

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

Complaint no. : 5085 of 2021
Date of filing complaint : 03.01.2022
First date of hearing : 11.02.2022
Date of decision : 14.10.2022

Mr. Ajai Kumar & Mayank Bhatnagar R/O: - 2135, C-2, Vasant Kunj, South West Delhi-110070	Complainants
Versus	
M/s SS Group Pvt. Limited Regd. Office at: - SS House, Plot no.77, Sector-44, Gurugram, Haryana-122003	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Ankur Berry	Advocate for the complainants
Sh. Rahul Bhardwaj	Advocates for the 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 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 of the project	"The Leaf", Sector 85, Gurugram
2.	Nature of project	Group Housing Complex
3.	RERA Registered/ Not Registered	Registered 23 of 2019 dated 01.05.2019
4.	DTPC License no.	81 of 2011 dated 16.09.2011
	Validity upto	15.09.2024
	Name of licensee	
	Licensed area	11.9 Acre
7.	Unit no.	7B, 7 th floor, Building No. 10 [page no. 23 of complaint]
8.	Unit measuring	2280 Sq. Ft. (page no. 23 of complaint)
9	Date of execution of floor agreement buyer's	28.09.2013. (page no. 22 of complaint)
10.	Possession clause	8. Possession



8.1 Time of handing over the possession

8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, **the developer proposes to handover the possession of the flat within a period of thirty six months from the date of signing of this agreement.** The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months or such extended period , for applying and obtaining occupation certificate in respect of the Group Housing Complex.

11.	Due date of possession	28.09.2016 (calculated from the date of signing of buyer agreement) Grace period not allowed
12.	Total sale consideration	Rs. 1,22,46,720/- (page no. 24 of complaint)
13.	Total amount paid by the complainants	Rs. 36,67,671/- (page no. 13 of complaint)
14	Notice for cancellation	24.11.2021 (page no. 115 of complaint)

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15.	Occupation certificate dated	09.05.2022 (As per page no. 95 of complaint)
16.	Offer of possession	Not offered

B. Facts of the complaint

3. That the complainants on 10.07.2012 booked a residential flat No 7B, Tower - 10, 7th floor in the project of the respondent namely, "The Leaf" located at Sector 84-85, Gurgaon, Haryana under the construction linked plan and paid an amount of Rs. 10,00,000/- at the time of booking of the unit.
4. That thereafter, the complainants made due payments as and when demanded by the respondent-builder and executed FBA on 28.09.2013 by both the parties. The complainants have paid an account of Rs. 36,67,671/- till date. Even after payment of total of Rs. 36,67,671/- the possession has still not been offered to them. The complainants have fulfilled their obligation of making payments and the respondent was obligated to handover the possession of the unit by 28.09.2016
5. That the respondent has never issued any allotment letter to the complainants, even though it acknowledged that the flat No. 7B, in Building No.10, in project "The Leaf" has been allotted to them. The actual intent of the respondent behind non-issuance of the allotment is unclear and they pray for relief of delivery of the residential unit at the earliest
6. That till date the respondent-builder never inform the complainants about the construction of the building and when the occupation certificate for the building would be received. Since the occupation

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certificate has still not even been received, the complainants are at loss as they have been residing elsewhere in the hope of getting their own residential unit in NCR and all their efforts have been in vain as even after 8 years. There is no hope of getting the delivery of the flat.

7. That the respondent has failed to honour the terms and conditions of the FBA between the parties, and has to pay the interest on delayed period and thus the present complaint has been instituted before this Hon'ble Authority for the relief delayed possession interest.
8. That the complainants have at all times made payments against the demands of the respondent and as per payment schedule of the agreement pertaining to has flat. Therefore, the fraudulent act and conduct of the respondent needs to be penalized in accordance with the provisions of the Real Estate (Regulation and Development) Act, 2016 (Hereinafter being referred as "the act"),

C. Relief sought by the complainants.

9. The complainants have sought following relief:
 - (i) Direct the respondent to pay interest at the prescribed rate per annum on the delay in handing over the possession from 28.09.2016 till actual date of possession in view of the violation of Section 18 of the RERA Act, 2016.
 - (ii) Direct the respondent to apply for the occupation certificate.
 - (iii) Direct the respondent to not to raise any further demand till the offer of possession.

D. Reply by the respondent.

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10. That the complainants vide a booking receipt booked a unit in the project constructed by the respondent. The complainants, in pursuance of the aforesaid booking receipt vide dated 10.07.2012 were allotted a unit bearing no. B-10/7-B. The complainants consciously and willfully opted for a construction linked payment plan for remittance of the sale consideration for the unit in question and further represented the respondent that they would remit every installment on time as per the payment schedule.
11. That, pursuant of the signing of the booking receipt, an allotment letter dated 10.09.2012 was executed between the parties and wherein the complainants were allotted a residential subject unit. Thereafter, immediately on 23.09.2013, the flat buyer agreement was executed between the complainants and the respondent which contained the final understandings between the parties stipulating all the rights and obligations.
12. That, the complainants were allotted the unit bearing no. 7B, 7th Floor, having super area of 2,880 sq.ft in building no. 10 of the project "The Leaf" at the basic price of Rs. 4559 per sq. ft. and preferential location charges (PLC) of Rs. 225/- per sq.ft., external development charges (EDC) of Rs. 355 per sq.ft. , infrastructure development changes (IDC) of Rs 35/- per sq.ft. to be payable as per the payment plan. It is submitted the sale consideration of the flat booked by the Complainants was Rs. 1,22,46,720/- and till date have paid only amount of Rs. 36,67,633/-. However, it is submitted that the sale consideration amount was exclusive of the registration charges, stamp duty charges, service tax and other charges which were to be paid by the complainant at the applicable stage. It is

submitted that complainant defaulted in making payments towards the agreed sale consideration of the flat from the very inception i.e. after signing the allotment letter.

13. That the construction of the project was within the time-line as stipulated in the flat buyer agreement and accordingly, the complainants were supposed to pay the instalments of the said unit by way of construction linked-payment plan. However, the respondent from the very inception had to run after the complainants to clear the outstanding dues. The same can be evidenced by the very fact that for every instalment towards the unit, the respondent had to send them the demand notice to clear the outstanding bills. It is pertinent to bring to the kind notice of the Authority that from 2012 to 2021 i.e. before the cancellation of the unit, the respondent sent numerous demand letters from 30.09.2013, 01.07.2015, 24.09.2015, 10.02.2016, 09.06.2016, 14.03.2017, 08.07.2017, 19.06.2018, and 18.07.2020 respectively.
14. It is to be noted that the last payment towards the agreed sale consideration was made dated 22.07.2013 amounting to Rs 6,11,574/- (Rupees Only) and since then no payment howsoever, has been made by the complainants. The respondent has continuously sent numerous demand letters to clear the outstanding dues but its request fell on deaf ears of the complainants which clearly reflects that they are in clear breach of the terms and conditions of the flat buyer agreement.
15. Furthermore, it is pertinent to note that the construction of the project was stopped on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by

any person, private or government authority. It is submitted that vide order dated 20.07.2016 NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi was permitted to transport any construction material. Since the construction activities were suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondent.

16. Copies of all the relevant do have been filed and placed on the 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

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

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

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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.

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.

G. Findings on the objections raised by the respondents.

G.I Objection regarding untimely payments done by the complainant.

17. It is contended that the complainants have made defaults in making payments as a result thereof, the respondent had to issue demand letters dated 30.09.2013, 01.07.2015, 24.09.2015, 10.02.2016, 09.06.2016, 14.03.2017, 08.07.2017, 19.06.2018 and 18.07.2020 respectively. The respondent has further submitted that the complainants have still not cleared the dues. The counsel for the respondent pointed out towards clause 7.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced

 below:



Time is the essence with respect to the Flat Buyer(s) obligations to pay the Sale Price as provided in Annexure-I along with other payments such as applicable stamp duty, registration fee, service tax, VAT tax and other charges stipulated under this Agreement to be paid on or before due date or as and when demanded by the Developer as the case may be and also to perform or observe all the other obligations of the Flat Buyer(s) under this Agreement. It is clearly agreed and understood by the Flat Buyer(s) that it shall not be obligatory on the part of the Developer to send reminders regarding the payments to be made by the Flat Buyer(s) as per the Schedule of Payments in Annexure-I or obligations to be performed by the Flat Buyer(s).

18. At the outset, it is relevant to comment on the said clause of the agreement i.e., "6. TIMELY PAYMENT ESSENCE" 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. Moreover, the authority observes that despite complainants being in default in making timely payments, the respondent has not exercised discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 6 of the flat buyer's agreement whereby the complainants were be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondent has charged delay payment interest as per clause 6 of the buyer's

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agreement and has not terminated the agreement in terms of clause 6 of the buyer's agreement. In other words, the respondent has already charged penal interest from the complainants on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter would be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainants would be charged at the prescribed rate i.e., 10% by the respondent which is the same as is being granted to the complainants in case of delay possession charges.

G. Findings on the relief sought by the complainants.

G.I Direct the respondent to pay interest at the prescribed rate per annum on the delay in handing over the possession from 28.09.2016 till actual date of possession in view of the violation of Section 18 of the RERA Act, 2016.

19. In the present complaint, the respondent has sent a cancellation letter dated 20.04.2022 after filing the present complaint before the authority which is bad in the eyes of law. The complainants sought delayed possession charges and possession of the unit after making the balance payment to the respondent. Further, the counsel for the respondent stated that the subject unit was cancelled due to non-payment by the complainants. The complainants have made last payment in the year 2013 to the respondent and thereafter, no

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payment has been made by them. It is pertinent to mention here that the respondent has obtained the OC on 09.05.2022.

20. While discussing earlier, it has been held that the complainants were in default in making timely payments leading to cancellation of the allotted unit by the respondent as per the term and conditions of buyers agreement. Now, the issue for consideration arises as to whether the complainants are entitled for refund or delay possession charges after making due payment to the respondent.
21. Keeping in view the above mention facts, it is proved that the complainants were supposed to pay the instalments to the said unit by way of construction-linked plan. The respondent sent various reminder letters dated 30.09.2013, 01.07.2015, 24.09.2015, 10.02.2016, 09.06.2016, 14.03.2017, 08.07.2017, 19.06.2018 and 18.07.2020 respectively to the complainants to clear the outstanding dues. It is pertinent to mention here that the complainants have made their last payment in the year 2013 and thereafter no payment has been made by them. It is observed that the respondent has raised various demands against the complainants and as per section 19 (6) & (7) of Act of 2016, the allottees were under an obligation to make timely payment as per payment plan towards consideration of the allotted unit. Despite sufficient time and opportunities to the complainants to make a payment towards consideration of allotted unit, they failed to avail that opportunity leading to violation of section 19 (6) & (7) of Act of 2016. Thus the respondent-promoter was left with no alternative but to cancel the allotment vide letter dated 24.11.2021 giving a period of 30 days to make payments, leading automatically to

cancellation of the unit and forfeiture of earnest money as per term and conditions of buyers agreement. Even that fact was later on confirmed by the respondent builder vide letter dated 20.04.2022. Thus, the cancellation of the allotted unit was made by the respondent promoter as per term and condition of agreement and the same is not liable to be set aside in any manner.

22. The next issue arises for consideration is that when cancellation of the allotted unit is valid, whether the promoter returned the remaining sale consideration to the complainants after retaining the earnest money. The answer is in the negative. It is now well settled that on cancellation of a allotted unit, the promoter is not entitled to deduct more than 10% of the basic sale consideration besides statutory charges. The issue w.r.t. deduction of earnest money arose before the hon'ble Apex Court of the land in case of **MaulaBux V/s Union of India (1970)1 SCR 928** and **Sirdar KB Ramchandra Raj Urs V/s Sarah C Urs (2015) 4SCC 136** and followed by NCDRC in cases of **Ramesh Malhotra V/s EMAAR MGF Land Limited and Mr. Saurav Sanyal V/s M/s IREO Pvt. Ltd.** decided on 12.04.2022 and wherein it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of "earnest money". Similarly to deal with such type of situations, Regulation 11 by the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, was framed providing 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

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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"

23. In view of aforesaid facts and law, the respondent was not right in retaining whole of the amount deposited by the complainants against the sale consideration of the allotted unit. Thus the respondent is directed to refund the paid up amount to the complainants 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 cancellations 24.11.2021 till the actual date of refund of that amount.

G.II (ii) Direct the respondent to apply for the occupation certificate.

(iii) Direct the respondent to not to raise any further demand till the offer of possession.

24. In view of findings under relief No. 1, the aforesaid relief sought by the complainant-allottees becomes redundant. Hence, no directions to this effect can be issued .

H. Directions of the authority


25. 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 amount i.e. Rs. 36,67,671/- 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 along with an interest @ 10% p.a. on the refundable amount, from the date of cancellation i.e. 24.11.2021 till the date of realization of payment after the Act of 2016.
 - 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
26. Complaint stands disposed of.
27. File be consigned to registry.


(Sanjeev Arora)

Member


(Ashok Sangwan)

Member


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.10.2022