

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

Complaint no.	641 of 2021
Date of complaint	10.02.2021
First date of hearing	22.03.2021
Date of decision	04.10.2023

Sangeeta Mattoo & Roopak Mattoo R/O: Flat no. 202, Kendriya Vihar, Sector 56, Gurugram.	Complainants
Versus	
St. Patricks Realty Pvt. Ltd. Registered address at Aloft Hotel, asset 5B, Aerocity, hospitality district, IGI Airport, New Delhi-110037.	Respondent

CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Shri Rajan Kumar Hans Advocate	Complainants
Shri Amit Aggarwal Advocate	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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 the project, the details of sale consideration, the amount paid by the complainants, the date of proposed handing over of the possession, and the delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name and location of the project	Central Park Flower Valley.
2.	Nature of the project	Plotted colony
3.	Project area	20.225 acre
4.	DTCP license no.	07 of 2020 dated 29 January 2020
5.	Name of licensee	Chandiram and 3 others.
6.	RERA Registered/ not registered	RERA registered 11 of 2020 dated 18.03.2020
7.	Unit no.	F-136 Ground Floor (Page no. 25 of Reply)
10.	Unit area admeasuring (super area)	1274 sq. ft. (As per page no. 21 of the Reply)
11.	Date of application for allotment	19.05.2018 (Page no. 31 of Reply)



12.	Date of execution of BBA	Not Executed
13.	Total sale consideration	Rs. 1,07,66,284/- (As per page no. 26 of the Reply) BSP: Rs. 84,97,726/-
14.	Amount paid by the complainant	Rs. 12,05,824/-
15.	Letter providing agreement for sale sent to the complainants	26.06.2018 (As per page no. 34 of the Reply)
16.	Request for change of payment plan by complainants to 10:75:15	07.08.2018 (As per page no. 35 of the Reply)
17.	Change of payment plan to 10:75:15 on request of complainants	06.09.2018 (As per page no. 36 of the Reply) Complainants say no acknowledgment of a change of plan
18.	Reminder letter providing an agreement for sale was sent to the complainants	14.09.2018 (As per page no. 37 of the Reply)
19.	Reminder for execution and registration of BBA and possible cancellation	11.12.2018 (As per page no. 38 of the Reply)
20.	Indemnity bond and cancellation request	05.01.2019 (Page no. 30 of complaint) 03.02.2020

		(Page no. 34 of complaint)
21.	Cancellation request	12.02.2020 (Page no. 40 of complaint)
22.	E-mail by complainants requesting retention of the unit.	11.06.2020 (Page no. 39 of Reply)
23.	Forfeiture by the respondent of the amount deposited by complainants and raising further demand.	05.09.2020 (Page no. 41 of complaint) Demand raised by respondent: Rs. 1,24,985/-

B. Facts of the complaint:

3. The respondent came up with the project "Central Park Flower Valley" located in sectors 29, 30, 32, Sohna, Gurugram. On 18.05.2018, the complainants booked a unit by paying Rs. 4,00,000/-.
4. A pre-printed application form was given to the complainants which was duly filled and deposited with the respondent. Along with the application form, the complainants provided another cheque of Rs. 8,05,824/- dated 30.05.2018 drawn on HDFC Bank. The cost of the unit was Rs. 1,07,66,284/-
5. At the request of the complainants, the respondent agreed to the bank subvention payment plan of 10:75:15. Where 10% was earnest money, 75% bank subvention, and 15% was to be paid at possession.
6. The respondent failed to provide any allotment letter to the complainants.

7. The Complainants have already paid over 11.2% of the agreed amount i.e. Rs. 12,05,824/- to date to the respondent, details of the payment is given below.

S.N	Cheque no. & date	Amount
1.	Cheque no. 009714, ICICI Bank on 31.03.2018	4,00,000/-
2.	Cheque no. 000103, HDFC Bank on 31.03.2018	Rs. 8,05,824/-
	TOTAL	Rs. 12,05,824/-

8. The respondent accepted more than 10% of the sale value even before the execution of the apartment buyer's agreement which is in direct contravention of Section 13 of the Real Estate (Regulation and Development Act), 2016.
9. As mentioned in clause 10 of the application form and the terms mentioned therein, the allotment was provisional and subject to a "definitive document" i.e. apartment buyer's agreement. A mere reading of the terms and conditions mentioned in the application form reveals stark incongruities between the remedies available to both parties. In the 199th Report of the Law Commission of India on '*Unfair (Procedural & Substantive) Terms in Contract*' it was stated that "A contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties".

10. The complainants waited patiently but even after agreeing on the 10:75:15 payment plan at the time of the booking, the respondent was not committed to its words, and the complainants were forced to write multiple letters to remind the respondent to comply with the commitment, and provide the 10:75:15 payment plan instead of 15:75:15 payment Plan.
11. The complainants wanted the house to live peacefully with family, and could not wait for more so they asked the company to cancel the unit in September 2018 (Within Four Months of the Booking), as they were fed up with the delayed tactics of the respondent.
12. On the guidance and insistence of the respondent, and on the pretext of formalities, the complainants filed the cancellation letter and Indemnity bond for the cancelation of the unit on 05.01.2019. The complainants were committed by the staff that their entire earnest money would be refunded back.
13. The entire year went by and the complainants waited patiently for the unit cancellation and for refund proceeds from the company, but the respondent did not budge and did not even provide any reply on the matter even after many follow-ups and numerous visits to it office.
14. Even after many months passed the complainants did not hear anything from the respondent and they again reminded the respondent and provided them the cancellation request again on 28.08.2020, which was the third time in the last 20 months.

15. On 05.11.2020 the respondent replied through an email in which the complainants were informed that all their earnest money was getting forfeited and they were further asked to shell out Rs. 1,24,985/- for the cancellation of the unit.
16. The complainants were not happy with the functioning of the company and the delay they were making and that is why the unit was cancelled before the execution of the builder-buyer agreement. Further, after the cancellation of the unit, the respondent has already re-alloted this unit to some other client.
17. The respondent acted in contravention to section 12 of the said act and has caused damage to the complainants by providing incorrect and false statements in the application form and allotment letter, and has failed to execute even the apartment buyer's agreement after booking the apartment. Further, the respondent also acted in contravention of section 11(4) of the said act.
18. That as per section 18 of the RERA Act. 2016, the promoter is liable to refund the amount and pay interest at the prescribed rate of interest and compensation to the allottees of an apartment, building, or project for a delay or failure in handing over such possession as per the terms and agreement of the sale.

C. Relief sought by the complainants:

19. The complainants have sought the following relief(s):
 - i. Direct the respondent to refund the entire amount of the earnest money.

- ii. Direct the respondent to pay interest at the scheduled rate of interest from the date of the actual payment till the date of the actual refund.

D. Reply by respondent:

20. The complainants vide application form dated 19.05.2018 applied for allotment of an independent floor no. F-136, ground floor in the project of the respondent, and opted for a 'Bank Subvention Payment plan'. The complainants at the time of the application form paid the booking amount of Rs. 12,05,824/- vide two cheques dated 18.05.2018 and 30.05.2018 for an amount of Rs. 4,00,000/- and Rs.8,05,824/- respectively. The total cost for the independent floor was Rs.1,07,66,284/- excluding applicable taxes.
21. Pursuant to the application form, the respondent sent a welcome letter dated 20.05.2018 to the complainants.
22. The respondent vide letter dated 26.06.2018 provided the agreement to sell to the complainants and apprised the complainants that as per RERA, the agreement to sell shall be registered and only upon registration the apartment will stand allotted to them. The agreement to sell is as per the draft approved under RERA Registration No. 95 of 2017.
23. On request of the complainants, the respondent agreed to the bank subvention plan of 10:75:15 vide e-mail dated 06.09.2018.
24. The respondent vide letter dated 14.09.2018 again provided the agreement to sell to the complainants and apprised them that as per

RERA, the agreement to sell shall be registered and only upon registration the apartment shall stand allotted to them.

25. The respondent vide letter dated 11.12.2018 wrote to the complainants stating that time and again they have requested them to get the floor buyer agreement executed and registered. It was further mentioned that in case they don't provide the signed agreement for registration and execution within a week, i.e. by 18.12.2018, the booking will be canceled.
26. The complainants vide letter dated 12.02.2020 (which was admittedly submitted to the Respondent on 28.08.2020), wrote to the respondent seeking cancellation of the apartment due to personal reasons and provided requisite documents.
27. Thereafter the complainants vide email dated 11.06.2020 informed the respondent that they want to retain their apartment/unit and requested the respondent to provide the original copy of the old contract and other documents given for cancellation but the second part of the email dated 11.06.2020 w.r.t. return of documents given for cancellation is completely false and concocted as no such document was ever given by them to the respondent before 28.08.2020.
28. That the present complaint suffers from *suppressio veri* and *suggestio falsi*. It is settled law that when a litigant suppresses material facts and states false facts before a judicial authority, such conduct is tantamount to playing fraud upon such judicial authority. Therefore, such a litigant,

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who approaches any judicial authority with unclean hands, disentitles themselves to any relief whatsoever.

29. Further, the allegation of the complainants that the respondent has taken an amount of Rs. 12,05,824/-, which is 11.2% of the total amount and is in contravention to Section 13 of the Act is completely baseless and misleading. The total tentative price mentioned in the application form is Rs.1,07,66,284/- and 10% of the said amount will amount to Rs 10,76,628.40/-. It is to be noted that the complainants have paid an amount of Rs. 12,05,824/- which includes tax @12%, which is explained as under:

Actual Amount paid excluding Tax (A)	Taxes @ 12% (B)	Amount(Rs.) (A + B)
Rs. 357142	Rs. 42858	Rs. 400000
Rs. 719486	Rs. 86338	Rs. 805824
Rs. 10,76,628	Rs. 1,29,196	Rs. 12,05,824

Therefore, the actual amount paid to the respondent by complainants is Rs. 10,76,628/- which is 10% of the total price indicated in the application form and thus, is in terms of Section 13 of the Act.

30. The booking amount is forfeitable in terms of clause 8 of the application form as well as Regulation 5 of Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the Builder) Regulations, 2018. Further, the complainants have withdrawn from the

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allotment of their own volition, without any cause or warrant, therefore, the respondent is entitled to forfeit the entire booking amount paid by the complainants, which as explained hereinabove comes to 10% of sales consideration for the independent floor in question.

E. Jurisdiction of the authority:

31. The plea of the respondents regarding lack of jurisdiction of Authority is 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

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 the entire Gurugram District for all purposes 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 the 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 with the obligations cast upon the promoters, the allottees, and the real estate agents under this Act and the rules and regulations made thereunder.

So, given 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.

F. Entitlement of the complainant for refund:

F.1 Direct the respondent to refund the entire amount of the earnest money.

32. The complainant booked a floor bearing no. F-136 on the ground floor, admeasuring super area of 1274 sq. ft. in the said project vide an application form dated 19.05.2018 for a total sale consideration of Rs.1,07,66,284/- and the complainant has paid a sum of Rs.12,05,824/- in all. The builder-buyer agreement was not executed between the parties. On perusal of the pleadings & documents submitted by the parties, it becomes evident that the respondent sent various reminders to the complainants for the execution of the agreement to sell on 26.06.2018, 14.09.2018, and 11.12.2018. Furthermore, the respondent

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agreed to the request of the complainants to change the payment plan. In spite of all this, the complainants did not come forward to execute the agreement to sell. Thereafter, cancellation requests dated 12.02.2020 was made by the complainants, and cancellation request cum indemnity bonds dated 05.01.2019, and 03.02.2020 were signed by them in favor of the respondent. However, on 11.06.2020, the complainants again wrote to the respondent requesting retention of the same unit. Hence, the earlier request of the complainants for cancellation was superseded by it. Thereafter, the respondent canceled the unit on 05.09.2020 on account of non-payment.

33. Section 18(1) is applicable only in the eventuality that the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein.
34. This is an eventuality where the promoter intends to deliver the unit but the allottee wishes to withdraw from the project and demands a return of the amount received by the promoter in respect of the unit. The allottee, in this case, filed this application/complaint on 10.02.2021 after the unit had been canceled. In the instant case, no BBA has been executed between the parties even though the respondent-builder gave multiple reminder letters to the complainants for the execution of the agreement to sale i.e. 14.09.2018 and 11.12.2018. There was reluctance on the part of the complainants to sign the agreement to sell. The complainant further requested that the unit be canceled through a cancellation request dated 12.02.2020. Section 18(1) gives two options

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to the allottee if the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

- (i) Allottee wishes to withdraw from the project; or
- (ii) Allottee does not intend to withdraw from the project

35. The Hon'ble Apex court of the land in cases of *Maula Bux Vs. Union of India (1973) 1 SCR 928* and *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 as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is a reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above-mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which 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

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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.

36. Keeping in view, the aforesaid legal provision, the respondent/promotor is directed to refund the paid-up amount after deducting 10% of the sale consideration and shall return the amount along with interest at the rate of 10.75% (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 filing of complaint i.e., 10.02.2021 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the Authority:

Hence, the authority hereby passes this order and issues the following directions under Section 37 of the Act to ensure compliance with obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016.

- i. The respondent is directed to refund the paid-up amount of Rs. 12,05,824/- after deducting 10% of the sale consideration with interest at the prescribed rate i.e., 10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate

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(Regulation and Development) Rules, 2017, on such balance amount, from the date of final cancellation of unit i.e. 05.09.2020.

- ii. A period of 90 days is given to the respondents to comply with the directions given in this order failing which legal consequences would follow.

37. Complaint stands disposed of.

38. File be consigned to the registry.



Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.10.2023

HARERA
GURUGRAM