



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

Complaint no. : 3198 of 2021
First date of hearing: 25.11.2021
Date of decision : 09.02.2023

1. Abhijeet Tiwary
2. Nutan Tiwary
Both RR/o: - 196/B, Shri Krishna Puri, Patna
Bihar-800001

Complainants

Versus

M/s Pareena Infrastructures Private Limited
Office: 2, Palm Apartment, Plot No. 13B, Sector - 6,
Dwarka New Delhi DL 110075

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Sanjeev Kumar Arora

**Member
Member**

APPEARANCE:

Sh. Partap Singh
Sh. Prashant Shoeran

**Counsel for Complainants
Counsel for Respondent**

ORDER

1. The present complaint dated 27.08.2021 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 provisions of the Act or the Rules and regulations

made there under or to the allottees 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 complainants, 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	"Coban Residences", sector-99A, Gurgaon
2.	Nature of the project	Group Housing Project
3.	Project area	10.5875 acres
4.	DTCP license no.	10 of 2013 dated 12.03.2013 valid up to 11.06.2024
5.	Name of licensee	Monex Infrastructure Pvt. Ltd.
6.	RERA Registered/ registered	Registered Vide no. 35 of 2020 issued on 16.10.2020 valid up to 11.03.2022 + 6 months = 11.09.2024
7.	Unit no.	T2-1102 (annexure A, page 19 of complaint)
8.	Unit admeasuring area	1997 sq. ft. (page 25 of complaint)
9.	Allotment letter	30.07.2013
10.	Date of builder buyer agreement	10.01.2014 [page 23 of complaint]
11.	Possession clause	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. (Emphasis supplied)
12.	Date of start of construction	16.10.2014 (as per SOA dated 13.07.2021 page 94 of complaint)
13.	Due date of possession	16.10.2018 [Due date calculated from start of construction]
14.	Total sale consideration	Rs 1,16,84,452/- (as per SOA dated 13.07.2021 page 92 of complaint)
15.	Total amount paid by the complainant	Rs. 42,26,071/- (as per SOA dated 13.07.2021 page 93 of complaint)
16.	Offer of possession	Not offered
17.	Occupation certificate	03.01.2023 (As stated by the counsel of respondent during hearing)
18.	Date of cancellation	16.07.2021 (page 146 of reply)

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:

I. On the basis of the representations of the respondent, the complainants agreed to purchase a 3 BHK flat in the project and were allotted flat no. T2-1102 ('Flat') to be located on the eleventh floor out of 19 floors in Tower-2, . The complainants accordingly paid a token amount of Rs. 8,50,000/- through RTGS on 31.01.2013.

II. That the complainants in order to make payments to the respondent availed a loan from ICICI Bank through their Patna branch in 2013, which came to be duly sanctioned. However, on account of delays caused by the respondent, the construction of the project was stalled and did not



commence, on account of which the sanction letter stood expired. The loan came to be re-sanctioned after demands were raised in 2014.

- III. That on 10.01.2014, the complainants and the respondent duly executed a builder buyer agreement for the sale/ purchase of the flat for the total consideration of Rs. 1,22,08,599.4/-. The respondent under the BBA, *inter alia*, acknowledged under clause 1.2(d) that the complainants had already paid a sum of Rs. 20,53,321/- towards the sale price of the flat. Further, it is crucial to point out that in terms of clause 3.1 the developer was bound to finish construction of the building and deliver the flat within 4 years of the execution of the agreement or the start of the construction. Moreover, under clause 5.1 it was always made clear that a maximum extension of only 6 months was contemplated under the BBA.
- IV. That despite making all payments on demand, the complainants were appalled at the slow pace at which the project was progressing, however on account of the representations made and the amount invested, they were hopeful that the project would take off very soon.
- V. That the bhumi-pujan of the project site was scheduled for 27.09.2014 and the excavation at the project commenced soon thereafter but before 01.10.2014, the respondent further sent a payment request letter dated 01.10.2014 for a sum of Rs. 12,71,792/- on account of the commencement of the construction, which was duly paid.
- VI. That the progress of the project was appalling and despite over one year having passed, the respondent had only managed to build up to the 1st floor out of the 19 total floors that were to be constructed. Despite the



slow progress of the project and based on various oral assurances by the respondent, the complainants paid further amount of over Rs 9 lakhs in August 2015.

- VII. That on account of the snail pace at which the project was continuing, it became clear to the complainants that it would be impossible for the respondent to meet its deadline of handing over the flat in 2017. Therefore, they were appalled when on 10.02.2016, received another demand for payment of Rs. 10.9 Lac.
- VIII. The complainants in response to the unjustified demands raised by the respondent and in view of the clearly failing project, wrote to it making it clear that they had invested their life's hard earned savings into the project and despite timely payments, it had failed to stick to the timelines as had been originally decided. Thus the petitioners, requested the respondent to come back with a new payment plan.
- IX. That despite the above mentioned email, the respondent did not even acknowledge or respond to the objections raised by the complainants. Therefore, they were restrained to write to the respondent again vide email dt. 23.03.2016, whereby reiterated the request for a new payment plan. The complainants also sought clarification as to why a 'penalty interest' had been levied on them despite all payments having been made on time. The complainants also sought clarification as to why no voucher or credit note had been issues to them for timely payments in terms of the agreement. Despite the aforesaid representations, the respondent either did not give a satisfactory resolution or did not reply at all.



Throughout the year 2016, repeated demands were raised upon the complainants in a mechanical manner. However, oral assurances were made by the respondent that their matter was under consideration by the management.

- X. That on 24.01.2017, demands were raised upon the complainants for further payments despite the fact that they had already made representations to have their matter considered. Pertinently out of the 19 total floors as on 24.01.2017, as per the respondent's own claim, the tower had been completed only 6th floor. Hence, it was abundantly clear that the respondent would not be able to complete the project even by the end of 2017 and would therefore fail to meet the deadline in terms of the BBA and the representations made to the complainants.
- XI. The complainants owing to the slow progress of the project approached the respondent for a possession linked payment plan and the following terms came to be finalized which were communicated by them by an email dt. 18.07.2017 i.e. Upto 60% to be paid immediately, 10% to be paid on the completion of super-structure, balance 30% to be paid on hand-over of property, TRP of Rs. 110 per sq. ft. to be provided, discount of Rs. 300 per sq. ft. to be extended to the complainants and waiver of any penal interest. The respondent was further informed that the complainants would be availing a loan at an interest rate of 9% which would become payable by the respondent for any delay beyond the 4 year + 6-month period in terms of the BBA.



- XII. The respondent failed to respond to the email dt. 18.07.2017 sent by the complainants on account of which they were constrained to write a reminder email dt. 04.08.2017. In response to the reminder email, the officer of the respondent wrote back to the complainants vide email dt. 09.08.2017, informing them that the management of the respondent was yet to revert with answers and that they would be able to revert in the next 5 days. Despite the aforesaid email, no response was forthcoming from the respondent despite over 3 months having been elapsed. The complainants wrote another email dated 12.12.2017 asking for a response from the respondent on their representation along with details in relation to RERA registration. They told the respondent that no payment would be made unless, the respondent was RERA compliant.
- XIII. That despite the fact that the representations of the complainants were under consideration, the respondent continued to issue unjust and unlawful demands upon them. In fact, the Invoice dt. 02.02.2018 clearly showed that despite 4 years having elapsed since the first payment was made, the respondent had failed to finish even half of the construction.
- XIV. That between 2013 and 2020 in 7 years, the respondent managed to finish only 9 floors out of the total 19 floors that were part of the project. However, despite the excessively long period of time taken by the respondent, it issued a 'Final Notice' to the complainants vide letter dt. 22.02.2021, whereby it threatened to cancel the BBA unless a total amount of Rs. 71.57 lakhs was not paid within 15 days.



XV. The complainants in order to resolve the dispute met the officers of the respondent on 24.02.2021 where the parties agreed to amicably settle the matter. The complainants in good faith made the following offer, which was recorded vide email dt. 27.02.2021 i.e. *that to transfer to Micasa. and is to keep in Coban and convert into PLP with balance payment of 30L in March 2nd half/ April 1st half and the remaining balance on possession and OC. We have also discussed that there can be penalty for delay in possession as well as interest for delay in payment emerging from both sides, that need to be determined and be agreed to as part of the amicable settlement.* The officers of the respondent vide email dt. 27.02.2021 informed the complainants that the proposal had been submitted to the higher ups and decision was awaited. However, to the shock of the complainants, even that generous offer was rejected by the respondent who demanded Rs. 40 lakh be remitted before 25.03.2021 and the balance of Rs. 27.69 lakhs be remitted by 30.06.2021 regardless of whether the occupancy certificate had been obtained.

XVI. Despite all efforts by the complainants to amicably come to a resolution, the respondent sent the pre-cancellation letter dt. 10.06.2021 whereby a final demand of the entire amount of Rs. 73,02,801/- was made even prior to the due date as per its own amended schedule of payments. The complainants replied to the aforementioned pre cancellation letter vide email dt. 06.07.2021, whereby they reiterated their previous offer of paying Rs. 30 lakh upfront with the remaining amount to be paid at the time of possession.



- XVII. That despite the conciliatory approach of the complainants, the respondent with a view to usurp the amounts paid by them, unilaterally and unlawfully cancelled the allotment vide cancellation letter dt. 16.07.2021. Pertinently, out of the total amount of Rs. 42.26 Lakh paid by the complainants, the respondent claimed that only Rs. 79,000/- was liable to be refunded, thus despite having delayed the project for over 8 years and the fact that the project still remained incomplete, the respondent tried to take advantage of its own wrong and usurp the amount paid by the complainants.
- XVIII. It is also pertinent to mention, that in over 8 years since the complainants booked the flat, they had to suffer on account of not having a accommodation to live in as well as paying interest on the bank loan raised to meet the sale price.
- XIX. That it is also relevant to mention that the complainants had availed of a home loan facility from ICICI bank which was sanctioned in them favour on 12.03.2014. The sanctioned amount/disbursed amount stood at Rs. 21,36,043 at a floating interest rate. As on date, about Rs. 14.61 lakh remains due to be paid.
- C. Relief sought by the complainants:**
4. The complainants have sought following relief(s).
 - I. Direct the respondent to refund the entire amount paid by the complainants.
 - II. Stay the letter of cancellation dated 16.07.2021.



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.
- That the respondent is in the process of developing several residential group housing colonies in Gurugram and out of them, one is "Coban Residences" at Sector 99A. The unit/tower in question is approximately nearly completed.
 - 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. The current status of project is attached herein as **Annexure R1**: However it is pertinent to mention here that construction work at present is nearly completed and respondent is endeavoring to apply for occupation certificate quite soon and under normal circumstances would offer possession up to end of first quarter of year 2022 after obtaining occupation certificate.
 - It is crystal clear that the project is near completion and within a very short span of period, it will be completed and thereafter, possession shall be offered, If entitled, after obtaining occupancy certificate as agreed in builder buyers agreement.
 - That the respondent continues to bonafidely develop the project in question despite of there being various instances of non-payments of



instalments by various allottees. This clearly shows unwavering commitment on the part of the respondent to complete the project. Yet, various frivolous petitions, such as the present one is seriously hampered the capability of the respondent to deliver the project as soon as possible. The amounts which were realized from the complainants have already been spent in the development work of the proposed project. On the other hand, the respondent is still ready to deliver the unit in question due on completion to the complainants, of course, subject to payment of due installments and charges.

- e. That it has become a matter of routine that baseless and unsubstantiated oral allegations are made by allottees against the respondent with a mere motive of avoiding the payment of balance consideration and charges of the unit in question. If such frivolous and foundationless allegations will be admitted then, interest of other genuine allottees of the project, will be adversely affected. In these circumstances, the present complaint deserves to be dismissed.
- f. That admittedly, the completion of project is dependent on a collective payment by all the allottees and just because few of the allottees paid the amount, demand does not fulfill 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, yet the respondent is trying to complete the project as soon as possible by managing available funds.



- g. On the other hand the respondent is still ready to deliver the unit in question of this due completion to the complainants, of course, subject to payment of due instalments and charges.
- h. That over a period of time numerous allottees have defaulted in their payments at the relevant stages of construction and it is not possible to construct with inadequate funds. Thus the situation of non -payment of amount by the allottees is beyond the control of respondent. It is submitted that even in the apartment buyer agreement, it was stated that period of 4 years 6 months was subjected to normal conditions and force majeure and with any stretch of imagination situations faced by respondent are not normal. It is submitted that if one goes through table given in reply, more than 30% payment was not received by the respondent yet the work at the site is completed approximately 95 percent. Thus, it is the fault of those allottees who had committed default and respondent should not be made to suffer for the same.
- i. That other than above stated factors, there are lot of other reason which either hamper the progress of construction and many cases, the complete stoppage of construction work i.e. NGT orders.
- j. 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 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.

- k. That the situation of COVID pandemic is in the knowledge of everyone, that since march 2020 till now our country has seen mass migration of labor, 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 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 has extended the time limits for completion of project vide notification dated 26.05.2020, by six 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 this consumed more than 11 months wherein 2/3rd 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. The authority would appreciate the fact that developer has to face several difficulties in construction of project few out of the several are already discussed above. Moreover, the complainants did not opt the services of respondent against a single unit isolated from whole of the project or other units in same tower. At the time of seeking allotment in the project of respondent, complainants very well knew that unit / apartment in question is part of tower consisting of several other units and the unit shall be completed along with other units belong to other allottees. It is submitted that merely because few allottees have paid on time, it does not fulfill the criteria of complete payment required for construction of whole of the tower/project. The complainants knew that without complete payment on time from all allottees, it is not possible or quite difficult to complete the project on time. It is submitted that for the same reason, the clause of "force majeure" was made part of agreement. It is submitted that it is absolutely beyond the control of developer to get money from the buyer on time. It is submitted that after a demand was raised, the only thing developer can do is to send a reminder and in extreme cases cancellation. But reminders / cancellation do not bring money which the developer had already incurred and is incurring continuously. 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.

- l. That material, labor and other requirements does not comes for free and if allottees wish to get the possession on time, then it is their legal duty to pay on time, since without money, it is not possible to construct the project on time.
- m. That complainants never paid amount after execution of apartment buyer agreement and even after receiving numerous demand letters from the respondent at respective stage of construction. It is submitted that RERA is based on principles of natural justice and equity and these principles applies both to allottee and developer alike. It is further submitted that RERA does not give absolute right to allottee to seek refund if in standard time the project is not completed. It is submitted that allottees rights are governed through their duties and if they fail to fulfill their duties, than they have no right to seek refund. But none is allowed to take benefit of their own mistake.
- n. That the construction is reciprocal to amount paid and it is not possible to raise complete construction without getting complete amount. In such cases if refund is granted, then it would be absolutely against the natural justice. It is pertinent to mention here that whatsoever amount which was received by respondent qua construction has already been utilized



for construction and it is the complainants who never paid the amount demanded. Thus, they cannot put blame upon respondent. Thus keeping in view of above stated facts and circumstances, present complaint is not maintainable and deserves to be dismissed.

- o. That it is the admitted fact that the builder buyer agreement was executed between the parties on 10.1.2014. However, 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 or whether the amount alleged to be paid by complainant is paid by them only.
- p. That other than this, the complainants in themselves admitted that they obtained loan from the ICICI bank and even executed tripartite agreement. Thus, the complainants have no right to seek refund in his name. In such cases if refund is granted, then it would be absolutely against the justice. It is also submitted that even out of total amount paid by complainants, a major portion was paid as taxes and charges like EDC, IDC to government. Thus, the said amount can't be claimed from respondent. It is pertinent to mention here that whatsoever amount which was received by respondent qua construction has already been utilized and any sort of refund would be against natural justice.
- q. That the present complaint has been filed by the complainants in utter disregard of the provisions of Indian Contract Act and in complete violation of various agreements executed between the parties.

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 complainants 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 case 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-promoter 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 the flat buyer's agreement, the due date of handing over of possession comes out to be 16.10.2018. 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 as there is a 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 plea taken by respondent is devoid of merits.

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 IAs 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 16.10.2018 and is claiming benefit of lockdown which came into effect on 24.03.2020 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 complainants.

G.I Direct the respondent to refund the entire amount paid by the complainants.

17. The complainants booked a flat in the project named as "Coban Residences" and paid Rs. 42,26,071/- on different dates against the total sale consideration of Rs. 1,16,84,452/-. On 10.01.2014 a BBA was executed between the parties. The contention of the complainants are that there has been an inordinate delay in the construction of the project and that the construction is very slow pace. The complainants have also contended regarding change in the payment plan initially agreed upon by the parties,



however, there is nothing on record to show that the payment plan was changed with both the parties agreeing to it.

18. The contention of the respondent is that the complainants have defaulted in making payment with respect to allotted unit. The respondent has placed on record the reminder letters sent to complainants regarding payment of dues. Accordingly, the respondent had issued reminder letters dated 07.03.2016, 16.07.2016, 24.01.2017, 08.04.2017, 11.07.2017, 13.07.2018 and 29.01.2021 before giving the final notice dated 22.02.2021 for payment of dues. Thereafter, the respondent issued pre-cancellation letter dated 10.06.2021 and finally cancelled the unit vide letter dated 16.07.2021.
19. During proceedings, the counsel for the complainants stated that initially, a sum of Rs. 8.5 Lakhs was paid on 31.01.2013 through RTGS but receipt was issued for the same only in July 2013. Further, BBA was signed after 1 ½ year on 10.01.2014 and unit was allotted at 11th floor but height clearance for the same was obtained only in 2015 as per the information available on the portal. Next payment was made on 01.10.2014 at the time of bhumi poojan and thus till date, an amount of Rs. 42,26,071/- (statement of account at page 92) has been paid. The complainants are seeking refund of the amount since 10.06.2020 vide email sent to the respondent (at page 80) followed by another email on 29.09.2020.
20. The counsel for the respondent stated that the complainants were in default in making payment since 2014 after the notice sent at the stage of 3rd floor. But inspite of repeated reminders, the payment of outstanding amount was not made leading to cancellation of the unit on 16.07.2021. The OC of the unit has been obtained on 3rd January 2023 but no offer of possession was made in view of the prior cancellation.

Now the question before the authority is whether this cancellation is valid?



21. On consideration of documents available on record and submissions by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainants have paid Rs. 42,26,071/- against the total sale consideration of Rs. 1,16,84,452/-. The respondent/builder send a number of demand letters/reminders on 07.03.2016, 16.07.2016, 24.01.2017, 08.04.2017, 11.07.2017, 13.07.2018 and 29.01.2021 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 16.07.2021 in view of the terms and conditions of the agreement. No doubt, the complainants did not pay the amount due despite various reminders but the respondent while cancelling the unit was under an obligation to forfeit out of the amount paid by them i.e., the earnest money and refund the balance amount deposited by allottee without any interest in the manner prescribed in this agreement as per clause 4.4. of the terms and conditions of the allotment but that was not done. Clause 4.4 of the agreement is reproduced hereunder for ready reference:

"4.4 If the Flat Allottee(s) is in default of any of the payments as afore stated, then the flat allottee(s) authorizes the Developer to withhold registration of the Sale/Conveyance Deed in his/her/their favor till full and final settlement of all dues to the Developer is made by the Flat Allottee(s). The flat allottee(s) undertakes to execute Sale/Conveyance Deed within the time stipulated by the Developer in its written notice failing which the Flat Allottee(s) authorizes the Developer to cancel the allotment and terminated this Agreement in terms of this Agreement and to forfeit out of the amounts paid by him/her/them the Earnest Money, processing fee, interest on delayed payment any interest paid, due or payable, any other amount of a non-refundable nature and to refund the balance amount deposited by the Flat Allottee(s) without any interest in the manner prescribed in this Agreement"

22. The complainants have paid Rs. 42,26,071/- to the respondent/builder and the cancellation of the allotted unit was made on 16.07.2021 by retaining the amount beyond 10% which is not legal in view of number of pronouncements of the Hon'ble Apex court.

23. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that:

"5. AMOUNT OF EARNEST MONEY

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

24. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the deposited amount i.e. 42,26,071/- after forfeiting 10% of the basic sale price of the unit being earnest money along with an interest @10.60% p.a. on the refundable amount, from the date of cancellation of unit (i.e. 16.07.2021) till the date of realization of payment. Given the fact that the cancellation of unit is valid, the 2nd relief becomes redundant.

G. III Direct the respondent to pay Rs. 5,00,000/- as compensation for mental harassment.

G. IV Direct the respondent to pay Rs. 1,00,000/- as litigation charges.

25. The complainants are also seeking relief w.r.t litigation expenses. 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.

F. Directions of the authority

26. 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 the deposited amount i.e. 42,26,071/- after forfeiting 10% of the basic sale price of the unit being earnest money along with an interest @10.60% p.a. on the refundable amount, from the date of cancellation of unit (i.e. 16.07.2021) 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.

27. Complaint stands disposed of.

28. File be consigned to registry.


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.02.2023


(Vijay Kumar Goyal)

Member