

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

Complaint no. :	1863 of 2019
Date of filing complaint:	09.05.2019
First date of hearing:	12.09.2019
Date of decision :	30.08.2022

Praveen Dagar R/o: C-83, Mianwali Colony, Gurugram Haryana	Complainant
Versus	
1. M/s 1000 Trees Housing Pvt. Ltd. Registered office at: B-805, 8 th floor, Tower B, Signature Tower, South City 1, Gurugram Haryana	Respondents
2. M/s Geo Works Realty Pvt. Ltd. Registered office at: Shop no. 3F/311, plot no. 1 and 2, Sector G, Mayur Vihar, Phase 3, Delhi-110096	

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
None (Advocate)	Complainant
Shri Vinayak Gupta (Advocate)	Respondents

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 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 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.No.	Heads	Information
1.	Project name and location	"1000 Trees" Sec 105, Gurugram
2.	Project area	13.078 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	127 of 2012 dated 27.12.2012 and valid up to 26.12.2022
5.	Name of licensee	Kanwar Singh, Rohtash, Krishan Pal and others
6.	RERA Registered/ not registered	Unregistered
7.	Unit no.	G-1501, 15th floor, Tower G [Page 45 of the complaint]
8.	Unit measuring	1738 sq. ft. [Page 45 of the complaint]
9.	Date of allotment	N/A

10.	Date of execution of builder buyer agreement	BBA has not been executed but the BBA was sent for signing on 07.02.2014 [Page 34 of the complaint] Also, the same date has been mentioned on page 38 of the complaint]
11.	Possession clause	4.1 The developer proposes to issue offer/notice of possession of the apartment within a period of 42 months from the date of signing of this agreement. (emphasis supplied)
12.	Due date of delivery of possession	07.08.2017 Calculated from date of signing of this agreement i.e.07.02.2014
13.	Total sale consideration	Rs.86,70,610/- [Page 46 of the complaint]
14.	Total amount paid by the complainant	Rs.22,48,210/- [As alleged by the complainant on page no. 3 of the complaint]
15.	Payment plan	Construction linked payment plan [Page 37 of the complaint]
16.	Offer of possession	Not offered
17.	Occupation Certificate	Not obtained
18.	Final reminder letter	19.03.2014 [Page 35 of the complaint]
19.	Cancellation notice	28.04.2014 [Page 36 of the complaint]

B. Facts of the complaint:

3. That, the complainant had booked a unit i.e. G-1501 on 15th floor, Block/Tower-G having super area of approx. 1738 Sq. ft. in complex 1000 Trees in Sector-105, Gurugram, Haryana. Both the parties had entered into a builder-buyer agreement on

- 01.09.2013. The total sale consideration of the above mentioned was Rs. 86,70,610/- and out of which the complainant had paid Rs.22,48,210/- at the time of booking the above-mentioned unit.
4. That, the builder had agreed to complete the above-mentioned project within three years from the execution of the agreement i.e. by October 2016. The complainant relying & under the belief of the builders brand name and the promises which were made at the time of booking the unit and out of sheer enthusiasm of owning a housing unit at a prime location kept on making all the required payments whenever they were payable without any room for delay on his part which was also appreciated by the builder time and again.
 5. That the housing project in which the complainant had invested huge amount of hard-earned earnings has not been delivered to him in time and in spite of a delay of about 6 years in total. As a right provided to a consumer under the domains of different statutes of law the complainant visited the builders office several times, send the builder endless reminders telephonically and also via several e mails inquiring about the reason of the delay in the completion of the project but to the utter shock and dismay of the complainant neither of the queries were ever entertained nor conclusive and satisfactory reply ever came from the builders end which he was duty bound to provide.
 6. That being the active party to the contract dated 01-09-2013 entered by the builder with the complainant the respondent never

delivered nor started the above-mentioned project but kept on taking the payments against the said unit.

7. That the complainant received a shocking email from the builder that the said project has been cancelled and he can either take his money back alongwith interest or take an alternative flat in another project at Noida to which he denied and asked for refund. The complainant also sent a legal notice to the builder on 10.08.2018 which was not accepted and telephonically abused the complainant to do anything he wished but would not get his refund back.

C. Relief sought by the complainant:

8. The complainant has sought following relief(s):
- Direct the respondents to refund Rs.22,48,210/- alongwith interest @16% to be paid for delay of 5 years.

D. Reply by respondents:

9. That the respondents deny the contents of each, and every averment made by the complainant in the complaint filed before this Authority, unless and until the same are specifically admitted. It is further submitted that the present short reply is being filed with specific submission with regard to the non-maintainability of the present complaint before this Authority.
10. That at the outset, it is the respectful submissions of the respondents, that the purported complaint filed by the complainant against them is not maintainable and the same

deserves to be dismissed as per the law settled by the Hon'ble Real Estate Appellate Tribunal, Haryana vide Judgment dated 02.05.2019 in Appeal No. 06 of 2018 titled as Sameer Mahawar vs. MG Housing Pvt. Ltd. The Appellate Tribunal has categorically held that the relief with regard to seeking of refund and compensation can be adjudicated/decided by the Adjudicating officer and not by the Haryana Real Estate Regulatory Authority.

11. That Haryana Real Estate Appellate Tribunal vide abovementioned judgment has categorically held that Real Estate Regulatory Authority has no jurisdiction to adjudicate upon the issue of refund, accordingly any decision declining/accepting refund would be without jurisdiction and cannot be sustained in the eyes of law.
12. That on the preliminary objection raised hereinabove with regard to the non-maintainability of the present complaint before the Authority as per the provision of the Act and as per the provisions of the RERA Act and even as per the law settled by the Haryana Real Estate Appellate Tribunal, the same deserves to be dismissed without going into the merits of the case in the interest of justice and equity.
13. That, the respondents respectfully submits that in case the Authority is not inclined with the preliminary objection raised by the respondents way of the present reply then further opportunity may kindly be granted to the respondents to file a detailed reply to the present complaint in order to adjudicate the same on merits.

14. 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:

15. While filling written reply it was pleaded by the respondent builder that in view of the judgment dated 05.05.2019 passed by the appellate Tribunal Haryana in Appeal no. 06 of 2018, it was observed that the authority has no jurisdiction to deal with the cases with regard to refund. But that judgement was challenged before the Hon'ble High Court of Punjab and Haryana in case of CWP No. 38144 of 2018 and other connected matters decided on 16.10.2020 and who observed that the jurisdiction with regard to refund lies with the authority and not with the adjudicating officer. That view was affirmed by the Hon'ble Apex Court in the case bearing no. *SLP(Civil) No(s). 3711-3715 OF 2021* titled as *M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors., and* followed 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 was held that as matters regarding refund and interest under section 18(1) are to be decided by the authority and matters regarding adjudging compensation to be decided by the Adjudicating officer. So, in view of the law laid down by the apex court of the land, the authority has the only jurisdiction to deal with the matter in issue

16. The plea of the respondents 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 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 regarding relief sought by the complainant:

F.1 Direct the respondents to refund Rs.22,48,210/- alongwith interest @16% to be paid for delay of 5 years.

17. The complainant was allotted unit no. G-1501, 15th floor, Tower G in the project "1000 Trees" by the respondent's builder for a total consideration of Rs. 86,70,610/- under the construction linked payment plan. The respondent's builder continued to receive the payments against the allotted unit. It has brought on record that the complainant had deposited several amounts against the allotted unit and paid a sum of Rs.22,48,210/- It is to be noted that final reminder dated 19.03.2014 was issued in respect of payment of outstanding dues.
18. 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 as per the statement of account

paid an amount of Rs.22,48,210/- (as alleged by the complainant on page no. 3 of the complaint) out of the total amount of Rs.86,70,610/-. The complainant failed to pay the remaining amount as per the schedule of payment and the respondents had issued final reminder letter dated 19.03.2014.

The complainant did not come forward to clear the dues and take possession, due to which the respondents issued cancellation letter dated 28.04.2014 to the complainant.

Now the question before the authority is whether this cancellation is valid?

As per the terms and conditions of buyer's agreement, the allottee was liable to pay the timely payment of the instalments of sale consideration as per clause 2.16 of the buyer's agreement.

As per clause 2.17 of terms and conditions of buyer's agreement that an amount equivalent to 10% of the of consideration shall always be deemed to have been paid by the allottee by way of earnest money. The respondents have neither obtained occupation certificate from the competent authority nor offered the possession of the unit. The respondents have given opportunity by sending reminder letter to complainant and thereafter when the complainant did not come forward to pay the outstanding amount, the respondents cancelled the unit allotted to the complainant. Thus, the cancellation of unit is valid.

Now the second issue for consideration arises as to how much money a builder is entitled to retain after cancellation of the unit. It is evident that after cancellation of the unit, the builder did not return any amount to the complainant and forfeited the money paid by him. In cases of *Maula Baux vs Union of India (1970) 1SCR 928 AND Sirdar K.B Ram Chandra Raj Ors. Vs Sarah C. Ors. (2015) 4SCC 136.*, a similar issue arose as in the present case and wherein the Hon'ble Apex court held that forfeiture of amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty then provisions of Sec 74 of Contract Act 1872 are attracted and the party so forfeiting must prove actual damage . After cancellation of allotment the flat remains with the builder as such there is hardly any damage. Keeping in view of principles laid down in these cases, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was framed and which provides as under:

"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."

Keeping in view the aforesaid legal provisions, the respondents are 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 alongwith interest @ 10 % p.a. on the refundable amount from the date of cancellation i.e. 28.04.2014 till the date of its payment.

G. Directions of the authority:

19. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act of 2016 to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act of 2016:

- i. The respondents are directed to refund the amount after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 within 90 days from the date of this order along with an interest @ 10% p.a. on the refundable amount, from the date of cancellation i.e. 28.04.2014 till the date of realization of payment.

- 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.

20. Complaint stands disposed of.
21. File be consigned to registry.


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.08.2022


(Dr. KK Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram