant paid the third installment as per the payment plan of Rs. 7,00,000/- to the respondent company vide cheque bearing number 516082 on 18.11.2013. The complainant inquired about the project from the respondent company as whenever he visited the site. He didn't see any sign of progress. The respondent company kept mum about the whole situation and never entertained the complainant's queries regarding the date of completion of the project.
8. That on 01.05.2013, the respondent company informed the complainant regarding execution of the apartment buyers agreement and provided two copies of the same to be signed and returned by him. The complainant requested more details about the project from the respondent company such as the current status of the project and the stage of development it has reached as the project site was lying dormant after more than a year or so after making the said application in 2012. The complainant now and again inquired about the date of initiation and completion of the project from the respondent but throughout that period, it kept silent about the whole situation. The complainant by then had already paid a considerable amount from his hard-earned money towards the allotment and hence was adamant to know the whereabouts of the project. Thus, as a result of the silence of the respondent on the inquiries being made by the complainant, the apartment buyer's agreement (hereinafter, "ABA") could not be executed between the parties.

9. That the ABA stipulates under article 5 (A) that the respondent(s), if failed to deliver the possession of the unit within 48 months from the date of booking/registration of the unit, shall pay compensation @ Rs.10/- per sq. ft. up to six months and there after @ Rs.15/- per sq. ft. of the super area per month for the entire period till the date of handing over the possession. But the respondent has failed to complete the project till date. The ABA stipulates a penal interest @ 18% per annum for any delay in payment of installments by the complainant. The compensation rate is merely peanuts as compared to this exorbitant rate of penal interest.
10. That the complainant in pursuant to the agreement for Sale made a total payment of Rs. 34,00,000/- by different modes as per the payment plan annexed to the agreement.
11. That after coming in force of Act of 2016, the respondent company applied for registration of the project before authority in accordance with law. The authority while discharging its regulatory/administrative functions granted registration certificate (Regd. No. 37 of 2017 dated 10.08.2017) to the real estate project "Oyster Grande".
12. That the respondent is a continuous and recurring defaulter and no respite is available against such a recurring either on justiciable or equitable ground. Any further extension would amount to travesty of justice as it seems to take in bad faith and with ill motive to misappropriate complainant(s) hard-earned money.

13. That it is wilfully not maintaining the necessary information such as copy of the RERA registration certificate, copy of lay out plan, sanctioned plan etc. on its website as mandated under Haryana Real Estate Regulatory Authority, Gurugram (Registration of Projects), Regulations, 2018.

C. Relief sought by the complainant:

14. The complainant has sought following relief(s):

- i. Direct the respondent to refund the entire amount of Rs. 34,00,000/- along with interest.
- ii. Direct the respondent pay cost of litigation.

D. Reply by respondent:

The respondent by way of written reply made following submissions: -

15. That the respondent launched a residential project under the name and style of "Oyster Grande" in Sector 102/102A of Gurugram, Haryana ("said project"), wherein the complainant approached it and made an application dated 20.10.2012, for allotment of an apartment in the said prestigious project.
16. That the complainant was allotted an apartment No. B- 1901 on 19th floor of the "Oyster Grande" vide provisional allotment letter dated 27.08.2013.
17. That as per the agreement arrived at between the petitioner and the respondent, the said unit was allotted to the complainant for a total sale consideration of Rs. 1,67,30,868/-.

18. That the complainant at his own accord has chosen to make the payment of sale consideration of the said unit by way of construction linked plan. The complainant has duly acknowledged the various stages which had been prescribed in the construction linked plan at which the installments had to be paid.
19. That the respondent duly achieved the various stages which were agreed through the construction linked plan. As and when such stages of construction were achieved, demand notices were issued to the complainant, calling upon him to make the payment of the installment linked to with such stage of construction. The complainant never made the payment of the due installments. In the case at hands, it is the complainant who has been in complete default of the terms and conditions which he himself had agreed with regard to payment of due installments of the sale consideration of the said unit.
20. That the complainant has opted for construction linked payment plan, and in pursuance thereof, paid an amount of only Rs. 34,00,000 and thereafter, did not paid a single installment, despite of several requests being made for the payment of installments.
21. That respondent issued sever demand letters but the complainant did not pay heed to the request of the respondent, and eventually the respondent was constrained to issue a demand-cum-cancellation notice dated 18.11.2013, requesting the complainant to make timely payment of the

outstanding installments and failing which the provisional allotment of the said apartment No. B1901 would have to be cancelled. The said demand-cum-cancellation notice was necessitated on account of continuous defaults by the complainant.

22. That even after intimation regarding cancellation of his allotment was communicated to the complainant, he never approached the respondent for settlement of his dues. Therefore, the respondent vide its letter dated 27.02.2015 cancelled the allotment of apartment and called upon the complainant to collect the balance sum due in his favour after forfeiture of applicable charges, in terms of the apartment buyers agreement.
23. That the respondent has suffered considerable loss on account of non-payment of due installments and the subsequent cancellation of the unit in question. It is submitted that the subject unit is still unsold and un-allotted. The tower wherein the unit in question is located in the project has already been completed and occupation certificate of the tower has already been obtained by the respondent. The respondent had to incur expenditure in completion of the unit in question as well as the tower without there being any actual payment being made by the complainant. This has caused severe financial burden upon the respondent which has naturally resulted in considerable losses and damages to the respondent.
24. That payments made by the complainant has actually made to the respondent included the payment of service tax, external development

charges and IDC. That the aforementioned tax and development charges have already been transferred by the respondent. The aforementioned submissions have been made to this honourable authority to kindly consider that once the amount which had been received by the respondent have already been spent upon the construction work and payment of taxes and development charges, then no question arises for refunding the same. It is also to be seen that the respondent has duly abided by the terms of the contract whatsoever existed between the complainant and the respondent. Once the complainant is defaulter, then he certainly does not deserve the refund of money.

25. That it is an extremely heavy financial burden upon the respondent developer since whatever amounts received are duly utilised for the development work of the project and payment of taxes and development charges and once the money has already been spent then if the same is ordered to be refunded, then it is certainly inequitable, unjust, illegal and against the contract as well.
26. Copies of all the relevant documents have been filed and placed on 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:

27. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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

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

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.

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.

F. Entitlement of the complainant for refund:

F.I Direct the respondent to refund the entire amount of Rs. 34,00,000/- along with interest.

28. The project detailed above was launched by the respondent as group housing colony. The complainant was allotted unit no B-1901 on 19th floor in the project "Oyster Grande" by the respondent-builder for a total consideration of Rs. 1,67,30,868/- under the construction linked payment plan. After the allotment letter was issued on 01.01.2013, the respondent builder continued to receive the payments against the allotted unit. It has been brought on record that the complainant had deposited several amounts against the allotted unit and paid a sum of Rs. 34,00,000/-. It is to be noted that demand dated 03.02.2013 and 16.01.2014 were raised against /for instalments due towards consideration of allotted unit and various reminders/ notice letters were issued vide letters dated 27.08.2013, 03.03.2014, 30.06.2014 in respect of payment of outstanding dues.

29. That the complainant did not come forward to clear the dues and take possession, due to which the respondent was left with no option but to

issue cancellation letter dated 18.11.2013 and further an intimation of cancellation was issued to him on 27.02.2015 wherein it was mentioned that a final cancellation notice bearing reference no. 2014/B-1901 dated 13.10.2014 was sent to the complainant as a final opportunity to pay due installments.

30. On consideration of the documents available on record and submission by both the parties, the authority is of the view that the allottee has failed to abide by the terms of agreement by not making the payments in timely manner as per the payment plan opted by him. The complainant failed to pay the remaining amount as per the schedule of payment. Now, the question before the authority is whether this cancellation is valid? As per clause E of the agreement, the allottee was liable to pay the installment as per payment plan opted by the complainant.
31. As per clause D of apartment buyer's agreement, the developer was required to retain 15% of the sale consideration as earnest money to ensure fulfilment of all the terms and conditions by the allottee. The respondent has obtained occupation certificate from the competent authority on 20.12.2017 but no offer of possession has been made. The respondent has given ample opportunities by way of demand letters/ notices to complainant and thereafter when he did not come forward to pay the outstanding amount, the respondent cancelled the unit allotted with adequate notices. Thus, the cancellation of unit is valid.

32. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, states that-

"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"

33. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the amount after deducting 10% of the sale consideration of the unit as per Regulation 11 of 2018 framed by Haryana Real Estate Regulatory Authority Gurugram within 90 days along with interest @ 9.80% p.a. on the refundable amount from the date of cancellation till the date of its payment.

F.II Direct the respondent pay cost of litigation

34. The complainant is claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate

complaint before adjudicating officer under section 31 read with section 71 of the Act and rule 29 of the rules.

G. Directions of the Authority:

35. Hence, the authority hereby passes this order and issue 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-promoter is directed to refund the amount after deducting 10% of the sale consideration of the unit as per Regulation 11 of 2018 framed by Haryana Real Estate Regulatory Authority Gurugram within 90 days from the date of this order along with interest @ 9.80% p.a. on the refundable amount from the date of cancellation till the date of its payment.

36. Complaint stands disposed of.

37. File be consigned to the registry.


(Vijay Kumar Goyal)
Member


(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.07.2022