

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

Complaint no. : 2539 of 2021  
First date of hearing: 09.08.2021  
Date of decision : 13.01.2023

1. Neha Kiran Agarwal  
2. Abhishek Kumar  
R/O : 761, Sector-A, Pocket-B, Vasant Kunj,  
New Delhi-110070

**Complainants**

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 complainants  
Counsel for the respondent**

**ORDER**

1. The present complaint dated 30.06.2021 has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

**A. Unit and project related details**

2. The particulars of unit details, sale consideration, the amount paid by the 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	<b>Registered vide no. 46 of 2019 issued on 25.09.2019 up to 31.07.2020</b>
7.	Unit no.	A-0508, 8 <sup>th</sup> floor Tower A [page no. 119 of complaint]
8.	Unit admeasuring area	1865 sq. ft. [page no. 119 of complaint]
9.	Provisional allotment letter	11.07.2013 [page no. 30 of complaint]
10.	Date of apartment buyer agreement	Not mentioned in complaint
11.	Possession clause (Taken from the similar matter of same project)	<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 <b>with 4 years of the start of construction or execution of this Agreement whichever is later, as per the said plans.....</b></i> <b>Emphasis supplied....</b>
12.	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>
13.	Date of start of construction	Not Provided
14.	Due date of possession	Can't be ascertain
15.	Basic sale price	Rs. 1,04,73,80/- [As per agreement page 43 of complainant]
16.	Total Sale consideration	Rs. 1,21,36,090/- [ page 43 of complainant]
17.	Total amount paid by the complainant	Rs.32,19,826/- [as alleged by the complainant]
18.	Occupation certificate	Not obtained
19.	Demand Letters	12.10.2015, 16.09.2016
20.	Reminder Letters	01.08.2014, 21.08.2014, 08.09.2014, 09.10.2014, 17.12.2014, 09.01.2015, 09.03.2015 and 14.07.2020 (final notice)
21.	Cancellation of booking letter	07.09.2020 (page 137 of the complaint)

### B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:
- I. That the complainants vide an application for provisional allotment booked an apartment in May 2013 in the project "The Elite Residencies" at Sector 99, Gurugram (Haryana) of the respondent. They while making the application for allotment paid Rs. 11,00,000/- as booking amount to the respondent.
  - II. That in pursuance of the above, the complainants were allotted an apartment bearing no. A-508, 5<sup>th</sup> floor vide allotment letter dated 11.07.2013. The total consideration to be paid towards the said apartment was Rs. 1,21,36,090/- and they made a total payment of Rs. 32,19,826/- till date.



- III. That thereafter, the respondent sent draft of apartment buyer agreement, However, the same was not executed, as the contents of the agreement were lopsided, materially only advantageous to the respondent at the costs of the complainants.
- IV. That in accepting more than 10 percent of the basic cost of the apartment before executing the agreement for sale, the respondent violated section 13 of the Act. From the very beginning, the respondent had such unlawful conduct and presented false assurances, representations, and warranties to the complainants. They have already paid more than 27% of the value of the flat and the respondent demanded approx. 90 % of the value of the flat without executing the agreement.
- V. That the complainants submit that after the allotment of the unit, the respondent demanding payment of money at regular intervals. They insisted on entering into the apartment buyers' agreement before making the payments. However, the respondent threatened to cancel the allotment if payments were not made and forfeit the money paid along with the application for allotment. The complainants for fear of losing their hard-earned money, had no choice but to make the payments as demanded by the respondent.
- VI. That the complainants stopped making the payments as neither any agreement was executed nor any significant development in the project was there. They suspected diversion of funds by the respondent since it had collected a hefty amount but had shown no development in the project.
- VII. That furthermore, it is pertinent to mention here that the respondent assured, represented and warranted the complainants that the project would be completed in 4 years, i.e. by May, 2017; Now, it had been about



3 years, and the project is nowhere near completion. It is pertinent mention here that the respondent failed to update the status of the construction. On various occasions the complainants asked to refund the whole amount, but the respondent paid no heed to the same.

VIII. That thereafter, the respondent, acting in contravention and the responsibilities under the Act and the agreement, wrongfully and arbitrarily cancelled the Unit of the complainants and forfeited the whole amount vide cancellation letter dated 07.09.2020 in which it was stated to be the earnest money being unlawful. The respondent did not complete its obligations according to the agreement and failing which it cancelled the Unit's allotment, thereby putting the responsibility on complainants' shoulders.

IX. That the complainants sent a letter on 15.02.2021 seeking information about the project, amenities, and facilities to be provided by the respondent. It is pertinent to mention here that the complainants 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. The respondent utterly failed to fulfill its obligations to deliver the possession of the apartment in time and adhere to the contentions of the agreement which caused mental agony, harassment and huge losses to the complainants and hence the present complaint

**C. Relief sought by the complainants:**

4. The complainants have sought following relief(s).

- I. **Direct the respondent to refund the whole amount paid by the complainants 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 complainants.**

**III. Direct the respondent to pay legal expenses incurred by the complainants 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 contested the complaint on the following grounds.
- 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.
  - 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 would be offered after obtaining occupancy certificate as agreed in builder buyers' agreement.
  - 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.
  - 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 factors 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 hampred 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. The 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 labour, complete lockdown in whole of the country, curfews and several other restrictions. That 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. That 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 those 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 sent for execution but the complainants never signed the said agreement. However, prior to apartment buyer agreement, complainants had executed an application form whereby they agreed certain terms and conditions which also contain conditions qua timely payment and in case on non-payment, cancellation of allotment and forfeiture of earnest money. On the basis of said application form the respondent





allotted a unit in favour of complainants. On allotment of an unit, a concluded contract came in force and the complainants are bound by the same. After allotment of unit in favour of complainants, respondent sent a draft apartment buyer agreement in order to execute the same. However, the same was never returned back. However since the majority of the terms already agreed upon between the parties, the respondent started raising demands as per relevant stage of construction. The said agreement was sent to complainants in the year 2014. Even the date of stamp paper bought for apartment buyer agreement pertains to 22.04.2014 and till date, the same was never challenged by the complainants anywhere. Even after receiving said apartment buyer agreement the complainants made few payments from 04.10.2014 to 14.03.2015 as per payment plan mentioned in the apartment buyer agreement. Thus by their conduct, they admitted validity of the terms and conditions of agreement as well. It is submitted that certain extremely important facts were concealed by the complainants while drafting the present complaint. The complainants have intentionally provided details of payments only but concealed the facts as to whether the payments were made on time or not. It is submitted that in the complaint itself the complainants admitted the fact that an amount of Rs. 87,36,982/- is due to be paid towards the respondent. However, the said amount is not the only amount due rather the complainants are also liable to pay interest on the delayed payment. It is submitted that material, labour 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. After allotment, the respondent sent several demand letters dated 12.05.2014, 01.08.2014, 21.08.2014,



08.09.2014, 17.12.2015, 26.02.20215, 07.08.2015, 12.10.2015, 16.09.2016, 02.06.2017, 19.06.2017 and 14.07.2020 against relevant stage of construction but the complainants miserably failed to pay the same. Since the complainants failed to pay even after receiving final notice, the respondent ultimately cancelled the allotment vide letter dated 07.09.2020.

j. That from above stated facts, it is clear that since year 2014, the complainants stopped making payment and even the respondent sent several letter so that payment was made. But the complainants chooses to commit default instead of making payment even after receiving several demand. When no payment was made by complainants, the respondent cancelled the allotment. Thus keeping in view of above stated facts and circumstances, the present complaint is not maintainable and deserves to be dismissed.

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 submissions 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.1 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***, 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. As per terms and conditions of the said unexecuted agreement (placed on file), the due date of handing over of possession comes out to be 23.04.2018. The events such as orders of the 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 as there is delay of more than three years and even some happening took place after due date of handing over of possession. Thus, the promoter-respondent cannot be

given any leniency based on 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, it is claiming benefit of lockdown which came into effect on 23.03.2020. 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.**

17. The complainants submitted that they booked a flat in the project named as "The Elite Residences". On 11.07.2013, an allotment letter was issued. However, no BBA was executed between the parties. It is pertinent to mention here that respondent issued various reminders on 01.08.2014,



21.08.2014, 08.09.2014, 09.10.2014, 17.12.2014, 09.01.2015, 09.03.2015 respectively. Thereafter, issued final notice on 14.07.2020. After all the reminders and final notice, the respondent cancelled the allotted unit of the complainants vide letter dated 07.09.2020. Now the question before the authority is whether that cancellation of the unit is valid or not.

18. On consideration of documents available on record and submission by both the parties, the authority is of the view that on the basis of terms and conditions of allotment the complainants paid Rs. 32,19,826/- against the total sale consideration of Rs. 1,21,36,090. The respondent/builder sent several demand letters/reminders on 01.08.2014, 21.08.2014, 08.09.2014, 09.10.2014, 17.12.2014, 09.01.2015 and 09.03.2015 respectively and asking the allottees to make payment of the amount due but having no positive result and ultimately leading to cancellation of unit vide letter dated 07.09.2020 in view of the terms and conditions of the agreement. No doubt, the complainant did not pay the amount due despite 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.
19. The complainant paid Rs. 32,19,826/- 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."*

20. 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 complainants 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. 1,04,73,840/- 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 complainants.**

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

21. The complainants are 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 complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses.

**H. Directions of the authority**

22. 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 complainants the deposited amount of Rs. 32,19,826/- 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.
23. Complaint stands disposed of.  
File be consigned to registry.

  
(Sanjeev Kumar Arora)  
Member

  
(Vijay Kumar Goyal)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 13.01.2023**