

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

Complaint no.	:	3688 of 2020
Date of filing complaint:		21.10.2020
First date of hearing:		08.12.2020
Date of decision	:	24.08.2022

Smt. Harish Goel W/o Sh. Anil Goel R/O: 221, Deed Plaza Complex, Opp. Civil Court, Gurugram	Complainant
Versus	
M/s Adani M2K Projects LLP Regd. office: 10th Floor, Shikhar, Nr. Adani House, Mithakhali Six Roads, Navrangpura, Ahmedabad, Gujarat- 380009	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Sanjeev Sharma (Advocate)	Complainant
Sh. Prashant Sheoran (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.

2. The present complaint has been received on 21.10.2020 and the reply on behalf of the respondent was filed on 22.01.2021. The complainant has generated new proforma B on 13.01.2021. To avoid multiplicity of complaints both the aforesaid complaint no.s shall be taken together. Promoter information has been filed by the respondent on 25.04.2022.

A. Unit and project related details

3. 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:

Sr. No.	Particulars	Details			
1.	Name of the project	Oyster Grande, Sector 102, Gurugram, Haryana			
2.	Total area of the project	19.238 acres			
3.	Nature of the project	Group Housing Colony			
4.	DTCP license details:				
	Sno.	License no.	Validity	Licensed area	Licensee
	1.	29 of 2012 dated 10.04.2012	09.04.2020	15.72 acres	M/s Aakarshan Estates Pvt. Ltd. C/O M/s Adani M2K Projects LLP
	2.	30 of 2012 dated 10.04.2012	09.04.2020	3.52 acres	M/s Aakarshan Estates Pvt. Ltd. C/O M/s Adani M2K Projects LLP

5.	Registered/not registered	Registered by Adani M2K Projects LLP		
Registration details				
S no.	Registration no.	Validity	Area	
1.	37 of 2017 dated 10.08.2017	30.09.2024	Tower G (15773.477 sq. mtrs.)	
2.	170 of 2017 dated 29.08.2017	30.09.2019	Tower J Nursery school-1 & 2, Convenient Shopping, Community Block X-1 & X-2 (19056.69 sq. mtrs.)	
3.	171 of 2017 dated 29.08.2017	30.09.2019	Tower H (17229.629 sq. mtrs.)	
6.	Occupation certificate details:			
S.no.	Details of tower in OC	OC granted on	Area	
1.	D, E, EWS Block	11.12.2017	22710.284 sqm	
2.	A, B, C, F	20.12.2017	48919.8 sqm	
3.	J, H, Community Building X1, Convenient Shopping 2	12.02.2019	33517.932 sqm	
7.	Provisional allotment letter	31.01.2013 (As per page 20 of complaint)		
8.	Unit no.	H-1904, 19 th floor, Tower H (As per page 20 of complaint)		
9.	Area of the unit (super area)	3198 sq. ft. (As per page 20 of complaint)		
10.	Date of execution of buyer's agreement	03.06.2013 (As per page 21 of complaint)		



11.	Possession clause	<p>Article 5(A)- POSSESSION</p> <p><i>Subject to the compliance of all terms and conditions of this agreement by the allottee(s) including the timely payment of the sale consideration and other charges and all other applicable taxes/levies/interests/penalties, etc., the developer based on its present plans and estimates and subject to all just exceptions will endeavor to complete construction of said apartment within a period of forty eight (48) months from the date of execution of this agreement or from the date of commencement of construction, whichever is later with a grace period of six (6) months, subject to force majeure events (as defined herein) which shall include events/circumstances or combination thereof which may prevent/ obstruct/hinder/ delay the construction development of the said project/complex. For the purpose of this agreement, the date of making an application to the concerned authorities for issue of completion/part completion/occupancy/part occupancy certificate of the said project/complex shall be treated as the date of completion of the apartment. In particular, after filing an application for grant of such certificate(s), the developer shall not be liable for any delay in grant thereof by the competent authorities.</i></p> <p>(page 43 of complaint)</p>
12.	Date of start of construction	<p>25.02.2013</p> <p>(As per pre-termination letter dated 20.06.2016 on page no. 116 of reply)</p>
13.	Due date of possession	<p>03.12.2017</p>

		(Calculated from date agreement dated 03.06.2013, being later) Grace period is allowed
14.	Total Sale Consideration	Rs. 2,04,82,056/- (As per payment plan annexed with BBA dated 03.06.2013 at page 75 of complaint.)
15.	Total amount paid by the complainant	Rs. 1,54,46,078/- (As per pre-termination letter dated 20.06.2016 on page no. 116 of reply) Rs. 1,54,57,323/- (As per ledger account dated 31.07.2020 at page 84 of complaint.)
16.	Demand letters & reminders	19.06.2015, 07.08.2015, 11.09.2015, 22.10.2015, 14.06.2016 (As per page no. 106-115 of reply)
17.	Pre- cancellation letter dated	20.06.2016 (As per page no. 116 of reply)
18.	Cancellation letter	05.08.2016 (As per page 82 of complaint)
19.	Occupation certificate	12.02.2019
20.	Offer of possession	Not offered

B. Facts of the complaint:

- That the complainant booked/purchased an apartment in group housing project in Sector 102/102(A), Gurgaon, and paid booking amount of Rs. 15,00,000/- on 18.10.2012.

5. That it issued a provisional allotment letter dated 31.01.2013 against the unit bearing no. H-1904 on 19th floor admeasuring a super area of 3198 sq. ft. at the rate of Rs. 5330.15/- per sq. ft. amounting total to Rs. 1,87,30,470/- including other charges on the assurance that construction shall be complete in time and possession would be handed over in time.
6. That the apartment buyer's agreement dated 03.06.2013 was executed between the parties detailing the terms and conditions as laid down by the company. As per article 5 "possession of apartment (A)" of said agreement, the possession of the unit was to be handed over within 48 months with a grace period of 6 months from the date of the said agreement. As per apartment buyer's agreement the possession of the unit/apartment shall be handed over lastly by 03.12.2017 including the grace period of 6 months however till today the construction of the project is far from completion.
7. That while entering into the above said agreement the respondent further sold 3 car parking spaces to her for a consideration of Rs. 11,25,000/- and up to 02.07.2015, he has paid an amount of Rs. 1,54,57,323/- towards allotted unit.
8. That the respondent/promoter sent a cancellation of provisional allotment letter to complainant on 05.08.2016 and forfeited whole of the amount paid by the complainant and no amount was refunded back to the complainant till date. That as per notification bearing no. 202-2018/ext dated 05/12/2018, it is clearly mention that no amount can be

forfeited by the builder and the forfeiture done by the builder of the amount of the complainant is totally in contravention to the provision of the above notification as well as of that of the numerous judgement pass by the various courts and judicial authority.

9. That the builder has not right to deduct the earnest money or the brokerage of any kind while refunding back the amount to the complainant as the builder has also charged delayed interest @ 18% compoundable quarterly which is also illegal as per the Act and rules.
10. That the builder has no right to charge GST on the deduction made by them for the refund of the amount and furthermore, the builder is claiming service tax and HVAT on the said flat. That as the allotment of the said unit has been cancelled by the builder so the builder has no right to charge the amount of said taxes from the complainant.

C. Relief sought by the complainant:

11. The complainant has sought following relief(s):
 - i. Direct the respondent to refund the amount of Rs.1,54,57,323/- to the complainant at the rate of 18% per annum compounded quarterly plus 2 % including compensation as the promoter failed to give possession of the apartment in accordance with terms specified in buyer's agreement to duly complete the unit by date specified.
 - ii. Direct the respondent to pay litigation cost of Rs. 1,00,000/-.

D. Reply by respondent :

The respondent by way of written reply made following submissions

12. That the tower in which allotment was granted (allotment of which was already cancelled 4 year ago) is already completed and occupation certificate has already been received by respondent on 12-02-2019 i.e. much prior to filing of present complaint.
13. That the complainant in the year 2012 through her broker Suraj Realtors India Pvt Ltd having its office at 901 DLF City Court MG Road Gurgaon initially approached the respondent to book a 3 BHK flat. At that point of time, the complainant vide an application applied for allotment and paid an amount of Rs.12,00,000/- vide cheque bearing no. 035643 dated 16.10.2012 and in lieu of the same a receipt was issued to the complainant.
14. That the complainant vide said application form specifically admitted that 15% of the BSP+PLC+Parking charges shall be treated as earnest money to ensure terms and conditions contained in this application and buyers agreement and further admitted that in case of non-payment or breach of terms allotment shall be cancelled/terminated and said 15% along with brokerage charges + direct expenses i.e. taxes and any other loss suffered by developer shall be forfeited.
15. That she made another payment for Rs.3,00,000/- vide cheque bearing no. 651350 dated 06.12.2012 and in lieu of the same a receipt was issued by the respondent. The above payments were given by the complainant as per the payment plan agreed upon by her when she approached the respondent for filing of application.

16. That she further paid an amount of Rs. 5,00,000 on 15.12.2012 and Rs. 15,00,000 on 01-12-2012. A provisional allotment letter dated 31.01.2013 was issued in favour of complainant whereby 4 BHK+PowderRoom+Servant Room Apartment bearing no. H-1904 at floor no.19 was allotted.
17. That an apartment buyer agreement was executed between the parties on 03.06.2013 and even as per said agreement it was specifically mentioned that 15% of the BSP+PLC+Parking charges shall be treated as earnest money to ensure terms and conditions contained in the buyers agreement and further that in case of non-payment or breach of terms the allotment shall be cancelled/terminated and said 15% along with brokerage charges + direct expenses i.e. taxes and any other loss suffered by developer shall be forfeited as provided in article 3 sub clause (D) and in article 6 sub clause ("V") of the apartment buyer agreement dated 03-06-2013. That the complainant voluntarily agreed and signed the said agreement bearing in mind the consequences to default in payment.
18. That till July 2015 complainant has only paid an amount of Rs. 1,54,46,078/- as duly disclosed in cancellation notice dated 20.06.2016. The complainant has paid regularly only till Feb 2014 but from Feb 2014 she started making defaults in payments. On 03.02.2014, the respondent issued a demand notice whereby an amount of Rs. 22,51,861/- was demanded against start of lower floor plus taxes and requested to pay the same by 20.02.2014, however the said payment was not made by the

complainant for next few months and failed to timely pay the amount demanded, the respondent was constrained to cancel the allotment of the complainant vide cancellation letter dated 05.08.2016.

19. That after receiving said cancellation notice, she contacted the respondent and requested to revoke the cancellation and paid an amount of Rs. 22,51,861/- as per demand letter dated 03.02.2014. That said request was accepted but it was again reminded to complainant that such a default shall not be tolerated in future and if such default is again committed by her then amount shall be forfeited as per agreement. She apologized for her default and assured no such default shall be committed by her in future and she will pay all the demands regularly and on time.
20. That in the year 2015, it sent another demand letter dated 19.06.2015 demanding an amount of Rs. 13,53,282/- against start of 9th floor plus taxes. The complainant's assurance qua timely payment was shattered on the very next demand letter and she again defaulted and only paid an amount of Rs. 11,13,381/- and failed to pay the remaining amount.
21. That it sent another demand letter on 07.08.2015 against 12th floor plus taxes and previous dues, for an amount of Rs. 15,72,032/- but surprisingly said payment was also not made by the complainant. Thereafter on 11.09.2015 another demand was raised and sent to the complainant against 15th floor plus taxes and previous due but even at this time complainant failed to make payment. That in the same manner

two more demand letters of Rs. 33,27,056/- and Rs. 42,16,421/- were sent to the complainant against 18th floor and top floor plus taxes and previous dues but as apparent complainant failed to pay even for these demands as well.

22. That since complainant failed to make payment against several demand notices, the respondent was left with no other option but to cancel the allotment for second time. Hence on 20.06.2016 respondent cancelled the allotment of complainant and sent a cancellation letter in this regard wherein specifically stating that if the complainant failed to make payment till 05.07.2016 the allotment shall stand cancelled automatically. That even after receiving said cancellation notice she didn't bother to pay the same, hence the allotment stand cancelled on 05.08.2016.
23. That after passing of more than 4 years since cancellation, the complainant has filed the present complaint, whereby false and frivolous allegations have been levied against the respondent. It is pertinent to mention here that complaint has been filed after expiration of period of limitation, i.e. 3 years from the date of cancellation. Thus, the present complaint is hopelessly barred by law of limitation since the same was filed after expiration of 4 years from the date of cancellation. Thus, the same is liable to be dismissed.
24. 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:

25. 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

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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 promoter, the allottee 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 complainant at a later stage.

F. Entitlement of the complainant for refund:

G.I Direct the respondent to refund the entire amount paid by the complainant to the respondent along with interest.

26. The complainant- allottee was allotted unit in the project of the respondent vide allotment letter dated 31.01.2013 and subsequently as per buyer's agreement executed inter-se parties on 03.06.2013, total sale consideration was agreed to Rs. 2,04,82,056/-.

27. **Validity of cancellation.**

The complainant paid an amount of Rs. 1,54,46,078/- against total sale price of Rs. 2,04,82,056/- constituting 75.42% of total sale consideration. The respondent builder issued demand letters dated 19.06.2015, 07.08.2015, 11.09.2015, 22.10.2015, 14.06.2016 and pre- termination letter dated 20.06.2016 before cancellation of allotted unit vide letter dated 05.08.2016 on account of non- payments of demands.

28. The authority observes that the unit of the complainant was also cancelled earlier vide letter dated 12.06.2014 but the said cancellation was revoked on request of the complainant. Further, sufficient

opportunities have been provided by the respondent-builder before cancellation of said unit vide cancellation letter dated 05.08.2016. The complainant has failed to fulfil the obligation conferred upon him as per section 19(6) of Act of 2016. Therefore, in view aforesaid circumstances, cancellation of the unit by the respondent is held valid.

29. As per article 6(V) and 3(D) of agreement dated 03.06.2013, an amount equivalent to earnest money (15%) of sale consideration shall be forfeited. However, there is nothing on record to show that the respondent has returned the amount paid by the complainant after cancellation of unit vide letter dated 05.08.2016.
30. The respondent-builder took a plea that after the cancellation of allotted unit on 05.08.2016, the complainant filed the present complaint on 21.10.2020 i.e. after expiry of 4 years and thus, is barred by the limitation. The authority observes that the occupation certificate of the tower H where the cancelled unit was situated was obtained on 12.02.2019. keeping in view the fact that the occupation certificate of the said tower was received after coming into the force of the Act and the completion certificate has not been received accordingly, the project is well within the ambit of RERA. The case of the complainant is not against the cancellation letter which was issued way back as on 05.08.2016 and the same cannot be agitated as complaint was filed after 4 years well outside the limitation period. But the promoter was required to refund the balance amount as per applicable cancellation clause of the builder buyer agreement. The balance amount has not been refunded which is a subsisting obligation of the promoter as per the builder buyers'

agreement. The respondent builder must have refunded the balance amount, after making reduction of the charges as mentioned in the buyers agreement. On failure of the promoter to refund the amount the authority is of considered opinion that the promoter should refund the balance amount after deducting 10% of the sale consideration and taxes which are not adjustable and have been borne by the promoter and brokerage charges as admissible as per law.

31. The Hon'ble Apex Court of land in case of *Maula Bux Vs. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs Vs. Sarah C. Urs, (2016) 4 SCC 136*, held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty then provision of the section 74 of the Contract Act, 1872 are attracted and the party so forfeiting must prove actual damage.
32. Even keeping in view, the principle laid down by the Hon'ble Apex Court of the land, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, framed regulation 11(5) provided as under-

"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"

33. In view of aforesaid circumstances, the respondent is directed to refund the paid-up amount after deducting 10% of the 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 and taxes which are not adjustable and have been borne by the promoter and brokerage charges as admissible as per law 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.; 05.08.2016 till the date of realization.

F.II Direct the respondent to pay litigation cost of Rs. 1,00,000/-.


34. The complainant is seeking relief w.r.t compensation in the aforesaid relief, Hon'ble Supreme Court of India in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (SLP(Civil) No(s). 3711-3715 OF 2021)*, held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant may approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the Authority:

35. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:
- i) The respondent is directed to refund the amount after deducting 10% of the 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 and taxes which are not adjustable and have been borne by the promoter and brokerage charges as admissible as per law along with an interest @10 % p.a. on the refundable amount, from the date of cancellation i.e.; 05.08.2016 till the date of realization.
 - 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.
36. Complaint stands disposed of.
37. File be consigned to the registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. KK Khandelwal)
Chairman

Dated: 24.08.2022