

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

Complaint no.:	2247 of 2022
First date of hearing:	14.07.2022
Date of decision:	15.09.2023

1. Akhlesh Kumar Pandey
2. Vivek Prashar

R/o 4/97, Teachers Colony, Deoria, Uttar Pradesh-274702

Complainants

Versus

Agrante Realty Ltd.

Office address: 522-524 DLF Tower A, Jasola, New Delhi-110025

Respondent

CORAM:

Shri Sanjeev Kumar Arora

Member

APPEARANCE:

Shri Daggar Malhotra (Advocate)

Complainants

Shri. Tarun Vishwas (Advocate)

Respondent

ORDER

1. The present complaint dated 18.05.2022 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 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 as provided under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Project and unit related details

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

S. N.	Particulars	Details
1.	Name of the project	"Galleria 108", Sector- 108, Gurgaon (Phase-1)
2.	Nature of project	Commercial component in affordable group housing project "Kavyam"
3.	RERA registered/not registered	Registered vide registration no. 23 of 2018 dated 22.11.2018
	Validity status	31.11.2022
4.	DTPC License no.	101 of 2017 dated 30.11.2017
	Validity status	29.11.2022
	Name of licensee	Arvinder Singh & others
	Licensed area	5 acres
5.	Unit no.	UGF-15 [as per receipt dated 16.01.2020 at pg. 22 of complaint]
6.	Total sale consideration	₹ 40,00,000/-

		[as per application form dated at pg. 17 of complaint]
7.	Amount paid by the complainant as per demand letter dated 09.06.2020 at pg. 23 of complaint	₹ 4,00,000/-
8.	Request for cancellation vide email	13.07.2020 [pg. 29 of complaint]
9.	Cancellation vide email	20.10.2020 [pg. 24 of complaint]

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -
- The complainant got to know about the respondent's project namely Galleria -108 at Sector -108, Gurugram. Complainants approached the respondent regarding the booking of a commercial unit in the said project. Accordingly, the complainants filled in the application form desirous of booking of shop no: 15 UGF. The complainants made a total payment of 10% as booking amount being ₹ 4,00,000/- as required by the respondent at the time of booking vide cheque bearing no. 000025 dated 15.01.2020. The same was duly encashed by the respondent and the acknowledgment of receipt of said amount was elucidated in the respondent's email dated 20.02.2020.
 - That, it is necessary to point at the outset itself that, the complainants had been informed that after the booking amount was paid, the following payments were to be made as follows: 40% once construction is initiated and remaining 50% at the time of possession. Further, and

- most importantly, there was no other payment plan mentioned in the application form by the respondent.
- c. That, the respondent raised a further demand vide demand letter dated 09.06.2020 on the complainants. The complainants, being vigilant at their end, in order to verify the genuineness of the said demand visited the project site on 11.07.2020. To the utter shock of the complainants, no construction work had begun on the said site, pictures of the same were taken by the complainants. The complainants then vide email dated 13.07.2020 attached the said photographs evidencing zero construction on the project site and informed the respondent to raise demands only once construction began as that was decided between the parties.
- d. The respondent replied to the said email of the complainant **after 2 months** on 07.09.2020 and once again sought payment of the said demand and further stated that the delayed payment would attract a penal interest @15% p.a. and further wrongly stated that the complainant was required to make payment within 90 days from the date of booking. Whereas, in reality, there was no such payment plan agreed upon by the complainant and the complainant was not even aware of any such payment plan. The complainant therefore responded vide email dated 14.09.2020 and reiterated that the payment plan that was agreed upon being 10% at the time of booking, 40% once construction is initiated and remaining 50% at the time of possession. The complainant was shocked and disappointed with the behaviour of the respondent in raising wrongful demands and threatening the complainant of addition of unwarranted penal interests on the said

demands in case of delay in payments. The respondent did not even share any builder buyer agreement with the complainants and just started demanding more payment. Accordingly, taken aback with such misconduct of the respondent, the complainant vide the same email sought for cancellation of the booking. once again, the respondent vide email dated 15.09.2020, threatened the complainant with imposition of additional penal interest on the said amount and sought for the payment of wrongful demand so raised by the respondent. The respondent had neither entered into any builder-buyer agreement with the complainants nor shared even an allotment letter with the complainants. Further, again, the complainants vide emailed 16.09.2020, asked for initiation of cancellation process and refund of their hard-earned money. The same was not replied to by the respondent and thus, the complainant followed-up with the respondent continuously but all in vain. Vide email dated 20.10.2020 the respondent finally confirmed the cancellation of the said booking but at the same time wrongfully treated the amount paid by the complainants as forfeited. That, later on 19.11.2021, the complainants met the respondent at their office regarding the cancellation process and refund. The complainants have been running from pillar to post after the respondent seeking the refund of their hard-earned money but all in vain and thus, the present complainant is being filed by the complainants.

- e. It is of utmost necessity to point out that, the complainants were compelled to ask for refund on account of arbitrary and wrongful actions on the part of the respondent. The respondent not only

unilaterally changed the payment plan/structure and started demanding more than 10% of the consideration amount without even sharing a builder-buyer agreement but also wrongfully sought for payment without even starting any construction on the said site. There has been no fault on the part of the complainants whatsoever. The payments being sought by the respondent were wrongful as it was agreed that next instalment had to be made only on the initiation of construction whereas, the respondent started demanding payment as per a payment structure which was never agreed or shared with the complainant and furthermore the respondent was demanding more than 10% payment without any builder buyer agreement. And further, there was zero construction at the site when the payment was being sought.

- f. It was only because of the arbitrary conduct of the respondent that the complainant asked for refund and cancellation, without any fault of the complainant whatsoever. The respondent therefore cannot be allowed forfeit any amount and take undue advantage of its own wrongs. Further, there was no allotment letter confirming allotment of unit made by the respondent in the favour of the complainant and no builder buyer agreement signed. The respondent never shared a builder buyer agreement with the complainants and sought for more than 10% payment from the complainants without the same which is clear violation of Section 13(1) of the Act. In the event of the complainant not going ahead with the same, the only right that the respondent had was that it could cancel the booking. The respondent did not have the right to forfeit any amount paid by the complainants to the respondent. The

act of the respondent of withholding the complainant's money is without any justification is completely illegal and unreasonable.

- g. The respondent's conduct is not only illegal but also arbitrary as the cancellation was sought by the complainants on account of the respondent's misconducts alone. Furthermore, there was no confirmed allotment in the favour of the complainant till date and the complainant had only paid an advance booking amount to the respondent. The complainant made an application as desirous of booking a unit in the respondent's project. There is no dispute that the complainant had merely made an application to the respondent for booking of a unit in the project of latter i.e., respondent and paid a sum of ₹ 4,00,000/- as booking amount being 10% of the total sales consideration as sought by the respondent. The complainants are therefore entitled to seek refund of the booking amount so paid by them to the respondent. The said legal point wherein the situation is such that, whether complainant, seeking direction be passed to the respondent/builder to return the booking amount, when no unit was allotted to complainant and no contract entered into, has been answered previously by the forum in the favour of the complainant and the same direction is being prayed for before this Hon'ble Authority.
- h. Even otherwise, the cancellation so sought by the complainant was on account of the misconduct and arbitrariness of the part of the respondent and the respondent cannot be allowed to take undue advantage of his own wrongs by wrongly forfeiting the hard-earned money of the complainants.

C. Relief sought by the complainants: -

4. The complainants have sought following relief(s)
 - a. Refund entire amount paid by the complainant along with the interest.
 - b. Litigation cost- ₹ 50,000/-.
5. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent has contested the complaint on the following grounds:
 - a. That the present reply is being verified and filed by Sh. Satish Kumar who is the authorized representative of the respondent i.e., Agrante Realty which is a duly incorporated company. Sh. Satish Kumar is duly authorized vide board resolution dated 12.07.2022.
 - b. It is submitted that complainant has malafidely filed the present complaint with the objective to arm twist the respondent and to treat the complainant above law neglecting the applicable rules, policy and the terms and conditions of allotment. It is submitted that the complainant has concealed vital material facts and circumstance for misleading this Hon'ble Authority.
 - c. It is submitted that the complainant has wrongly pleaded in the complaint that he was never allotted a unit in the said project. It is submitted that unit no. UGF-15 was admittedly allotted to the complainants. The complainants have also acknowledged the said allotment in their email correspondences to the respondent company which are already on record and filed by the complainant himself. The Hon'ble Authority may kindly refer the email dated 21.11.21 sent by the complainants to the respondent company filed by the complainants only,

wherein they are admitting that they have objected the cancellation of the allotment of their unit UGF-15 on account of default in payment and therefore the bald attempt to twist the facts that there was no allotment is false and of no consequence.

- d. That the bald averment that no BBA was executed by the respondent is also false and misrepresentative. The respondent company has never denied the execution of the BBA and has requested the complainant to fix a date for the same but the complainants with a view of backing out of the project made a false story of no construction of the project and demanded refund.
- e. That the bald averment of the complainants that no payment plan was agreed upon by the parties is again wrong and misleading. The complainants have concealed documents and pages of the application for allotment which clearly shows that the complainants had opted for payment plan-II 50:50 plan which was annexed to the application for allotment. The respondent had raised its demand letter as per the payment plan opted for by the complainants. The plan clearly says that the second instalment will be demanded within 90 days from the date of booking. The complainant was and is well aware of the same but now on account of seeking an exit from the project has cooked up a story of no construction and praying for full refund.
- f. That the complainant had not mentioned the relevant clause of the application of allotment which was duly agreed upon by him at the time of execution of the same. It is submitted that as per clause 8 of the application it is clearly stipulated that in the event of cancellation of the booking/allotment the booking amount i.e., earnest money would be

forfeited by the respondent company. The complainant after being fully understanding the same agreed and applied for the allotment in the project. The complainant has no legal right to seek refund for the booking amount as he is a defaulter as numerous reminders of release of second instalment were made to him which were ignored on the pretext of no construction.

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 these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

8. The application 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

9. 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

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

Section 11

.....

(4) The promoter shall-

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

Section 34-Functions of the Authority:

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

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Supra)*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is

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

13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainants.

F.I Refund entire amount paid by the complainants along with the interest.

14. The complainants are allottees in the commercial component in the project "Kavyam", an affordable group housing colony developed by the respondent. The complainants were allotted the units in the project and then surrendered the unit before the expiry of due date.
15. For introductory purposes, the counsel for the complainant indicates that the respondent was demanding more than 10% of the total sale consideration without execution of BBA which the complainant refused to pay. However, the respondent on the other hand states in its reply that the complainant opted for payment plan 2 i.e., 50:50 plan annexed with the application form and the respondent raised the demand as per payment plan opted by the complainants. The complainants state that they opted to quit out of the

project after the demand of 40% as the BBA was not executed and requested for cancellation of the unit on 14.09.2020. Furthermore, the said request of cancellation dated 14.09.2020 was accepted by the respondent after several discussions on 20.10.2020. Although no email or letter is traced on record which shows that the insisted the respondent to complainant execute the BBA except the mail dated 21.11.2021.

16. The counsel for the respondent states that the request for cancellation was accepted because of default on the part of the allottee and it was very well conveyed that upon cancellation of your unit, you shall never be eligible for interest as per clause 8 of initial agreed terms and conditions which is application form, therefore, your earnest money has been forfeited.
4. 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". 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 farmed 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. Keeping in view the aforesaid facts and legal position, the cancellation of the allotted unit is held to be valid and forfeiture of the 10% of the earnest money of basic sale price cannot be said to be wrong or illegal in any manner. However, after forfeiting that amount to the extent of 10% of the basic sale consideration.
18. Since in the present case the complainants have only paid only ₹ 4,00,000/- i.e., 10% of the sale consideration i.e., ₹ 40,00,000/- and the said amount is liable to be forfeited by the respondent therefore, no case of refund is made out.

F. II. Compensation & litigation expenses.


19. The complainant in the aforesaid head is seeking relief w.r.t compensation. Hon'ble Supreme Court of India, in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), 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. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

20. The complaint stands disposed of. True certified copies of this order be placed on the case file.
21. Files be consigned to registry.

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.09.2023



(Sanjeev Kumar Arora)
Member

HARERA
GURUGRAM