

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

Complaint no. : 4902 of 2020
Date of filing complaint : 12.01.2021
First date of hearing : 03.03.2021
Date of decision : 22.11.2022

	Balraj S/o Ramchand R/O: -H. No. 125, Village Bashariya, P.O. Baslambi, Gurugram (Haryana).	Complainant
Versus		
1 2 3 4 5	M/s SS Group Pvt. Limited M/s Matrix Buildwell Privated Limited M/s Northstar Towers Private Limited M/s Green Gem Estates Private Limited Regd. Offices at: - SS House, Plot no.77, Sector-44, Gurugram, Haryana,122003 North star Apartments Private Limited Regd. Office at: 4 th floor, The Plaza, IFFCO Chowk, M.G. Road	Respondents

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Balraj	Complainant in person
Sh. CK Sharma and Dhruv Dutt Sharma	Advocates for the respondents

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 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:

1.	Name and location of the project	"SS Omnia", Sector-86, Gurugram
2.	Project area	2.91875 acres
3.	Nature of real estate project	Commercial Complex
4.	DTCP License No.	113 of 2013 dated 30.12.2013
5.	RERA registered/ not registered.	Registered
6.	Registration certificate	94 of 2017 dated 28.08.2017
7.	Validity of registration upto	27.08.2020
8.	Unit No.	TF-49, 3rd Floor (As per page no. 88 of complaint)
9.	Super Area of the unit	233 sq. ft. (As per page no. 88 of

		complaint)
10.	Date of execution of buyer's agreement	09.09.2015 (As per page no. 86 of complainant)
11.	Payment plan	Construction linked plan
12.	Total Sale Price	Rs. 15,65,061/- (As per page no. 88 of complainant)
13.	Total amount paid by the Complainant	Rs. 6,50,014/-
14.	Emails for cancellation of unit by the complainant	04.04.2016, 06.04.2016, 08.04.2016, 12.04.2016, 22.04.2016
15.	Due date of delivery of possession as per para (a) of clause 8.1 of the buyer's agreement - 36 months from the date of execution of buyer's agreement +180 days grace period for obtaining for OC in respect of the commercial complex	09.09.2018
16.	Occupation Certificate	14.06.2019 (As per page no.39 of reply)
17.	Offer of possession	Not offered

B. Facts of the complaint

- That on 08.09.2013, the complainant was allotted a retail shop TF - 49, third floor admeasuring super area of 233 sq ft/ 21.65 sq mtrs in the project of the respondent namely, "SS Omnia", Sector-86", Gurgaon. The complainant paid an amount of Rs 6,50,014/- towards the sale price at the time of the application, in accordance to the payment schedule represented by the developer.

4. That thereafter the complainant and the respondents executed a buyer's agreement (hereinafter referred to as the agreement) on 09.09.2015 for a total sale consideration of Rs. 15,65,061/-.
5. That it has been categorically mentioned that time is essence of the buyer agreement. But the respondents raised the demands of instalments without adhering to the terms of the BBA and payment plan. As per the terms of the allotment, the possession of the said unit was to be handed over to the complainant within a period of 36 months from the date of execution of buyer agreement dated (9th September 2015) but the builder was raising demands without making construction accordingly. So, in those circumstances, the complainant could not wait endlessly for possession of booked unit.
6. That the respondents did not start construction of the project as per construction link plan under which the unit was allotted to the complainant and having no hope for completion of the project in near future and falling short of finance and family problems, he contacted the office of the respondents many times who then told him that he should apply for cancellation of the unit and after that the amount paid by him shall be refunded back. When no satisfactory response was given by the officials of the respondents, he sent several mails dated 4th, 6th, 8th, 12th, 22nd, 25th April 2016 and 8th and 9th November 2017 to the respondent to cancel the allotment and refund the amount paid by him.
7. That the complainant personally visited the office of the respondents where the officials of it asked him to file a written request for refund of his amount and then shall be refunded shortly.

Thereafter several applications were made by him requesting the respondents to refund his amount but all the requests went in vain. Rather, the respondents were bent upon to forfeit upon the hard earned money of the complainant.

8. That the complainant at all times made payments against the demands of the respondents and as per payment schedule of the agreement pertaining to his unit. Therefore, the fraudulent act and conduct of the respondents need to be penalized in accordance with the provisions of the Real Estate (Regulation and Development) Act, 2016 (Hereinafter being referred as "the act"),

C. Relief sought by the complainant.

9. The complainant has sought following relief:
 - (i) Direct the respondents to refund amount paid by the complainant along with prescribed rate of interest.

D. Reply by the respondents.

10. That the complaint filed by the complainant is misuse of process of law and the reliefs claimed as sought for and is liable to be dismissed. No relief much less any interim relief, as sought for, is liable to be granted to the complainant.
11. That the complainant miserably and willfully failed to make payment in time or in accordance with the terms of the allotment/flat buyer's agreement. It is submitted that the complainant has frustrated the terms and conditions of the buyer's agreement, which were the essence of the arrangement between the parties. So, the complainant now cannot invoke a particular clause, and therefore, the complaint is not maintainable and be rejected at the threshold.

12. That the complainant failed to make payment in time in accordance with the terms and conditions as well as payment plan annexed with the allotment letter and buyer's agreement and as such the complaint is liable to be rejected. It is submitted that out of the consideration of Rs. 16,00,011/-, the amount actually paid by the complainant is Rs. 6,50,014/-i.e., approx. 40% of the total consideration of the unit. It is submitted that the last payment was made by the complainant on 20.1.2015, i.e., much before the proposed date of delivery of possession. It is an admitted fact that the complainant due to financial constraints was not able to make the further payment and wanted to withdraw from the project. It is, however, submitted that as per the buyer agreement, the respondent is entitled to forfeit the earnest money along with other amount of non-refundable nature. The complainant is adamant on getting the full refund which is against the terms and conditions of the agreement.
13. All other averments made in the complaint were denied in toto.
14. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

The respondents raised an objection regarding jurisdiction of authority to entertain the present complaint. 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, 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

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 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.

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. Findings on the relief sought by the complainant.

F.I Direct the respondent to refund amount paid by the complainant along with prescribed rate of interest.

15. The complainant was allotted unit no TF-49, third floor in the project "SS Omnia" by the respondent-builders for a total consideration of Rs. 15,65,061/- and he paid a sum of Rs. 06,50,014/- which is approx. 40% of the total sale consideration. The complainant requested the respondents to refund the entire amount paid by him as he does not want to continue due to financial problems. It is pertinent to mention here that the complainant visited at the site of project and found that there was no construction going on at the project site. Moreover, due to falling short of finance and family problems, he was left with no option except to surrender the subject unit by sending various emails to the respondents vide dated 04.04.2016, 06.04.2016, 08.04.2016, 12.04.2016, 22.04.2016 respectively and which are prior to the due date of offer of possession i.e. 09.09.2018. Though after completion of the project, the respondents obtained its occupation certificate but when the complainant has already surrendered the unit due to his financial incapability vide various emails and there is no response to the same, then the authority allows surrender of unit after making 10% deduction of the sale consideration as the same was intimated at the time of builder buyer agreement (i.e. Rs. 15,65,061/- at page no. 88 of the complaint).
16. As per the provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, the respondent builder has to return the remaining amount after

deducting 10% of sale consideration as earnest money, along with interest @10.35% (MCLR+2%) from the date of surrender i.e. 04.04.2016 till its realization. The authority observes that the complainant is not entitled to refund to the entire amount due to his own default and the unit has not been cancelled by the respondents after issuing proper reminders. Therefore, the surrender of the allotted unit to the respondents is valid. They can proceed against him as per the terms and the conditions of buyer's agreement with regard to cancellation / surrender and forfeit the earnest money but not exceeding 10% of basic sale price besides other non-refundable statutory charges. The issue w.r.t. deduction of earnest money arose before the hon'ble Apex Court of the land in cases of **MaulaBux V/s Union of India (1970)1 SCR 928** and **Sirdar KB Ramchandra Raj Urs V/s Sarah C Urs (2015) 4SCC 136** and followed by NCDRC in cases of **Ramesh Malhotra V/s EMAAR MGF Land Limited and Mr. Saurav Sanyal V/s M/s IREO Pvt. Ltd.** decided on 12.04.2022 and wherein it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of "earnest money".

17. Similarly Regulation 11 of the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, provides 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 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"

18. In view of aforesaid circumstances, the respondents are directed to refund the paid up amount after deducting 10% of the sale consideration of the unit being earnest money along with statutory taxes (subject to its actual payment and furnishing of proof of actual payment) within 90 days along with an interest @ 10.35% p.a. on the refundable amount, from the date of surrender i.e. 04.04.2016 till the actual date of refund of that amount.


G. Directions of the authority


19. 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):
1. The respondent-promoters are directed to refund the paid-up amount after deducting 10% of the sale consideration of the unit being earnest money with statutory taxes (subject to its actual payment and furnishing of proof of actual payment) along with an interest @ 10.35% p.a. on the refundable amount from the date of surrender i.e. 04.04.2016 till the actual date of refund of that amount.

II. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow

20. Complaint stands disposed of.

21. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.11.2022

HARERA
GURUGRAM