

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

Complaint no.	:	40 of 2020
Date of filing complaint:		13.01.2020
First date of hearing	:	05.02.2020
Date of decision	:	14.03.2023

1. Mr. Ajay Vaishnavi R/o: A-1204, Park View City 2, Sohna Road, Gurugram, Haryana-122001	Complainant
Versus	
1. M/s Eldeco Sohna Projects Limited R/o: 21-212, Splendor Forum, 2 nd Floor, Jasola District Centre, New Delhi - 110025 2. Sh. Naveen Kashyap (Director) R/o: 3057/1, Ranjit Nagar, Delhi - 110008. 3. Sh. Anil Tiwari (Director) R/o : 68, Vishupuri, Church Road, Aliganj S.O Lucknow- 226024. 4. Sh. Sanjay Kumar Singh (Director) R/o: E-308, Tower 2, Ashiana Orchids Gamma II, Greater Noida- 201308. 5. Sh. Prabhat Kumar (Director) R/o: C-34, Awas Vikas Sitapur, U.P. - 261001. 6. Sh. Parag Arvind Gupta (Director) Supertech Avant Grade, Flat no. 405, Plot no.1, Sector 5, Vaishali, U.P.- 201011.	Respondents

CORAM:

Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member

APPEARANCE:	
Sh. Jayant Sood (Advocate)	Complainant
Ms. Ananya Kathuria AR of the respondent company	Respondent

**ORDER**

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se and section 11(5) of the Act wherein it is inter alia prescribed that the promoter may cancel the allotment only in terms of the agreement for sale.

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.	Particulars	Details
1.	Name of the project	"Eldeco Accolade", Sector -2, Sohna, Distt Gurugram
2.	Nature of project	Group housing project
3.	RERA registered/not registered	Registered vide registration no. 81 of 2017 dated 23.08.2017
	Validity status	30.06.2025
4.	DTPC License no.	83 of 2013 dated 09.10.2013
	Validity status	08.10.2024
	Licensed area	13.21875 acres
	Name of licensee	M/s Mapsko Builders Pvt. Ltd and ors
5.	Allotment letter	12.04.2016 [Annexure P4]
6.	Unit no.	PR/1704, 17 th floor, type C-6 (as per allotment letter)
7.	Unit area admeasuring	1457 sq. ft.
8.	Date of apartment buyer agreement	Not executed [However, the said agreement bears date i.e., 12.04.2016] (Annexure3)
9.	Payment plan	Construction linked payment plan
10.	Total sale consideration	Rs.65,64,007/- (As per payment plan, annexure p-7.)

11.	Amount paid by the complainant	Rs.11,10,030 /- (As per receipt information of complaint)
12.	Possession clause	<p>C.(1) Construction/completion of unit</p> <p>The Allottee/s understands and agrees that the construction of the Unit is likely to be completed within a period of 45 months from the date of Allotment of the Unit with a grace period of 6 (six) months subject to the receipt of Environment Clearance and other requisite approvals & permissions from the concerned authorities, Force Majeure Conditions (defined hereinafter) and subject to fulfillment of the terms and conditions of this Agreement including but not limited to timely payments by the Allottee/s, in terms hereof. The Company shall be entitled to extension of time for completion of construction of the Unit equivalent to the period of delay caused on account of the reasons stated above. No claim by way of damages/compensation shall lie against the Company in case of delay in handing over possession of the Unit on account of the aforesaid reasons. However, if the Allottee/s opts to pay in advance of schedule, a suitable discount may be allowed but the completion schedule shall remain unaffected. The Allottee/s understands and agrees that the construction will commence only</p>

		after all necessary approvals are received from the concerned authorities including Ministry of Environment & Forest/State Environment Impact Assessment Authority (SEIAA). The Allottee acknowledges that the Company has filed an application for obtaining environment clearance from the competent authorities and the approval is awaited. (Page 18 of reply).
13.	Due date of possession	12.01.2020
14.	Occupation certificate	11.05.2020 (As per page 39 of reply)
15.	Offer of possession	Not offered
16.	Reminder for outstanding payment	26.07.2017
17.	Pre-cancellation letter	31.05.2018 (page 23 annexure r-9 of written arguments)
18.	Cancellation letter	11.03.2019 (Annexure r-10 page 24 of written arguments)

B. Facts of the complaint:

The facts of the complaint are as under:

- That the respondents parties constructed a group housing project namely "Eldeco Accolade" in Sohna Gurgaon Road, Sector-2, Near G. D. Goenka World School Gurgaon, Haryana-122103. Through public advertisement, the respondents boasted their endeavour to meet the

expectations of the buyers. They further claimed that 'Eldeco Accolade' was inspired by the dreams of the consumers and driven by commitment to deliver the finest quality and set new benchmarks in the industry. The complainant was lured and deceived by such representations and tall claims of opposite party and booked an apartment in the project titled "Eldeco Accolade".

4. That the complainant booked one dwelling unit no. PR/1704 measuring 1457 sq. ft. 17th floor based on advertisements and assurances vide allotment letters dated 12.04.2016 and 15.04.2016.
5. That the respondents agreed with the complainant on 17.03.2016, the cost of flat as Rs. 68.50 Lakh with 40% of the amount payable within 15 months (as per email dated 02.04.2016). The letter dated 02.09.2016 contains the details of prevailing price list for the subject unit and letter dated 27.09.2016 contains payment plan. The cost of flat was as Rs. 68.50 Lakh, with 40% of the amount payable within 15 months. However, the respondents arbitrary continued to amend the terms and conditions which were never agreed by complainant and started demanding 40% of the amount within 8 months only. The complainant has made a payment of Rs.11,10,030/- till date.
6. That the complainant on 29.05.2016, wrote an email to opposite party informing them that payment dates as mentioned on allotment certificate and agreement are different. The car parking charges were agreed at NIL however agreement showed them as 2 Lacs. A clause in agreement was inserted which kept the costs as open and whereas all costs were agreed and closed between the parties. In spite of the fact that complainant never agreed to the respondents amended conditions, they continued to send demand notices to him. He several requests to

- withdraw the allotment letter and amend the clauses of the agreement as already agreed with him.
7. That it is submitted that complainant entrusted the faith and his money in the builder. However, since the beginning, the builder always had the intention to cheat and to commit fraud upon complainant. The complainant requested for refund of money paid to the respondents vide mail dated 30.05.2016.
 8. That various mails have been sent by the complainant for cancellation and refund of money, but the respondents rejected his request vide 'Cancellation Notice' dated 11.03.2019 and e-mail dated 15.03.2019, 13.04.2019, 01.08.2019. The respondents in order to cheat the complainant insisted on keeping the terms and conditions in buyer's seller agreement different from what were agreed. In order to defraud the complainant, the respondents gave false assurance that the terms would be confirmed on mail by them email dated 02.06.2016. It is submitted that the respondents have duped the complainant and clearly misrepresented the facts to suit their explanations. It further shows their malafide intention and unfair trade practice. Furthermore, it is submitted that respondents and their officials have always been playing tricks and hide behind the wrong doings to wriggle out of the binding contract by playing tricks. They arbitrarily forfeited the amounts paid by the complainant. In such circumstances, they are in default of their contractual obligations and are liable for the compensation/ damages to complainant . He would not allow the respondents to take undue advantage of the situation merely because they are the builder.
 9. That the respondents are not only guilty of deficiency in services by not fulfilling their promises in due course towards their helpless customers,

but also for mental torture and harassment to the complainant by unnecessarily misleading and delaying the refund of advance amount. Hence, they are liable to refund amount..

C. Relief sought by the complainant:

10. The complainant has sought following relief(s):

- i. Direct the respondents to pay to the complainant Rs.11,10,030/- towards the refund of the application money paid at the time of booking plan
- ii. Direct the respondent to pay compensation of Rs.5,00,000/- for deficiency of services, Rs. 5,00,000/- for causing mental torture and harassment to the complainant.

D. Reply by respondent builder:

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

11. That the captioned misconceived complaint is being filed on behalf of the complainant under section 31 of the Act seeking refund an amount of Rs. 11,10,030/- along with the interest @18% and also compensation of Rs. 5,00,000/- for deficiency of service and for causing mental torture. At the outset, save and except what is matter of record, the contents of all paragraphs, each and every single averment, submissions and contentions made by the complainant are denied in entirety as if the same have been traversed in seriatim and replied to it individually until and unless any of the contents are specifically admitted.
12. That the complainant, after making detailed and elaborate inquiry through an application form dated 14.03.2016 applied for allotment of unit no. PR/1704 measuring 1457 sq. ft. (super area) on 17th floor of the

said project. The respondents, on 12.4.2016, sent an allotment certificate and agreement for sale of the said residential unit. The complainant consistently tried to delay the signing and execution of the allotment letter by lingering it on and raising issues. The complainant raised an issue to the respondents regarding the car parking charges being charged at Rs.2,00,000/- instead of nil. The respondent timely reverted back to the complainant to satisfy the above-mentioned concern vide its email dated 05.7.2013 and explained that the price list issued to the complainant on 02.09.2016 mentions the car parking charges as complimentary. The complainant despite being satisfied with the clarifications to the concerns raised by him, did not sign or execute the allotment certificate and the agreement. This clearly displays the mala fide intention of the complainant and that he never intended to retain the unit.

13. That on 19.05.2016, the respondent issued a price list showing the bifurcation of the cost of the unit. On 02.09.2016, they issued a revised price list bifurcation to the complainant. On 27.09.2016, the respondent issued a letter considering the revised payment terms. On 03.10.2016, the complainant paid an amount of Rs.4,60,030/- to the respondents. On 26.07.2017, the respondents issued a reminder letter for payment of outstanding amount by the complainant. On 31.05.2018, the respondent issued a pre-cancellation notice to the complainant. On 11.03.2019, the respondents issued a cancellation notice to the complainant. The respondents obtained the occupancy certificate dated 11.05.2020 for tower.
14. That the respondents did not arbitrarily change the terms and conditions of the agreement. However at every step, they supported the complaint and made the changes as per his will. After several

communications through mail and letters, both the parties decided the terms and conditions of sale/purchase of the said unit and accordingly, the complainant made the payment on 21.03.2016 and 05.04.2016 as per the same. The respondents submits that vide letter dated 27.09.2016 , they communicated the terms of the payment as decided by both the parties.

15. That the respondents also provided a 2-month extension in payment of the due instalments to the complainant. The contention of the complainant is unjust and illegal, demanded the instalments as per the agreed terms between both the parties.
16. Further , complainant has raised an issue that respondent mentioned car parking charges as Rs. 2,00,000/- instead of nil/-. In this respect , it is submitted that respondent had issued price list to the complainant on 02.09.2016 and wherein the car parking charges had specifically mentioned as complimentary. Therefore ,contention of the complainant is vague and baseless. The complainant has raised the aforesaid issue in the year 2016 and respondent resolved all issues immediately. Thereafter, the complainant made the payment of next installment on 03.10.2016. It can be concluded here that the complainant made this complaint based on the various immaterial facts which have been resolved by the respondents in the year 2016 itself. In the present case, despite several reminders dated 27.12.18 and 03.08.2019, the complainant has not made any payment of the due installments as per the agreed terms between the parties and made the complaint before this authority with malafide intentions. The respondents have not violated any provision of the Act in the case and the complainant himself is a serious defaulter in making the payments of due installments. Further , the complainant has raised the issue that he had

made several requests to withdraw the allotment letter and amend the clauses of the agreement as already agreed with him . In this respect , it is submitted that the respondents had vide letter dated 27.09.2016 revised all the terms and conditions as asked by the complainant and despite of the said letter, he has not signed the agreement and not paid the due installments on time.

17. All the other averments made in the complaint were denied in toto.
18. Copies of all the relevant do have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

19. 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. 1/92/2017-1TGP 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

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 promoter, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.

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.

20. 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.*** SCC Online SC 1044 decided on 11.11.2021 and followed in ***M/s Sana Realtors Private Limited & others V/s 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.'

21. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matters noted above the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the amount paid by him.

F. Entitlement of the complainant for refund:

F.1 Direct the opposite party to pay to the complainant Rs.11,10,030/- towards the refund of the application money paid at the time of booking plan

22. The complainant was allotted a unit in the project of the respondent detailed above on 12.04.2016 for a total sale consideration of Rs. 65,64,007/- The builder buyer's agreement was not executed. The possession of the subject unit was to be offered within 45 months from the date of allotment of the unit. The due date of completion of project and offering possession of the unit comes out 12.01. 2020. The occupation certificate was obtained on 11.05.2020 and no possession is offered . The complainant also surrender on 12.11.2017 but the same being conditional is held to be invalid.
23. The counsel for the complainant stated at bar as requesting for refund of the amount of Rs.11,10,030/- paid by him on the basis of allotment

- letter but BBA was not signed due to change in price of the unit and demand for parking charges in BBA which were not part of the LOI. The complainant requested the respondent for correction in price and other terms and conditions of BBA multiple times through email but the same was never confirmed to him leading to non-payment of the remaining instalments.
24. However, the counsel for the respondent stated at bar that revised payment plan was duly agreed by the complainant allottee and he was required to make balance payment as per revised payment plan but were not made despite repeated reminders leading to cancellation of the unit on 11.03.2019. The due date of possession as per allotment was 12.01.2020 and OC had been obtained on 11.05.2020 but no offer of possession was made to the complainant allottee in view of the cancellation /termination of the unit on 11.03.2019.
25. The respondent was compelled to issue reminder dated 26.07.2017 towards the payment of outstanding dues. Subsequently, on 31.05.2018 the respondent has issued pre cancellation notice stating forfeiture of 20% of the unit value as earnest money as a result of cancellation due to non-payment of dues. Finally vide letter dated 11.03.2019, the unit was cancelled in terms of pre-cancellation notice dated 31.05.2018. The due date of possession as per allotment was 12.01.2020 and OC had been obtained on 11.05.2020 but no offer of possession was made to the complainant allottee in view of the cancellation /termination of the unit on 11.03.2019. Thus, the cancellation of unit is valid.
26. The issue with regard to deduction of earnest money on cancellation of a contract arose 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., (2015) 4 SCC 136*, and wherein it was 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 section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 **Ramesh Malhotra VS. Emaar MGF Land Limited** (decided on 29.06.2020) and **Mr. Saurav Sanyal VS. M/s IREO Private Limited** (decided on 12.04.2022) and followed in CC/2766/2017 in case titled as **Jayant Singhal and Anr. VS. M3M India Limited** decided on **26.07.2022**, held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money".*

27. Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was framed providing as under-

"5. AMOUNT OF EARNEST MONEY

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

28. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, the respondent/builder can't retain more than 10% of basic sale consideration as earnest money on

cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complaint after deducting 10% of the basic sale consideration and return the remaining amount along with interest at the rate of 10.70% (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 termination/cancellation 11.03.2019 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

F.II Direct the respondent to pay compensation of Rs.5,00,000/- for deficiency of services, Rs. 5,00,000/- for causing mental torture and harassment to the complainant.

29. The complainant is seeking above mentioned relief with regard to 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. 2021-2022 (1) RCR (c) 357*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses.


H. Directions of the Authority:

30. 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 functions entrusted to the authority under section 34(f) of the Act:


- i) The respondent is directed to refund the paid-up amount of Rs. 11,10,030/- after deducting 10% as earnest money of the basic sale consideration of Rs.65,64,007/- with the interest at the prescribed rate i.e., 10.70% is allowed on the balance amount, from the date of cancellation i.e., 11.03.2019 till date of actual refund.
- ii) A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow. यत्ने

31. Complaint stands disposed of.

32. File be consigned to the registry.


(Sanjeev Kumar Arora)

Member


(Ashok Sangwan)

Member

 v.1-3
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.03.2023