

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

Complaint no.	:	2127 of 2021
Date of complaint	:	19.04.2021
Date of order	:	20.09.2023

Vivek Khurana,
R/o: - 739/19, Sainik Public School,
Hansi, Hisar, Haryana-125033.

Complainant

Versus

M/s Pareena Infrastructures Private Limited
Office at: C7 A, 2nd Floor, Omaxe City, Centre Mall,
Sohna Road, Sector-49, Gurugram, Haryana.

Respondent

CORAM:

Ashok Sangwan

Member

APPEARANCE:

Priyanka Aggarwal (Advocate)

Prashant Sheoran (Advocate)

Complainant

Respondent

ORDER

1. The present 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 thereunder or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S.N.	Particulars	Details
1.	Name and location of the project	"Coban Residences", sector-99A, Gurgaon
2.	Nature of the project	Group Housing Project
3.	Project area	10.5875 acres
4.	DTCP license no.	10 of 2013 dated 12.03.2013 valid up to 11.06.2024
5.	Name of licensee	Monex Infrastructure Pvt. Ltd.
6.	RERA Registered/ not registered	Registered Vide no. 35 of 2020 issued on 16.10.2020 valid up to 11.03.2024 + 6 months = 11.09.2024
7.	Unit no.	1801, 18 th Floor, Tower T-3 [Page 21 of the complaint]
8.	Unit admeasuring area	1997 sq. ft. of super area [Page 21 of complaint]
9.	Allotment letter	27.11.2013 [Page 19 of the complaint]
10.	Date of builder buyer agreement	06.04.2014 [page 20 of the complaint]
11.	Possession clause	<i>3.1 That the developer shall, under normal conditions, subject to force majeure, complete construction of Tower/Building in which the said flat is to be located with 4 years of the start of construction or execution of this Agreement whichever is later, as per the said plans.....</i> Emphasis supplied....
12.	Date of start of construction	16.10.2014 (start of excavation) [page 48 of reply]

13.	Due date of possession	16.10.2018 [Calculated from the date of start of construction]
14.	Total sale consideration	Rs. 1,21,43,771/- (excluding service tax) [page 33 of the complaint]
15.	Total amount paid by the complainant	Rs. 65,38,736/- [as per SOA on page 16 of the complaint]
16.	Occupation certificate	N/A
17.	Demand Letter	25.05.2017 [page 90 of the reply]
18.	Reminder Letters	24.01.2017, 08.04.2017, 11.07.2017, 13.07.2018, 20.11.2020, 29.01.2021, 22.02.2021
19.	Cancellation Letter	16.08.2021 [page 110 of reply]

B. Facts of the complaint:

- I. That the complainant approached the respondent for booking of a flat in the project named "The Coban Residences" at Sector 99A, Gurugram. Accordingly, a flat bearing no. T3/1801, Tower-T3, admeasuring 1997 sq.ft. in the said project was allotted to him vide allotment letter dated 27.11.2013. Thereafter, a builder buyer agreement dated 06.04.2014 was executed between the parties for a total sale consideration of Rs.1,21,43,771/- and he has paid an amount of Rs.65,38,736/- in all.
- II. That the respondent has illegally and arbitrarily demanded money from the complainant without even doing appropriate work at the project site as agreed under construction linked payment plan.
- III. That as per clause 3.1 of the buyer's agreement the due date of possession was 16.10.2018. However, the respondent has failed to hand over possession of the unit even after passing 3 years from the agreed due date of possession. Further, as per project registration



form A to H filed before this authority in the year 2020, the construction status of the project is not more than 33% in financial terms, but the respondent has demanded more than 90% from the complainant. Therefore, the complainant stopped making the remaining payment after paying 64% of basic sale price.

- IV. That on seeing the construction status and absence of basic amenities at the project, the complainant many times visited the office of respondent and requested for refund of paid amount along with interest, but the builder always gave false assurance about completion of unit. After a long perusal complaint also sent an email dated 07.03.2021 but he did not get any reply.
- V. That the respondent has failed to complete the project and obtain the occupancy certificate for unit due to which the complainant has suffered a great financial loss, mental trauma and had suffered a great setback.

C. Relief sought by the complainant:

3. The complainant has sought following relief(s):

- I. Direct the respondent to refund paid-up amount along with interest.

D. Reply by respondent:

4. The respondent vide reply dated 17.08.2021 contested the complaint on the following grounds:

- i. That in the year 2014 complainant had executed two apartment buyer agreements against unit no. 1801 and 401 in its project named "Coban Residences" and had paid an amount of Rs.26,95,029/- against total sale consideration of Rs.1,04,42,900/- + taxes regarding unit no.401.
- ii. That complainant had made several defaults in making payment of demands raised against unit no. 401. As the complainant was unable



to pay the amount against said unit, he requested the respondent to merge the amount paid by him against unit no. 401 towards unit no 1801 and the said merger was accepted by it vide letter dated 05.10.2016 subject to the condition of timely future payments. Further, the complainant also agreed to the condition that he shall never withdraw from the project. Thus, in view of these conditions, the complainant has no right to seek a refund.

- iii. That as the complainant failed to abide by the terms and condition of apartment buyer agreement. Thus, the respondent cancelled the allotment of complainant against unit in question and forfeited the earnest money of earlier unit i.e., 401 tower 6 as well, as per agreed terms.
- iv. That non-payment is one of the major issues faced by all the developers including respondent. Further, the respondent while developing the said project, several orders/notifications were kept on passed by various authorities/courts like NGT or supreme court where construction activities were either completely stopped or levied such condition which makes it highly difficult to develop the project, even when developer is facing shortage of fund due to non-payment of installments by allottees. Thus, from the above stated facts and circumstances, if the authority passes an order of refund than it shall be extremely prejudicial to the rights of respondent as well as other allottees who are also being suffered due to fault of allottees like present one. Therefore, the present complaint is not maintainable and is liable to be dismissed.
5. 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:

6. 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

7. 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

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 allottee 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 complainant at a later stage.

F. Findings on the objections raised by the respondent.

F.I Objection regarding the delay in payments.

10. The objection raised by the respondent regarding delay in payments by the allottee is totally invalid as he has already paid an amount of Rs.65,38,736/- against the total sale consideration of Rs.1,21,43,771/- to it as per the construction linked payment plan. The fact cannot be ignored that there might be certain group of allottees who defaulted in making payments. But upon perusal of documents on record, it is observed that no default has been made by him in the instant case. Hence, the plea advanced by the respondent is rejected.

F.II Objection regarding force majeure conditions.

11. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders/restrictions of the NGT as well as competent authorities, High Court and Supreme Court orders, spread of Covid-19 across worldwide. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 16.10.2018. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons



and it is a well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainant:

G.I Direct to the respondent to refund the paid-up amount along with interest.

12. The complainant had booked two units bearing no.s 1801 and 401 in the project named "Coban Residences" at sector-99A, Gurugram. Further, on 05.10.2016, the complainant sent a letter to the respondent to cancel the allotment of unit T6/401 and made a request to transfer all the payments made for cancelled unit to the account of unit no. T3/1801 in the said project and the said request was accepted by the respondent vide letter dated 05.10.2016. The buyer's agreement was executed between the parties on 06.04.2014. However, as per possession clause 3.1 of the buyer's agreement, the possession of the unit was to be handed over within 4 years from the date of start of construction i.e., 16.10.2014 or execution of the said agreement. Therefore, the due date for handing over of possession comes out to be 16.10.2018 being later. Thereafter, on non-fulfillment of the terms and obligations of the promoter by the respondent, the complainant vide email dated 07.03.2021 requested it to cancel the allotment of the unit in question and to refund the paid amount alongwith interest, but the respondent despite refunding the amount paid by him illegally and arbitrarily cancelled the allotment and forfeited the amount paid by him vide cancellation letter dated 16.08.2021 after filing of the present complaint.
13. On consideration of the documents available on record and submissions made by both the parties, the authority is of the view that there has been



a huge delay on the part of respondent in completing construction of the project in question. Further, the complainant vide email dated 07.03.2021 requested the respondent to cancel his allotment on non-completion of the project in due time as agreed between the parties vide buyer's agreement dated 06.04.2014, but on failure of the respondent to refund the same, the complainant has filed the present complaint dated 19.04.2021 seeking refund. Subsequently, after filing of the complaint the unit in question was tactically cancelled and the paid-up amount has been illegally forfeited by it vide cancellation letter dated 16.08.2021. Therefore, the cancellation done by the respondent cannot be held valid in the eyes of the law.

14. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in **Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.**, civil appeal no. 5785 of 2019, decided on 11.01.2021. The relevant para is reproduced as under:

".....The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

15. Further in the judgement of the Hon'ble Supreme Court of India in the cases of Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR (c), 357 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, it was observed as under:

“25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.”

16. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a) of the Act. The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
17. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 and 72 read with section 31(1) of the Act of 2016.
18. **Admissibility of refund along with prescribed rate of interest:** The section 18 of the Act read with rule 15 of the rules provide that in case



the allottee intends to withdraw from the project, the respondent shall refund of the amount paid by the allottee in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules.

Rule 15 has been reproduced as under:

"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.: Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."*

19. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
20. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 20.09.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.
21. The authority hereby directs the promoter to return the amount received by him i.e., Rs.65,38,736/- 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 each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Rules *ibid*.



H. Directions of the Authority:

22. 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/promoter is directed to refund the entire amount paid by the complainant i.e., Rs.65,38,736/- along with prescribed rate of interest @10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 from the date of each payment till the date of refund of the deposited amount.
 - 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.
23. The complaints stand disposed of.
24. Files be consigned to the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.09.2023