

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

Complaint no. : 1016 of 2021
First date of hearing: 28.04.2021
Date of decision : 13.07.2022

1. Sh. Amit Bhayana S/o Ashok Kumar Bhayana
2. Smt. Sheela Bhayana W/o Ashok Kumar Bhayana
Both RR/O: - 447, Defense Colony, Near SP Residence, Jind, Haryana-126102

Complainants

Versus

M/s Pareena Infrastructures Private Limited
Office: C7A 2nd Floor, Omaxe City Centre Mall,
Sohna Road, Sector 49, Gurugram, Haryana.

Respondent

CORAM:

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Sh. Sanjeev Sharma (Advocate)
Sh. Prashant Shoeran (Advocate)

**Complainants
Respondent**

ORDER

1. The present complaint dated 04.03.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the

Act or the Rules and regulations made 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 unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.N.	Particulars	Details
1.	Name and location of the project	"Coban Residences", sector-99A, Gurgaon
2.	Nature of the project	Group Housing Project
3.	Project area	10.5875 acres
4.	DTCP license no.	10 of 2013 dated 12.03.2013 valid up to 11.06.2024
5.	Name of licensee	Monex Infrastructure Pvt. Ltd.
6.	RERA Registered/ not registered	Registered Vide no. 35 of 2020 issued on 16.10.2020 valid up to 11.03.2022 + 6 months = 11.09.2024
7.	Unit no.	303, tower K, 3 rd floor (page 19 of complaint)
8.	Unit admeasuring area	1770 sq. ft. (page 19 of complaint)
9.	Allotment letter	N/A
10.	Date of builder buyer agreement	16.10.2012 [page 18 of complaint]
11.	Possession clause	3.1 That the developer shall, under normal conditions, subject to force majeure, complete construction of Tower/Building in which the said flat is to be located with 4 years of the start of construction or execution of this

		Agreement whichever is later, as per the said plans.
12	Grace period clause	5.1 In case within a period as provided under clause 3.1, further extended by a period of 6 months if so, required by the developer, the developer is unable to complete construction of the said flat as provided hereinabove to the flat allottee(s) who have made payments as required for in this agreement, then the flat allottee(s) shall be entitled to the payment of compensation for delay at the rate of Rs. 5/- per sq.ft. per month of the super area till the date of notice of possession as provided hereinabove in this agreement.
13.	Date of start of construction	26.05.2016 (as per SOA dated 16.01.2021 page 45 of complaint)
14.	Due date of possession	26.05.2020 [Due date calculated from start of construction]
15.	Total sale consideration	Rs 91,31,547/- (as per SOA dated 16.01.2021 page 43 of complaint)
16.	Total amount paid by the complainant	Rs. 70,54,766/- (as per SOA dated 16.01.2021 page 43 of complaint)
17.	Offer of possession	Not offered
18.	Occupation certificate	Not obtained

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:

- I. That the application form for the booking of the unit in question was made on 25.04.2012 and thereafter, On 15.10.2012, a BBA was executed between the parties.

- II. That as per the clause 3.1 of the builder buyer agreement, the possession was to be handed over within 4 years from the start of construction or the execution of the builder buyer agreement, which was later.
- III. That due to this one-sided agreement and no sufficient ground for delay mentioned by the respondent, the due date of possession therefore arises from the execution of the builder buyer agreement, i.e., 16.10.2016. The complainants have made a total payment of Rs. 70,54,766.99/-.
- IV. That the complainants had made several attempts to settle the dispute with the respondent, but the respondent is paying no heed towards the present matter and they are being made to suffer heavily.
- V. That the complainants aggrieved of having not received possession on time filed the present complaint before Adjudicating Officer of the authority for refund along with interest/compensation.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s).
 - I. Direct the respondent to refund the entire amount paid by the complainants;
 - II. Direct the respondent to pay Rs. 5,00,000/- as compensation for mental harassment.
 - III. Direct the respondent to pay Rs. 1,00,000/- as litigation charges.



5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds.
- a. That the respondent is in the process of developing several residential group housing colonies in Gurugram and out of them, one is "Express Heights" at sector 99. The construction of the said project is at an advance stage and the structure of various towers has already been completed and remaining work is endeavored to be completed as soon as possible. The project is near completion and within a very short span of period, it would be completed and thereafter, possession shall be offered after obtaining occupancy certificate as agreed in builder buyer's agreement.
 - b. That quite conveniently certain pertinent facts have been concealed by the complainants. The concealment has been done with a motive of deriving undue benefit through an order, which may be passed by this hon'ble authority at the expense of the respondent.
 - c. That it has become a matter of routine that baseless and unsubstantiated oral allegations are made by allottees against the respondent with a mere motive of avoiding the payment of balance consideration and charges of the unit in question. If such frivolous and foundationless allegations would be admitted then, interest of

other genuine allottees of the project, will be adversely affected. In these circumstances, the present complaint deserves to be dismissed.

- d. That admittedly, the completion of project is dependent on a collective payment by all the allottees and just because few of the allottees paid the amount, demand does not fulfil the criteria of collective payment. It is submitted that numerous allottees have defaulted in payment demanded by the respondent, resulting in delaying of completion of project, But the respondent is trying to complete the project as soon as possible by managing available funds. The certificate of chartered accountant shows the cost incurred till 31.03.2019 and amount spent by builder out of its own fund, due to reason of non-payment by allottees.
- e. That other than above stated factors, there are lots of other reasons which either hamper the progress of construction and in many cases, the complete stoppage of construction work.
- f. That the situation of COVID pandemic is in the knowledge of everyone, Since march 2020 till now, the country has seen mass migration of labor, complete lockdown in whole of the country, curfews and several other restrictions. The present situation seriously hampered the construction progress in real estate sector. From March 2020 till now, there have been several months where construction work was completely stopped either due to nationwide lock down or regional restrictions, Furthermore, the metro cities like Gurgaon and Delhi suffered from a major outburst of COVID cases and

deaths in such a number which can't be comprehended. There has been severe dearth of labor due to state imposed restrictions. The developers were helpless in these times since they had no alternative but to wait for the situation to come under control. That even RERA has extended the time limit for completion of project vide notification dated 26.05.2020, by six months. But the aforesaid was the period evidencing the first wave but the relaxation in restrictions were seen at fag end of year 2020. However soon thereafter, the country saw a more dangerous variant of COVID from the month of March 2021 and only recently restrictions have been lifted by the government. That whole of this consumed more than 11 months wherein 2/3rd time, there was no construction and rest of the time construction progressed at very slow pace to several restrictions imposed by state government on movement and number of people allowed etc.

- g. That the hon'ble authority would appreciate the fact that developer has to face several difficulties in construction of project few out of the several are already discussed above and moreover the complainants did not opt services of respondent against a single unit isolated from whole of the project or other units in same tower. That at the time of seeking allotment in the project of respondent, complainants very well knew that apartment in question is a part of tower consisting of several other units and the project would be completed along with other units which belong to other allottees. It is submitted that merely because few allottees had paid on time, it does not fulfil the

criteria of complete payment required for construction of whole of the project. The complainants knew that without complete payment on time from all allottees, it is not possible or quite difficult to complete the project on time. It is submitted that for the same reason, the clause of "force majeure" was made part of agreement. It is submitted that it is absolutely beyond the control of developer to get money from the buyer's on time. It is submitted that after a demand was raised, the only thing developer can do is to send a reminder and in extreme cases cancellation. But reminders/cancellation do not bring money which the developer had already incurred and is incurring continuously.

- h. That at the outset, it is necessary to mention here that the present complaint is not maintainable at all especially without making Indiabulls Housing Finance Limited a party. It is submitted that the complainants had availed a loan from the aforementioned finance company for making the payment of the consideration of the unit in question. The respondent had duly assisted the complainants in obtaining the loan, at their request. A separate tripartite agreements was executed between the complainants, the respondent and the finance company. Thereafter substantial amounts were received by the respondent from the finance company in terms of the loan towards the sale consideration of the unit in question. In terms of that tripartite agreement, the complainants cannot seek the refund of any amount whatsoever from the respondent. The entire matter relating

to refund is in fact governed by the said tripartite agreement and the said finance company holds exclusive rights with regard to the refund matters. However, it is submitted that the present complaint is not maintainable before the hon'ble forum. It is submitted in order to gain undue benefits; the complainants have concealed several material facts from the hon'ble forum. The complainants have intentionally twisted not only the facts and circumstances but have also concealed important provisions/conditions of agreement entered upon between the complainants and the respondent.

- i. That admittedly apartment buyer agreement was executed on 16.10.2012 and before execution of apartment buyer agreement, the complainant had paid an amount of Rs. 22,21,552/- since the complainant opted for possession linked plan. However, after execution of apartment buyer agreement, the complainants apprised the respondent that they did not have sufficient means to pay the further sale consideration of the apartment in question and requested to change their payment plan from possession linked to construction linked plan. That at that point of time, they apprised that they would opt for a bank loan in order to pay the demands against the apartment at the appropriate stage. That thereafter not even a single penny was paid by the complainants till year 2016.
- j. That the said agreement was executed by the complainants out of their own accord and out of their free will and consent. That as per the apartment buyer agreement, both the parties agreed that the

developer would try to complete the construction within a period of four years from the date of start of construction or signing of apartment buyer agreement, whichever was later. It is pertinent to mention here that in the present case since the construction started later than the execution of apartment buyer agreement thus the period of four years would be liable to be calculated from the date of starting of construction and not from the date of execution of apartment buyer agreement. The said apartment buyer agreement was signed by the complainants after understanding all terms and conditions and after agreeing the same. That the apartment buyer agreement was duly filled up in the complainants' presence and they duly acknowledged the same by signing over the clauses filled with pen. That the complainants duly acknowledged the fact that the completion of the construction shall be four years from the date of start of construction. Thus, it is crystal clear that the complainants intentionally concealed this fact from the hon'ble forum.

- k. It is submitted that after execution of apartment buyer agreement, the complainants approached the respondent and requested that since they needed to get a home loan, thus it will take some time to arrange funds from banks by applying loan and requested not to cancel their apartment as per terms and conditions of the apartment buyer agreement. It is submitted that at that point of time the respondent told the complainants that the construction of the tower in which the apartment of the complainants is situated, would be

started at later stage. Thus, the the complainants acknowledged the said fact and requested they would intimate the respondent as soon as any bank agrees to give them a house loan.

1. That after a lapse of certain period, the construction of the tower in which the apartment of the complainants is situated started in June 2016 and accordingly, a demand against start of excavation was raised by the respondent in this regard. Thus acknowledging their liability to pay against the said demand, the complainants paid the said demand. It is submitted that after paying the initial demand against start of excavation, the complainants contacted the respondent and requested them to help them in getting a loan from any bank. Thereafter, the respondent helped the complainant's in getting loan from Indiabulls Housing Finance Limited and on 31.10.2017, a tripartite agreement was executed between the complainants, respondent and the Indiabulls. That both the complainants and respondent are bound by the same. That as per the said agreement, the apartment in question was mortgaged with Indiabulls and all the amounts were paid by Indiabulls to the builder. Thus the present complainants have no right to seek refund directly in their name. That even if the complainants wish to withdraw from the project before the date of completion of the apartment as per the terms of apartment buyer agreement, then the builder is legally entitled to deduct earnest money and other charges etc. and the

remaining amount would be refunded to Indiabulls only and not to the complainants.

- m. It is already stated above as per clause 3.1 of the apartment buyer agreement, the date of completion of apartment was to be calculated from the date of start of construction i.e. June 2016 and as per clause 5.1 of the agreement which says about further extension of six months. It is submitted that as per the terms and conditions, the developer is liable to complete the construction of the apartment in question up to Dec 2020. But the said date is not absolute and was subjected to other terms and conditions as agreed by the complainant, which includes force majeure clause as well. That if total number of days as mentioned in paras no. 8 and 9 above and as per agreement, the respondent is entitled to reasonable extension due to the reason that factors mentioned in para no 8 and 9 are beyond the control of respondent and any delay caused due to above, stated reason is not the fault of respondent. That due to reasons mentioned above more than 1.5 years were wasted and developer has no control over it. Thus, adding by these days, the date of possession comes to June 2022. The date of completion of apartment is yet to arrive. Moreover, the complainant stopped making payment of the demands raised by the respondent since Jan 2021, without there being any plausible reason.

n. That keeping in view of above stated facts and circumstances, it is clear that the present complaint is premature and is liable to be dismissed.

E. Jurisdiction of the authority

7. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

10. 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 complainants at a later stage.
11. 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 ***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others*** dated ***13.01.2022 in CWP bearing no. 6688 of 2021*** 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."

12. 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.

F. Findings on the relief sought by the complainants.

- F. I Direct the respondent to refund the entire amount paid by the complainants from the date of deposit of each payment till date of realisation on pro rata basis along with interest at the rate of 10% p.a.**
13. The complainants submitted that booking of the unit was made on 16.10.2012. On 15.10.2016, a BBA was executed between the parties. They made a total payment of Rs. 70,54,766/- against the total sale consideration of Rs. 91,31,547/-. They filed a complainant before the due date and are seeking the relief of refund. The respondent submitted that the present complaint is not maintainable at all especially without MAKING "Indiabulls Housing Finance Limited" a party. It is submitted that the complainants had availed a loan from the aforementioned finance company for making the payment of the consideration of the unit in question. A separate tripartite agreement was executed between the complainants, the respondent and the finance company. Thereafter, substantial amounts were received by the respondent from the finance company in terms of the loan towards the sale consideration of the unit in question. In terms of tripartite agreement, the complainants cannot seek the refund of any amount whatsoever from the respondent and the entire matter relating to refund is in fact governed by the said tripartite agreement and the said finance company holds exclusive rights with regard to the refund matters.
14. Keeping in view the fact that the allottee/complainant wish to withdraw from the project and are demanding return of the amount received by

the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the plot in accordance with the terms of agreement for sale or duly completed by the date specified therein, the matter is covered under section 18(1) of the Act of 2016.

15. The due date of possession as per agreement for sale as mentioned in the table above is **26.05.2020** and there is delay of 9 months and 6 days on the date of filing of the complaint.
16. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which they have paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

"... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022.*** it was observed as under:

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as



an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottees wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

The authority hereby directs the promoter to return the amount received by them along with interest at the rate of 9.70% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

F. Directions of the authority

17. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of

obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent/promoter is directed to refund the entire amount of Rs. 70,54,766/- paid by the complainant along with prescribed rate of interest @ 9.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

18. Complaint stands disposed of.

19. File be consigned to registry.


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. K.K. Khandelwal)

Chairman

Dated: 13.07.2022