

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

Complaint no. : 1955 of 2021
First date of hearing: 27.05.2021
Date of decision : 09.02.2023

Rahul Gossain
R/O : CU-116, Pitampura, Delhi-110034

Complainant

Versus

M/s Pareena Infrastructure Pvt. Ltd.
Office: Flat no. 2, Palm Apartment, Plot no. 13b,
Sector-6, Dwarka, New Delhi- 110075.
Also at : 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. Sumesh Malhotra
Sh. Prashant Sheoran

**Counsel for the complainant
Counsel for the Respondent**

ORDER

1. The present complaint dated 09.04.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the 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	"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.	RERA Registered/ not registered	Registered Vide no. 35 of 2020 issued on 16.10.2020 valid up to 11.03.2022 + 6 months = 11.09.2024
6.	Unit no.	1001, 10 th floor, T-3 (page 93 of complaint)
7.	Unit admeasuring area	1997 sq. ft. of super area
8.	Allotment letter	20.11.2013 [page 87 of the complaint]
9.	Date of builder buyer agreement	04.04.2014 (page 91 of complaint)
10.	Possession Clause	3.1. Possession <i>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 within 4 years of the start of construction or execution of this agreement, whichever is later. (Emphasis supplied)</i>



11.	Date of start of construction	16.10.2014 (page 138 of complaint)
12.	Due date of possession	16.10.2018 (calculated as per start of construction as the same is later)
13.	Total sale consideration	1,23,39,477/- (page 114 of complaint)
14.	Total amount paid by the complainant	1,12,40,942/- (page 139 of the complaint)
15.	Occupation certificate	N/A
16.	Offer of possession	N/A

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:

- I. In and around January, 2013, Mr. Rahul Gossain, the complainant along with his brother Mr. Ravish Gossain were on the lookout for buying a residential apartment for their own personal requirement Mr. Salinder Arya & Mr. Mohit approached the original buyers and represented that they were the authorised representatives of M/s Prithvee Propmart Pvt. Ltd. represented to the original buyers that the respondent company was coming soon with a new luxury project in Sector 99-A, Dwarka Expressway, Gurugram and that M/s Prithvee Propmart Pvt. Ltd. (Prithvee) was the accredited property agent/broker of the respondent/promoter for the said project and was fully authorised to represent, negotiate & finalise prices, bookings, etc. on behalf of the respondent/promoter. It was further represented by Mr. Salinder Arya & Mr. Mohit that respondent/promoter is a well-established company in the field of real estate and that the respondent/promoter will fulfil all

their assurances/promises and that all transactions with the respondent/promoter will be fair and transparent. Vide email dated 16.01.2013, Mr. Salinder Arya sent prospectus, brochure(s) on behalf of the respondent/promoter regarding the above-mentioned upcoming project and the indicative price/rate, terms of booking, etc. followed by various telephonic calls.

- II. Believing the representations, assurances and promises made by the respondent/promoter through promoter's agents and its broker Prithvee, to be true and relying upon the same, vide application dated 28.01.2013, the original buyers jointly applied for booking of unit/apartment in the above-mentioned upcoming residential housing project of the respondent/promoter. As instructed by the respondent, along with the application towards provisional booking, the original buyers also submitted a cheque, bearing no. 658951 dated 24.01.2013, drawn on Yes Bank Ltd., for Rs. 8,50,000/-. The said application for provisional booking along with cheque for Rs. 8,50,000/- was duly received with endorsement of 3% discount and net rate of Rs. 4,947/-. However, upon insistence of the original buyers for a formal communication regarding price/rate before presentation of the above cheque, Mr. Salinder Arya of Prithvee reconfirmed the rate of INR. 5,100/- less 3% discount (i.e. net rate @ Rs. 4,947/-) vide email dated 01.02.2013. Pursuant to receipt of email dated 01.02.2013, a fresh cheque, bearing no.658953 dated 01.02.2013 drawn on Yes Bank Ltd., for Rs. 8,50,000/- was handed over towards the booking amount as desired by Prithvee. The said cheque dated 01.02.2013 for Rs. 8,50,000/- was duly encashed by the respondent/promoter and was credited to the account of the respondent/promoter on 08.02.2013. Thereafter, Mr.

Salinder Arya of Prithvee, once again confirmed the rate of Rs. 5,100/- less 3% discount (i.e.net rate of Rs. 4,947/-) vide email dated 22.02.2013.

III. On enquiring about the booking status of the unit, Mr. Mohit of Prithvee vide email dated 04.04.2013 confirmed that 3 BHK unit has been booked in Pareena, Sector-99A @ price of Rs. 4,950/- and also confirmed that TPR (Timely Payment Rebate) will be adjusted against future demands. It is pertinent to mention here that in the statement(s) of account received by the complainant from the respondent/promoter, 'mode of booking' is shown as 'broker'.

IV. On instructions and as directed by the respondent, the original buyers submitted 'Application for registration of allotment of flat/dwelling unit in Coban Residences in Sector 99-A, Gurgaon, Haryana' for an apartment admeasuring 1997 sq. ft.. Pertinently, the respondent/promoter belatedly issued a receipt bearing no. 285 dated 30.07.2013, confirming receipt of the aforementioned cheque/booking amount of Rs. 8,50,000/-. The date of booking has been shown as 27.07.2013 by the as respondent/promoter in its records/statement of account instead of 01.02.2013/08.02.2013. It is thus clear that the respondent/promoter deliberately and intentionally has shown wrong booking date and wrong date of receipt of booking amount in its records/statement and has therefore indulged in falsification of records.

V. Pursuant to submission of the application for registration of allotment of flat and receipt of booking amount of Rs. 8,50,000/- as above, the respondent/promoter issued a demand letter dated 03.08.2013 for Rs. 12,57,499/- and the complainant/original buyers paid the amount of Rs. 12,57,499/- vide cheque no. 658957 for Rs. 6,00,000/- and cheque no. 484125 for Rs. 6,57,499/- both dated 04.09.2013 drawn on Yes Bank,

which amount was duly acknowledged as received by the respondent/promoter vide receipt bearing no.526 dated 15.10.2013

- VI. Upon receipt of payments amounting to Rs. 21,07,499/-, the respondent/promoter vide provisional allotment letter dated 20.11.2013 informed the original buyers that apartment type: 3 BHK+ SQ', Apartment No. 1001 in Tower No. 3 (T- 3/1001) of Size: 1997 sq. ft. in "Coban Residences" has been provisionally allotted in their names.
- VII. The respondent/promoter sent two copies of the "apartment buyer agreement" dated 04.04.2014 along with cover letter dated 11.04.2014 and requested the original buyers to sign the said "apartment buyer agreement" and return the same. The respondent and original buyers executed the apartment buyer agreement dated 04.04.2014.
- VIII. As per the apartment buyer agreement, the basic sale price of the allotted unit was Rs. 1,01,60,736/- computed on the basis of super area of 1997 square feet of the allotted unit. The total value inclusive of allied/supplemental charges, such as External Development Charges (EDC), Infrastructure Development Charges (IDC), Preferential Location Charges (PLC), Car Parking, Club Membership, Power Backup, Registration Charges and Stamp Duty charges, etc. as per the apartment buyer agreement was Rs. 1,23,39,477/-. The original buyers had opted for a construction linked payment plan as per annexure-II of the apartment agreement. It is relevant to mention here that at the time of signing & execution of the apartment buyer agreement, the promoters agents had assured the original buyers that discount@ 3% that was offered at the time of booking through Prithvee will be credited in their account by way of credit note along with the credit note towards Timely payment rebate (TPR) of Rs. 110/- per sq. ft..

- IX. Mr. Ravish Gossain, brother of the complainant had temporarily shifted to Canada for job purposes and he being one of the original buyers/co-buyer of the allotted unit/apartment, vide Special Power of Attorney dated 12.01.2019 authorized Mr. Rahul Gossain, the complainant to take necessary action as may be required and execute relevant documents on his behalf in connection with the allotted unit/apartment. Further, Mr. Ravish Gossain submitted a letter to the respondent/promoter giving NOC for removal/deletion of his name from ownership of apartment no. T-3/1001 in Coban Residences in Sector 99-A, Gurgaon, which was in the joint name of Mr. Rahul Gossain and Mr. Ravish Gossain. Accordingly, name of Mr. Ravish Gossain was deleted and allotment was changed to the name of Mr. Rahul Gossain as confirmed by the respondent/promoter vide letter dated 08.04.2019. Mr. Rahul Gossain, the complainant with the consent and under instructions from Mr. Ravish Gossain got his name deleted from apartment buyer agreement and the other related documents. Consequently, all the rights of Mr. Ravish Gossain in the allotted Unit were transferred in favour of Mr. Rahul Gossain, the complainant. The apartment buyer agreement and other related documents were endorsed by the respondent/promoter in favour of Mr. Rahul Gossain, the complainant vide letter dated 09.05.2019 issued by the respondent/promoter. Consequently, Mr. Rahul Gossain, the complainant became the sole allottee of the unit/apartment and he acquired all the rights and the authority to deal with the Unit in any manner suitable to his interests at his sole discretion.
- X. It is submitted that as per clause 3.1 of the apartment buyer agreement, possession of the unit was to be handed over within 4 years from date of

start of the construction or execution of the apartment buyer agreement, whichever is later.

- XI. The respondent/promoter was bound to deliver possession of the allotted unit, within 4 years from the date of execution of the apartment agreement or from the date of start of construction, whichever is later in accordance with clause 3.1 of the apartment buyer agreement. In the payment request letter dated 01.10.2014, the respondent/promoter had demanded payment of the instalment of 'On Start of Excavation' thereby representing and admitting that excavation work at the project site had started on or before 01.10.2014. However, in the application dated 21.09.2020 bearing project registration no. RERA-GRG-PROJ-575-2020 submitted by the respondent/promoter to HARERA seeking registration of the project 'Coban Residences' under RERA, the start date has been shown as 10.10.2014 and date of completion has been shown as 10.10.2018 under the heading of 'Time schedule of completion of already booked apartments.
- XII. It is, however, submitted that date of start of construction and due date of delivery of possession of the apartment in respect of 'Coban residences' has been decided and determined as 16.10.2014 and 16.10.2018, respectively by this authority in the order dated 20.03.2019 passed in the matter titled 'Mr. Rajdeep Aggarwal Vs. M/s Pareena Infrastructure Pvt. Ltd.' bearing Complaint No. 2191/2018.
- XIII. Since the construction of the project began on 16.10.2014, thus in accordance with Clause 3.1 of the apartment agreement, the 4 years period reckons from 16.10.2014 (Start Date), the respondent/promoter was under obligation to hand over possession of the allotted unit to the complainant on or before 16.10.2018. But the respondent/promoter and

the promoter's agents have not handed over possession of the apartment to the complainant till date because construction of the project has not been completed. Since, the respondent/promoter and the promoter's agents failed to handover possession of the apartment to the complainant on or before the due date, thus they have violated the terms of the apartment buyer agreement knowingly, deliberately and intentionally.

- XIV. After the apartment buyer agreement was executed, the respondent kept on issuing demand notices from time to time, despite the fact that actual construction of the project was much behind the schedule. The complainant paid all amounts as and when demanded by the respondent/promoter. The respondent/promoter has already received a total sum of Rs.1,12,44,983/- from the complainant as per the statement of account on 02.09.2020 received by the complainant from the respondent/promoter.
- XV. It is pertinent to mention here that the complainant availed loan facility to the extent of Rs. 92 Lakhs (Approx.) from the bank for making payment to the respondent/promoter towards sale/purchase consideration of the residential apartment. Initially, the loan facility was obtained from State Bank of India, which was later transferred to HDFC Bank. The complainant has paid and is continuing to pay the instalments towards repayment of the loan facility to the bank. The respondent/promoter is well aware of the fact that the complainant availed loan facility from the bank, the respondent/promoter being a party to the tripartite agreement entered into with the banks in this regard. It is pertinent to mention here that HDFC Bank had also expressed concern over delay in completion of the project and had

declined to release payment to the respondent/promoter. However, payment was released by HDFC Bank upon assurance by the promoter's agents that the project will be completed soon. The complainant, in compliance of the demands raised by the respondent/promoter paid the last two instalments amounting to Rs. 9,39,936/-. One instalment of Rs. 4,58,264/-, payable on completion of final floor/roof slab was paid on 15.10.2018 and the other instalment of Rs. 4,81,672/-, payable on completion of brick work was paid on 09.01.2019. It is thus apparent that the respondent/promoter kept on demanding and receiving payments from the complainant till the due date of delivery of possession of the allotted apartment and even after expiry of due date of delivery of possession of the allotted apartment by making misrepresentation that the project was nearing completion and that the possession will be handed over soon and by threatening that the complainant will be burdened with penalty/late payment charges/interest in case of delayed payment. The acts of the respondent/promoter of demanding and receiving payments, despite the fact that the project was nowhere near completion, are clearly fraudulent and malafide in nature.

- XVI. Even in the letter dated 09.05.2019 issued by the respondent/promoter, at the time of endorsement of various documents in favour of Mr. Rahul Gossain, the complainant, it has been stated in the 1st para on page 2 that: *"We request your compliance with the time schedule for making payment(s) which would help us in completing the said project in time."* Thus even on 09.05.2019, the respondent/promoter had been making representation that the project will be completed in time although due date of delivery of possession of the apartment had already expired and

the complainant had already made payments in accordance with the payment schedule. This amounts to gross misrepresentation by the respondent/promoter.

XVII. The complainant had visited the project site on various dates and had expressed his concern regarding delay in completion of the project. However the promoter's agents had repeatedly assured that project will be completed soon and possession of the apartment will be handed over shortly. The complainant made several calls to the office of the respondent/promoter and the promoter's agents to know the status of the project. The promoter's agents kept on assuring the complainant that the project was nearing completion and that the possession will be handed over soon. However, since the complainant did not receive any intimation or notice of possession from the respondent/promoter. Despite assurances by the promoter's agents, the complainant once again visited the project site on or around 07.10.2019 and was surprised and shocked to notice that the project was far from completion and absolutely no external development work had been done at the project site.

XVIII. Thereafter, the complainant also visited the corporate office of the respondent on the same day on or around 07.10.2019 after the visit to the project site and met Mr. Virender Verma, MD/Director and Ms. Radhika Sehdev, CRM to seek the status of construction of the project and plans for handing over of the possession of the unit/apartment. The promoter's agents revealed that construction work had been suspended due to financial constraints and it was represented by the promoter's agents that finance facility had been sanctioned by the bank and funds would be released shortly and they reiterated that the construction

activity at the project site will commence right away and that the possession will be handed over soon. Further, it was also represented by them that they have completed all requisite compliances with regard to registration of the project under RERA and that RERA registration certificate will be received soon. During the course of meetings, the promoter's agents admitted that track record of payment of the complainant had been excellent and they admitted having received full payment from the complainant in accordance with the construction linked payment plan. The promoter's agents admitted that the allotted apartment No. T-3/1001 was not 'Pool and Green Facing' and reiterated and assured that alternate 'Pool and Green Facing' apartment will be allotted soon in lieu of the apartment No. T-3/1001. They further assured that they will compensate the complainant suitably and handsomely due to delay in handing over of the possession of the Unit to the complainant. But the factual position is that the project has not yet been completed and the complainant has not received any compensation till date. The conduct of the respondent/promoter and promoter's agents clearly indicate total lack of bona-fides and severe breach of commitment under the apartment buyer agreement to deliver the apartment on time.

- XIX. The complainant visited the project site recently on or around 20.09.2020 and observed that status of construction remains the same as was noticed on the last visit of the complainant to the project site on or around 07.10.2019 and that the project is far from completion and absolutely no external development work has been done at the project site after the last visit of the complainant to the project site on or around 07.10.2019.

- XX. From the facts narrated above, it is abundantly clear that the respondent/promoter and its agents have failed to adhere to the time schedule for construction of the project, resulting in non-delivery of possession of the unit/apartment to the complainant in accordance with the apartment buyer agreement till date.
- XXI. The complainant has suffered huge wrongful loss, enormous inconvenience, mental agony, mental torture and hardship at the hands of the respondent/promoter and its agents. Admittedly, the respondent/promoter has received large amount of monies from the complainant to the tune of Rs. 1,12,44,983/-, which amount is 110.67% of the basic sale price (BSP) or 91.13% of the total cost of the unit. Had the complainant invested the aforesaid amount with a mutual fund/financial institution or elsewhere, he would have received handsome return on his investment. The diligence and meticulousness of the complainant has been met with absolute callousness and unwillingness with malafide and dishonest intentions on part of the respondent/promoter and its agents.
- XXII. It is further submitted that total cost of Rs. 1,23,39,477/- of the apartment allotted to the complainant is inclusive of Rs. 4,23,364/- on account of preferential location charges for 'pool and green facing' but admittedly, the actual location of the apartment allotted to the complainant is not 'pool and green facing'. Hence the said amount of Rs. 4,23,364/- is to be deleted from the total cost and the effective Total Cost will work out to Rs. 1,19,16,113/-. It is most respectfully submitted that the complainant had taken up the matter with the respondent/promoter and its agents repeatedly and had also sent various emails in this regard that the complainant had made booking specifically for 'Pool and Green

Facing' location but the allotted apartment did not fulfil this criterion. The respondent/promoter and its agents have been assuring the complainant that alternate 'pool and green facing' apartment will be allotted but nothing has been done in this regard till date. Location of the apartment is of paramount importance to the complainant but respondent/promoter and its agents by not allotting "Pool and Green Facing' apartment have deceived the complainant.

XXIII. That the respondent despite having not completed the project in time has vide email dated 04.03.2021 sent to the complainant a demand letter, whereby, the respondent has raised false and frivolous invoice on account of 'On completion of Flooring work Slab' without there being any such milestone in the construction linked payment plan. The said email was replied by the complainant vide reply mail dated 07.03.2021, however the respondent has not reverted or even bothered to address the concerns raised by the respondent.

XXIV. In view of the above mentioned facts and circumstances, the complainant is entitled to receive exemplary compensation for hardship, mental agony, mental torture and inconvenience, caused by the respondent/promoter and its agents to the extent of Rs. 5,00,000/- in addition to other reliefs. The complainant is also entitled to receive punitive compensation for the wrongful and unfair acts of the respondent/promoter and its agents.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).

- I. Direct the respondent to refund the paid-up amount along with interest.

- II. Direct the respondent to pay an amount of Rs. 5,00,000/- as compensation on account of mental agony hardship and mental torture.
 - III. To pay the litigation cost of Rs. 1,00,000/-.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds.
- a. That the respondent is in the process of developing several residential group housing colonies in Gurugram, out of them one is "Coban Residences" at Sector 99A..
 - b. That the construction work of the said project is at an advanced stage and the structure of various towers has already been completed and remaining work is endeavoured to be completed as soon as possible.
 - c. That the project is near completion and within a very short span of period it will be completed and thereafter possession shall be offered after obtaining occupancy certificate as agreed in builder buyers agreement.
 - d. That quite conveniently certain pertinent facts have been concealed by the complainant. The concealment has been done with a motive of deriving undue benefit through an order, which may be passed by this authority at the expense of the respondent.
 - e. That the respondent continues to bonafidely develop the project in question despite there being various instances of non-payment of installments by various allottees. This clearly shows unwavering commitment on the part of the respondent to complete the project. Yet



various frivolous petition, such as the present one seriously hampers the capability of the respondent to deliver the project as soon as possible. The amount which was realized from the complainant has 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 of its due completion to the complainant, of course subject to payment of due installments and charges.

- f. That admittedly completion of project is dependent on a collective payment by all the allottees and just because a few of the allottees paid the amount, It does not fulfill the criteria of collective payment. It is submitted that numerous allottees have defaulted in payment demanded by the respondent, which resulted in delay in completion of project, yet the respondent is trying to complete the project as soon as possible by managing available funds.
- g. That over a period of time numerous allottees have defaulted in their payments at the various stages of construction and it is not possible to construct with in adequate funds. That though the respondent had several other projects but it is not legally permissible to divert fund of one project into another. 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 was subject to normal conditions and force majeure and with any stretch of imagination situations faced by respondents are not normal. It is submitted that more than 30% payment was not received by the respondents yet the work at the site is completed approximately 80%. That it is the fault of those allottees



who had committed defaults and respondent should not be made to suffer for the same.

- h. That other than above stated factors there are a lot of other reason i.e. NGT orders of various dates, Environment pollution (Prevention and control) Authority orders, Haryana State Pollution Control Board orders and Municipal Corporation Gurugram orders, which hampered the progress of construction of project and in many cases led complete stoppage of construction work.
- i. That other than these, there are several other orders of 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.
- j. That the situation of COVID pandemic is in the knowledge of everyone. Since march 2020 to till now, our country has seen mass migration of labour, complete lockdown in whole of the country, curfews and several other restrictions. This situation seriously hampered the construction progress in real estate sector. From march 2020 to till



now, there has been several months where construction work was completely stopped either due to nationwide lock down or regional restrictions. There has been severe dearth of labour due to state imposed restrictions. The developers were helpless in these times since they had no alternative but to wait for the situation to come under control. Even RERA extended the time limits for completion of project vide notification dated 26.05.2020 by 6 months. But the aforesaid was the period evidencing the first wave but the relaxation in restrictions were seen at fag end of year 2020 however soon thereafter our country saw a more dangerous variant of COVID from the month of March 2021 and only recently restrictions have been lifted by the government. The whole of this 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.

- k. That the authority would appreciate the fact that complainant did not opt services of respondent against a single unit isolated from whole of the project or other units in same tower. That at the time of seeking allotment in the project of respondent, complainant very well knew that unit/apartment in question is a part of tower consisting of several other units and the unit shall be completed along with other units which belong to other allottees. It is submitted that merely because complainant had paid on time, it does not fulfill the criteria of complete payment required for construction of whole of the tower/project. That the complainant 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.

- l. That it is the admitted fact that the builder buyer agreement was executed between the parties on 04.04.2014. However, certain extremely important facts were concealed by the complainant while drafting the present complaint. That the complainants have intentionally provided details of payments only but concealed the facts whether the payments were made on time or not or whether the amount alleged to be paid by complainant is paid by complainant only. It is submitted that the amount alleged to be paid by complainant consist of amount paid by respondent which was credited in the account of complainant over a period of time and complainant has no right to seek refund of the amount which was paid by respondent itself. That the credit notes issued by respondent are already admitted by complainant in his complaint on page 143 of complaint.
- m. That the complainant in his complaint himself admitted that he obtained loan from the HDFC bank and even executed tripartite agreement. It is submitted that complainant intentionally did not attach the copy of said tripartite agreement, since as per said agreement in case of refund of amount it is the bank who has right over it. However bank is not the party in the present case and the



complainant has no right to seek refund in his name. That in such cases if refund is granted than it would be absolutely against justice. It is denied that complainant has paid an amount of Rs. 1,12,44,983, thus he cannot claim the refund of same. 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 for construction and any sort of refund will be against natural justice. That no affidavit has been filed by the complainant qua the allegations made in complaint. Thus keeping in view of above stated facts and circumstances, present complaint is not maintainable and deserves to be dismissed.

7. Copies of all the relevant documents has 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.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this

authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject-matter jurisdiction

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357* and reiterated in case of *M/s Sana Realtors Private Limited & other*

Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022, 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 prayed that grace period on account of force majeure conditions be allowed to it. It raised the contention that the construction of the project was delayed due to force majeure conditions such as orders of Hon'ble Supreme Court of India to curb pollution in NCR, various orders passed by NGT, EPCA and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. The apartment buyer's agreement was executed

between the parties on 04.04.2014 and as per terms and conditions of the said agreement, the due date of handing over of possession comes out to be 16.10.2018. The events such as order of the Hon'ble Supreme Court of India to curb pollution in NCR and 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. Even some events took place after due date of handing over of possession. Thus, the promoter-respondent cannot be given any leniency based on aforesaid reasons and 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 as under-

"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/builder 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 (calculated from date of start of construction i.e. 16.10.2014, this date of start of construction of project is taken from similar complaint of this project) 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 complainant.

G.I Direct the respondent to refund the paid-up amount along with interest.

17. The complainant purchased a unit vide apartment buyer agreement dated 04.04.2014 executed between the complainant and the respondent wherein the total sale price was Rs. 1,23,39,477/-. Under the said agreement the complainant was allotted a residential unit viz. T3-1001 admeasuring 1997 sq. ft. in the said project. As per Clause 3.1 of the said the respondent was obligated to deliver the possession within 4 (four) years of the start of construction or execution of the agreement, whichever was later i.e. by or before 16.10.2018. The complainant discovered that despite a lapse of around 7(seven) years from the date of the booking by complainant substantial portion of the project remains incomplete. There has been an inordinate delay on the part of the respondent to handover the possession of the unit to the complainant.
18. Keeping in view of the above-mentioned facts the allottee approached the authority for refund before the cancellation of the unit. The respondent has cancelled the unit on account of non-payment. It is pertinent to mention that the respondent failed to give possession on time and also hasn't obtained the OC till date. In this situation, the project was delayed, it is the right of the allottee to seek withdrawal from the project and get a return of the amount paid by him along with interest at the prescribed rate.

19. The due date of possession as per agreement for sale as mentioned in the table above is **16.10.2018** and there is delay of **2 years 6 months** on the date of filing of the complaint.
20. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in **Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021:**

“ The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project.....”

21. Further in the judgement of the Hon'ble Supreme Court of India in the cases of Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) 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. it was observed :**

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed”

22. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
23. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
24. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 1,12,40,942/- with interest at the rate of 10.60% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.
25. The complainant availed loan of Rs. 92.00 lakhs from the HDFC bank under subvention scheme. The respondent is directed to first refund the amount of loan to the HDFC bank with interest and also to make refund to the complainant of the balance amount with interest within 90 days of the orders.

F II. Direct the respondent to pay an amount of Rs. 5,00,000/- as compensation on account of mental agony hardship and mental torture.

F III. To pay the litigation cost of Rs. 3,00,000/-

26. The complainant is also seeking relief w.r.t compensation. **Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)**, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

H. Directions of the authority

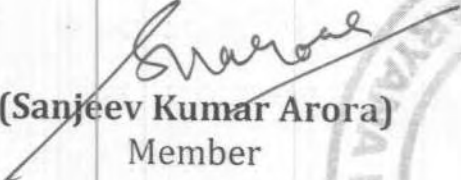
27. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- The respondent is directed to return the amount received by him i.e., Rs. 1,12,40,942/- from the complainant with prescribed rate of interest i.e.10.60% from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.



HARERA
GURUGRAM

Complaint No 1955 of 2021

- ii. The respondent is also directed to first refund the amount of loan to the HDFC bank with interest and also to make refund to the complainant of the balance amount with interest within 90 days of the orders.
- iii. 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.
28. Complaint stands disposed of.
29. File be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.02.2023

HARERA
GURUGRAM