

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

Complaint no. : 4575 of 2022
Date of filing complaint : 29.06.2022
Date of decision : 27.07.2022

1. Archana Kumari 2. Rajesh Kumar Khandelwal R/O: - 147D, 1 st floor, Sector-23, Gurugram, Haryana.	Complainants
Versus	
M/s SS Group Pvt. Limited Regd. Office at: - SS House, Plot no.77, Sector-44, Gurugram, Haryana-122003	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Sanjeev Sharma	Advocate for the complainants
Sh. Rahul Bhardwaj	Advocate for the 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 provision of the

Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.N.	Particulars	Details
1.	Name of the project	"The Leaf", Sector 85, Gurugram
2.	Nature of project	Group Housing Complex
3.	RERA Registered/ Not Registered	Registered 23 of 2019 dated 01.05.2019
4.	DTPC License no.	81 of 2011 dated 16.09.2011
	Validity upto	15.09.2024
	Licensed area	11.9 Acre
5.	Unit no.	7B, 7 th floor, Building No. 8 [page no. 18 of complaint]
6.	Unit measuring	2280 Sq. Ft. (page no. 18 of complaint)
7.	Date of allotment	10.09.2012 (Page no, 51 of complaint)
8.	Date of execution of floor buyer's agreement	18.09.2013. (Page no. 24 of complaint)
9.	Possession clause	8. Possession 8.1 Time of handing over the possession

		<p>8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty six months from the date of signing of this agreement. The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months or such extended period, for applying and obtaining occupation certificate in respect of the Group Housing Complex.</p>
10.	Due date of possession	<p>18.09.2016 (calculated from the date of signing of buyer agreement) Grace period not allowed</p>
11.	Total sale consideration	<p>Rs. 1,24,54,200/- (Page no. 18 of complaint)</p>
12.	Total amount paid by the complainant	<p>Rs. 37,19,996/- (As alleged by the complainant)</p>
14.	Occupation certificate dated	<p>09.05.2022 (taken from another file of the same project)</p>
15.	Notice of cancellation	<p>24.11.2021 (Page no. 84 of reply)</p>

16.	Date of cancellation	19.04.2022 (cancellation letter issued at page 49 & 50)
-----	----------------------	---

B. Facts of the complaint

3. That the complainant purchased a residential flat bearing unit no. 7B, 7th floor, tower/building BLD-8, admeasuring 2280 Sq. ft. along with one reserved car parking in the said project floated by the respondents and on the inducement that the possession of the unit purchased would be handed over on time with all amenities as promised. Whereby the complainants had paid the booking amount of Rs. 10,00,000/-.
4. That the complainants and the respondent entered into the buyer's agreement on 18.09.2013. However, as per clause 8.1 of the buyers agreement, the possession of the unit was to be handed over 36 months from the date of signing of the agreement, i.e., September 2016.
5. That the total sale consideration for the unit no. 7B, 7th floor, tower/building 8-1, admeasuring 2280 Sq. ft. in the project i.e., "The Leaf" was fixed at Rs. 1,07,16,100/-. The complainants never requested the respondent for any particular location or floor and based on the inventory available with the respondent, the unit in question was allotted to the complainants and when the complainants questioned about the difference between the PLC, the response which was received by the complainants was that one PLC is park or corner.
6. That the possession was to be handed over to the complainants by September 2016 but the same did not happen even till today, being delay of 6 years despite the fact that the complainants have made a

payment of Rs. 37,19,996/- from September 2012 to November 2015 itself based on the demands raised by the respondent.

7. That the complainants initially paid an amount of 30% to 35% against the total basic sale consideration excluding duties, taxes and other charges. The promoter/builder was not allowed to collect more than 10% as application fee/allotment of the unit before completing the statutory provisions. A BBA was executed between the parties on certain terms and conditions. The Hon'ble Supreme Court has discussed and decided such terms and conditions viz-a-viz to builder buyer agreement executed between both the parties.
8. That the respondent kept the pace of development and completion of the project at a very slow speed or did not develop the project after some slabs. So, the allottee stops paying the instalments as per the payment plan after noticing the attitude of the respondent. The respondent dragged the matter and issue the notice of cancellation on 24.11.2021. Later on, the unit was cancelled vide letter dated 19.04.2022 and no refund is made to the allottee. The allottee requested the respondent for refund of the paid-up amount along with interest from the date of amounts received by the promoter builder.
9. That the cases where the respondent has unilaterally cancelled the unit but did not refund the amount along with interest, is illegal, unjust, arbitrary, and needs to be penalized heavily. The cause of action arose for cancellation when some obligation on part of the allottee default. The respondent should refund the remaining

amount after deducting the earnest money along with interest from the period when actual payments/instalments were received by it.

C. Relief sought by the complainants:

The complainants have sought the following relief:

- a) Direct the respondent to pay delay possession charges at the prescribed rate of interest.

Reply by the respondent

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

10. That the complainants vide an application form applied for the allotment of a unit in the project constructed by the respondent. The complainants, in pursuance of the aforesaid application form were allotted a unit bearing no.7B, located on the 7th Floor, in located on the Tower Building B-8 vide an Allotment Letter dated 10.09.2012 along with broad terms & conditions and payment plan. The complainants consciously and wilfully opted for a construction-linked payment plan for remittance of the sale consideration for the unit in question and further represented to the respondent that he shall remit every instalment on time as per the payment schedule. The respondent had no reason to suspect the bona fide of the complainants and proceeded to allot the unit in question in their favor.

11. That, it is pertinent to mention that the allotment letter being the preliminary and the initial draft contained the basic and primary understanding between both the parties, to be followed by the flat buyer's agreement to be executed between the parties. Thereafter, immediately on 18.09.2013, the flat buyer agreement was executed between the complainants, and the respondent which contained the

final understandings between the parties stipulating all the rights and obligations.

12. That, the complainants were allotted the unit bearing no. 7B, located on the 7th Floor, in building-8 having an approximate super area of 2280 sq.ft. of the project "**The Leaf**" at the basic price of Rs. 4700 per sq.ft. and preferential location charges (PLC) of Rs. 100/- per sq.ft., external development charges (EDC) of Rs. 355 per sq.ft., infrastructure development charges (IDC) of Rs. 35/- per sq.ft. to be payable as per the payment plan. It is submitted the total sale consideration of the flat booked by the complainants was Rs. 1,24,54,200/-. However, it is submitted that the sale consideration amount was exclusive of the registration charges, stamp duty charges, service tax and other charges which were to be paid by the complainants at the applicable stage. It is submitted that the complainants defaulted in making payments towards the agreed sale consideration of the flat from the very inception, i.e., after signing the allotment letter.
13. That, the complainants have failed to pay the remaining sale consideration amounting to Rs. 71,60,358/- as on 24.11.2021 without interest. It is submitted that initially on account of non-payment of the outstanding amount, the respondent sent numerous demand letters to the complainants. The respondent as per the terms and conditions of the flat buyer's agreement, upon completion of the respective milestone raised numerous demand Letters were issued to the complainants.
14. It is to be submitted that the complainants till the issuance of the final demand letter have only paid Rs. 37,19,996/- towards the total sale consideration amounting to Rs. 1,24,54,200/- which only accounts to approx. 15% of the total sale consideration. It is pertinent to note that

the complainants were very well aware of the continuous delays and were reminded on continuous basis through the demand letters. Both the parties agreed as per the terms and conditions and the complainants were well aware that "time being the essence" the total sale consideration to be paid according to the construction- linked plan.

15. That the respondent continuously sent numerous demand letters to clear the outstanding dues, but the respondent's request fell on deaf ears of the complainants which clearly reflects that the complainants were in clear breach of the terms and conditions of the flat buyer agreement. That after not receiving any response from the complainants the respondent herein was constrained to cancel the unit allotted to them vide a notice for cancellation letter dated 24.11.2021.
16. The complainants after being the wilful defaulter in complying with the terms and conditions of the flat buyer's agreement are trying to take a shelter under the garb of the Real Estate Regulation and Development Act 2016 and are shifting the burden on the part of the respondent whereas, the respondent has suffered huge financial loss due to such wilful defaulters. That it is submitted that several allottees, have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. That despite there being a number of defaulters in the project, the respondent itself infused huge amount of funds into the project.
17. It is to be stated that it shall be the respondent who shall be entitled for the relief from this Hon'ble Authority for the breach in the terms and conditions of the flat buyer agreement by the complainants. That as per the clause 1.2(f) of the flat buyer agreement, the respondent is entitled

to forfeit the earnest money as well as the brokerage along with the taxes and interest.

18. All other averments made in the complaint were denied in toto.
19. 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 these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

20. The respondent has raised an objection regarding jurisdiction of authority to entertain the present complaint. 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

21. 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

22. 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)(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.

23. 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.

G. Findings on the objections raised by the respondent.

G. I Objection regarding untimely payments done by the complainants.

24. The respondent has contended that the complainants have made defaults in making payments as a result thereof, it had to issue numerous demand letters dated 08.09.2012, 29.09.2012, 27.06.2013, 23.02.2015, 27.07.2015, 21.01.2016, 08.04.2016, 14.03.2017, 21.08.2018, 18.06.2018, 13.08.2018, 15.12.2018, 04.07.2019 and 23.09.2020 respectively, it is further submitted that the complainants have still not cleared the dues. The counsel for the respondent referred to clause 13 of the allotment letter dated 26.05.2008 wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

13.In case of delay of 60 days in making payment by the Applicant to the Company as per the Schedule of Payments, the Company shall have the right to terminate the Allotment/Agreement and forfeit the Earnest Money. The Company shall also be entitled to charge interest @ 18% pa from the due date of

installment, as per the Schedule of Payments, till the date of payment....."

25. At the outset, it is relevant to comment on the said clause of the allotment letter i.e., "13. **TIMELY PAYMENT** ESSENCE wherein the payments to be made by the complainants have been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottees that even a single default by the allottees in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. There is nothing on the record to show as to what were the terms and conditions of allotment of the unit in favour of the complainants. The total sale price of the allotted unit to the complainants as per letter of allotment letter was 1,24,54,200/-. The complainants admittedly paid a sum of Rs. 37,19,996/- to the respondent from time to time. The complainants admittedly made default in making payments but what was the status of construction at the spot at the time when termination of the unit was made by the respondent. Moreover, if the complainants were committing default in making payments due as alleged by the respondent, then after cancellation of the unit vide letter dated 19.04.2022, it was obligatory on it to return the remaining amount after deducting earnest money of the sale consideration. There is nothing on the record to show that after deducting earnest money of the basic sale price, the respondent sent any cheque or bank draft of the remaining amount to the complainants, and which is against the settled principle of the law as laid down by the Hon'ble Apex Court of the land in cases of in **Maula Bux V/s Union of India** AIR 1970 SC, 1955 and **Indian Oil Corporation Limited V/s**

Nilofer Siddiqui and Ors, Civil Appeal No. 7266 of 2009 decided on 01.12.2015 and wherein it was observed that forfeiture of earnest money more than 10% of the amount is unjustified. Keeping in view the principles laid down in these cases, the authority in the year 2018 framed regulation bearing no. 11 providing forfeiture of more than 10% of the consideration amount being bad and against the principles of natural justice. Thus, keeping in view in the above-mentioned facts, it is evident that while cancelling the allotment of unit of the complainants, the respondent did not return any amount and retained the total amount paid by the complainants.

H. Findings on the relief sought by the complainants.

H. I Direct the respondent to pay delay possession charges at the prescribed rate if interest.

26. The complainants were allotted unit no 7B, 7th floor, building no. 8, ground floor in tower A in the project "The Leaf" by the respondent builder for a total consideration of Rs. 1,24,54,200/- and he paid a sum of Rs. 37,19,996/-. The respondent had sent various reminder letters to the complainants to make payment of the outstanding amount. The complainants continued with their default and again failed to make payment even after receipt of final reminder letter.
27. While discussing earlier it has been held that the complainants were in default in making timely payments leading to cancellation of the allotted unit by the respondent as per the term and conditions of agreement. Now, the issue for consideration arises as to whether the complainants are entitled for delay possession charges.
28. The complainants received cancellation notice dated 24.11.2021 and respondent builder cancelled the unit on 19.04.2022 but there is

nothing on record which shows that respondent builder refunded the balance amount paid by the complainant

29. As per cancellation letter dated 19.04.2022, the earnest money shall stand forfeited against amount of Rs. 37,19,996/- paid by the complainants. As per the complaint, the said unit was booked under construction linked plan and till date a total consideration of Rs. 37,19,996/- was paid against total consideration of Rs. 1,24,54,200/- which is approx. 30% of total consideration. Upon perusal of documents on records from page no. 53-83 of reply, various reminders for payment were raised by the respondent, the complainants received cancellation letter dated 19.04.2022. It is observed that the respondent has raised various demand letters to the complainants and as per section 19 (6) & (7) of Act of 2016, the allottees were under an obligation to make timely payment as per payment plan towards consideration of the allotted unit. When sufficient time and opportunities have been given to the complainants to make a payment towards consideration of allotted unit, it would be violation of section 19 (6) & (7) of Act of 2016. As per the provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, the respondent builder has to return the remaining amount after deducting 10% of sale consideration as earnest money. The authority observes that the complainants are not entitled to refund of the entire amount as their own default, the unit has been cancelled by the respondent after issuing proper reminders. The cancellation of the allotted unit by the respondent is valid. So, the complainant is not entitled for delay possession charges. However, the respondent has contravened the provision of sec 11(5) of the Act and illegally held the monies of the complainants. In cases of *Maula Bux Vs.*

Union of India (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. Vs. Sarag 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 the contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. Even keeping in view, the principles laid down in the above mentioned cases, the authority made regulations w.r.t forfeiture of earnest money and regulation 11 (5) of 2018 provides 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 amount of the real estate i.e .apartment/plot/building as the case may be in all case where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."

30. Thus, keeping in view of aforesaid circumstances and the law of the land, though the cancellation of the allotted unit is held to be valid, but the respondents was not justified in retaining whole of the paid-up amount on cancellation. It could have retained 10% of the basic sale consideration of the unit and was required to return the remaining amount on cancellation. Since that was not done, so the respondent is directed to refund the paid-up amount after deducting 10% of the sale consideration of the unit being earnest money within 90 days from the date of this order along with an interest @10.75 % p.a. on the refundable

amount from the date of cancellation i.e., 19.04.2022 till the date of its actual realization.

I. Directions of the Authority:

31. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondents/promoter is directed to refund the paid-up amount of Rs. 37,19,996/- to complainants-allottees after deducting 10% amount of the sale consideration of Rs. 1,24,54,200/- as earnest money and such balance amount be paid with interest at the prescribed rate i.e., 10.75% from the date of cancellation i.e., 19.04.2022 till the date of its actual realization.
- 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.

32. Complaint stands disposed of.

33. File be consigned to the Registry.

v.l - 
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 27.07.2023