

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

Complaint no. : 1605 of 2023
Date of first hearing: 12.09.2023
Date of decision : 05.01.2024

1. Deepa Chaudhary 2. Lt. Colonel Anil Kumar R/o - B-46, Darshanam Splendora, Vasna Bhayli Road, Vadodara, Gujarat-391410	Complainants
Versus	
DSS Buildtech Pvt. Ltd., Office: - 506, 5 th Floor, Time square Building, B Block, Sushant Lok-I, Gurugram.	Respondent
CORAM:	
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Shri Pranshu Khatri	Complainants
Shri Harshit Batra	Respondent

ORDER

1. The present complaint dated 21.04.2023 has been filed by the complainants/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 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 unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	"The Melia" at sector 35, Gurgaon, Haryana
2.	Nature of the project	Residential
3.	Project area	17.41875 acres
4.	Rera Registered/Not Registered	Registered Vide no. 288 of 2017 dated 10.10.2017 upto 25.04.2025
5.	DTCP License No.	77 of 2013 dated 10.08.2013 upto 09.08.2024
6.	Name of Licensee	Smt. Aarti Khandelwal and two others
7.	Unit no.	F-501, 5th Floor (as per cancellation letter page no. 23 of complaint)
8.	Unit admeasuring	1350 sq. ft. (as per cancellation letter page no. 23 of complaint)

9.	Date of receipt of Rs. 6,00,000/-	24.10.2013 (page no. 15 of complaint)
10.	Allotment Letter	Not provided
11.	Date of builder buyer agreement	Not Executed
12.	Demand Letter	01.12.2013 (page no. 27 of reply)
13.	Reminders For payment	25.03.2014, 08.08.2014, 07.07.2015, 30.01.2017, 10.04.2017, 22.02.2017, 04.05.2017, 25.05.2017, 15.12.2017, 12.02.2018, 20.03.2018, 24.04.2018, 08.06.2018, 20.08.2018, 19.01.2018, 01.10.2018, 15.01.2019, 19.06.2019, 01.05.2019, 04.11.2022
14.	Email for surrender by complainants	08.05.2016 (page no. 17 of complaint)
15.	Reminder email for refund of the amount paid	18.05.2016, 31.05.2016, 21.09.2016, 15.10.2016 (page no. 18-21 of complaint)
16.	Cancellation of booking	14.02.2023 (page no. 23 of complaint)
17.	Due date of possession	24.10.2016 (due is taken as 3 years from the date of payment i.e., booking date)
18.	Total sale consideration	Rs. 76,64,850/-

		(as per cancellation letter on page no. 23 of complaint)
19.	Total amount paid by the complainants	Rs 6,00,000/- (page no. 15 of complaint)
20.	Occupation certificate	Not obtained
21.	Offer of possession	Not offered

B. Facts of the complaint

3. That the complainants paid booking amount of Rs.6,00,000/- through cheque bearing no.875442 dated 26.07.2013 drawn upon HDFC Bank, to take a flat in the upcoming new project of the respondent namely "The Melia" situated at Sector-35, Sohna, Distt. Gurgaon, Haryana. The respondent issued a receipt dated 24.10.2013 through Silverglades Holdings Pvt. Ltd. To the complainants.
4. That respondent was not keen to start the construction within the time frame, hence the complainants approached the respondent for refund of the amount along with interest & compensation but respondent did not bother to pay. With ulterior motives, respondent issued reminder letter dated 07.07.2015 to the complainants without even starting excavation on the said project.
5. That time and again, complainant no.1 through various calls & emails dated 08.05.2016, 18.05.2016, 31.05.2016, 21.09.2016, 15.10.2016 have approached the respondent for the refund of booking amount

with interest, to which complainants received vague reply or rather automated message dated 21.09.2016 & 17.10.2016.

6. That it is pertinent to mention here is that no agreement was ever executed between the complainants and the respondent.
7. That the complainants got to know for the first time that they were being tentatively allotted a flat bearing no.F-501 situated at Village Mohamadpur Gujjar, Sector 35, Sohna, Gurugram, on 14.02.2023, when respondent issued vague cancellation letter knowing fully well that the complainants had already applied for refund of booking amount along with interest & compensation for not starting the project within time-frame.
8. That the respondent issued frivolous cancellation letter dated 14.02.2023 just to usurp the booking amount provided by the complainants which should be treated as null & void.
9. That the complainants on several occasions visited the office of the respondent at their Gurgaon office with a request of cancellation and refund of amounts paid along with interest in accordance with Rera notified rate of interest but they were threatened with the dire consequences and forfeiture of the amounts paid by the complainants till date, which is Rs.6,00,000/-, hence this complaint.

C. Relief sought by the complainants:

10. The complainants have sought following relief(s):
 - a) Direct the respondent to refund the amount of Rs. 6,00,000/- with interest.

D. Reply by the respondent

11. That in 2013, the complainants have approached the respondent for booking of a unit in the project and paid a booking amount of Rs. 6,00,000/- against the total sale consideration of Rs. 76,64,850/- Plus other statutory charges and taxes, as applicable.
12. The complaint is not maintainable as the complainants herein have themselves defaulted in making timely payments to the respondent herein and on that account alone is not entitled to any equitable relief under law. That, the complainants have agreed, to pay installments on time and discharge their obligations. The complainants failed to clear the instalments dues despite repeated reminders given by the respondent.
13. That in the year 2013, the complainants herein only made a payment of Rs. 6,00,000/- towards the booking amount. That as on 14.02.2023 an amount of Rs. 69,92,88/- with taxes towards the total sale consideration along with an amount of Rs. 37,98,643/- is outstanding towards interest on delay in timely payment of installment due.
14. That as per clause 2 of the "undertaking" and clause 5 and 8 of the payment plans attached with the standard application form, timely payment is the essence of the allotment and the respondent is entitled to forfeit 10% of the total sale consideration along with the due interest in the event of default committed by the buyer and subsequently terminate the application form and the allotment of the said unit.
15. Furthermore, it is relevant to mention here that as per Section 19(6) of the Real Estate (Regulation and Development Act), 2016 (hereinafter referred to as "The Act"), the complainants are under obligation and responsibility to make necessary payments in the manner and within the time as agreed.
16. That the complainants herein are under obligation and responsibility to make necessary payments in the manner and within the time and as and

when demanded by the respondent. However, till date the complainants have only paid an amount of Rs. 6,00,000/- and an amount of Rs. 6,99,288/- with taxes towards the total sale consideration along with an amount of Rs. 37,98,643/- is outstanding towards interest on delay payment as on 14.02.2023.

17. The obligation to approach this Hon'ble Authority with clean hands is an absolute obligation. The complainants have attempted to pollute the stream of justice, and touched the pure foundation of justice with tainted hands and therefore, is not entitled to any relief, interim or final. Pertinent to say that the Court does not sit simply as an umpire in a contest between the parties and declare at the end of the combat as to who won and who lost but has a legal duty of its own, independent of parties, to take active part in proceeding and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. Moreover, it is the bounden duty of this Hon'ble Authority to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Authority must ensure that there is no wrongful, unauthorized or unjust gain to anyone as a result of abuse of the process of the law. One way to curb the tendency is to impose realistic or punitive costs.
18. That the complainants have only paid a booking amount of Rs. 6,00,000/- thereafter the complainants stopped making payments of the installment and have now filed the present complaint seeking refund of the payment made by them on baseless and frivolous grounds. It must be noted that though the complainants have the right to cancel/withdraw his allotment in a project under the provisions of the Act, however same cannot be

sought as a matter of right when the cancellation/withdrawal is done without any fault attributable to the developer.

19. That upon request from the complainants regarding cancellation of the unit the respondent asked the complainants to visit the office of the respondent and tried to resolve the grievance of the complainants but the complainants were adamant and only asked to refund their paid amount.
20. That the respondent sent various demand letters & reminder letter to the complainants to pay the outstanding amount however the same was of no avail and the complainants keep defaulting in making payment.
21. That the complainants have not made timely payment of due of installments despite, repeated demands raised by the respondent from time to time and thus the complainants have failed to comply with the payment terms subject to which the said unit had been agreed to be sold to the complainants. The complainants have failed to fulfill their part of contract, obligations, commitment and payment plan. In total violation to that and in terms and conditions agreed between the parties, the complainants made defaults in payments dues despite the repeated request and demands of the respondent. The complainants have also clearly failed to fulfill his responsibilities under the section 19(6) of the Real Estate (Regulation and Development) Act, 2016.
22. That the respondent obtained the sanction of building plan (BR-III) on 21.04.2015. Clause 3 of the sanctioned plan stipulates that the developer shall obtain clearance/NOC from the Fire Department, Gurugram before starting the construction/execution of development works at site. Furthermore clause 17 (iv) of the sanctioned building plan stipulated that the developer shall obtain an NOC from the Ministry of Environment & Forests as per provisions of the Notification No. S.O. 1533 9EI dated

- 14.09.2006 before starting the construction/execution of development works at site.
23. The fire clearance/NOC was obtained by company on 09.02.2016 and the same was submitted to DTCP Haryana. It is pertinent to mention that Section 15 of the Haryana Fire Safety Act, 2009 makes it mandatory for a Builder/Developer to obtain the approval of the fire fighting scheme conforming to the National Building Code of India and obtain a no objection certificate (NOC) before commencement of construction.
24. That on 20.09.2016 respondent received the environmental clearance from state environment impact assessment authority (SEIAA). It is pertinent to mention that clause 1 of the environment clearance stipulate that the developer has to obtain "consent to establish" from the Haryana State Pollution Control Board under Air and Water Act, and a copy shall be submitted to the SEIAA before the start of any construction works at site.
25. Thereafter, in terms of the provisions of the environmental clearance dated 20.09.2016, the respondent herein applied for the 'consent to establish' from the Haryana State Pollution Control Board, and was the same was granted on 12.11.2016. It is submitted that "Consent to establish" is the last necessary approval before commencement of construction activity.
26. That the project of the respondent is duly registered under the Act and the Haryana Real Estate (Regulation and Development) Rules, 2017 vide HRERA Registration No. 288 of 2017 dated 10.10.2017.
27. Copies of all the relevant documents have been duly filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

28. 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

29. 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

30. The 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.

31. 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.
32. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 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:
- सत्यमेव जयते
- "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."*
33. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case 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.

Relief sought by the complainants: The complainants had sought following relief(s):

- i. Direct the respondent to refund the amount of Rs. 6,00,000/- with interest.

34. In the present complaint, the complainants intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with interest as per section 18(1) of the Act and the same is reproduced below for ready reference:

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*

he shall be liable on demand to the allottees, in case 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 that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”

(Emphasis supplied)

35. The complainants booked a unit in the respondent’s project and paid an amount of Rs. 6,00,000/- for which a receipt was issued by the respondent on 24.10.2013. The allotment letter for the said unit was not provided by the respondent and even the BBA was not executed between the parties.

36. However, in the present matter no BBA has been executed between the parties therefore the due date of possession cannot be ascertained. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained then a reasonable time period of 3 years has to be taken into consideration. It was held in matter **Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442 : (2018) 3 SCC (civ) 1** and then was reiterated in **Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725 -:**

"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered."

37. Accordingly, the due date of possession is calculated as 3 years from the date of receipt of payment i.e., 24.10.2013. Therefore, the due date of possession comes out to be 24.10.2016.
38. It is observed that the respondent vide letter dated 01.12.2013 raised a demand for the unit and further sent various reminders for making payment. Thereafter, the complainants paid no heed to the said reminders and on 08.05.2016 they surrendered the unit and requested for refund of their paid up amount. Secondly, the complainants remained dormant of their rights for more than 7 years and they didn't approach any forum to avail their rights. There has been such a long unexplained delay in pursuing the matter. No doubt, one of the purposes behind the enactment

of the Act was to protect the interest of consumers. However, this cannot be fetched to an extent that basic principles of jurisprudence are to be ignored.

39. So, the deduction should be made as per law. The issue w.r.t. deduction of earnest money arose before the hon'ble Apex Court of the land in cases of *MaulaBux V/s Union of India (1970)1 SCR 928* and *Sirdar KB Ramchandra Raj Urs V/s Sarah C Urs (2015) 4SCC 136* and followed by NCDRC in cases of *Ramesh Malhotra V/s EMAAR MGF Land Limited and Mr. Saurav Sanyal V/s M/s IREO Pvt. Ltd.* decided on 12.04.2022 and wherein it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of "earnest money".
40. Therefore, the deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

"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."

41. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the paid-up amount after deducting 10% of the sale consideration of the unit being earnest money within 90 days. However,

in the present matter the complainants have paid only Rs. 06,00,000/- against the total sale consideration of Rs. 76,64,850/- which constitutes about only 7.8% of consideration money and hence, no case for refund of any amount is made out.

42. Complaint stands disposed of.
43. File be consigned to registry.



(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.01.2024

HARERA
GURUGRAM