

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

Complaint no. : 2533 of 2021
First date of hearing: 09.08.2021
Date of decision : 13.01.2023

Manminder Singh S/o Kuldip Singh
R/o : 761, Sector-A, Pocket-B, Vasant Kunj,
New Delhi-110070

Complainant

Versus

M/s Pareena Infrastructure Pvt. Ltd.
Office: C-7A, Second Floor, Omaxe City Centre,
Sector-49, Sohna Road, Gurugram-122018

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Sanjeev Kumar Arora

Member
Member

APPEARANCE:

Sh. Arpit Jain
Sh. Prashant Sheoran

Counsel for the complainant
Counsel for the respondent

ORDER

1. The present complaint dated 30.06.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions 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 complainant, 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 and location of the project	"The Elite Residences", sector-99, Gurgaon
2.	Nature of the project	Group Housing
3.	licensed area	12.031 acres and 1.289 acres
4.	DTCP license no.	70 of 2011 dated 22.07.2011 valid up to 21.07.2024 82 of 2012 dated 27.08.2012 valid up to 26.08.2023
5.	Name of licensee	Shivnandan Buildtech Pvt. Ltd.
6.	RERA Registered/ not registered	Registered vide no. 46 of 2019 issued on 25.09.2019 up to 31.07.2020
7.	Unit no.	05, Tower A [page no. 16 of complaint]
8.	Unit admeasuring area	2473 sq. ft. [page no. 16 of complaint]
9.	Provisional allotment letter	11.06.2013 [page no. 16 of complaint]
10.	Date of apartment buyer agreement	23.04.2014
11.	Possession clause	<i>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 with 4 years of the start of construction or execution of this Agreement whichever is later, as per the said plans.....</i> Emphasis supplied....
	Grace period	<i>clause 5.1 In case within a period as provided under clause 3.1, further extended by a period of 6 months if so, required by the developer, the developer is unable to complete construction of the said flat as provided hereinabove to the flat allottee(s) who have made payments as required for in this agreement, then the flat allottee(s) shall be entitled to the payment of compensation for delay at the</i>

		<i>rate of Rs. 5/- per sq.ft. per month of the super area till the date of notice of possession as provided hereinabove in this agreement.</i>
12.	Date of start of construction	Not Provided
13.	Due date of possession	23.07.2018
14.	Basic sale price	Rs. 1,37,43,697/- (as per page 49 of complaint)
15.	Total sale price	Rs. 1,63,20,748/- (page 69 of complaint)
16.	Total amount paid by the complainant	Rs.43,09,999/- (page 70 of complaint)
17.	Cancellation letter dated	07.09.2020 (page 159 of complaint)

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:
 - I. That the complainant vide an application for provisional allotment booked an apartment in June 2013 in the project "The Elite Residencies" at Sector 99, Gurugram (Haryana) of the respondent. He while making the application for allotment paid Rs. 15,00,000/- as booking amount to the respondent.
 - II. That in pursuance of the above, the complainant was allotted an apartment bearing no.0005, Podium Floor, A-Block, admeasuring super area 2,473 /- sq. ft. vide the allotment letter dated 11.06.2013.
 - III. That the total consideration to be paid towards the said apartment was Rs. 1,62,95,747/- and the complainant made a total payment of Rs. 43,10,000/- till date.
 - IV. That the apartment buyer agreement was executed between the parties on 23.04.2014 and which specifically states that the project will be completed and the possession of the residential unit would be handed-over to the complainant within 4years from the date of execution of the buyer's agreement. Thereby, the respondent was required to hand-over the possession of the said unit by April 2018. But the said contractual obligation of the builder was not fulfilled.



- V. That from the very beginning, the respondent had such unlawful conduct and presented false assurances, representations, and warranties to the complainant. He had already paid more than 26% of the value of the flat and the respondent has demanded approx. 90 % of the value of the flat.
- VI. That during the year 2014, the complainant was regularly making the payments as and when demanded by the respondent as the construction was in full swing which displayed its intention to build the super structure as soon as possible. Post 2014, when the complainant sent his representative to visit the project site, he found that there was no development in the construction of the project apart from what had already been started. Moreover, it has been over six years since the execution of the agreement but development of the project has not completed till date. The complainant stopped making the payments as there was no significant development in the Project and suspected diversion of funds by the respondent as it had collected a hefty amount but shown no corresponding development in the project.
- VII. That the respondent via email dated 08.11.2016 informed the complainant that construction of the project shall be tentatively completed by last quarter of 2017. However, it failed to comply his responsibilities and as a consequence to which, he did not make further payments. The sole purpose of not making any payment to the respondent was to avoid any uncertainty of losing the hard-earned money of complainant as he presently resides out of the country and it was not possible to contact the respondent on a regular basis. It is pertinent to mention here that various emails have also been exchanged between the parties.



- VIII. That the construction in the project had only begun and as per the agreement, the completion of the project was bound to happen within 4 years of the start of construction or the agreement whichever was later and subject to force majeure conditions. The date of execution of the agreement being the later event, the construction was bound to be completed by 23.04.2018 and which was not done by the respondent.
- IX. That furthermore, it is pertinent to mention here that the respondent assured, represented and warranted the complainant that the project would be completed in 4 years, i.e. by May, 2017; Now, it has been about 3 years, and the project was nowhere near completion. It is pertinent mention here that the respondent failed to update the status of the construction. On various occasions, the complainant asked to refund the whole amount but the respondent paid no heed to the same. its conduct is violative of section 18 of the Act.
- X. That thereafter in 2020, the respondent, acting in contravention and the responsibilities under the Act and agreement, wrongfully and arbitrarily cancelled the unit of the complainant and forfeited the whole amount vide cancellation later dated 07.09.2020 in which it was stated to be the earnest money being unlawful. The respondent did not complete the obligations according to the agreement and failing to which it has cancelled the unit's allotment thereby putting the responsibility on complainant's shoulders.
- XI. That the complainant sent a letter on 17.02.2021 seeking information about the project, amenities and facilities to be provided by the respondent. It is pertinent to mention here that the complainant also requested to refund the amount along with interest @24% per annum. But the respondent did not bother to give reply to the said letter.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).
- I. **Direct the respondent to refund the whole amount paid by the complainant with prescribed rate of interest from the date of payment.**
 - II. **Direct the respondent to pay compensation for mental harassment and depression suffered by the complainant.**
 - III. **Direct the respondent to pay legal expenses incurred by the complainant till date.**
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.
- D. Reply by the respondent**
6. The respondent has contested the complaint on the following grounds.
- a. That the construction of the said project is at an advanced stage and the construction of various towers has already been completed and remaining work is endeavored to be completed as soon as possible.
 - b. It is crystal clear that the project is near completion and within a very short span of period it would be completed and thereafter, possession shall be offered after obtaining occupancy certificate as agreed in builder buyers agreement.
 - c. That quite conveniently, certain pertinent facts have been concealed by the complainants. The concealment has been done with a motive of deriving undue benefit through an order and which may be passed by this hon'ble authority at the expense of the respondent.
 - d. That admittedly completion of project is dependent on a collective payment by all the allottees and just because few of the allottees paid the amount, it does not fulfil the criteria of collective payment. It is submitted that numerous allottees have defaulted in payment demanded by the respondent, resulted in delaying of completion of



project, but the respondent is trying to complete the project as soon as possible by managing available funds. The certificate of chartered accountant shows the cost incurred till 31.03.2019 and amount spent by builder out of its own fund, due to non-payment by allottees.

- e. That other than above stated factor there are lots of other reason i.e. NGT orders of various dates, Environment pollution (Prevention and control) Authority orders, Haryana State Pollution Control Board orders, Municipal Corporation Gurugram orders, and which hampered the progress of construction of project and in many cases, complete stoppage of construction work.
- f. That other than these, there are several other orders that the hon'ble supreme court in Nov 2019 wherein it was ordered that "With respect to demolition and construction activities we direct that no demolition and construction activities take place in Delhi and NCR region. In case it is found that such activity is done, the local administration as well as the municipal authorities including the zonal commissioners, deputy zonal commissioners shall be personally held responsible for all such activities. They have to act in furtherance of the court's order and to ensure that no such activity takes place" That said order was revoked by Hon'ble supreme court in Feb 2020, and whereby it was ordered that "The restriction imposed vide order dated 04.11.2019 is recalled. As per the norms, the work can be undertaken during day and night by all concerned, as permissible. Application for direction is, accordingly, disposed of.
- g. That the situation of COVID pandemic is in the knowledge of everyone. Since march 2020 till now, our country has seen mass migration of laborers, complete lockdown in whole of the country, curfews and several other restrictions. The present situation seriously hampers the



construction progress in real estate sector. From march 2020 till now, there have been several months where construction work was completely stopped either due to nationwide lock down or regional restrictions. The metro cities like Gurgaon and Delhi suffered from a major outburst of COVID cases and deaths in such a number which can't be comprehended. There has been severe dearth of labour due to state imposed restrictions. The developers were helpless in these times since they had no alternative but to wait for the situation to come under control. Even RERA extended the time limits for completion of project vide notification dated 26.05.2020, by 6 months. But the aforesaid was the period evidencing the first wave but the relaxation in restrictions were seen at fag end of year 2020 however soon thereafter, our country saw a more dangerous variant of COVID from the month of March 2021 and only recently restrictions have been lifted by the government. The whole of the same consumed more than 11 months wherein 2/3 time there could be no construction and rest of the time construction progressed at very slow pace to several restrictions imposed by state government on movement and number of person allowed etc.

- h. That even the hon'ble apex court has already held that notice, order, rules, notification of the Government and/or other public or competent authority, including any prohibitory order of any court against development of property comes under force majeure and period for handing over of the possession stood extended during the prevalence of the force majeure event.
- i. That it is the admitted fact that the builder buyer agreement was executed between the parties on 23.04.2014. However, certain extremely important facts were concealed by the complainant while drafting the present complaint. The complainant has intentionally

provided details of payments only but concealed the facts whether the payments were made on time or not. It is submitted that material, labor and other requirements do not come for free and if allottees wishes to get the possession on time, than it is their legal duty to pay on time, since without money, it is not possible to construct on time.

7. 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

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

9. 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

10. 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.

11. 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.
12. 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 (Civil), 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 and*** 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."

13. 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. Finding on objections raised by the respondent

F.I Objection regarding force majeure conditions:

14. The respondent/developer alleged that grace period on account of force majeure conditions be allowed to it. It raised the contention that the construction of the project was delayed due to force majeure conditions such as orders of Hon'ble Supreme Court of India to curb pollution in NCR, various orders passed by NGT, EPCA and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. The apartment buyer's agreement was executed between the parties on 23.04.2014 and as per terms and conditions of the said agreement, the due date of handing over of possession comes out to be 23.04.2018. The events such as Hon'ble Supreme Court of India to curb pollution in NCR, various orders passed by NGT, EPCA were for a shorter duration of time and were not continuous. There is delay of more than three years and even some happening after due date of handing over of possession. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons and the plea taken by respondent is devoid of merit.
15. As far as delay in construction due to outbreak of Covid-19 is concerned, Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020*** dated 29.05.2020 has observed that:

'69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in

breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself.

16. The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by 23.04.2018 and is claiming benefit of lockdown which came into effect on 23.03.2020 and whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant.

G.I Direct the respondent to refund the whole amount paid by the complainant with prescribed rate of interest from the date of payment.

The complainant submitted that he booked a flat in the project named as "The Elite Residences". On 11.06.2013, an allotment letter was issued. A buyer agreement was executed between the parties on 23.04.2014. It is pertinent to mention here that respondent issued various reminders on 09.03.2015, 07.08.2015, 02.06.2017, 19.06.2017, 14.09.2017 respectively. Thereafter, issued final notice on 02.07.2020. After all the reminders and final notice, the respondent cancelled the allotted unit of the complainant vide letter dated 07.09.2020. Now the question before the authority is as to whether that cancellation is valid or not.

17. On consideration of documents available on record and submission by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainant had paid Rs. 43,09,999/- against the total sale

consideration of Rs. 1,63,20,748/-. The respondent- builder sent a number of demand letters/reminders on 09.03.2015, 07.08.2015, 02.06.2017, 19.06.2017, 14.09.2017 respectively asking the allottee to make payment of the amount due but having no positive results and ultimately leading to cancellation of the unit vide letter dated 07.09.2020 in view of the terms and conditions of the agreement dated 23.04.2014. No doubt, the complainant did not pay the amount due despite issuance of various reminders but the respondent while cancelling the unit was under an obligation to forfeit only the earnest money and refund the balance amount deposited by the allottee with any interest paid if any, in the manner prescribed in clause 1.2(e) of the buyer's agreement. According to clause 1.2(e) of that agreement, 15% of the basic sale price would be considered as earnest money and the same would be forfeited in accordingly in the event of default by the allottee.

18. The complainant paid Rs. 43,09,999/- to the respondent/builder and the cancellation of the allotted unit was made on 07.09.2020 by retaining the amount beyond 10% which is not legal in view of a number of pronouncements of the Hon'ble Apex court in cases of ***Maula Bux Vs Union of India (1970)1SCR298 & Dardar KB Ramchandra Raj Urs Vs Sarah C Urs (2015)4SCC136***. The same view was followed by ***NCDRC, New Delhi in consumer case no. 2766 of 2017 titled as Jayant Singal & anr. vs M/s M3M India Limited*** decided on 26.07.2022. Further, the Haryana Real Estate Regulatory Authority Gurugram also framed a regulation called (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, prescribed as under -

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the

amount of the real estate i.e. apartment/plot/building as the case may be in all case 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."

19. Thus, keeping in view the aforesaid legal provisions, the respondent-builder was not right in retaining 15 % of the basic sale price of the allotted unit and not returning the remaining amount to the complainant on cancellation vide letter dated 07.09.2020. So, it is directed to retain 10% of the basic sale price of the said unit i.e., Rs. 1,37,43,697/- as per agreement of sale and return the balance amount to him along with interest at the prescribed rate from the date of cancellation dated 07.09.2020 within a period of 90 days from the date of this order.

F II. Direct the respondent to pay compensation for mental harassment and depression suffered by the complainant.

F III. Direct the respondent to pay legal expenses incurred by the complainant till date.

20. The complainant is also seeking 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. (supra)*, 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 complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.



H. Directions of the authority

21. 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 is directed to refund to the complainant the deposited amount of Rs. 43,09,999/- after deducting 10% of the basic sale price of the unit being earnest money along with an interest @10.60% p.a. on refundable amount, from the date of cancellation of unit (i.e., 07.09.2020) till the date of realization of payment.
 - 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.
22. Complaint stands disposed of.
23. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.01.2023