

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

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| Complaint no. : | 2915 of 2021 |
| Date of filing complaint: | 23.07.2021 |
| Date of decision : | 22.12.2023 |

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| 1. Sh. Chetan Kaher 2. Sh. Satyen Kehar Both are R/O: Office No. 18, 1st Floor, Pitha Street, Fort, Mumbai-400001 | Complainants |
| Versus | |
| DLF Limited Regd. office: DLF Shopping Mall, 3rd Floor, Arjun Marg, DLF City Phase-I, Gurugram 122002 | Respondent |

CORAM:

Shri Sanjeev Kumar Arora

Member**APPEARANCE:**

Sh. Rishabh Jain (Advocate)

Complainants

Sh. Ishaan Dang (Advocate)

Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details



2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, 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 of the project | "The Ultima", Sec 81, Gurugram |
| 2. | Project area | 10.563 acres |
| 3. | DTCP license | 114 of 2012 dated 15.11.2012 and valid up to 14.11.2023 <i>Expired</i> |
| 4. | RERA Registered or not | Registered vide registration no. 52 of 2019 dated 20.09.2019 valid up to 30.11.2020 <i>Expired</i> |
| 5. | Unit no. | UTS-162, Tower-S, 16 th floor and the same was allotted on 15.04.2016. (page no. 150 of reply) |
| 6. | Unit area admeasuring | 2092 sq. ft. (page no. 150 of reply) |
| 7. | Date of builder buyer agreement | Not executed |
| 8. | Application form | 31.03.2016 [Page 150 of reply] |
| 9. | Sale consideration | Rs. 1,82,00,400/- (Page no. 220 of reply) |

| | | |
|-----|--|--|
| 10. | Amount paid by the complainants | Rs.1,38,44,923/- (As per page 2 of note on payment submitted by respondent) (As stated by complainant Rs.1,37,19,923/- + Rs. 1,25,000/- as additional paid on 30.03.2016- and also as per page 1 and 2 of note on payment submitted by respondent) |
| 11. | Due date of possession | 30.09.2021 31.03.2021+6 months of COVID (As calculated from 60 months from the date of application form as was mentioned in clause 19(a) of the application form at page 155 of reply) |
| 12. | Occupation certificate | 11.06.2018 (Page no. 208 of reply) |
| 13. | Letter of offer of possession for completing formalities | 14.02.2019 (Page no. 210 of reply) |

B. Facts of the complaint:

3. On or around 2008, the complainants had booked two flats, i.e., one each respectively, in a project being developed by the respondent in Chennai named DLF OMR at Chennai being apartment Nos. C35044/O-35/45#119 & C35044/O-35/46#119. The total consideration payable against apartments were Rs.71,62,634.07/- and Rs.69,59,097.87/-. They stated that they had paid an amount of Rs.69,61,730.07/- and Rs.67,58,193.87/- towards both the apartments to the respondent.

4. That they were unhappy with the workmanship and delays of the project DLF OMR at Chennai, on or around the second half of the year 2015, one Mr. Puneet Anand (Assistant General Manager - Marketing of the Respondent) contacted them and by his email dated 8.8.2015, requested them that the DLF team would be available in London and meet them between 8.8.2015 to 12.8.2015 for resolving the queries to the utmost satisfaction of them.
5. That on or about 12.8.2015, Mr. Puneet Anand met them in London and suggested that it would be more beneficial for them to move their booking from DLF OMR at Chennai to DLF Ultima being their flagship project at Gurugram being "The Ultima", DLF Garden City, Sector 81, Gurugram 122004. That as per the cost sheet the total sale price offered to them was Rs.2,06,48,040/- They state that the respondent by its email dated 7.10.2015, sent the application form for the said project and requested them to sign and send the said application form to the respondent. They finally accepted the proposal of transferring their investment from DLF OMR at Chennai to the said project and signed the application for allotment of an apartment being apartment No. UTS162 and parking No. PS1014/PS1015 and forwarded the copy of the said application for allotment of an apartment to the respondent by their email dated 23.11.2015.
6. The respondent promised them to give the possession within 60 months of the application. The respondent confirmed that the money paid against the

complainants' investment at DLF OMR at Chennai project would be transferred to this project and the balance would be payable on possession.

7. By email dated 29.3.2016, the respondent requested them to pay a sum of Rs.1,25,000/- to enable them to process the booking before 31.3.2016 and confirmed that the respondent shall refund this money, i.e., Rs.1,25,000/- to them post shifting of the amount internally.
8. That by letter dated 15.4.2016 addressed to them, the respondent confirmed that they had shifted their allotment from properties in DLF OMR and transferred all amounts to the new allotted unit. The respondent having confirmed that they had shifted their allotment and had transferred all amounts to the new allotted unit, the respondent continued to send demand notices calling upon them to pay monies which were not even due. On 29.10.2018, the complainant No. 1 by its email informed the respondent that he was coming to Delhi on 6th or 7th of December and would like to check the progress of the project.
9. On 14.2.2019, they received a letter from the respondent informing that the occupation certificate was received and asked them to pay the balance dues of Rs.1,04,86,369.40 and comply with the procedure of documentation following possession formalities. They state the amount payable by the complainants on possession was only Rs.43,26,315/- + service tax and registration charges. They state that demand of Rs.1,04,86,369.40 by the respondent was total misrepresentation and unfair practice. By email dated 23.3.2019, the respondent confused them about the total amount

transferred from the Chennai units collectively. Thereby, they requested the respondent to provide clarification by various reminder emails dated 24.3.2019, 28.3.2019, 12.4.2019, 18.4.2019 and 5.6.2019. It was only on 8.6.2019 that the respondent by its email insisted and confirmed that the total amount transferred from OMR Chennai was Rs.1,33,58,043.78/- only. Whereas, it should have been Rs.1,37,19,923/-, but the respondent failed to clarify the same.

10. It is stated that the respondent has now sent a final notice dated 14.4.2021 to them threatening to make the payment within 30 days failing which they shall cancel the allotment in terms of the buyer's agreement/ application.
11. They states that the total amount of the said apartment was Rs.1,65,71,987/- and they have paid Rs.1,37,19,923.94 to the respondent. They state that the respondent has intentionally and with ulterior motives mentioned the date of the application for allotment of an apartment as 31.3.2016 in the buyer's agreement, in spite of the facts that the application for allotment of an apartment was signed and forwarded on 23.11.2015.
12. That in spite of receipt of more than 80% of the sale consideration; the respondent never registered an agreement with the complainants in violation of section 13 of the RER Act, 2016.
13. They state that the respondent having not entered into agreement with them for its own wrong cannot demand any monies over and above 10% of the total value of the apartment. They are seeking appropriate relief under the provisions of Sections 12 and 18 of the RERA Act, 2016 against the

respondent with regards to the refund of the amounts paid by the complainants to the respondent, interest and compensation.

C. Relief sought by the complainants:

14. The complainants have sought following relief(s):

- i. Direct the respondent to refund the entire amount paid by the complainants to the respondent till date along with interest at the prescribed rate under Act of 2016.

D. Reply by respondent:

The respondent by way of written reply made following submissions

15. That the present complaint is not maintainable in law or on facts. The provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'Act') are not applicable to the project in question. This Hon'ble Authority does not have the jurisdiction to entertain and decide the present complaint. The present complaint is liable to be dismissed on this ground alone. That the present complaint is not maintainable in law or on facts. It is submitted that the present complaint is not maintainable before the Hon'ble Authority. The Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "the Act" for short) as well as Haryana Real Estate (Regulation and Development) Rules, 2017, (hereinafter referred to as "the Rules") do not have retrospective operation. The present complaint is liable to be dismissed on this ground alone.

16. That the respondent has developed a residential group housing complex known as "The Ultima", situated in Sector 81, DLF Garden City, Gurugram (hereinafter referred to as 'said project' That they had approached the respondent and had evinced an interest in purchasing a residential unit in the aforementioned project.
17. That prior to booking the apartment in "The Ultima" project, they had booked two apartments in another project known as Gardencity DLF OMR/DLF OMR in Tamil Nadu, being developed by an associate company of the respondent known as DLF Southern Homes Private Limited. That they refrained from taking possession of the apartments despite repeated requests and reminders from the developer and also failed to get the conveyance deed registered in their favour.
18. That the respondent had communicated to them that representatives of the respondent would be in the UK in the month of August 2015 and that they could have a meeting with the representatives of the respondent so as to understand and resolve the concerns of the complainants.
19. That the representative of the respondent explained to them that the developer of the DLF gardencity OMR project was a separate entity and that the cancellation of the apartments in the said project would be carried out in accordance with the terms and conditions of the buyer's agreements executed between the parties.
20. It was repeatedly emphasised by the representative of the respondent that the transactions in respect of the properties in DLF Gardencity OMR Project

and in "The Ultima", Gurugram, were two independent transactions, and that until the DLF Gardencity OMR Project properties were cancelled the amount from the said project could not be transferred/adjusted against the apartment in The Utltima.

21. That vide email dated 30.03.2016, the respondent conveyed its proposal to them in terms of which, after adjustment of Rs 1,42,44,213/- (being the tentative value of the DLF Gardencity OMR Project , subject to accounts audit) and rebate, the total cost of the apartment in "The Ultima" Project worked out to Rs 1,85,70,528/-.
22. That the buyer's agreement was dispatched to them for execution under cover of letter dated 24.06.2016. The same was duly received by the complainants on 29.06.2019. They were called upon to execute both copies of the buyer's agreement and return the same to the respondent.
23. That they kept delaying the issuance of cheques in favour of DLF Southern Homes Private Limited and thus delaying the refund and transfer/adjustment of payment towards the apartment in the Ultima. The respondent had issued refund cheques on 08.06.2016 but the complainants only transferred the payment on 26.10.2016 and 14.12.2016.
24. That as per the payment plan applicable to the complainants, Rs 12,50,000/- was payable upon booking, Rs 1,63,79,022.50 was payable within 45 days from the date of booking, i.e by 15th May 2016 and the balance on possession. However, the complainants delayed the cancellation of the DLF OMR properties by delaying return of original documents, failing

to provide the no dues certificate from the DLF OMR Condominium Association and delaying issuance of cheques in favour of DLF Southern Homes Private Limited/ the respondent on account of which the complainants became liable for payment of interest on delayed payment in accordance with clause 15(b) of the terms and conditions of the application form for allotment.

25. That, furthermore, the complainants being NRIs/Foreign Nationals, all remittances , refunds, transfers etc are to be made in accordance with the provisions of the Foreign Exchange Management Act, 1999 and applicable rules and regulations of the RBI and it is the responsibility of the complainants to abide by the same.
26. That furthermore, it was explicitly provided in clause 19(a) of the application form that subject to timely payment of amounts and compliance with the terms and conditions of the application/buyer's agreement and subject to reasons beyond the control of the respondent, construction of the apartment would be completed within 60 months from the date of application plus grace period of 6 months thereafter.
27. That clause 15(a) of the application form, which is reproduced herein below for ready reference:

15(a). The Applicant(s) agrees that the Company shall be entitled to cancel the allotment and forfeit the Earnest Money paid by the Applicant(s) along with the Non Refundable Amounts in case of non-fulfillment/breach of the terms and conditions of the Application and the Agreement including withdrawal of the Application and also in the event of the failure by the Applicant(s) to sign and return to the Company the agreement within thirty (30) days from the date of its

dispatch by the Company. Thereafter, the applicant(s) shall be left with no lien, right, title, interest or any claim of whatsoever nature in the Said Apartment/Parking Spaces. It is understood by the Applicant(s) that the company is not required to send reminders/notices to the Applicant(s) in respect of the obligations of the Applicant(s) as set out in this Application and/or Agreement and the Applicant(s) is required to comply with all its obligations on its own. The Company shall thereafter, be free to resell and/or deal with the Said Apartment/Parking Spaces in any manner whatsoever.

28. That the aforesaid terms and conditions were duly understood and accepted by them after which they proceeded to execute and submit application form.
29. That construction of the tower of subject apartment is situated (as well as five other towers of the project) stands completed and the respondent had made an application on 28.06.2017 to the competent authority for issuance of the occupation certificate in respect thereof. An occupation certificate has been issued by the competent authority on 11.6.2018.
30. That it is submitted that letter of offer of possession dated 14th of February 2019 had been issued to the complainants by the respondent. It had been specifically stated therein that the complainants were required to make payment of the balance dues, furnish complete documentation and complete certain formalities in order to enable the respondent to handover possession of the said unit to them. The statement of account reflecting the payments made by them , delayed interest and credit details. Thereafter, several reminder letters had been issued to them by the respondent but to no avail. The complainants never came forward to make payment of the outstanding amount and complete the documentation formalities in order

to enable the respondent to handover possession of the said unit to the complainants and have instead proceeded to file the present complaint on frivolous and fallacious grounds.

31. That from the facts and circumstances set out in the preceding paras, it is evident that the respondent has acted strictly in accordance with the terms and conditions of the application form voluntarily executed by the complainants. There is no default or lapse on the part of the respondent. The allegations made in the complaint qua the respondent are manifestly false and baseless. It is the complainants who are in breach of their contractual obligations on account of their failure to make payment of the balance sale consideration in accordance with the payment plan willingly and consciously opted by them.
32. That it is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by them qua the respondent are totally baseless and do not merit any consideration by this Hon'ble Authority. The present application is nothing but an abuse of the process of law. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.
33. All other averments made in the complaint were denied in toto.
34. 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:

35. The plea 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

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 allottee 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 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.

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.

F. Entitlement of the complainants for refund:

F.1 Direct the respondent to refund the entire amount paid by the complainants to the respondent till date along with interest at the prescribed rate under Act of 2016.

36. The project detailed above was launched by the respondent as group housing complex and the complainants were allotted the subject unit in against sale consideration of Rs. 1,82,00,400/-. Further it was convinced by them to shift their booking from DLF OMR at Chennai to DLF Ultima being respondent's flagship project at Gurugram being "The Ultima", DLF Garden City, Sector 81, Gurugram as the workmanship was not satisfactory of the project in Chennai. A document dated 15.04.2016 has been sent by the respondent wherein it was mentioned that allotment from DLF OMR project has been transferred to DLF Gardencity, Gurgaon alongwith it transferred all amount to newly allotted unit. Vide letter dated 14.02.2019, an offer of possession for completing formalities have been sent to the complainant as occupation certificate has been obtained on 11.06.2018 and asked them to pay the pending dues. But as alleged by the complainants that the demand raised by the respondent was completely unfair and illegal. They sent various emails to put into the notice of respondent but all went in vain.

37. No agreement have been executed between the parties and complainant has averred that the same is a violation of section 13 of the RERA Act 2016.

On the contrary the complainant mentioned the reason for not sending back the agreement to respondent is that total sale consideration has been increased without any reason. It has also come on record that against the basic sale consideration of Rs. 1,82,00,400/- the complainants have paid a sum of Rs.1,38,44,923/- to the respondent.

38. If allottee has not exercised the right to withdraw from the project after the due date of possession is over and even after the offer of possession was made to them, it impliedly means that the allottees tacitly wish to continue with the project. In the instant case, the complainants wish to withdraw from the project even after the offer of possession has been made on account along with unreasonable demands. Also, the promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottees interest for the money he has paid to the promoter is protected accordingly and the same was upheld by 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. (supra)* 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; that: -

25. The unqualified right of the allottees 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 allottees, 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 allottees/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 allottees 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.

39. 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. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein.
40. In case the allottees wish to withdraw from the project, the promoter is liable on demand to return the amount received by it with interest at the prescribed rate if it fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale.
41. In the instant case, the unit was provisionally allotted through application form on 31.03.2016 and the due date for handing over for possession was 30.09.2021. The OC was received on 11.06.2018 whereas, offer of possession was made on 14.02.2019. However, it is observed that the complainants vide filing the present complaint on 23.07.2021 made the request for refund. Therefore, in this case, refund can only be granted after certain deductions as was held by apex court of the 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., (2015) 4 SCC 136* and as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 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"

42. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.1,38,44,923/- after deducting 10% of the basic sale consideration of Rs. 1,82,00,400/- being earnest money along with an interest @ 10.85% p.a. (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 on the refundable amount, from the date of surrender i.e., 23.07.2021 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.
43. Separate proceeding to be initiated by the planning department of the Authority for taking an appropriate action against the builder as the registration of the project has been expired.

G. Directions of the authority

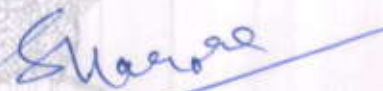
44. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondent/builder is directed to refund the paid-up amount of Rs.1,38,44,923/- after deducting 10% of the basic sale

consideration Rs. 1,82,00,400/- being earnest money along with an interest @ 10.85% p.a. on the refundable amount, from the date of surrender i.e., 23.07.2021 till its realization.

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.

45. Complaint stands disposed of.

46. File be consigned to the registry.



(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority,
Gurugram

Dated: 22.12.2023

HARERA
GURUGRAM