

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

Complaint no. :	3307 of 2019
Date of filing complaint:	21.08.2019
First date of hearing:	03.12.2019
Date of decision :	31.08.2022

Naveen Garg R/O: B-102, Hax-Tax Society, Sector-43, Gurugram, Haryana	Complainant
Versus	
Fantasy Buildwell Pvt. Ltd. Regd. office: Room No. 205, Welcome Plaza S-551 School Block-II Shakarpur , Delhi-110092	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Rishabh Jain (Advocate)	Complainant
Ms. Stuti Sharma (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 complainant, 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	"Paras Quartier", Sector-2, at Village Gwal Pahari, District- Gurugram
2.	Project Area	10.096875 acres
3.	Nature of the project	Residential group housing colony
4.	DTCP License no. & validity status	74 of 2012 dated 31.07.2012 valid up to 30.07.2020
5.	Name of licensee	Maxicon Traders Pvt. Ltd. and 2 others
6.	Date of environment clearances	12.07.2013 [Page 69 of reply]
7.	RERA Registered/ not registered	Registered vide no. 164 of 2017 dated 29.08.2017
8.	RERA registration valid up to	28.08.2022
9.	Unit no.	1, 05 th floor, Tower PL1 (Page no. 33 of complaint)
10.	Unit area admeasuring	5350 sq. ft. (Page no. 33 of complaint)
11.	Due date of execution of apartment buyer agreement	20.02.2013 (Page no. 30 of the complaint)



12.	Possession Clause	<p>3. Possession</p> <p>3.1 <i>subject to clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the seller and any restrain/restriction from any courts/authority and subject to the purchaser 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 having complied with all the provisions, formalities, documentations, etc. as prescribed by th seller, whether under this agreement or otherwise, from time to time the seller proposes to offer to hand over the possession of the apartment to the purchaser with in a period of 42 (Fourty-two) months within additional grace period of 6 (six) months from the date of execution of this agreement or date of obtaining all licenses or approvals for commencement of construction, whichever is later, subject to force majeure. The purchaser(s) agrees and understands the seller shall be entitled to a grace period of 90 (ninety) business days, after the expiry of grace period, for offer to hand over the possession of the apartment to the purchaser. Any application for the occupation certificate in respect of the project shall be filed in the due course. The seller shall give notice of offer of possession in writing to the purchaser with regard to the handing over the possession, whereafter, within 30 (thirty) days, the purchaser shall clear its outstanding dues when complete documentary formalities and take physical possession of the apartment.</i></p> <p>(Page 27 of the complaint).</p>
13.	Due date of possession	12.08.2017

		[Note: Grace period of 6 months allowed being unconditional and unqualified due date calculated from date of ec being later]
14.	Total sale consideration	Rs.5,83,30,678/- (As alleged by respondent on page 6 of reply))
15.	Amount paid by the complainant	Rs.1,47,98,818 /- (As alleged by the complainant)
16.	Occupation certificate	04.06.2018 [Page 36 of reply]
17.	Offer of possession	19.07.2018 but not for this unit (Page 38 of reply)
18.	Demand Letters	02.04.2013,09.05.2013,30.05.2014,14.07.2014, 24.07.2014,21.08.2014,22.10.2014,05.12.2014, 24.12.2012,23.01.2015,03.03.2015,24.03.2015, 02.04.2015,23.04.2015, 29.05.2015,12.09.2015,28.10.2015,10.08.2016, 31.08.2016,05.11.2016,11.02.2017, 04.03.2017,12.04.2017,18.07.2017, 05.10.2017 (Annexure R-6 page 78-105 of reply)
19.	Cancellation Letter	07.03.2020 (Annexure R-7 page 106 of reply)

B. Facts of the complaint:

3. That the respondent published a brochure, highlighting his project 'Paras Quartier', Sector-2 Gurugram, Haryana, launched in 2012 with the promise to deliver the possession in time. The complainant was approached by the sale representatives of the company. A booking amount of Rs. 22, 50,000/- was paid by the complainant for the unit on 20.08.2012. The buyer's agreement was signed between the parties on 20.02.2013.

4. The complainant further paid an amount of Rs.22, 50,000/- and Rs. 37, 50,000/-towards booking of the unit and next instalment via cheque no. 359245, and via cheque no. 359264 on 21.08.2012 and 28.12.2012. The respondent violated Section 13 of the act by taking more than ten per centum (10%) cost of the unit before signing the agreement.

5. That in the said buyer's agreement, the possession was to be handed over within a period of 42 months within additional grace period of 6 months from the date of execution of this agreement or date of obtaining all licenses or approvals for commencement of construction.

6. That in the buyer's agreement, the respondent fraudulently and illegally charged from the complainant such charges separately which ought to be inclusive in basic sale price as the car parking charges, interest free maintenance security, etc that violates the basic nature of agreement between the parties. The complainant further paid an amount of Rs.24,10,650/-, Rs. 24,10,649, Rs. 17,28,519/- via cheque no. 536161, and cheque no. 591132 on 17.05.2013 and on 19.06.2013 within 120 days from allotment including the service tax.

7. The complainant further paid Rs.17, 28,519/- via cheque no. 000009, on 16.09.2014 on completion of upper basement roof slab. The complainant paid, as and when demanded by the respondent, a total sum of Rs.1, 47, 99,818/- for the unit from August 2012 to September 2014.

8. The respondent assured that the construction activities are taking place at full swing and made promises to hand over the possession of the unit within the stipulated time. However, the respondent has failed to offer possession of the unit to the complainant.

9. The complainant wrote various letters and e-mails, making calls and contacting the respondent by visiting the office of the respondent seeking

status of construction of the apartment but met with no response.

10. The respondent collected huge money from the complainant and other buyers and has not utilised said funds for development of the project as promised by it at the time of booking of the unit in 2012.

11. The complainant was astonished to see that construction activities were stopped whenever he visited the site. However, the respondent kept demanding money without achieving the particular stage of construction.

12. That the complainant wants to withdraw from the project as he has not got the possession in time and the remaining non-responsive to the requisitions of the complainant. The complainant was left with no other alternative but to file the present complaint seeking refund of the paid-up amount besides interest and compensation.

C. Relief sought by the complainant:

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

- i. Direct the respondent to refund the amount of Rs. 1,47,98,818 /- with interest.
- ii. Direct the respondent to pay compensation of Rs. 5,00,000/- for causing mental agony, harassment to the complainant.
- iii. Direct the respondent to pay an amount of Rs. 1,00,000/- as legal expense.

D. Reply by respondent:

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

14. That the complainant purchased a residential unit in the project of the respondent and an apartment buyer agreement was executed on 20.02.2013. It is pertinent to mention that the unit no. 1,05th floor, Tower PL1 was allotted

to the complainant in Paras Quartier project and the same was cancelled by the respondent vide its letter dated on 07.03.2020 on account of non-payment despite reminders.

15. That in terms of clause 2.21 of the buyer's agreement, the respondent has a right to cancel the allotment of the unit of the complainant and is also entitled to forfeit the earnest money upon cancellation on account of non-payment of instalments.

16. That after forfeiture of the earnest money of the complainant, the respondent has even offered the refund of the balance amount upon submission of the original documents relating to the said unit. But it is the complainant who is not coming forward with its originals to claim his refund and contrary to this has filed the instant complaint.

17. That before such cancellation, the complainant was even served with several reminder letters. But despite that he deliberately chose not to pay any further sum leaving the respondent with no other option except to cancel the allotment of his apartment subject to deduction of the earnest money.

18. That the occupation certificate for Tower PL-1 was obtained on 04.06.2018. The respondent has immediately offered the possession of the unit on 19.07.2018. The present complaint is not maintainable since the possession had to be handed over to the complainant in terms of clause 3.1 of the buyer's agreement. Moreover, all the approvals for commencement of the construction work were received towards around the end of the year 2013 and the construction work began only in November 2013.

19. It is submitted that the respondent had issued several demand letter/reminders letters on 02.04.2013, 09.05.2013, 30.05.2014, 14.07.2014, 24.07.2014, 21.08.2014, 22.10.2014, 05.12.2014, 24.12.2012, 23.01.2015, 03.03.2015, 24.03.2015, 02.04.2015, 23.04.2015, 29.05.2015, 12.09.2015

28.10.2015 10.08.2016, 31.08.2016, 05.11.2016, 11.02.2017, 04.03.2017, 12.04.2017, 18.07.2017 & 05.10.2017 to the complainant with a request to pay its arrear instalments at an earliest. But he paid no heed to such request resulting in cancellation of the allotment of his unit on account of non-payment.

20. The respondent after obtaining the requisite approvals started its construction activities. However, the respondent was forced to stop the construction activities for some time due to various reasons which were not in their control. Some of these reasons are:

a. The Director of Town and Country Planning, Haryana has issued directions to stop work at towers of the project "Paras Quartier" till further order vide order dated 28.07.2015. Further, the Director of Town and Country Planning, Haryana considering the report of the Commissioner Municipal Corporation, Gurgaon dated 20.04.2016 directed to de-freeze the construction on the site of Project "Paras 14 Quartier" vide order dated 29/04/2016. The construction at the site was stopped from 28.07.2015 to 29.04.2016, i.e., for the period of 9 months and 2 days.

b. That it is a matter of record that in the year 2015-16, the Hon'ble National Green Tribunal (NGT) has banned the extraction of ground water in whole NCR including Gwal Pahari, Gurugram where the project of the respondent is situated. On account of this banning, the period of 2 months and 10 days was taken which was also one of the reason of delay in the project.

c. That in the year of 2019, the Hon'ble Apex Court has banned construction activity on the recommendations of Central Pollution Control Board (CPCB) in Delhi NCR region from 4/11/2019, to 09.12.2019. Even on the said date, the ban was partially lifted, and construction activities was allowed between 6 AM to 6 PM, in daytime only. The respondent takes up construction activities at

the site seeing the situation and accordingly, increased its pace by devoting more time on daily basis and as well as by infusing more work force. The total construction was banned in the Delhi NCR region was from 04.11.2019 to 09.12.2019. Even thereafter, full-fledged activities were not allowed at the construction site.

21. The project has faced these instances which are of the nature of act of god and force majeure, which forced the respondent to stop construction activities at the site for the period more than 12 months and 17 days and in turn delayed completion of project.

22. That in terms of clause 11.1 of the buyer's agreement, respondent was not responsible for non-performance of any of its obligations under the agreement, if such performance is prevented due to force majeure reasons, outside the control of respondent.

23. 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:

24. 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.1 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

25. 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.

26. 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.

27. 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. 2021-2022 (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.”

28. 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. Objections raised by the respondent:

F.I Objections regarding force majeure circumstances and the respondent was forced to stop construction due to various reasons beyond its control.

29. The respondent is claiming that the Director of Tower and Country Planning, Haryana has issued directions to stop work of some towers of the project, as a result the promoter was not able to complete the project within the stipulated time. The authority is of the considered view that if there is any restriction by any competent authority concerned and that the respondent

was not at fault in then the respondent should approach the competent authority for getting this time period i.e., 28.07.2015 till 29.04.2016 be declared as 'zero time period' for computing delay in completing the project. However, for the time being, the authority is not considering this time period as zero period and the respondent is liable for the delay in handing over possession as per provisions of the Act.

30. The respondent-promoter has raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the National Green Tribunal, Hon'ble Apex Court has banned the construction activity on the recommendations of Central Pollution Control Board in Delhi NCR Region which was partially lifted. But the plea taken in this regard is not tenable. The due date for completion of project is calculated as per clause 3 of the buyer's agreement. Though there have been various orders issued but these were for a short period of time. So, the circumstances/conditions after that period can't be taken into consideration for delay in completion of the project.

G. Entitlement of the complainant for refund:

G. I Direct the respondent to refund the amount of Rs. 1, 47, 98,818 /- with interest.

31. In the present case, the subject unit was booked by the complainant in the year 2012 for a basic sale consideration of Rs. 5,83,30,678 /-. He paid a sum of Rs. 1,47,98,818 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 on time. The respondent sent reminder letters on 02.04.2013, 09.05.2013, 30.05.2014, 14.07.2014, 24.07.2014, 21.08.2014, 22.10.2014, 05.12.2014, 24.12.2012, 23.01.2015, 03.03.2015, 24.03.2015, and 02.04.2015, 23.04.2015, 29.05.2015

12.09.2015 28.10.2015 10.08.2016, 31.08.2016, 05.11.2016, 11.02.2017, 04.03.2017, 12.04.2017, 18.07.2017 & 05.10.2017 due to non-payments of the due instalments. Ultimately the respondent sent letter of cancellation on 07.03.2020 forfeiting 10% of the basic sale price.

32. It is an admitted fact that a buyer's agreement with regard to the allotted unit was executed between the parties on 20.02.2013. The due date for completion of the project and offer of possession of the allotted unit comes to be 12.08.2017. There is nothing on the record that the remaining amount after forfeiting earnest money was sent by the respondent. 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 it did not return the amount after retaining the earnest money. Though as per clause 2.21 of the buyer's agreement, the promoter could have forfeited 10% earnest money on cancellation and return the remaining paid up amount but that was not done. Even 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 basic 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.

33. So, the deduction of the earned money 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."

34. Keeping in view the above-mentioned facts and since the respondent cancelled the allotment of the unit on 07.03.2020 so the authority hereby directs the promoter to return the amount after forfeiture of 10% of basic 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 07.03.2020 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017.

G.II Direct the respondent to pay compensation of Rs. 5, 00,000/- for causing mental agony, harassment to the complainant.

G.III Direct the respondent to pay an amount of Rs. 1, 00,000/- as legal expense.

35. The the complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749

of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. 2021-2022 (1) RCR (c) 357*, has held that an allottee is entitled to claim compensation & litigation charges 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 & litigation expense 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 & legal expenses. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses.

G.IV Admissibility of refund at prescribed rate of interest.

36. The complainant is seeking refund at the prescribed rate of interest on the amount already paid by her. However, proviso to section 19(4) provides that where an allottee intends to withdraw from the project, she shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

37. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable

and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

38. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 29.08.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.

39. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

40. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10% by the respondents/promoters which is the same as is being granted to the complainant in case of refund.

H. Directions of the Authority:

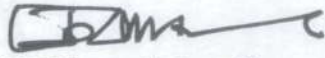
41. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- 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., 07.03.2020 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.
- iii) The respondent is further directed not to create any third-party rights against the subject unit before the full realization of paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainants.

42. Complaint stands disposed of.

43. File be consigned to the registry.

V.I-3
(Vijay Kumar Goyal)
Member
Haryana Real Estate Regulatory Authority, Gurugram


(Dr. KK Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.08.2022