



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

Complaint no.	:	4937 of 2020
Date of filing complaint:		12.01.2021
First date of hearing:		26.02.2021
Date of decision	:	02.08.2022

1. Arshdeep Tiwana 2. Pritam Saikia R/O: N2/103, Paras Irene, Sector 70 A	Complainants
Versus	
1. Haamid Real Estate Private Limited Regd.office: 232-B, Fourth Floor, Okhla Industrial Estate, Phase-III New Delhi-110020 2. Advance India Projects Ltd. Regd. Office: The Masterpiece, Golf Course Road, Sector 54, Gurugram -122002, Haryana	Respondents

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Ms. Sanskriti Tyagi Proxy Counsel (Advocate)	Complainant
Sh. M.K Dang (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 complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Name of the project	"The Peaceful Homes" Sector 70A, Gurugram, Haryana
2.	Project area	8.38 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	16 of 2009 dated 29.05.2009 valid upto 28.08.2024 73 of 2013 dated 30.07.2013 valid upto 09.07.2019
5.	Name of licensee	Haamid Real Estates Pvt. Ltd.
6.	RERA Registered/ not registered	63 of 2019 dated 22.10.2019
7.	RERA registration valid up to	31.12.2019
8.	Booking dated	04.06.2012 (As alleged by the complainant in point no. 5 of brief facts and as per allotment letter dated 23.05.2013)
9.	Allotment of unit	23.05.2013 (Annexure R-3-page no. 47 of reply)



10.	Unit no.	B-174, 17 th floor, Tower- B (As per page no. 47 of reply)
11.	Unit admeasuring	2150 sq. ft. (super area) (As per page no. 47 of reply)
12.	Date of executing application booking form	04.06.2012 (As alleged by the complainant in point no. 5 of brief facts and agreed by the respondent on page no. 03 of reply) (No BBA has been executed, but a similar application form containing terms and conditions of allotment was signed by the parties. Therefore, the said document will be treated at par with BBA)
13.	Possession clause	As per Clause 35 of application form: The company proposes to hand over the possession of the unit to the allottee within the period of 36(Thirty-Six) months, from the date of commencement of construction of the project , which shall mean the date of commencement of construction of the project, which shall mean the date of commencement of excavation work at the Project Land and this shall be duly communicated to the Allottee ("Commitment Period"). The applicant further agrees and understands that the Company shall additionally be entitled to a period of 180 (One- hundred eighty) days ("Grace Period"), after the expiry of the said Commitment Period to allow for any contingencies or delays in construction including for

		obtaining the Occupation Certificate of the Project from the Governmental Authorities. (As per page no. 40 of complaint)
14.	Date of commencement of construction	21.04.2014 (As per demand letter on page no. 49 of reply)
15.	Due date of possession	21.04.2017 (Calculated from date of commencement of construction i.e. 21.04.2014) Grace period of 180 days is not allowed
16.	Total sale consideration as per payment plan	Rs.1,54,99,051/- (As per page no. 48 of reply)
17.	Amount paid by the complainant	Rs.33,50,697/- (As per cancellation letter dated 11.08.2015 on page no. 65 of reply and as per allotment letter)
18.	Cancellation letter	11.08.2015 (As per page no. 65 of reply)
19.	Occupation certificate	29.10.2019 (As per page 78 of the reply)
20.	Offer of possession	Not offered
21.	Grace period utilization	Since the utilization of grace period is conditional to unforeseen situations and obtaining OC. The respondent has not specified/detailed unforeseen circumstances. Application for OC is not made within time specified. Therefore, such grace period of 180 days cannot be allowed.

B. Facts of the complaint:

3. That in the year of 2012, the complainants were approached by the respondent, with a proposal of investment in one of its upcoming project being developed namely "The Peaceful Homes", Sector 70A, Gurugram, Haryana.
4. That the booking for the said unit was done on 04.06.2012 for unit bearing number B174, 17th Floor, located in Tower B, having Super Area of 2150 sq. ft. The flat/apartment was purchased under the construction linked payment plan for a total sale consideration of Rs.1,54,99,051/-The allotment of the unit was made by the respondent on 23.05.2013. No buyer's agreement was executed between the parties.
5. That, as per the terms and conditions agreed in payment plan, complainants made timely payments as and when demanded by the respondents.
6. That the complainants visited the site of the project and was astonished to see that the works at project site going on at a really slow pace and the respondents have abandoned the project. The complainants also came to know that the land of project site is a disputed property, and the litigation is to be initiated on respondents and the project for unlawful acquisition and ongoing construction.
7. That, in 2015, the complainants decided to withdraw from the project and intimated the respondent about the same. The respondent arranged a meeting with the complainants with its directors, where they assured them that the property is not in dispute and to regain their trust facilitated them with exemption of any further payments.

8. That the complainants trusting the respondents continued with the project and as agreed did not pay any further payments for the allocated unit. After that meeting the, complainants visited the respondent's office multiple times, and the same statement was reiterated by their directors when in the year 2018, no communication was received by the complainants they again visited the office of the respondents and were issued with a letter dated 05-12-2018, giving them assurance of completion and quality of the project.
9. That later in the year 2019, complainants from some other property agent got to know that the work of construction has been completed at the project site and the respondents have been offering possession to the buyers. The complainants again got shocked as no such update was provided by the respondents to them. So in order to check the status of the project site, the complainants visited the project site, and the security officials informed them that the allotted unit is occupied by some third party, as the respondents sold the allotted unit to a third party.
10. That, the complainants approached the respondents for the resolution of the discrepancy but no revert was provide to them. They even offered the respondents to refund their hard-earned money if they are unable to deliver the residential unit but they respondents acted in mala fide nature and has not refunded any money till date.
11. That the respondents are not in a position to offer the possession of the said unit as they have already sold the allotted unit to the third party fraudulently and have created third party rights. Thus, the complainants were left with no other option but to file the present complaint seeking refund of the entire amount paid against allotment.

C. Relief sought by the complainant:



12. The complainants have sought following relief(s):

- i. Direct the respondent to immediately handover the possession of the unit.
- ii. Direct the respondent to pay the interest so accrued on the entire amount paid by the complainant at 24% for every month of delay from the due date of possession till the offer of possession.

D. Reply by respondents:

The respondents by way of written reply made the following submissions

13. That the complainants were allottees of the above-mentioned unit for a total sale consideration of Rs. 1,54,99,051/- and had applied for allotment of an apartment vide the booking application form on 04.06.2012.
14. That after booking of the allotted unit, they were allotted the unit vide allotment letter dated 23.05.2013. The allottees were required to execute a buyer agreement.
15. That respondent no.1 raised payment demands from the complainants in accordance with the mutually agreed terms and conditions of the booking application form as well as of the payment plan. The complainants committed several defaults in making timely payments of the demanded amount. It is submitted that respondent no.1 had raised the payment demand dated 21.04.2014 for the amount of Rs. 13,49,092/- and the same was paid by the complainants only after reminders dated 12.05.2014, 27.05.2014 and 19.06.2014 were issued by it.
16. That as per the agreed payment schedule vide payment request dated 06.10.2014, 29.12.2014, 27.04.2015, respondent no.1 raised the installment demands of net payable amount of Rs. 21,18,946/-, Rs. 33,00,878/- and Rs.

45,75,955/-. However, the same were not paid by them despite issuance of reminders dated 28.10.2014, 24.11.2014, 15.01.2015, 28.01.2015 and 18.02.2015, 22.05.2015, 24.06.2015 and final notice dated 21.07.2015 and the due amount was adjusted in the next installment amount by it.

17. That on account of non-fulfilment of the contractual obligations by the complainants despite several opportunities extended by respondent no.1, their allotment was cancelled, and the earnest money deposited by them along with other charges was forfeited vide cancellation letter dated 11.08.2015
18. It was denied that the construction of the project is not complete. Rather, the construction of the project is complete and respondent builder has obtained the occupation certificate on 29.10.2019.
19. Copies of all the relevant do 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 submissions made by the parties.

E. Jurisdiction of the authority:

20. 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

21. 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.

22. 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.

23. 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 judgements passed by the Hon'ble Apex Court in *Newtech Promoters and Developers*

Private Limited Vs State of U.P. and Ors. 2020-2021 (1) RCR (c) 357 and 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 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.”

24. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases 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 objections raised by the respondent:

F.I Objection regarding complainants is in breach of agreement for non- invocation of arbitration.

25. The respondents raised an objection that the complainants have not invoked arbitration proceedings as per application form which contains a provision regarding initiation of arbitration proceedings in case of breach of agreement.



The following clause 49 of schedule 1 has been incorporated w.r.t arbitration in the application form:

49 "All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The award of the Sole arbitrator shall be final and binding on the Parties. The company and the allottee will share the fees of the Arbitrator in equal proportion".

26. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to

render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*** and followed in case of ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, Consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. A similar view was taken by the Hon'ble apex court of the land in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018*** and has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, that the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

27. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within the right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Entitlement of the complainants for refund:

G.I Direct the respondents to immediately handover the possession of the unit.

G.II Direct the respondents to pay the interest so accrued on the entire amount paid by the complainants at 24% for every month of delay from the due date of possession till the offer of possession.

28. The subject unit was allotted to the complainants on 23.05.2013 under the construction linked payment plan on the basis of booking dated 06.04.2012. No buyer's agreement was executed with regard to the allotted unit between the parties. However, on the basis of booking, the complainants started making payments against the allotted unit and paid a sum of Rs.33,50,697/- against total sale consideration of Rs. 1,54,99,051/-. Due to financial constraints, they were unable to continue with the project and requested for refund of the paid up amount in october 2015 and approached the authority seeking relief of refund of the paid-up amount on the ground that the work at the project site was going on at a really slow pace and respondent were not in a position to offer the possession of the said unit as they have already sold the allotted unit to the third party. Moreover, they do not want to continue with the project and with due from the same due to financial constraints.
29. It is an admitted fact that no buyer's agreement was executed between the parties. So, the due date for completion of the project and handing over possession of the allotted unit is being taken from the application form and the same comes to 21.04.2017 after excluding grace period. The allotment of the unit was made in favour of the complainants on 23.05.2013.

30. The respondents raised various demands against the complainants which were not cleared by them. So the respondents cancelled the allotted unit vide letter 11.08.2015 and the tracking report is also placed on record on page no. 66 of reply. The complainants pleaded that no such cancellation letter has ever been received by any of them. Though as per the tracking report, the said cancellation letter is shown to have been delivered on 21.08.2015 at Gurgaon but no specific delivery address could be ascertained from that report.
31. The complainants vide emails dated 02.09.2015 & 05.03.2017 i.e after cancellation of the allotted unit issued vide letter dated 11.02.2015 wrote to the respondents regarding cancellation/ surrender and refund of the unit as the project seems nowhere near completion. It has been pleaded cancellation was not received sent by the respondents. Even vide letter dated 05.03.2017, the complainants requested for refund and the same is placed on file. Admittedly between the years 2015-2017, the complainants did not pay any amount against allotted unit. The due date of completion of project expired on 21.04.2017. Thus, it is evident that the complainants were no longer interested in the project and sought refund of the paid-up amount as per the provisions of application form leading to allotment of the unit.
32. After cancellation of an allotted unit, the forfeiture of earnest money should be either as per the provisions of allotment / buyer's agreement entered into between the parties . But in the case in hand , after cancellation of the unit , the respondents after forfeiture of the earnest money did not return any amount to the allottees and illegally retained the same 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. Even 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 sale consideration amount being bad and against the principles of natural justice. Thus, keeping in view the above-mentioned facts, it is evident that while cancelling the allotment of unit of the complainants, the respondents did not return any amount and retained the total amount paid by them. Thus, the respondents are directed to return the balance amount after retaining 10% of the sale consideration of Rs. 1,54,99,051 /- from the date of cancellation of the unit i.e, 05.03.2017 till the date of refund along with interest @ 9.80 % per annum within a period of 90 days.

H. Directions of the Authority:

33. 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 promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent-promoters are directed to refund the amount of Rs. 33,50,697/- after deducting 10% of the sale consideration of Rs. 1,54,99,051/- of the unit being earnest money along with interest @ 9.80% p.a. on the refundable amount, from the date of email of surrender i.e 05.03.2017 till the actual date of refund of the amount.
- ii) A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.


34. Complaint stands disposed of.

35. File be consigned to the registry.

V.I-
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. KK Khandelwal)

Chairman

Dated: 02.08.2022



HARERA
GURUGRAM