



HARERA
GURUGRAM

Complaint No. 614 of 2021

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

Complaint no. : 614 of 2021
Date of filing complaint: 02.02.2021
First date of hearing : 18.03.2021
Date of decision : 14.07.2022

Mrs. Mona Bedi R/O: - Plot No. 285, Sector- 14, Gurugram, Haryana-122001	Complainant
Versus	
M/s Experion Developers Private Limited Regd. Office at: F-9, 1 st Floor, Manish Plaza -1, Plot No.7, MLU Sector 10, Dwarka, New Delhi - 110075	Respondent

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Shri. Vinay Kumar Aini & Shri. Rishabh Sharma	Complainant
Shri. Arun Kumar Yadav	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 allottees as per the agreement for sale executed inter se.

A. Unit and project related details

2. A complaint dated 02.02.2021 was filed under section 31 of real estate (regulation and development) act, 2016 read with rule 28 of Haryana Real estate (regulation and development) rules , 2017 by the complainants , against the respondent builder in respect of the apartment booked by them in the project " THE HEART SONG " on account of the violation of section 11 (4) (a) of the act ibid .
3. 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.no.	Heads	Information
1.	Project name and location	" THE HEART SONG " , sector - 108 , Gurugram
2.	Nature of the project	Residential- group housing colony
3.	a) DTCP license no	38 of 2010 DATED 14.05.2010
	b) License valid up to	13.05.2022
	c) Name of the licensee	M/s S.K.N. Developers pvt. Ltd. and M/s K.S.N. Real Estate Developers
	d) area	15.025 acres



4.	a) RERA registered/not registered	113 of 2017 dated 28.08.2017 valid upto 27.08.2018
5.	Unit no.	Plot no. D3-102, 2779 sq. ft. (Plot no. C1-0701 as well)
6.	Unit admeasuring	2779 sq. ft.
7.	Date of execution of BBA	not executed
8.	Date of allotment letter	30.07.2014
9.	Date of application form	17.07.2014
10.	Total consideration	Rs. 1,02,97,025/-
11.	Total amount paid by the complainants	Rs. 59,90,000/- <i>(as per annexure "P-2" page 30 receipt dated 17.7.2014, complaint)</i> Rs. 40,00,000/- <i>(as per respondent on page 13 of its reply, booking application on annexure "R-3" page 43 of reply & receipt attached on page 64 of the reply.)</i>
12.	Possession clause	ESTIMATE PROJECT COMPLETION SCHEDULE (13) subject to the terms of this application form and the agreement including but not limited payment of total sale consideration , stamp duty and other costs and charges by the applicant , force majeure , and subject to the applicant having complied with necessary formalities and documents as may be prescribed by the company from time to time and especially , as may be prescribed in the notice of possession , the company shall endeavor to hand over possession of the apartment within 36 months from the date of execution of the agreement or any revision in the sanctioned building plan, whichever

		is later . the applicant further accepts, agree and understand that in addition , a period of 180 days (grace period), after expiry of commitment period will be available to the company to account for unforeseen / unplanned project
13.	building plan	18.09.2012
14.	Due date of delivery of possession	18.09.2015 (Taken from building plan)
15.	occupational certificate	02.05.2018
16.	Offer of possession	Not offered
17.	Reminders Letter	28.10.2014 , 19.11.2014 , 27.01.2015 , 16.02.2015 , 29.04.2015 , 21.05.2015 . final notices - 03.12.2014 , 03.03.2014 , 09.06.2015 .
18.	Termination Letter	27.04.2017

B. Facts of the complaint

4. That the Respondent(s) had launched a residential Group Housing Project in the name of "The Heart Song" in Sector -108, Gurugram (Haryana) in the year 2014 and had published an advertisement in the National Newspaper Times of India in the June 2014 inviting the bookings from general public of the "Heart song Project" offering various lucrative facilities attached to the project like outdoor gym facility, open area theatre and leisure space. It further claimed that the project is funded by Foreign Direct Investment in which only 10% booking amount was required to be paid at the time of booking and the remaining 90% of the amount was to be paid at the time of possession of the flat/apartment/unit.
5. The complainant believing upon the representation made by the Respondent(s) in the advertisement and on basis of the information provided by the marketing team, had booked one residential flats bearing

no. C1/701 on 7th Floor in Sector -108, Gurugram for the consideration price of INR 1,02,97,025.00/- on 17/07/2014.

6. That it was assured by the Respondent(s) at the time of accepting payment that very shortly a builder buyer agreement will be executed towards booking of the said residential Flats/apartment no. C1/701 on 7th Floor in Sector-108, Gurugram, however, the same was never executed and signed by the Respondent, in spite of the fact that the complainant pursued regularly with the Respondent(s) casting pressure for signing Builder Buyer Agreement.
7. That as per the booking application form vide clause no. (13) physical possession of the said flat/apartment was to be handed over within 36 months from the date of execution of the agreement which was not signed between the respondent and the complainant. That it was also agreed between the complainant and the respondent that the remaining payment for aforesaid unit/apartment would be paid at the time of handing over the possession of the unit/apartment.
8. That the respondent neglected to complete the project and failed to hand over the flats/unit/apartment within 36 months but continued to illegally raise demand upon the complainant for the balance amount. The complainant became apprehensive of their acts and omission since no activity of construction was visible on site.
9. That despite regular followed-up by the Complainant, the Respondent never signed any Builder Buyer Agreement nor commenced any construction work on site but continued to cast pressure to make balance payment.
10. That on refusal of the complainant to make the payment unless the proper documents are executed the Respondents illegally cancelled the allotment of

Apartment flat No.C1/701 on 27/04/2017 and forfeited the entire application money of INR 19,90,000/- paid by the complainant.

11. That said act and conduct of the Respondent(s) to cancel the allotment and forfeiture of the amount without undertaking any construction activity is illegal, they ought to have returned the booking amount paid by the complainant but no payment was returned by the respondent.
12. That the respondent have arbitrarily forfeited sale consideration sum of INR 19,90,000/- paid by the complainant hence the present complaint is being filed by the complainant before the Hon`ble Authority for refund of sale consideration amount paid by the complainant.
13. That despite regular follow up the respondent had refused to refund on one pretext or the other pretext, therefore the complainant is left with no other efficacious remedy available except to file the present complaint before the Hon`ble Authority seeking refund of money invested along with penalty and interest charges for wilful breach by the respondent.
14. That the cause of action for filling the present complaint arose when the allotment was illegally cancelled and the cause of action still exists as respondent have refused to pay sum of INR19,90,000/- to the Complainant.
15. That respondents are carrying their business within territorial jurisdiction of this Hon`ble Authority and the entire cause of action also accrued between the parties at Gurugram, therefore, this Hon`ble officer/Authority has got the jurisdiction to entertain and try the present complainant. the complainant had filed a case before the Hon`ble Permanent Lok Adalat, Gurugram against the respondent and withdrawn the same with liberty to file the complaint before the Hon`ble RERA Authority.
16. That the respondent had by its acts, conduct and omission had violated the RERA Act for failure of the promoter to complete or unable to give



possession therefore the respondent is liable to compensate the complainant by refund of sale consideration and with interest and compensation as provided in section 18 the RERA Act as above.

C. Relief sought by the complainants:

The complainants have sought the following relief:

- a). The respondent be directed to refund sale consideration sum of INR 19,90,000/- along with interest to be paid to the complainant.
- b.) The respondent be directed to pay Rs. 5 lakhs to be paid to To complainant for causing mental agony and harassment.
- c.) The complainant is also entitled to get Rs. 50,000/- towards the cost of the litigation.

D. Reply by the respondent

17. It is denied that the respondent issued any such advertisement wherein such lucrative promises were made. The respondent claimed payment plan wherein 10 % amount was to be paid as booking amount and 90% was paid on offer of possession. The complainant booked the apartment in question of her volition after conducting thorough market research and due diligence.
18. The complainant failed to execute the apartment buyer's agreement for the reasons best known to her, the respondent issued reminder letters dated 28.01.2015 and final notice dated 15.05.2015 for execution and return of apartment buyers' agreement but of no use.
19. The payment plan opted by the Complainant, the Complainant was liable to make do payments within agreed time frame as provided under the payment plan opted by her in the Booking Application and annexed with Provisional Allotment Letter it is submitted that the time frame for offer of possession was linked with the timely payment of due instalments by the Complainant.

Further it is submitted that the as per agreed terms of the contract between the parties being Clause 13, Schedule V of the Booking Application the Respondent was liable to handover possession of the said apartment to the Complainant, subject to timely payments of due instalments and Force Majeure events, within a period of 42 months (including 180 days as Grace Period) from the date of execution of Apartment Buyer Agreement or any revision in the sanctioned building plans whichever is later. However, the Complainant miserably failed to make the due payments as per the payment plan opted by her, in fact the Complainant did not pay any amount after payment of booking amount. As detailed in reply to previous para the Apartment Buyer Agreement was not executed by the Complainant for the reasons best known to her, the Complainant is trying to take advantage of her own defaults, without having any fault on the part of the Respondent.

20. The respondent issued allotment letter dated 30.07.2014 along with the payment plan as opted by the complainant, which clearly shows that instalments were liable to be paid by the complainant prior to the time of handing over of possession as well. The complainant never raised any objection in respect of said payment plan opted by her. it was never agreed to make all the remaining payments at the time of offer of possession. the complainant was liable to make due payments and the respondent raised payment demand accordingly
21. It is submitted that the Respondent has completed the construction of the project including the apartment In question well within time as per agreed terms of contract between the parties, obtained occupation certificate and has offered possession to the respective allottees who fulfilled their contractual obligations, several families are already residing therein. The

Complainant with malafide and willful default failed to make payment of due instalments and to execute the Apartment Buyer Agreement without having any cause/reason for the same. The allotment in favour of the Complainant was cancelled due to persistent default in payment. The Complainant was not entitled to get offer for possession of the apartment booked by her due to her failure fulfil her obligations under the terms of the contract between the parties. It is submitted that as per clause 13 of the Booking Application the Respondent was liable to offer possession to the Complainant within 42 months (including 180 days Grace Period from the date of execution of Apartment Buyer Agreement. As detailed hereinabove the Complainant failed to execute the Apartment Buyer Agreement, it is submitted that the construction of the apartment booked by the Complainant was completed and Respondent applied for obtaining occupation certificate vide application dated 17.10.2017 and the same was received on 02.05.2018. All the payment demands were raised by the Respondent in accordance with the payment plan opted by the Complainant.

22. It is submitted that as detailed herein above that is the Complainant who failed to execute the Apartment Buyer Agreement even after repeated reminders. Further it is submitted that the Complainant was liable to make due payments as per the payment plan opted by her. The Complainant miserably failed to make due payments without having any reason for the same. The Respondent was in process of construction of the project, completed the construction, obtained occupation certificate and offered

possession to the respective allottees. the Complainant miserably failed to make due payments as per the payment plan opted by her. The Respondent issued several reminders/final notices, as annexed herewith as Annexure R-6 and R-7, for making the due payments. The Respondent was constrained to cancel the allotment of the apartment in question only after giving ample opportunity, for making payments, to the Complainant and her persistent default. It seems that being an investor the Complainant chose to not to make the due payments due to recession in the real estate market. Complainant had booked two apartments in the project another apartment bearing apartment no. C-1/701 was also booked by the Complainant but she also failed to make due payments for the same and the allotment of said apartment was also cancelled by the Respondent.

23. The Respondent in accordance with the agreed terms of the contract between the parties rightly cancelled the allotment of the apartment vide Cancellation Letter dated 27.04.2017 and forfeited the amounts paid by the Complainant. As per Clause 20 of Schedule-V of the Booking Application the Respondent is entitled to forfeit the Earnest Money along with delayed payment interest, brokerage paid and applicable taxes/charges etc. The Respondent completely acted in accordance with the agreed terms of allotment however the Complainant failed to adhere to the agreed terms of allotment and payment plan opted by her.

24. The Complainant has signed and submitted Booking Application dated 30.07.2014 along with Schedule-V therein. It is submitted that in Schedule-

V of the Booking Application the detailed terms and conditions of allotment, timely payment and cancellation on default by the allottee are clearly mentioned. Booking Application is the binding contract between the parties. The Complainant perused and understood the same even before payment of any single penny to the Respondent. The Complainant was a willful & chronic defaulter and miserably failed to make due payments. The Respondent was entitled to cancel the allotment and forfeit the amounts in terms of Clause 20, Schedule-V of Booking Application.

25. That the Complainant defaulted in timely payment accordingly in accordance with the agreed terms of the contract between the parties the allotment of the apartment in question has been cancelled and the amount paid by the Complainant has been forfeited by the Respondent as per the agreed terms of contract between the parties. Under the agreed terms of the contract between parties the Complainant has no right to ask for refund of the paid amount. As per agreed terms of the contract between the parties the Respondent is entitled to forfeit all the amounts as detailed in the submissions already made hereinabove. The Complainant has no cause of action to file the present complaint. The Complaint is time barred as the same has been filed after expiry of more than two years from the date of issuance of Cancellation Letter by the Respondent. Keeping in view the facts and circumstances detailed herein above the Hon'ble Adjudicating Officer has no jurisdiction to entertain the present complaint.

26. The Complainant has no cause of action to file the present complaint before Hon'ble Adjudicating Officer. the Complainant has no cause of action to file the present Complaint before Hon'ble Adjudicating Officer as the cause of action, as alleged by the Complainant, arose before applicability of RERA Act/Rules. It is submitted that the Complainant willfully defaulted in making timely payments as per the payment plan opted by her. The Respondent as per agreed terms of the contract between the parties has rightly cancelled the allotment and forfeited the paid amounts. The allotment in favour of the Complainant was cancelled prior to applicability of RERA Act/Rules hence any question of violation of section 18 of RERA Act does not arise. The present complaint is liable to be dismissed on this ground alone.

E. Jurisdiction of the authority

27. The respondent has raised an objection regarding jurisdiction of authority to entertain the present complaint. 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

28. 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

29. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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 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.

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.

F. Findings on the relief sought by the complainants.

F. I The respondent be directed to refund sale consideration sum of INR 19,90,000/- along with interest to be paid to the complainant.

30. The respondent has contended that the complainants have made defaults in making payments as a result thereof, it had to issue reminders dated 28.10.2014, 19.11.2014, 27.01.2015, 16.02.2015 , 29.04.2015 , 21.05.2015

and final notices – 03.12.2014 , 03.03.2014 , 09.06.2015 . It is further submitted that the complainants have still not cleared the dues. The relevant clause is reproduced below:

“20) TIMELY PAYMENT: The timely payment of the entire amounts due and payable by the Applicant to the Company is an integral part of this Agreement. In the event the Applicant defaults in payment of any amount(s) due and payable per this Agreement or otherwise beyond a period of 60 (sixty) days from the due date(s) for each of such payments, the Company shall have the right to terminate this Agreement and cancel the allotment of the Apartment and refund the amounts received against the Apartment without interest and only after re-allotment of the Apartment after deduction of the Earnest Money, accrued interest, brokerage/commission, if any and other charges of non-refundable nature. The Applicant shall be liable to pay simple interest at the rate of 18% per annum for such period for each payment delayed beyond the due date till the date of receipt. The Company shall adjust all amounts received from the Applicant first towards interest on overdue payments, thereafter towards any overdue payments or any outstanding demand and finally, the balance if any, shall be adjusted towards the current dues for which the payment is tendered.”

31. At the outset, it is relevant to comment on the said clause of the application form, wherein the payments to be made by the complainants have been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottees that even a single default by the allottees in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. There is nothing on the record to show as to what were the terms and conditions of allotment of the unit in favour of the complainants. Admittedly, the unit allotted to the complainants initially was changed two times by the respondent due to one reason or the other. The total sale price



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of the allotted unit to the complainants was Rs. 1,02,97,025/-. The complainants admittedly made default in making payments but was the status of construction at the spot at the time when termination of the unit was made by the respondent. Moreover, if the complainants were committing default in making payments due as alleged by the respondent, then on cancellation of their unit vide letter dated 27.04.2017, it was obligatory on it to retain 15% of the basic sale price and return the remaining amount to them. There is nothing on the record to show that after deducting 15 % of the basic sale price, the respondent sent any cheque or bank draft of the remaining amount to the complainants, and which is against the settled principles of the law as laid down by the Hon'ble Apex Court of the land in cases of in *Maula Bux V/s Union of India* AIR 1970 SC, 1955 and *Indian Oil Corporation Limited V/s Nilofer Siddiqui and Ors, Civil Appeal No. 7266 of 2009* decided on 01.12.2015 , followed in *Jayant Singhal v/s M3M India ltd. Consumer case no. 27669 2017 decided on 26.07.2022* and wherein it was observed that forfeiture of earnest money more than 10% of the amount is unjustified. Keeping in view the principles laid down in these cases, the authority in the year 2018 framed regulation bearing no. 11 providing forfeiture of more than 10% of the consideration amount being bad and against the principles of natural justice. Thus, keeping in view in the above-mentioned facts, it is evident that while cancelling the allotment of unit of the complainants, the respondent did not return any amount and retained

the total amount paid by the complainants. The respondent is directed to return the balance within 90 day along with interest @ 10 % per annum.

F.II cost of litigation

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:


32. 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 return the amount paid by the complainant after deducting 10% earnest money of the total sale consideration along with interest at the rate of 10% p.a. from the date of cancellation till the actual date of refund of that 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.

33. Complaint stands disposed of.
34. File be consigned to the Registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated:14.07.2022

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