BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**2744 of 2021**
Date of filing complaint:		**19.07.2021**
First date of hearing:		**19.08.2021**
Date of decision	**:**	**14.12.2023**

Sh. Naveen Garg
R/o: Flat No. A-2, 1402, Uniworld City, Sector – 30, Gurugram – 122001 **Complainant**

Versus

M/s Pareena Infrastructure Private Limited

Regd. Office at: Flat No. 2, Palm Apartment, Plot No.13B, Sector – 6, Dwarka, New Delhi – 110075
Corporate Office at: C-7A, Second Floor, Omaxe City Centre, Sector – 49, Sohna Road, Gurugram – 122018 **Respondent**

CORAM:

Shri Vijay Kumar Goyal **Member**

APPEARANCE:

Sh. Sukhbir Yadav (Advocate) Complainant
Sh. Prashant Sheoran (Advocate) 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 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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name and location of the project	"Coban Residences", Sector-99A, Gurugram
2.	Nature of the project	Residential
3.	Project area	10.5875 acres
4.	DTCP license no.	10 of 2013 dated 12.03.2013 valid up to 11.03.2024
5.	Name of licensee	Monex Infrastructure Pvt. Ltd.
6.	RERA Registered or not registered	GGM/419/151/2020/35 dated 16.10.2020 valid up to 11.03.2024
7.	Unit no. and floor no.	904 and 9th floor and Tower-2 (As per page no. 33 of the complaint)
8.	Unit area admeasuring	1997 sq.ft. (Super area) (As per page no. 20 of the complaint)
9.	Provisional allotment letter	27.11.2013 (As per page no. 29 of the complaint)
10.	Date of execution of apartment buyer's agreement	27.12.2013 (As per page no. 31 of the complaint)
11.	Possession clause	***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 within 4 years of the start of construction or execution of this Agreement whichever is later,*** *as per the said plans and specifications seen and accepted by the Flat Allottee.....* *and* ***5.1*** ***In case within a period as provided***

		hereinabove, further extended by a period of 6(six) months if so required by the developer, the developer is unable to complete construction of the said flat *as provided hereinabove (subject to force majeure conditions) to the flat allottee(s), who have made payments as required for in this agreement, then the flat allottee(s) shall be entitled to the payment of compensation for delay at the rate of Rs. 5/- per sq.ft. per month of the super area till the date of notice of possession as provided hereinabove in this agreement. The flat allottee(s) shall have no other claim against the developer in respect of the said flat and parking space under this agreement.* (As per page no. 44 and 47 of the complaint)
12.	Due date of possession	01.10.2018 (Note: Due date to be calculated 4 years from the date of execution of start of construction being later i.e., 01.10.2014.)
13.	Payment Plan	Construction linked payment plan (As per page no. 56 of the complaint)
14.	Total sale consideration	Rs.1,23,91,924/- (As per schedule of payments on page no. 56 of the complaint)
15.	Amount paid by the complainant	Rs.20,06,846/- (As per cancellation letter on page no. 67 of the complaint)
16.	Occupation Certificate/ completion certificate	Not obtained
17.	Offer of possession	Not offered
18.	Pre-cancellation letter	23.01.2021 (As per page no. 75 of the reply)
19.	Cancellation letter	23.02.2021 (As per page no. 67 of the complaint)

B. Facts of the complaint:

3. The complainant has made following submissions:

I. That in January 2013, the complainant received a marketing call from a real estate agent, the caller represented himself as an authorized agent of the respondent and marketed a residential project namely "Coban Residences" situated at Sector – 99 A, Gurugram. The complainant visited the Gurugram office and project site of the respondent/builder. There he met with the marketing staff of builder and got information about the project "Coban Residences". The marketing staff gave him a brochure and pricelist etc. and allured him with a picture of the project.

II. That believing on representation and assurance of respondent, the complainant booked 3BHK apartment bearing No. 904 in tower T2 for size admeasuring 1997 sq. ft. and paid a booking amount of Rs.8,50,000/- vide cheque dated 21.01.2013. The apartment was purchased under the construction linked plan for a sale consideration of Rs.1,23,91,924/-.

III. That on 05.09.2013, the complainant paid a demand of Rs.11,45,278/- being raised by the respondent and the respondent issued the payment receipt for the same.

IV. That on 27.11.2013, the respondent issued a provisional allotment letter in favor of complainant confirming the allotment of the unit No. T2-904 in tower T2 for size admeasuring 1997 sq. ft.

V. That on 27.12.2013, a pre-printed, unilateral, one-sided, arbitrary ex-facie builder buyer's agreement was executed inter-se the respondent/promoter and the complainant/allottee. This agreement has a plethora of clauses and according to clause no. 3.1, the builder/respondent has to give possession of the flat within 4 years of

the start of construction or execution of this agreement whichever is later. Therefore, the due date of possession as per BBA was 27.12.2017.

VI. That thereafter the respondent raised the third demand on 16.10.2014 and upon receiving the demand from the respondent, the complainant requested the respondent that due to some personal financial reasons he is unable to pay further demands and thus requested to cancel the unit by deducting 10% of the Earnest money and refund the balance paid amount. But the respondent expressed their inability to refund the paid amount due to financial constrain of the company and said that as a special case we are allowing you to pay the demands within one year without interest and further represented that "if you fail to pay the demand within one year, we will consider your request."

VII. That after one year, the complainant again shows his inability to pay the balance demands and requested to refund of the amount. That after considering the financial condition of the complainant, the office bearers of the respondent said that if you surrender the unit/allotment the company will deduct 15% earnest money as per clause No. 1.2 e) i. of the BBA, but a special case, if we find a suitable buyer for your allotted unit, we will allot the flat in prospective buyer and will refund you the paid money without interest. That under the compelling circumstances the complainant become agree on the assurance of the respondent.

VIII. That thereafter the respondent kept sending the reminder letters to the complainant, but when the complainant asked to stop sending the demand letter, the office bearers of the respondent said that letters are system generated and there will be no harm to you by these demand letters. That despite repeated requests by the complainant for

cancellation of the unit and refund the paid amount, the respondent failed to do the same.

IX. That in December 2020, the complainant visited the office of the respondent asked for the refund of the money after deduction of Earnest Money i.e., 10% of basic cost, but the respondent did not accept the request of the complainant.

X. That on 23.02.2021, the respondent sent a unit cancellation letter to the complainant and stated that Rs.32,95,834/- is due towards the complainant which includes unjustifiable and unreasonable demand under different heads. It is pertinent to mention here that since 2014 the complainant is requesting the respondent to cancel the unit and refund the paid amount but the respondent did not acknowledge any request of the complainant and sent a cancellation letter including various unreasonable demands which are unjustifiable & unacceptable. That it is again pertinent to mention here that till now the respondent did not repay the balance consideration and keep the money illegally.

XI. That as per the cancellation letter issued by the respondent, the respondent acknowledged that the complainant has paid Rs.20,06,846/- i.e., 16% of the total sale consideration.

XII. That the complainant visited several times to the office of the respondent and made phone calls to the respondent and asked to cancel the unit and refund the balance paid amount but the respondent did not pay any heed to the just & reasonable demand of the complainant.

XIII. That the complainant visited the office of the respondent and asked for balance money as per regulation of Hon'ble Authority, but the respondent shunted out the complainant from their office.

XIV. That the main grievance of the complainant in the present complaint is that despite the complainant is ready to bear the loss of forfeiture of the earnest money as per regulation dated 05.12.2018, the respondent is not realising the balance payment after deductions.

XV. That the above said cancellation was after the coming into force of the "forfeiture of earnest money by the builder Regulations, 2018".

XVI. That due to the above acts of the respondent and the unfair terms and conditions of the builder buyer's agreement, the complainant has been unnecessarily harassed mentally as well as financially, therefore the opposite party is liable to compensate the complainant on account of the aforesaid act of unfair trade practice. There is a prima facie case in favor of the complainant and against the respondent for not meeting its obligations under the buyer's agreement and the Real Estate (Regulation and Development) Act, 2016, the Haryana Real Estate (Regulation and Development) Rules, 2017, and regulation thereunder, which makes the respondent liable to answer to the Hon'ble Authority.

XVII. That for the first time cause of action for the present complaint arose **in December 2014,** when the buyer's agreement containing unfair and unreasonable terms was, for the first time, forced upon the allottees. The cause of action further arose **in Oct 2014**, when the complainant requested the respondent to cancel the unit and refund the balance paid amount. But the respondent failed to do the same. Further, the cause of action again arose on various occasions, including on: a) October 2016; b) Feb. 2017; c) May 2018, d) March 2019, e) July 2020, f) Feb 2021, and on many times till date, when the protests were lodged with the respondent and asked for a refund of money along with interest. The cause of action is alive and continuing and will continue to subsist till

such time as the Hon'ble Authority restrains the respondent by an order of injunction and/or passes the necessary orders.

XVIII. That the complainant being an aggrieved person filed the present complaint seeking refund of the paid-up amount along with interest.

C. Relief sought by the complainant:

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

   i. Direct the respondent to refund Rs.20,06,846/- the amount paid by the complainants to the respondent till date along with interest at the prescribed rate under Act of 2016.

   ii. To refrain the respondent from giving effect to unfair clauses unilaterally incorporated in the apartment buyer's agreement.

D. Reply by the respondent:

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

   a. That in the present complaint complainant has challenged the cancellation on the ground that respondent can deduct only 10% of the basic sale price as per notification of RERA passed in year 2018 and no other amount can be deducted by respondent. It is admitted that vide notification passed in year 2018 Hon'ble RERA quantified that the earnest money should be 10% of sale consideration and notified that no developer can deduct more than 10% against earnest money. However, said notification only quantifies the percentage of earnest money, which was generally 15% in almost every apartment buyer agreement of nearly every builder. However, it is pertinent to mention here that said notification has not amended other provisions of RERA Act. It is submitted that as per RERA act if the allottee commits default in payments then the developer has a right to cancel his/her allotment as

per agreement for sale and as per agreement for sale respondent has right to deduct earnest money at the rate of 15% (however after notification only 10%) and other charges i.e., processing fees, interest on delayed payment, any interest paid, due or payable, or any other amount of a non-refundable nature (taxes paid or liable to be paid to government).

b. That there are no charges which are beyond the purview of apartment buyer agreement or illegal. Whatsoever amount was deducted by the respondent is either of mandatory nature like taxes or as per agreement for sale. That even respondent has duly taken care of notification on earnest money and has only deducted 10% of sale consideration. That even RERA authority has passed several orders after 2018 notification whereby 10% of sale consideration along with other charges like taxes and other charges of non-refundable nature were allowed to be deducted. That from the above stated facts, it is clear that the amount deducted was within the purview of RERA Act and is completely legal.

c. That the complainant had failed to pay the instalments since very inception of excavation work till completion of all floors and even brick work, still complainant has audacity to file a complaint before RERA challenging cancellation and seeking refund.

d. That the complainant has not come before authority with clean hands as they would have not disclosed the actual state of affairs and mode and time period of payment made by them, but they concealed all their defaults with a malafide motive to gain undue benefit from the authority.

e. That non-payment is one of the major issue faced by the all the developer including respondent but it is not the only issue faced by the

respondent while developing a project, the outbreak of COVID-19, 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 allotees.

f. That above stated issues are only few out of many, still respondent trying to complete construction even after all these odds. The respondent nearly completed the project out of its own expenses even after facing all these issues. Thus, from the above stated facts and circumstances, if the Hon'ble 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. It is submitted that granting relief as prayed by complainant will be against the principle of natural justice as well. It is therefore prayed that keeping in above stated facts and circumstances it is crystal clear that present complaint is not maintainable and is liable to be dismissed.

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

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

7. 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 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.*

8. 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. Findings on objections raised by the respondent:

F.I Objection regarding delay due to force majeure circumstances

9. The respondent-promoter raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the Hon'ble Supreme Court or NGT, lockdown due to outbreak of Covid-19 pandemic and non-payment of instalments by different allottees. Further, the authority has gone through the possession clause of the agreement and observed that the respondent-developer proposes to

handover the possession of the allotted unit within a period of 4 years from the date of start of construction or date of execution of buyer's agreement, whichever is later." In the present case, the date of execution of buyer's agreement is 30.12.2013 and date of start of construction is 01.10.2014 as taken from the documents on record. The due date is calculated from the date of start of construction being later, so, the due date of subject unit comes out to be 01.10.2018, which is prior to the occurance of Covid-19 restrictions and hence, the respondent cannot be benefitted for his own wrong. Though there has been various orders issued to curb the environment pollution, but these were for a short period of time. So, the circumstances/conditions after that period can't be taken into consideration for delay in completion of the project. Though some allottees may not be regular in paying the amount due but the interest of all the stakeholders concerned with the said project cannot be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter/respondent cannot be given any leniency based on aforesaid reasons and the plea advanced in this regard is untenable.

G. Findings on relief sought by the complainants:

G.I Direct the respondent to refund of paid-up amount of Rs.20,06,846/- along with compound interest at the prescribed rate from date of payments till its actual payment.

10. The complainant was allotted a unit in the project of respondent "Coban Residences" in Sector 99-A, Gurugram vide provisional allotment letter dated 27.11.2013 for a total sum of Rs.1,23,91,924/-. The buyer's agreement was executed on 27.12.2013 and the complainant started paying the amount due against the allotted unit and paid a total sum of Rs.20,06,846/-. It was pleaded by complainant that respondent sent various demand letters demanding outstanding amount, which was due but he was unable to pay

and already requested the respondent to cancel the allotted unit and refund the paid-up amount.

11. On the contrary, it was submitted by respondent that even after many reminders, the complainant continuously defaulted in making the payments towards the total price. In view of the same, the respondent was constrained to issue a pre-cancellation letter dated 23.01.2021 demanding the outstanding amount but that was of no use. Subsequently vide dated 23.02.2021, it issued cancellation letter for the allotted unit for non-payment.

12. It is evident from the above mentions facts that the complainant paid a sum of Rs. 20,06,846/- against sale consideration of Rs.1,23,91,924/- of the unit allotted to him.

13. Now when the complainant approached the Authority to seek refund, the respondent already clarified their stance that the complainant is not entitled to refund as according to clause 1.2 e) i. of BBA, the respondent-builder is entitled to forfeit the 15% of the basic sale price. The relevant clause is reproduced herein below: -

> *"That it's agreed between the parties that out of the amount(s) paid/payable by the Flat Allottee(s) towards the Basic Sale Price, the Developer shall treat 15% of the Basic Sale price as earnest money (hereinafter referred to as the "Earnest Money"). The Flat Allottee(s) hereby authorizes the Developer to forfeit the amount paid/payable by him/her/them, as Earnest money as aforementioned together with the processing fee, any interest paid, due or payable, any other amount of a non-refundable nature in the event of the failure of the Flat Allottee(s) to perform his/her/their obligations or fulfill all other terms and conditions set out in this agreement".*

14. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136,*** and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty,

then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 ***Ramesh Malhotra VS. Emaar MGF Land Limited*** *(decided on 29.06.2020) and* ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** *(decided on 12.04.2022)* ***and followed in CC/2766/2017 in case titled as Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022,*** held that 10% of basic sale price is a reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed providing as under-

> *"5. AMOUNT OF EARNEST MONEY*
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money* ***shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may*** *be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

15. 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, 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 complainant i.e., Rs.20,06,846/- after deducting 10% of the basic 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 termination/cancellation 23.02.2021 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the Authority:

16. 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/promoter is directed to refund the amount i.e., **Rs.20,06,846/-** received by him from the complainant after deduction of 10% of basic sale price as earnest money along with interest at the rate of 10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of cancellation i.e., 23.02.2021 till the actual date of refund of the amount.

    ii) A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

17. Complaint stands disposed of.

18. File be consigned to the registry.

(Vijay Kumar Goyal)
Member
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 14.12.2023