

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

Complaint no. : 855 of 2023
Date of filing complaint: 07.03.2023
First date of hearing: 29.08.2023
Date of decision : 19.10.2023

1. Mrs. Shalini Kumar
 2. Mr. Vikas Kumar
- Both RR/o:** House No. C6/6485, Vasant Kunj, New
Delhi- 110070

Complainants

Versus

M/s Blackberry Realcon Private Limited
Regd. office: 11th Floor, Paras Twin Towers (tower-
B), Sector- 54, Golf Course Road, Gurugram- 122002

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE WHEN ARGUED:

Sh. Abhey Jain (Advocate)

Complainants

Sh. Himanshu Singh (Advocate)

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 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

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

S. N.	Particulars	Details
1.	Name and location of the project	"Paras Square" situated in Sector 63 A, Gurugram
2.	Nature of the project	Commercial Project
3.	Project area	2.20 acres
4.	DTCP license no.	23 of 2013 dated 17.05.2023
5.	Name of licensee	Yule Prop build Pvt. Ltd C/o Blackberry Realcon Pvt. Ltd.
6.	RERA Registered/ not registered	Registered GGM/281/2018/13 dated 06.09.2018 valid upto 31.12.2018
7.	Date of booking	27.04.2013 (As per annexure 1, at page no. 29 of the complaint)
8.	Date of Allotment	05.08.2013 (Page no. 49 of the complaint)
9.	Welcome Letter	09.08.2013 (Page no 50 of the complaint)
9.	Apartment No.	ST/0703 (Page no. 49 of the complaint)
10	Unit Type	Studio Apartment
11.	Unit area admeasuring	870 sq. ft. (Page no. 49 of the complaint)
12.	Date of builder buyer agreement	Not executed
13.	Possession clause	Cannot be ascertained
14.	Surrender Letter	28.11.2014 (Page no. 53 of the complaint)
15.	Total sale consideration	Rs.83,27,490 (As per annexure 1 at page no. 29 the complaint)



16.	Amount paid by the complainant	Rs.15,57,287/- As per Annexure 1 at pg. 29 complaint
17.	Occupation certificate	23.07.2018 (As brief fact of the reply at page no. 2 of the reply)
18.	Completion certificate	24.01.2020 (As brief fact of the reply at page no. 2 of the reply)

B. Facts of the complaint:

3. The complainants have made the following submissions in the complaint: -
- I. That the respondent published very attractive colourful brochure, highlighting the project 'Paras Square' situated in Sector 65 A, Gurugram, Haryana. The respondent claimed to be one of the best and finest in construction and one of the leading real estate developers of the country, in order to lure prospective customers including the complainants to buy retail/service apartment in the project. There are fraudulent and misleading representations, incorrect and false statements in the brochure.
 - II. That the complainants were approached by the sale representatives of the respondent, who made tall claims about the project 'Paras Square' describing it as the world class project. They were invited to the sale office and were lavishly entertained and promises were made to them that the project would be finished in time, complete with parking, horticulture, parks, club, and other common area facilities. The complainants were impressed by their statements, oral representations

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and promises and ultimately lured to book a retail/service apartment in the project by filing an application form and paid Rs.10,00,000/- via cheque no. 905477 dated 27.04.2013 to the respondent for booking the apartment in the project. The respondent issued a provisional receipt no. PS/ST/0703/BA dated 05.08.2013 to the complainants and acknowledged the booking payment.

- III. That the respondent confirmed the booking of the retail/service apartment in the project and issued an allotment letter dated 05.08.2013 to the complainants. The respondent allotted Studio Apartment No. ST/0703 having a super area of 870 square feet to the complainants under the construction linked payment plan. The total consideration of the apartment is Rs.83,27,490/- inclusive of EDC charges amounting Rs.3,74,970/-, IDC charges amounting Rs.61,770/-, car parking charges amounting Rs.3,00,000/- and interest free maintenance security (IFMS) amounting Rs.1,08,750/-. Thereafter, the respondent also issued a welcome letter dated 09.08.2013 to the complainants for welcoming the complainants in the said project.
- IV. That the complainants further paid Rs.5,57,287/- to the respondent via cheque no.142237 dated 01.01.2014 for the said apartment. The respondent acknowledged the payment and issued receipt no. 0476 dated 03.01.2014 to the complainants. Till January, 2014, they have paid, as and when demanded by the respondent, a total sum of Rs.15,57,287/- for the said apartment.

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- V. That in November, 2014, due to unavoidable circumstances, the complainants decided to withdraw from the project and requested the respondent vide letter along with an Affidavit dated 24.11.2014 to cancel the allotment of the apartment no. ST/0703 and return/refund the deposited amount for the apartment to the complainants. They also returned the original payment receipts, no. PS/ST/0703/BA dated 05.08.2013 amounting Rs.10,00,000/- and no. 0476 dated 03.01.2014 amounting Rs.5,57,287/- to the respondent for cancellation of the apartment. The respondent acknowledged the cancellation letter of the complainants on 28.11.2014.
- VI. That the respondent didn't bother to respond to the cancellation request made by the complainants and refund the money to the complainants, even after repeated requests, phone calls and personal visits made by them. The complainants again sent an email dated 25.07.2016 to the respondent and requested for refund their deposited amount at the earliest.
- VII. That since no response was received from the respondent, the complainants again sent a reminder email dated 14.04.2017 to the respondent requesting to refund the deposited amount at the earliest. They also attached the receipt of tax deposited at source (TDS) deducted on the payments made to the respondent for the said apartment and deposited with the concerned department.



VIII. That till date more than eight (8) years and three (3) months, the respondent took no action and did not respond to the cancellation request of the complainants and withheld the hard earned money of the complainants even after repetitive requests made by the complainants. The respondent also failed to execute the builder buyer's agreement with the complainants for the said apartment, despite receiving more than ten percent amount for the said apartment.

IX. That the complainants have fulfilled their duty by returning the original payment receipts to the respondent along with the cancellation letter on 28.11.2014. As per the terms and conditions mentioned in the application form signed by the complainants at the time of booking in 2013, the respondent can forfeit ten percent of the basic sale price as earnest money from the deposited amount on non-fulfilment of the terms and conditions, and refund the balance amount. But, still respondent has not refunded the amount to the complainants after deducting the earnest money as per the terms and conditions of the application form.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):
 - i. Direct the respondent to return the deposited amount after forfeiture of 10% of the basic sale price as earnest money for cancellation of the studio apartment, along with the prescribed rate of interest as per Act,



2016, from the respondent from the date of cancellation request i.e., 28.11.2014 till the amount is refunded to the complainants.

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 respondent:

6. The respondent has contested the complaint on the following grounds:-
- i. That the present complaint is badly hit/barred by the period of limitation. As per their own admission in the complaint, the cause of action arose on 28.11.2014, when they submitted the cancellation letter along with affidavit to the respondent for cancellation of the allotted unit bearing no. ST/0703 in the project, "Paras Square" situated at Sector-63 A, Gurugram, and Haryana. Further, as per their own admission, this complaint has been filed after the delay period of 8 years 3 months after the cause of action.
 - ii. That the present complaint raises several such issues which cannot be decided by way of the present complaint in summary proceedings. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint are beyond the purview of RERA and can only be adjudicated by a civil court. The present complaint deserves to be dismissed on this ground alone.
 - iii. That the instant complaint is not maintainable in terms of decision of the Hon'ble Apex Court in *IREO Grace RealteH Pvt Ltd vs Abhishek Khanna &Ors (2021) 3 SCC 241* wherein it was specifically held that in

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cases where the respondent/builder is already in receipt of occupancy certificate pursuant to which the respondent/builder has even offered possession of unit to an allottee that too before institution of the case, the allottees in such cases are bound to take possession of their unit with DPC, if any, and no order of refund is warranted in such cases.

The ratio of aforesaid judgement is very well applicable to the facts and circumstances of the instant case. The respondent has already obtained occupancy certificate for the project on 23.07.2018. That the complainant has not disclosed the real and true facts of the case. In fact, the complainants had shown interest for purchase of studio apartment of 870 sq. ft. at basic sale price of Rs.8600 per sq. ft. in the said project for the basic sale price of Rs.8600 per sq. ft. + other charges towards car parking, EDC, IDC, IFMSD, taxes etc. for a studio apartment of 870 sq. ft. was agreed to between the parties.

- iv. That it was explicitly mentioned in the application form referred to above that in case the instalments were delayed, the complainants would proceed to pay interest on delayed payments. It was further mentioned that the right of the respondent to realise interest would be without prejudice to its right to cancel the allotment.
- v. That in the present case the complainants failed to make payment of instalments along with interest in the manner stated above within a period of 60 days from the date of booking, the respondent would be entitled to forfeit the amount of earnest money/registration money deposited by them along with brokerage paid (if any) and the allotment would in such event stand cancelled and the complainants would have no lien/charge/interest/right in respect of the said apartment.



- vi. That it was also recited in the application form that in the event of cancellation in the manner contemplated above, the amount paid over and above the earnest money would be refunded without any interest by the respondent after adjustment of interest on delayed payments, if any due from the complainants.
- vii. That it was categorically mentioned in the application form referred to above that in case the complainants at any stage sought cancellation of allotment and/or refund of the amount deposited, the respondent would at its absolute discretion be entitled to forfeit the earnest money, brokerage paid, interest accrued and refund the remaining amount paid by them. It was further mentioned that earnest money had been quantified to be 10% of the basic sale price.
- viii. That the details of payment plan had been revealed by the respondent to the complainants during the course of enquiries made by them prior to making the booking referred to above and accordingly complainants has proceeded to make part booking payment of Rs.10,00,000/-. Further, the complainants have made one payment with in a period of 60 days from the date of booking i.e., Rs.5,57,287/-. However, it soon transpired that the complainants had proceeded to make the booking referred to above in respect of studio apartment with the intention of earning short-term speculative profit from real estate investment. At the relevant point of time the profits anticipated by the complainants did not materialize on account of adverse market conditions over which the respondent had absolutely no control. In any case, it had never been represented by the respondent to the complainants directly or impliedly that the complainants would necessarily generate

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any short-term profit from making booking of the apartment in question.

- ix. That instead of making payments in terms of payment plan, the complainants issued a letter dated 28.11.2014, with regard to cancelation of their allotment of unit/flat bearing no ST/0703 admeasuring super area "870 sq. ft." in the said project.
- x. That the complainants are not legitimately entitled to seek refund of any amount. They cannot be permitted to take advantage of his own illegal and wrong acts. The complainants have consciously and knowingly refrained from abiding by covenants incorporated in the application form voluntarily and consciously executed and submitted by them. In any case, the demand of the complainants for refund of any amount is contrary to terms and conditions of application for booking voluntarily and consciously executed and submitted by them.
- xi. That the provisions of the Act of 2016, have been misinterpreted and misconstrued by the complainants. The provisions of the aforesaid statute could not have any retrospective operation. There did not exist any valid circumstance whatsoever for the complainants to have instituted the present complaint. Thus, institution and prosecution of the present litigation by the complainant constitutes gross misuse of process of law. In the present case, the respondent has been needlessly victimized and harassed by them. The application preferred by the complainants deserves to be dismissed with punitive costs.
- xii. That the present complaint is not maintainable since not only is the complainant in breach of the application form and allotment letter but has also violated provisions of the Act, 2016 and the Rules, 2017 and section 19 of the Act, 2016 lays down the rights and duties of the

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allottees and sub-clause (6) of Section 19 provides that the allottee shall be responsible to make payments in the manner and as per the time specified in the agreement between the parties.

7. 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 those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

8. 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 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

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)

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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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

9. 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.
10. Further, the authority has no hitch in proceeding with the complaint and to grant a relief sought of the complainants in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 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."

11. 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. Direct the respondent to return the deposited amount after forfeiture of 10% of the basic sale price as earnest money for cancellation of the apartment, along with the prescribed rate of interest as per Act, 2016, from the respondent from the date of cancellation request i.e., 28.11.2014 till the amount is refunded to the complainants.**
12. The complainants were allotted a unit bearing no. ST/0703, area admeasuring 870 sq. ft. for the studio apartment in the project "Paras Square" by the respondent/builder for a total consideration of Rs.83,27,490/- and the complainants have paid an amount of Rs.10,00,000/- as booking amount in the year 2013. Further, the respondent company issued an allotment letter and welcome letter on 05.08.2013 and 09.08.2013 respectively for the said studio apartment in favour of the complainants. Thereafter, the complainant paid an amount of Rs.5,57,287/- and the total amount of Rs.15,57,287/- paid by the complainants to the respondent in the year 2014.
13. Moreover, the complainants wrote an letter to the respondent on 28.11.2014, and even requested withdrawal/surrender of the allotment of the said unit due to the harsh circumstances of them as per page no. 53 of the complaint reproduced as under for ready reference: -

*"In this connection I wish to state that due to some unavoidable circumstances I want to cancel my application. We therefore request you **to cancel my***





application /registration for provisional allotment of apartment and refund me the amount paid by me as aforesaid.

*We hereby relinquish all my rights, title and interest whatsoever on my aforesaid application for registration for allotment of a flat, I shall have no charge lien or claim either for allotment against my application for registration of for Interest or for damages whatsoever over the Company and my account shall stand fully and finally settled. I hereby return the original money receipt no. PS /S * T/703/B * A bearing provisional unit no. ST 0703 dated 5/8/2013 issued to me. We hereby affirm that we have not represented to anybody of having any firm booking against the aforesaid application and has not otherwise created any charge of any third party interest upon the aforesaid application and undertake to keep the Company saved harmless and indemnified against all losses, costs and damages."*

14. The counsel for the respondent contented that the present complaint is not maintainable and barred by the law of limitation as the complainant /allottees have already withdrawn from the project on 28.11.2014. Therefore, the present complaint is liable to be dismissed. However, the complainants draws the attention of the authority towards the letter dated 28.11.2014, along with continuous follow-ups through letters and e-mails dated 25.07.2016, 17.04.2017, 13.04.2021, 29.10.2022 and the 21.02.2023 vide which they requested the respondent to cancel the allotment and to make refund of the amount paid, but the said request was not entertained by the respondent. Therefore, the cause of action is continuous as the respondent has not adhered to the request of the complainant and has not refunded the amount paid till date. Thus, the complaint is maintainable. After considering facts available on record as well as submissions made by the parties, the Authority is of considered view that the present complaint is maintainable as the cause of action still survives and the pleas advanced by the respondent is rejected being devoid of merits.
15. The OC for the said project of the allotted studio apartment was granted on 23.07.2018 and the completion certificate on 24.01.2020. It is evident from the above-mentioned facts that the complainants have paid a sum of Rs.15,57,287/- against sale consideration of Rs.83,27,490/- of the unit

allotted on 05.08.2013. Thereafter, the complainants wrote a letter to the respondent on 28.11.2014, and even requested withdrawal/surrender of the allotment of the said unit due to the harsh circumstances of them. Moreover, despite repeated requests for the refund of the deposited amount after deduction of 10% as earnest money, no refund has been made to the complainants and hence requests for seeks refund of the deposited amount after forfeiture of 10% of the basic sale price along with interest.

16. The terms and the relevant clauses of the application form are reproduced under for a ready reference:

13. *The Applicant agrees that out of the amount(s) paid/payable by him/ it towards the sale price of the Retail/Service Apartments, **the Company shall treat 10% of the sale price as earnest money** ("Earnest Money") to ensure due fulfillment, by the Applicant(s) of all the terms and conditions as contained herein and in the Buyer's Agreement.*

14. *The Applicant(s) hereby authorizes the Company to **forfeit the Earnest Money along with the interest paid, due or payable along with any other amounts of non-refundable nature in case of non-fulfillment of any of the terms and conditions herein contained** and those of the Buyer's Agreement as also in the event of failure by the Applicant to sign and return to the Company the Buyer's Agreement within [thirty (30)] days of its dispatch by the Company.*

17. Further, the Hon'ble Apex Court of land 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, (2016) 4 SCC 136***, 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 provision of the section 74 of the Contract Act, 1872 are attracted and the party so forfeiting must prove actual damage.

18. Even keeping in view, the principle laid down by the Hon'ble Apex Court of the land, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, framed regulation 11 provided 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."*

19. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainants after deducting 10% of the sale consideration and return the remaining 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 withdrawal/surrender i.e., 28.11.2014 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:

20. 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 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.15,57,287/- after deducting the earnest money which shall not exceed the 10% of the sale consideration of Rs.83,27,490/-. The refund should have been made on the date of withdrawal/surrender i.e., 28.11.2014. Accordingly, the interest at the prescribed rate i.e., 10.75% is allowed on the balance amount from the date of surrender till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017.
- 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.

21. Complaint stands disposed of.

22. File be consigned to the registry.

Dated: 19.10.2023

HARERA
GURUGRAM


(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram