

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

Complaint no.:	5371 of 2022
Date of filling of complaint:	28.07.2022
Oder reserved on:	19.07.2023
Date of pronouncement:	04.10.2023

Jyoti Bose Address:- H.NO U-24, A/26,first floor,DLF Phase III, Pink Town House ,Gurugram	Complainant
Versus	
Capital Heights Pvt Ltd Address:- Veritas Building ,4th floor, Golf Course Road, Sector 53 Gurgaon	Respondent
CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Shri Ravi Rao Proxy counsel	Advocate for the complainant
Shri Ishaan Singh proxy Counsel	Advocate for the Respondent

ORDER

1. This 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 provisions 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 details

2. The particulars of unit, 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:

Sr. No.	Particulars	Details
1.	Name of the project	Residences 360, Sector-70A
2.	Total area of the project	27.7163 acres
3.	Nature of the project	Group housing
4.	DTCP license no.	16 of 2009 dated 29.05.2009
	Validity of license	28.05.2024
	Name of licensee	Vibhore Home Developers Pvt. Ltd. And 6 others
5.	HRERA registered/ not registered	Not registered
6.	Unit no.	CR-02/15-04, Tower-CR-02, 15 th floor
7.	Unit measuring	1900 sq. ft.
8.	Provisional Allotment	20.09.2013



	letter dated	(Page 17 of complaint)
9.	Date of execution of buyer's agreement	Not Executed
10	Possession clause	<p>17. <i>Subject to Force Majeure, and further subject to all of the Apartment holders/ Applicant(s) of the Project, having complied with all its obligations under the terms and conditions of this Provisional Allotment and the Applicants) not being in default under any part of this Provisional Allotment including but not limited to the timely payment of the Sale Consideration and other charges and also subject to the Applicant(s) having complied with all formalities or documentation as prescribed by the Company, the Company proposes to hand over the possession of the Apartment to the Applicant within a period of 36 (thirty-six) months from the date of commencement of construction i.e. casting of the raft of the entire project, and this date shall be duly communicated to the Applicant(s) ("Commitment Period"). The Applicant(s) further agrees and understands that the Company shall additionally be entitled to a period of 180 (one hundred eighty) business days ("Grace Period"), after the expiry</i></p>



		<p><i>of the Commitment Period to allow for any contingencies or delays in obtaining the occupation/completion certificate etc., of the Project from the concerned Authorities/ departments. The Applicant(s) understands and agrees that the Company shall be entitled to an additional grace period of 90 (ninety) business days ("Additional Grace Period"), after the expiry of the Grace Period, for offering to handover the possession of the Apartment to the Applicant(s).</i></p> <p>(Emphasis supplied)</p>
11.	Date of start of construction dated	15.03.2013 (As per the payment schedule on page 32 of the complaint)
12.	Due date of possession	15.03.2016
13.	Total consideration	Rs. 1,18,95,900/-
14.	Total amount paid by the complainant	Rs. 23,07,669/-
15.	Occupation certificate	26.10.2021 (Page 59 of reply)
16.	Offer of possession	Not offered

B. Fact of the complaint

3. The complainant has made the following submissions: -



- i. The respondent gave advertisements in various leading newspapers about their forthcoming project named "Residences 360" Sector 70A, Gurgaon promising various advantages, like world-class amenities and timely completion/execution of the project, etc. Relying on the promise and undertakings given by the Respondent in the aforementioned advertisements, the complainant booked an apartment/flat measuring 1900 sq. ft (approx) in the aforesaid project of the Respondent for a total sale consideration is Rs 11895900/-.
- ii. The Complainant made a payment of Rs. 23,07,669/-to the Respondent vide different cheques on different dates. That flat buyers agreement was executed on dated 23.01.2013 and as per fba the respondent had allotted a unit/flat bearing No. 15-04 in Tower No. CR-02 having a super area of 1900 sq. ft (approx). to the Complainant. As per para-No. 17 of the Agreement, the Respondent had agreed to deliver the possession of the flat within 36 months from the date of commencement of construction i.e 15.03.2013.
- iii. The Complainant used to telephonically ask the respondent about the progress of the project and the respondent always gave the false impression that the work is going in full mode and accordingly asked for the payments which the complainant gave on time and the complainant visited to the site was shocked & surprised to see that construction work is not in and no one was present at the site to address the queries of the

Complainant. It appears that Respondent has played fraud upon the Complainant. The only intention of the Respondent was to take payments for the flat without completing the work and not handing over the possession on time.

- iv. The Respondent mala-fide and dishonest motives and intention cheated and defrauded the Complainant. Despite receiving more than 25% approximately payments on time for all the demands raised by the Respondent for the said Flat and despite repeated requests and reminders over phone calls and personal visits of the Complainant, the respondent has failed to deliver the possession of the allotted Flat to the Complainant within stipulated period.
- v. That it could be seen that the construction of the block in which the Complainant flat was booked with a promise by the Respondent to deliver the flat by 14.03.2016 but was not completed within time for the reasons best known to the Respondent which clearly shows that ulterior motive of the respondent was to extract money from the innocent people fraudulently.
- vi. That due to this omission on the part of the Respondent the Complainant has been suffering from disruption in his living arrangement, mental torture, and agony and also continues to incur severe financial losses. This could have been avoided if the Respondent had given possession of the Flat on time. As per clause 18 of the agreement, it was agreed by the Respondent that in case of any delay, the Respondent shall pay to the



Complainant a compensation @ Rs. 10/- per sq. ft. per month of the super area of the flat. It is however, pertinent to mention here that a clause of compensation at such a nominal rate of Rs. 10/- per sqft per month for the period of delay is unjust and the Respondent has exploited the Complainant by not providing the possession of the flat even after a delay from the agreed possession plan. The Respondent cannot escape the liability merely by mentioning a compensation clause in the agreement. It could be seen here that the Respondent has incorporated the clause in one-sided buyer's agreement and offered to pay a sum of Rs. 10 per sq.ft for every month of delay. If we calculate the amount in terms of financial charges it comes to approximately @ 2% per annum rate of interest whereas the Respondent charges @ 18% per annum interest on delayed payment. That on the grounds of parity and equity the Respondent also be subjected to pay the same rate of interest hence the Respondent is liable to pay interest on the amount paid by the Complainant from the promise date of possession till the flat is actually delivered to the Complainant.

- vii. The Complainant has requested the Respondent several times on making telephonic calls and also personally visiting the offices of the Respondent to deliver possession of the flat in question along with Prescribed interest on the amount deposited by the Complainant but the Respondent has flatly refused to do so. Thus, the Respondent in a pre-planned manner defrauded the Complainant with his hard-earned huge amount

of money and wrongfully gained himself and caused wrongful loss to the Complainant.

C. Relief sought by the complainant

4. The complainant has sought the following relief sought: -

- i. Direct the respondent to refund the amount of Rs. 23,07,669/- deposited by the complainant with interest of every month from date of payment till the realization of full amount.

D. Reply by the respondent

5. The respondent contested the complaint on the following grounds :

- i. At the very outset, it is submitted that the present complaint is not maintainable or tenable in the eyes of the law. The Complainant has misdirected themselves in filing the above-captioned complaint before this Authority as the reliefs being sought by the Complainant do not fall within the realm of the jurisdiction of this Authority. It is pertinent to mention here that for the fair adjudication of grievances as alleged by the Complainant, detailed deliberation by leading the evidence and cross-examination is required, thus only a Civil Court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication.
- ii. That presently, the Authority is not the right forum for the reliefs sought by the Complainant as there is no question of a refund to be given in view of the catena of judgments passed by the Real Estate Regulatory Authority, Gurugram. The Complainant is attempting to seek an advantage from the



slowdown in the real estate sector and is trying to seek an undue advantage by concealing the true facts.

iii. That the Complainant has himself violated the obligations as set forth in Section 19 of the RERA Act and has further breached his duty as allottee by not paying the consideration amount set to be paid as per the payment plan, which was duly informed and accepted by the Complainant. The present complaint has been filed by the Complainant by hiding the true facts of the present case and by placing half-baked truths before this Authority. Thus, the present complaint ought to be dismissed with heavy costs.

iv. That the Complainant has failed to make timely payments as per the agreed payment plan. It is most pertinent to submit that, despite numerous opportunities, reminders, and additional chances, the Complainant has failed to fulfill their promise of paying the total consideration amount as mutually agreed upon and thus, with no fault on the part of the Respondent. Further, the Respondent had issued a final notice dated 05.01.2015 intimating the Complainant to clear the outstanding dues and upon failure of the same, the Unit booked by the Complainant shall be cancelled. Despite such final notice, the Complainant has utterly failed to clear the outstanding dues.

v. That the Complainant has failed to disclose that despite repeated reminders from the Respondent, the Complainant failed to clear the dues timely. That further the Respondent has sent numerous reminders as well as demand letters to the



Complainant on 15.05.2013, 08.07.2014, 15.07.2014, 01.09.2014, 10.10.2014, 10.11.2014, 25.11.2014, 01.01.2015, 05.01.2015, 15.01.2016, 20.03.2016, 16.05.2016, 20.06.2016 and 07.07.2016 asking the Complainant to make payment of the due amount but having no positive result. It is humbly submitted that the Complainant was a regular defaulter.

vi. It is submitted that when the above-mentioned reminders, opportunity, and several chances were given to the Complainant, the Respondent was legally entitled to cancel the allotment on account of non-payment of instalments due and to forfeit the earnest money deposited by the Complainant, however, as a gesture of goodwill, instead of forfeiting the earnest money paid by the Complainant against the Unit, the Respondent agreed to grant some time to the Complainant to make payment towards the outstanding dues and thus only after waiting for 9 years since booking, did the Respondent issued the final notice dated 05.01.2015. It is pertinent to mention that the Complainant has committed breach of understanding arrived at between the parties and failed to make any payment towards the Unit, despite various requests and reminders by the Respondent.

vii. That the Complainant has come before this Authority with unclean hands only to unjustly enrich itself at the cost of the Respondent. The complaint has been filed by the Complainant just to harass the Respondent and to gain unjust enrichment. The actual reason for filing the complaint stems from the



change in financial valuation of real estate sector in the past few years and this shows the malicious intention of the Complainant to earn some easy money.

- viii. It is humbly submitted that the project in question has been completed by the Respondent company. Moreover, the Respondent has received the Occupation Certificate from the Director General, Town and Country Planning, Chandigarh, Haryana, vide letter dated 26.10.2021.
- ix. That since the hurdles faced by the Respondent were beyond its control, hence no fault can be found qua the Respondent. It is further submitted that it was never the intention of the Respondent to not complete the project on time. Rather, the alteration in the timeline was beyond the control as indicated in the previous paragraph. That it is extremely imperative to bring to the notice of this authority that the alteration in the timeline for the development of the project was due to external, unseen, and unavoidable reasons and that there was no intentional delay on the part of the Respondent.
- x. That it further submitted that out of the Basic Sale Consideration of Rs. 1,18,95,900/- the Complainant has merely paid Rs. 23,07,669/-, which is inclusive of taxes amounting to Rs. 69,170/-. That further the Respondent has sent numerous reminders to the Complainant on 15.05.2013, 08.07.2014, 15.07.2014, 01.09.2014, 10.10.2014, 10.11.2014, 25.11.2014, and 05.01.2015 asking the Complainant to make payment of the due amount but the same were to no avail. Since the

Respondent has already received the Occupation Certificate way back in 26.10.2021, without prejudice to any rights of the Respondent it is submitted that, in the present case if the Authority allows the prayer of refund in favour of the Complainant, then it is a matter of right of the Respondent that relief under Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulation, 11(5) of 2018 be made applicable, and the Respondent be directed to refund the monies deposited by the Complainant only after deduction of earnest money @ 10% of total sale consideration. Therefore, the present complaint filed by the Complainant deserves to be dismissed with heavy costs.

6. Copies of all the relevant documents 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 submission made by the parties.

E. Jurisdiction of the Authority

7. The respondent has raised a preliminary submission/ objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding the rejection of the 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. 2020-2021 (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*** 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. 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 complainant

F.I Direct the respondent to refund the amount of Rs. 23,07,669/- deposited by the complainant with interest every month from date of payment till the realization of the full amount.

13. The complainant was allotted unit no. CR-02/15-04, Tower-CR-02, 15th floor in the project "Residences 360, Sector-70A" by the respondent-builder for a sale consideration of Rs. 1,18,95,900/- and she paid a sum of Rs. 23,07,669/- which is approx. 19% of the sale consideration. A builder buyer's agreement is not executed between parties with regard to the allotted unit. So the due date of possession is calculated from the date of start of construction i.e., 15.03.2013, and handover possession of the same comes out to 15.03.2016. The complainant failed to pay the amount due against the allotment unit.

14. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 months from the date of start of commencement of construction, and further provided in agreement that the promoter shall be entitled to a grace period of 180 days for obtaining the completion certificate/occupation certificate in respect of the unit and/or the project. The period of 36 months expired on 15.03.2016 as a matter of fact, the promoter has not applied to the concerned authority for obtaining completion



certificate/ occupation certificate within the grace period prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

15. The 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.
16. This is an eventuality where the promoter obtaining occupation certificate and the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate. The allottee in this case has filed this application/complaint on 28.07.2022 after obtaining occupation certificate by the promoter. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when occupation certificate was obtained by the promoter and demand for due payment was raised then only filed a complaint before the authority. Section 18(1) gives two options 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

17. 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 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 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

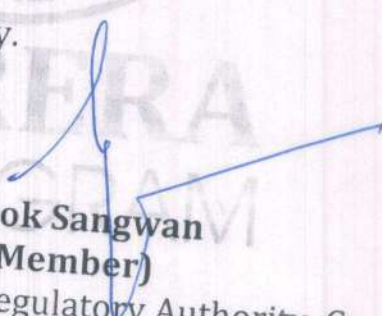
18. Keeping in view, the aforesaid legal provision, the respondent/promotor is directed to refund the paid-up amount after deducting 10% of the sale consideration and shall return the amount along with interest at the rate of 10.75% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of filling of complaint i.e., 28.07.2022 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid.*

G. 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 is directed to refund the paid-up amount of Rs. 23,07,669/- after deducting 10% of the sale consideration of Rs. 1,18,95,900/- with interest at the prescribed rate i.e., 10.75% p.a. on such balance amount, from the date of filing of complaint i.e., 28.07.2022.
 - 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.
 - iii. The Planning branch of the authority is directed to initiate Suo-moto cognizance against the respondent/promoter for non-registration of the project under this Act and separate proceeding shall be initiated against the respondent under section 59 of the Act.
20. Complaint stands disposed of.
21. File be consigned to registry.


Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 04.10.2023

10/10/2014

HARERA
GUYANA

The respondent is directed to return the loan-up amount of
\$200,000 after deducting 10% of the respondent's net
income for the year ending 31st December 2013, to the
respondent with interest at the prescribed rate of 10%
per annum from the date of filing of accounts.

A period of 30 days is given to the respondent to comply with
the directions given in this order and return within 14
days of the order.

The Planning Bank's authority is directed to initiate an
enforcement action against the respondent/producer for non-
compliance with the order and to report the same to the
Registrar of the Bank and the relevant
proceedings shall be initiated against the respondent under
section 54 of the Act.

20. Complaint stands dismissed.
21. This order is made on 10/10/2014.

[Signature]
[Name]
[Title]
[Address]
[Phone Number]