

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

Complaint no.	:	3547 of 2021
Date of complaint	:	02.09.2021
Date of order	:	30.05.2023

1. Vimla Agarwal,
2. Anupam Agarwal,
both R/o: - House No. 109,
2nd Floor, Cedar Crest,
Nirvana County, Sector 50,
Gurugram, Haryana.

Complainants

Versus

M/s Puri Constructions Private Limited.
Regd. Office at: - 4-7B, Ground Floor,
Tolstoy House 15 & 17, Tolstoy Road,
Connaught Place, New Delhi-110001.

Respondent

CORAM:

Ashok Sangwan
Sanjeev Kumar Arora

**Member
Member**

APPEARANCE:

Dhruv Lamba (Advocate)
Himanshu Juneja (AR)

Complainants
Respondent

ORDER

1. The present complaint 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 thereunder 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 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 of project	"Emerald Bay", sector-104, Gurgaon
2.	Nature of the project	Group Housing Colony
3.	RERA registered/not registered	Registered having registration no. 136 of 2017 dated 28.08.2017, valid upto 28.01.2020
4.	DTPC license no.	68 of 2012 dated 21.06.2012
	Validity status	20.06.2025
	Name of licensee	Florentine Estate of India & 2 Ors.
	Licensed area	15.34 Acres
5.	Unit no.	A2-702, 7 th Floor [annexure 1 on page 29 of complaint]
6.	Unit admeasuring area	2450 sq. ft. of super area [annexure 1 on page 29 of complaint]
7.	Provisional allotment letter	26.02.2013 [annexure R2 on page 77 of promoter information]
8.	Date of builder buyer agreement	09.11.2013 [annexure 1 on page 22 of complaint]
9.	Possession clause	11(a) Schedule for possession <i>The company based on its present plans or estimates and subject to all just exceptions endeavours to complete the construction of the said building/said apartment/villa within a period of forty eight(48) months conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of</i>



		<i>the allottee(s) to pay in time the total price and other charges and dues/payments mentioned in this agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this agreement. The apartment/villa Allottee agrees and understand that beyond 48 months that the company shall be entitled to period of an additional one hundred eighty (180) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.</i>
10.	Due date of possession	09.11.2017 [calculated from the date of agreement] Note: Grace period is not allowed
11.	Total sale consideration	Rs.2,47,99,090/- Basic sale price- Rs.1,83,75000/- [As per payment schedule on page 96 of complaint]
12.	Total amount paid by the complainant	Rs.1,63,62,382/- [as per the customer ledger on page 73 of reply]
13.	Occupation certificate	21.11.2018 [as per annexure R4 on page 68 of reply]
14.	Offer of possession	30.03.2019 [annexure R-5 on page 70 of reply]
15.	Cancellation/refund request	14.06.2019 (page 93 of complaint)
16.	Cancellation letter dated	30.08.2019 [annexure R9 on page 89 of reply]

B. Facts of the complaint:

3. The complainants have made the following submissions: -

- I. A project by the name of "Emerald Bay" situated in sector-104, Gurugram was being developed by the respondent. The complainant



coming to know about the same booked a unit measuring 2450 sq. ft. (super area) in it and were issued a provisional allotment dated 26.02.2013 for a total basic sale consideration of Rs.1,77,62,500/- i.e., Rs.7250/- per sq.ft. A builder buyer agreement dated 09.11.2013 was also executed between the parties in this regard. The due date for completion of project was fixed as 09.11.2017.

- II. That in pursuant to buyer's agreement between the parties, the complainants started making various payments against the allotted unit and paid a sum of Rs.1,63,62,382/- in all.
- III. That the complainants vide email dated 12.03.2016 requested the respondent to change the payment plan from construction linked plan to possession linked plan for their unit at a revised rate of Rs.7500/- per sq.ft. but the respondent unilaterally, arbitrarily/cleverly linked the same to application for occupancy certificate rather than the demand dependent on possession as per proposed possession linked plan and also increased the total cost of the unit to Rs.2,47,99,090/-.
- IV. That the respondent looted the complainants in the name of the premium apartments. On a physical visit made by them, the apartments were completely inhabitable and even basic necessity of electricity and water was dependent on generator and water tanks. The apartment was completely unsafe, non-utilisable and worthless despite of making the payment according to the terms and conditions time to time revised and agreed upon by them. Therefore, vide email dated 14.06.2019, they requested the respondent to cancel the allotment and return the paid-up amount along with interest accrued till date.

- V. That the respondent vide cancellation letter dated 30.08.2019 unilaterally and arbitrarily cancelled the unit after making unjustified deductions from the paid-up amount received by it against the unit in question in derogation of the provisions of the RERA rules.
- VI. That the complainants never received any offer of possession from the respondent despite multiple enquiries till withdrawal from the project and as per tracking record the same was shown "RTO returned". Hence, on failure of respondent to give possession of the subject unit in accordance with the terms of buyer's agreement the respondent is liable to refund the entire amount received by it along with interest as per section 18(1) of the Act of 2016.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

- I. To refund the entire paid-up amount of Rs.1,63,62,382/- (Rupees One Crore Sixty-Three Lac Sixty-Two Thousand Three Hundred and Eighty-Two only) along with prescribed rate of interest.
- II. To pay a sum of Rs.10,000,00/- towards the compensation and litigation cost.

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/builder.

6. The respondent contested the complaint by filing reply dated 11.10.2021 on the following grounds: -
- i. That the complainants booked an apartment bearing no. A2-702 in the project named Emerald Bay, Sec-104, village Dhanwapur, Gurgaon in 2013 after going through and accepting the terms of the



- allotment/booking contained in the application form. Thereafter, a buyer's agreement was executed between the parties on 09.11.2013.
- ii. That originally the payment plan was construction linked which got revised as per the request of the complainants to another special scheme plan i.e. (60:35:5). Further, before accepting the request for change in payment plan, several requests were made by them for changing the payment plan and one of such request made vide email dated 12.03.2016 was for changing the payment plan from construction linked plan to possession linked plan. Thereafter, the complainants vide email dated 14.06.2019 clearly intimated that they want to cancel the allotment as they suffered a huge loss because the pricing of the property was in a state of free fall and they cannot continue supporting that investment.
 - iii. That the project has been completed and the respondent has already offered the possession after receiving occupation certificate from the competent authority on 21.11.2018 to all the allottees vide offer of possession letter dated 30.03.2019.
 - iv. That the complainants have made breach of the terms and conditions of allotment. Therefore their allotment was cancelled vide cancellation letter dated 30.08.2019 and refund of amount was offered in agreed terms of buyer's agreement. Hence, this complaint is liable to be rejected.
 - v. All other averments made in the complaint were denied in toto.
7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

E.II Subject matter jurisdiction

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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.

10. 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.
11. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(C), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** and wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

12. The application filed in the form CAO with the adjudicating officer and on being transferred to the authority in view of the judgement titled as ***M/s Newtech Promoters and Developers Pvt Ltd. Vs State of UP &***



Ors. 2021-22(1) RCR (C), 357, the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case the allottee wishes to withdraw from the project on failure of the promoter to give possession as per agreement for sale irrespective of the fact whether application has been made in form CAO/ CRA. It has been deliberated in the proceedings dated 10.5.2022 in CR No. 3688/2021 titled **Harish Goel Versus Adani M2K Projects LLP** and observed that there is no material difference in the contents of the forms and the different headings whether it is filed before the adjudicating officer or the authority.

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. Findings on the relief sought by the complainants.

F.I To refund the entire amount deposited i.e., Rs.1,63,62,382/- by the complainants along with prescribed rate of interest.

14. The complainants booked a flat bearing no. A-2-702 on 7th floor, admeasuring super area of 2450 sq.ft. for a basic sale consideration of Rs.1,83,75000/- and paid a sum of Rs.1,63,62,382/- against the same. Thereafter, the buyer's agreement was executed between the parties on 09.11.2013. It is observed that the complainants vide email dated 14.06.2019 requested the respondent even before filing of the complaint for withdrawal from the project. Thereafter, the respondent after making unjustified deductions cancelled the unit vide



cancellation letter dated 30.08.2019. So, they were forced to approach the authority seeking refund.

15. **Admissibility of grace period:** The promoter has proposed to handover the possession of the said unit within a period of 48 months from the date of execution of buyer's agreement. Further, the respondent-builder added a clause that beyond the above said period of 48 months, it would further be entitled to a grace period/extended period of 180 days for applying and obtaining the occupation certificate which cannot be allowed as it failed to complete the construction work within the stipulated time as agreed under clause 11(a) of the agreement. Therefore, the due date for handing over possession of the unit comes out to be 09.11.2017.
16. Section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. The due date of possession as per buyer's agreement was 09.11.2017. The OC was received on 21.11.2018 which was duly intimated to the complainants vide intimation regarding offer of possession letter dated 24.12.2018 and whereas the offer of possession was made on 30.03.2019. The complainants in this case made a withdrawal request vide email dated 14.06.2019 only after the possession of the unit was offered to them after obtaining occupation certificate by the promoter. So, they were entitled to get refund of the paid-up amount but only after certain deductions as per the terms and conditions of clause 4 of the buyer's agreement dated 09.11.2013. However, in this case after completion of the project, the respondent offered possession of the allotted unit to the complainants on



30.03.2019. But instead of availing that offer, they thought it fit to withdraw from the project by writing letter dated 14.06.2019. Though, it is contended on behalf of the complainants that they never received any offer of possession of the allotted unit but admittedly, they received an intimation with regard to possession vide letter dated 24.11.2018 after receipt of occupation certificate of the project. So, in such a situation, the plea of the complainants that they are entitled to full refund of the paid-up amount is untenable. However, after withdrawal from the project by the complainants on the basis of request for cancellation vide letter dated 14.06.2019, neither the respondent accepted the same nor returned any amount after statutory deductions as per buyer' agreement. Though, it is contended on behalf of respondent that it cancelled the allotment of the unit on the ground of non-payment vide letter dated 30.08.2019 and also sent the amount due after retaining the necessary amount from the paid-up one and the letter sent in this regard was received back undelivered. But the plea advanced in this regard is untenable. The complainants had already withdrawn from the project by writing letter dated 14.06.2019. So, any cancellation of the allotted unit on the basis of non-payment of amount due on the basis of letter dated 30.08.2019 does not hold any ground. Thus, after withdrawal from the project in the face of occupation certificate and intimation of possession the respondent could not have retained more than 10% of the basic sale consideration and was bound to return the remaining. Even the Hon'ble Apex court of the land in cases of *Maula Bux Vs. Union of India (1973) 1 SCR 928*, *Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136*, and followed by the National Consumer



Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as **Jayant Singhal and Anr. Vs. M/s M3M India Ltd.** decided on 26.07.2022 took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder and as such, there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Thus, keeping in view the principles laid down by the Hon'ble Apex court in the above mentioned two cases, the rules with regard to forfeiture of earnest money were framed by the authority known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, 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."

17. So, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainants against the allotted unit and is directed to refund the paid-up amount of



Rs.1,63,62,382/- after deducting 10% of the basic sale consideration of Rs.1,83,75000/- being earnest money along with an interest @10.70% p.a. (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 on the refundable amount from the date of surrender i.e., 14.06.2019 till actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.II To pay a sum of Rs.10,000,00/- towards the compensation and litigation cost.

18. The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal 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 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 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. Therefore, the complainants are advised to approach the adjudicating officer seeking the relief of compensation or cost of litigation.

H. Directions of the authority

19. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent/builder is directed to refund the paid-up amount of Rs.1,63,62,382/- after deducting 10% of the basic sale consideration of Rs.1,83,75000/- being earnest money along with an interest @10.70% p.a. on the refundable amount from the date of surrender i.e., 14.06.2019 till date of actual refund.
 - ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
20. Complaint stands disposed of.
21. File be consigned to the registry.


(Sanjeev Kumar Arora)

Member


(Ashok Sangwan)

Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 30.05.2023

HARERA
GURUGRAM