

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

Complaint no. :	1315 of 2019
Date of filing complaint:	01.04.2019
First date of hearing:	04.09.2019
Date of decision :	30.08.2022

Deepak Singh R/O: V.P.O Gijarodh	Complainant
Versus	
Cosmos Infra Engineering India Regd. office: 5 a, c, d 5 TH Floor, Vandhna Building, 11 Tolstoy Marg , Delhi	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Ankur Sharma Proxy Counsel (Advocate)	Complainant
Ms. Pooja Sareen (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. N.	Particulars	Details
1.	Name of the project	Cosmos Express 99 Sector 99, Village Dhankot , Tehsil and Distt., Gurugram
2.	Project Area	10.025 acres
3.	Nature of the project	Residential Unit
4.	DTCP License no. & validity status	70 of 2011 dated 22.07.2011 upto 21.07.2024
5.	Name of licensee	Shivnandan Buildtech Pvt Ltd
6.	RERA registered / not registered	Registered bearing no. 62 of 2019 dated 14.10.2019 upto 30.09.2021
7.	Unit no.	D-03 (Annexure A -page no. 15 of the agreement)
8.	Unit admeasuring	1540 sq. ft. (Annexure A -page no. 15 of the agreement)
9.	Date of execution of flat buyer agreement	26.07.2012 (Annexure A -page no. 13 of the agreement)
10.	Possession Cluse	3.1 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 , in 4 years from the start of construction or



		execution of this agreement whichever is later . (Emphasis supplied).
11.	Due date of delivery of possession	26.07.2016 (In absence of date of excavation, the due date is calculated from the date of execution of this agreement 26.07.2012)
12.	Total sale consideration	Rs 56,98,000 /- (Page no. 3 of the complaint)
13.	Total amount paid by the complainant	Rs 34,77,520/- (Page no. 4 of the complaint)
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered
16.	Reminder Letter	10.11.2012 ,27.11.2012, 05.02.2013, 05.03.2013, 01.05.2013
17.	Cancellation Letter	21.05.2013 (Annexure R-7 page 20) (Letter was sent for return the documents and for collecting the remaining amount on 27.06.2013)

B. Facts of the complaint:

3. A unit in the project by the name of M/s. Cosmos Infra Engineering (India) Ltd., known as "Cosmos Express 99 ", situated at Sector-99, Vill. Dhankot, Tehsil and Dist. Gurugram, Haryana, was booked by the complainant in the year 2012. The unit was purchased under the construction linked plan for a sale consideration of Rs. 56,98,000/-
4. That on 26.07.2012, the complainant entered into a buyer's agreement with the respondent, by virtue of which it allotted residential unit No. 03, tower d,

located on the podium floor having super area 1540 sq. ft., in the project of the respondent. The complainant till date, has made the total payment of Rs. 34,77,520/- and the balance payment was to be made at the time of offering of possession.

5. That in the said buyer's agreement the possession of the said residential unit was be handed over to the complainant within four years from the date of signing of the buyer's agreement or start of construction whichever was later.
6. That, the said buyer's agreement is totally one sided, which impose completely biased terms and conditions upon the complainant, thereby tilting the balance of power in favour of the respondent and which is further manifest from the fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs.5/- per sq. ft, on the super area of the residential unit, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs.5/- per sq. ft. and 24% penal interest on the unpaid amount of instalment due to the respondent.
7. That, in all these years, the complainant also visited at the site and observed that there was just a barren land and was astonished to see that no construction has been started by the respondent. The respondent till date has delayed in delivery the possession of the unit.
8. That, the Respondent had promised to complete the project by july' 2016 and till date, the construction has not even started. That, the respondent has not acknowledged the requests of the complainant in regard to the status of the project. There is no sign of construction of the project.
9. That the complainant wants to withdraw from the project as he has not got the possession till date. The complainant was left with no other alternative

but to file the present complaint seeking refund of the paid-up amount besides.

C. Relief sought by the complainant:

10. The complainant has sought following relief(s):

- i. Direct the respondent to refund the amount of Rs. 34,77,520 with interest.

D. Reply by respondent:

The respondent by way of written reply made following submissions: -

11. That the complainant purchased a residential flat in the project of the respondent and the apartment buyer agreement was executed on 26.07.2012. It is pertinent to mention that the unit no. D-03 was allotted to the complainant in Express 99 Project and the same was cancelled by the respondent vide its letter dated 27.06.2013 due to non-payments of the due installments after corresponding letters dated 10.11.2012, 27.11.2012, 5.2.2013, 5.3.2013, and 01.5.2013 respectively.
12. That the delay caused in the construction of the project was not due to the acts of the respondent but due to the factors beyond its control. It is pertinent to mention here that the 70% of the project work is completed now and the construction work is on full swing. The following factors caused the delay in the construction of the project, which are not within the control of the respondent and are force majeure events.
13. That since basic infrastructure and facilities like road, water, electricity supply and sewer were not available, the respondent could not continue with the construction.
14. That the project is located on the Dwarka Expressway which was proposed in the year 2006 and was supposed to be completed by 2010-11. But,

however due to the unfortunate delay in the construction of the expressway, the construction of the project got delayed as well since there was no road for commuting. The respondent even filed an RTI application with the NHAI in 2017 inquiring about the estimate time of completion of the Dwarka expressway to which no date of completion was informed in the reply given by the authority. The respondent has even filed an RTI with the HUDA asking information on water supply to the project, in reply of which it was stated that it would take another 2-3 years for supplying water to the project which again delayed the project as the respondent could not have handed over the possession without basic amenities like water.

15. That the application for registration was immediately filed with the HRERA by the respondent on 31.07.2017 at the Panchkula Office. However, on 03.01.2018, an order was received by the respondent wherein it was stated that a copy of duly renewed license by the Director Town & Country Planning Haryana, was to be filed for the registration. On 16.03.2018, the renewed license was submitted with the concerned authority but no registration was granted by HARERA for reasons not known to the respondent. Thereafter, the respondent came to the knowledge that Haryana Real Estate (Regulation & Development) Rules 2017 were superseded by Haryana Real Estate regulatory authority Gurgaon (Registration of projects) Regulation 2018 & had to submit a fresh application that required many permissions from TCP Haryana which took up a lot of time of the respondent.
16. Furthermore, the respondent even sent a reminder dated 28.03.2018 to the principal secretary cum DRA to Government of Haryana Chandigarh to register the project as soon as possible as all the conditions under the Act and application had been met. On 15.03.2018, the respondent received the reply to the said reminder, in which it was stated that as per the new regulation of 2018, the Gurgaon office had the authority to register the

project rather than the panchkula office and a fresh application to be filed with the gurgaon office. Thus a fresh application was again filed with the gurgaon office on 23.04.2018 and the registration was granted only on 14.10.2019 which is almost 27 months after the very first application was filed.

17. That the construction of the project was in full swing, and the respondent expected it be completed within the timeframe promised to the buyers but however due to the changes in law, the construction of the project suffered an unfortunate delay. On top of that, when the respondent tried to mobilize the construction of the project after receiving the registration, the world was struck by the pandemic in the year 2020 and a nationwide lockdown was imposed due to which many workers went back to their hometowns and have not returned till date.
18. That the bank accounts of the respondent were blocked due to the RBI circular RBrI2020-21/20DOR.No. BP. BC/7/21.04.048/2020-21 dated 6.08.2020 and hence the respondent could not use the funds for the development of the project.
19. That as per the notification dated 26.05.2020, issued by HARERA Gurugram, an extension period of 6 months has been granted to projects that were expiring in 25.05.2020 or after. Since, the date of completion for the subject project is 30.09.2021, thus the extension is available for the respondent as well. Therefore, the construction. of the project would be completed well within the time frame.
20. That the delay in the construction of the project due to the force majeure events, does not go against the provisions of the flat buyer's agreement and the agreement itself allows the delays that are caused by the factors beyond the control of the respondent.

21. Copies of all the relevant do have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be denied on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

22. 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 completed territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

23. 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.

24. 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 complainant at a later stage.
25. 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. 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."

26. 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. Entitlement of the complainants for refund:

F. I Direct the respondent to refund the amount of Rs. 34,77,520.

27. In the present case, the subject unit was booked by the complainant in the year 2012 under the construction linked payment plan for a basic sale price of Rs. 56,98,000/-. He paid a sum of Rs. 34,77,520/- towards total consideration of allotted unit. The complainant approached the authority seeking refund of the paid-up amount on the ground that he has not got the possession of the allotted unit till date. The respondent sent reminder letters on 10.11.2012, 27.11.2012, 5.2.2013, 5.3.2013, and 01.5.2013 due to non-payments of the due instalments. So, the respondent sent letter of cancellation on 21.05.2013 forfeiting 15% of the basic sale price and sending an account pay cheque for the remaining amount.

28. It is an admitted fact that a buyer's agreement with regard to the allotted unit was executed between the parties on 26.07.2012. The due date for completion of the project and offer of possession of the allotted unit comes to be 26.07.2016. There is nothing on the record that the remaining amount after forfeiting earnest money was ever received by the complainant. Though the cancellation of the allotment of the allotted unit was made by the respondent as per the terms and conditions of buyer's agreement but did not return the amount after retaining the earnest money. Though as per



clause ix (e) of the buyer's agreement, the promoter could have forfeited 15% earnest money on cancellation and return the remaining paid up amount but that was not done. Keeping in view such type of situations the Haryana Real Estate Regulatory Authority, Gurugram framed regulation 11 in the year 2018 providing deduction of 10% of total sale consideration as earnest money and sending the remaining amount to the allottee immediately. While doing so, a reference was made to the principles laid down in cases of **Maula Bux Vs. Union Of India 1970** (1) SCR 928 and **Sirdar KB Ramchandra Raj Urs Vs. Sarah C Urs** (215) 4 SCC 136 wherein it was observed that only a reasonable amount can be forfeited as earnest money in the event of default on the part of purchaser. It is not permissible in law to forfeit any amount beyond reasonable amount unless it is shown that the person forfeiting the said amount had actually suffered loss to the extent of the amount forfeited by him. Thus, deduction of 10% of the sale price of the unit was held to be reasonable on cancellation.

29. So, the deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

"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."

30. Keeping in view the above-mentioned facts and since the respondent cancelled the allotment of the unit on 21.05.2013 so the authority hereby directs the promoter to return the amount after forfeiture of 10% of total sale consideration with interest at the rate of 10% (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 cancellation i.e 21.05.2013 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017.

G. Directions of the Authority:

31. 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 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 with interest @ 10% p.a. on the refundable from the date of cancellation i.e., 21.05.2013 till the actual date of refund of the amount.
- ii) A period of 90 days given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.




HARERA
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32. Complaint stands disposed of.
33. File be consigned to the registry.

V.I - 3
(Vijay Kumar Goyal)
Member


(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.08.2022



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