

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

Complaint no.	:	2504/2022
Date of filing complaint:		31.05.2022
First date of hearing:		25.08.2022
Date of decision	:	21.02.2023

Sh. Avinash Chandra Swain S/o Anam Charan Swain Through his attorney Chetan Kumar s/o Balram R/O: 71 , Village Way Pinner Harron , London - Ha5 5Aa , United Kingdom	Complainant
versus	
Experion Developers Private Limited R/O: Second Floor, Plot No.-18, Sector-32, Gurugram, Haryana	Respondent

CORAM:	
Shri Sanjeev Kumar Arora	Member
Shri Ashok Sangwan	Member
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Sanjeev Sharma (Advocate)	Complainant
Sh. Venket Rao (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee through his attorney Chetan Kumar 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 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 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.No.	Heads	Information
1.	Name of the project	"The Westerlies", Gurugram , Haryana
2.	Nature of the project	Residential plotted colony (As per license issue annexure P-21 , page 132)
3.	DTCP License no.	57 of 2013
4.	Registered / not registered	103 of 2017 valid upto 23.08.2019.
5.	Allotment letter	25.11.2013 (Page 49 of reply)
6.	Plot no.	E1/02
7.	Plot admeasuring	300 sq. mtr. (Page 49 of reply)
8.	Date of execution of plot buyer's agreement	14.07.2014 (page 14 of complaint)
9.	Possession clause	Article IX: COMPETION OF THE VILLA 1. Possession Subject to the terms and conditions of this Agreement. the Developer estimates completing the construction of the Villa and issue

		<p>the Possession Notice of the Villa within 4 (Four) years from the date of receipt of the last of all the Project Approvals for the commencement of development of the Villa from the Governmental Authorities or within such other timelines as may be directed by the concerned Governmental Authorities ("Commitment Period"). The Buyer further agrees and understands that the Developer shall be entitled to a further period of 6 (Six) months ("Grace Period") after the expiry of the said Commitment Period. Except for reasons of Force Majeure, if the Developer fails to offer possession of the Villa to the Buyer by the end of the Grace Period, it shall be liable to pay to the Buyer compensation calculated at the rate of Rs. 7.50/- (Rupees Seven and Paise Fifty only) per square feet of the Sale Area ("Delay Compensation") for every month of delay or part thereof from the date of expiry of the Grace Period until issuance of the Possession Notice. However, Delay Compensation shall be payable only if the Buyer has not defaulted in making any payment in terms hereof. The Buyer agrees that the payment/adjustment of any Delay Compensation shall be done only at the time of issuance of the Possession Notice or at the time of payment of the final instalment due under the Payment Plan, whichever is later.</p> <p>(VILLA BUYERS AGREEMENT).</p>
10.	Due date of delivery of possession	05.05.2020

		(As taken from the similar complaint of the same project bearing no. 507 of 2019 as taken from the zoning plan i.e 05.11.2015 and decided on 14.07.2022)
11.	Total sale consideration	Rs. 2,13,51,409/- (As alleged by the respondent on page no. 1 of reply)
12.	Total amount paid by the complainant	Rs. 62,77,177/- (as per pleadings of the complainant.) (Inadvertently mentioned in the proceedings of the day as Rs. 43,43,185/-)
13.	Completion certificate	31.07.2017 (Page 136 of reply)
14.	Offer of possession	Not offered
15.	Reminder letters	21.01.2016 04.02.2016, 01.04.2016, 25.04.2016, 09.05.2016, 08.08.2016, (Page 112, 114, 117, 124, 126 of reply)
16.	Cancellation letter	27.04.2017 (Page 99 of reply)

B. Facts of the complaint:

- That a project by the name of the project "The Westerlies", situated in sector 108, Dwarka Expressway, Gurugram was being developed and advertised by the respondent. The complainant coming to know about the same showed interest and was allotted plot no. E1/02 admeasuring 300 sq. mtrs for a total sale

consideration of Rs. 2,13,51,409/ . A booking amount of Rs. 1,00,000/- and Rs. 4,30,000/- was paid by him.

4. The buyer's agreement was executed between the parties on 14.07.2014. The unit was to be delivered by **4 (Four) years** from the date of receipt of the last of all the Project Approvals for the commencement of development of the Villa from the Governmental Authorities or within such other timelines as may be directed by the concerned Governmental Authorities. The due date cannot be ascertained. The complainant has already paid an amount of Rs. . 62,77,177/- till date.
5. That despite paying an amount so high, the allotment of the unit in question was cancelled by respondent on 27.04.2017 as the complainant failed to make the payment of the demand which was raised during that time. Since the address of the complainant was changed and therefore, there was no communication received by him, from the respondent regarding making payment of the instalment amount. The complainant did not receive any email in respect of making payment of the instalment amount.
6. That the respondent issued a cheque of Rs. 6,62,623/- dated 10.06.2021 and the same was received by the complainant after the lapse of time for the cheque to get encashed.
7. That the complainant is aggrieved by the fact that the respondent has a right to deduct only the earnest money of 10% from the paid amount and refund the remaining balance along with interest.
8. That the complainant - allottee has filed the complaint for refund of the paid up amount.

C. Relief sought by the complainants:

9. The complainant sought the following relief(s):
- Direct the respondent - builder to refund the paid up amount .

D. Reply by respondent:

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

10. That the complainant is allottee of the above-mentioned unit for a total sale consideration of Rs. 2,13,51,409/- and had applied for allotment of the plot on 25.11.2013.
11. That the complainant was allotted Plot bearing No. E1/02 admeasuring 300 sq. mts. plot area in the Project "The Westerlies" and thereafter, a plot buyer's agreement was executed between the parties on dated 14.07.2014.
12. That the application for part completion certificate was made on 10.04.2017 with the competent Authority. The completion certificate was received on 31.07.2017 and thereafter no possession was offered to the complainant.
13. That the present complaint is barred by law of limitation as the respondent had cancelled the allotment of the plot to the complainant on 27.04.2017 itself due to the persistent defaults in making do payments as per the PBA. Now, the complainant after expiry of almost 5 years from the date of cancellation of the allotment of the plot, has filed the present complaint on 26.05.2022 allegedly claiming refund of the amount which is in itself an abuse of the process of law and highly delayed.
14. That, since Section 18 (1) & (3) of RERA Act, 2016 does not provide for the period of limitation, therefore, the provisions of the

Limitation Act, 1963 shall become applicable by virtue of Section 29(2) and Section 3 of the Limitation Act, 1963 and it is relevant to read the abovementioned provisions of the Limitation Act in the light of Section 88 of the RERA Act 2016.

15. Therefore, it is abundantly clear that the period of Limitation shall be deemed to be 3 years. It is further clarified that in case there is a cancellation by the respondent the period of limitation shall in this case also commence on the date the allotment was cancelled and would end on the date 3 years have elapsed from the date limitation had commenced.
16. That the right to sue i.e. cause of action, if any, should have accrued to the complainant from the date of cancellation till 3 years. Since more than 3 years has elapsed, the present complaint is not maintainable before the Ld. Authority. It's is the duty of this Ld. Authority to dismiss such complaints filed beyond the period of limitation. Once the period of 3 years has expired, the claim of the allottee is not maintainable before any forum including the civil courts and the consumer forum.
17. That in the instant case, the cancellation letter was issued on 29.04.2017 which was prior to the Section 11 of RERA Act coming into force. The cancellation letter clearly provides various heads under which forfeiture amount has been calculated in accordance with the agreed provisions of the PBA. Hence, once the action against which the complaint is being filed had been initiated prior to the coming into force of the RERA Act, such action cannot be challenged on the parameters prescribed in the Act which were not enforceable as on the date when the cancellation was undertaken.

Hence, the cause of action being much prior to the enforceability of the provisions of the RERA Act, and the same cannot be applied to for ascertaining the legality and validity of such an action.

18. That the Complainant has been in blatant violation of Section 19(6) of the RERA Act, 2016 as he has failed to pay the due instalments on time against the sale consideration amount payable towards the Plot despite multiple reminders sent to him in this regard. The complainant has opted for Development Linked Plan and the respondent accordingly raised the demands on achievement of relevant milestones. However, not a single instalment has been paid on time by the complainant and only three instalments had been paid as per the payment plan. Further, from 04.09.2014, the payments have been completely stopped. It is submitted that all the demands raised by the respondent were strictly as per the payment schedule annexed with the PBA dated 14.07.2014.
19. That the last payment received from the complainant was on 04.09.2014 and that too after the respondent was constrained to send multiple reminders to the complainant due to the persistent delay on his part. After that the respondent continued to send demands and reminder letters to the complainant to pay the dues vide communications dated 02.12.2015, 29.12.2015, 21.01.2016, 04.02.2016, 03.03.2016, 01.04.2016, 25.04.2016, 09.05.2016, 16.06.2016, 08.08.2016, 23.08.2016 and 11.11.2016 respectively. Since, the complainant utterly failed in his obligation to pay the due instalments, the respondent was left with no option but to cancel the provisional allotment and forfeit the amount paid by him in accordance with the agreed terms and conditions of the PBA and

Provisional Allotment Letter. Therefore, the provisional allotment was cancelled vide Letter dated 27.04.2017

20. That there is no delay in completion and development of the Project. That as per Article IX- Completion of the Project: , the respondent was to complete the development of the Project within 4 years from the date of receipt of the last of all the project approvals for the commencement of development of the project from the Competent Authorities or within such other timelines as may be directed by the DGTCP. The last project approval obtained by the respondent was the Zoning Plan for the said Project, which was approved by the Competent Authority on 05.11.2015. Therefore, the due date of possession was 05.11.2019.
21. That the part completion certificate for the project wherein the plot of the complainant was located was received on 31.07.2017 i.e. much before the due date as per the PBA. It is submitted that the relevant part completion certificate being obtained, the respondent has offered possession to the respective allottees and the many of allottees have already accepted possession of their plots.
22. That even otherwise, without prejudice to any other submission made herein, if the due date is calculated from the date of the PBA, the PBA was executed with the Complainant on 14.07.2014, Thus the due date of completion comes out to be 14.07.2018. Hence, there is no delay by the Respondent even upon calculating the due date of possession from the date of the PBA.
23. That as per the Clause 2 of Article XII, it is clearly stated that in the event of default on the part of the complainant, the respondent shall have the right to terminate the PBA, and cancel the allotment of the plot under a notice to him and the respondent shall be entitled to

forfeit the amount of earnest money and other non-refundable amounts. It is also relevant to note that the Earnest Money was also defined in the Booking Application signed and submitted by the complainant. Hence he was aware of all the terms of allotment including the obligation to make timely payments, the consequences of default and the calculation of the amount of Earnest Money upon cancelation of the allotment even prior to making a single payment to the respondent.

24. That Brokerage for the plot allotted to the complainant has already been paid to the concerned broker which is non-refundable even after the Plot has been cancelled. Further, if the cancelled Plot is sold in the future, then again brokerage has to be paid by the respondent to the concerned broker, irrespective of payment in the past as the broker will again be investing time and resources to identify new prospective allottee. Therefore, the said charges have been deducted.
25. That similarly, the marketing and advertising fee incurred on the plot for allotment and sale to the complainant has been deducted as these expenditures have to be again incurred to locate and identify new prospective allottees so that the cancelled Plot may be re-allotted afresh. When the said plot was re-sold in the year 2021, the respondent sent a cheque of Rs.6,62,623/- to the Complainant which was dispatched on 09.04.2021. However, the same was not presented for encashment from the end of the complainant.
26. That since the cheque previously sent was not encashed by the complainant and the respondent being prudent, sent a second Cheque dated 16.06.2021 of Rs. 6,62,623/- to him . It is further submitted that the respondent also sent an email intimating the

Complainant regarding refund and dispatching of the Cheque, to which he has not replied or acknowledged till date.

27. That the complainant had never intimated the respondent of any such change in address. Therefore, the complainant was himself in default for not intimating the respondent about the change in his address.

28. All other averments made in the complaint were denied in toto.

29. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be denied on the basis of those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

30. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

31. 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.

32. 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.

33. 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* 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."

34. 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. Findings on the relief sought by the complainant:

F.1 Direct the respondent – builder to refund the paid-up amount

35. The complainant-allottee booked a residential plot in the project of the respondent named as "The Westerlies" situated at sector 108-A, Gurgaon, Haryana for a total sale consideration of Rs. 2,13,51,409/-. The allotment of the unit was made on 25.11.2013. The, buyer's agreement was executed between the parties on 14.07.2014 and the due date for completion of the project and offer of possession comes to 05.05.2020, taken from the zoning plan approval granted on 05.11.2015 .

36. The respondent started raising payments demands from the complainant from the year 2016 but he defaulted to make the payments. The complainant-allottee in total has made a payment of Rs. . 62,77,177/-. The respondent sent various demand letters and reminder letters on 02.12.2015, 29.12.2015 , 21.01.2016 , 04.02.2016 , 03.03.2016 , 01.04,2016., 25.04.2016 , 09.05.2016 , 16.06.2016 , 08.08.2016 , 23.08.2016 , 11.11.2016 . Thereafter, the respondent cancelled the allotment of the plot vide letter dated 27.04.2017. The completion certificate of the tower where the allotted unit is situated has been received on 31.07.2017.
37. After cancellation of allotted unit on 27.04.2017, the complainant filed the present complaint on 31.05.2022 i.e., after gap of more than 5 years and thus, is barred by the limitation. The authority observes that the case of the complainant is not against the cancellation letter issued way back as on 27.04.2017 as the same cannot be agitated as complaint was filed after more than 5 years well beyond the limitation period.
38. The counsel for the complainant stated at bar that the respondent has sent the cheque for refund of Rs. 6,62,000/- on 10.06.2021 but was not received by him due to change of address at the foreign destination. The right of allottee persists and is not barred by limitation as the refund cheque has been issued only on 10.06.2021. The refund should be granted after deduction of 10% earnest money and interest from the date of cancellation.
39. The counsel for the respondent stated that the above plot was cancelled on 27.04.2017 for non - payment of the outstanding instalments by the allottee despite issuance of multiple reminders and the last payment was made only on 04.09.2014. The

cancellation is PRE-RERA and the model agreement as well as regulations, of the Act do not apply as cancellation was made on 27.04.2017 and the respondent after deduction as per buyer's agreement had issued the refund cheque .If its validity date has expired , the same can be renewed . The complaint is barred by limitation and the refund may be considered only in terms of BBA.

40. That it is pertinent to mention here that the cancellation is not PRE-RERA as the cancellation was done on 27.04.2017 and the same was post RERA. Moreover, a perusal of letter dated 27.04.2017 issued by respondent - builder to the complainant cancelling the allotment of the subject unit shows that on cancellation, the remainder amount after forfeiture of Rs. 57,42,091/- was not sent to the allottee. There is a specific recital with regard to refundable amount providing that "The refundable amount if any shall be paid to you only after resale of the apartment". It shows that on cancellation, the remaining amount was not sent to the allottee by the respondent - builder and the same was sent through an account pay cheque dated 24.02.2021 followed by a reminder dated 30.06.2021 along with an account pay cheque and both remained being uncashed, leading to filing of the present complaint.
41. The Hon'ble Apex Court of land in cases of *Maula Bux Vs. Union of India, (1970) 1 SCR 928* and *Sirdar K.B. Ram Chandra Raj Urs Vs. Sarah C. Urs, (2016) 4 SCC 136*, held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of the section 74 of the Contract Act, 1872 are attracted and the party so forfeiting must prove the actual damages suffered by it .

42. Even keeping in view, the above mentioned principles laid down by the Hon'ble Apex Court of the land, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, framed regulation 11 providing as under-

"AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"

43. Keeping in view the above-mentioned facts, the promoter was required to return the paid-up amount after retaining 10% of the basic sale consideration of the allotted unit.

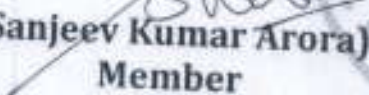
G. Directions issued the Authority:

44. 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 is directed to refund to the complainant the paid-up amount of Rs. . 62,77,177/- after deducting 10% as earnest money of the basic sale consideration of Rs.2,13,51,409/- with interest at the prescribed rate i.e., 10.70% on the balance amount, from the date of cancellation i.e 27.04.2017 till the date of actual refund.
- 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.

45. Complaint stands disposed of.

46. File be consigned to the Registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

HARERA
Dated: 21.02.2023
GURUGRAM