

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

Complaint no. : 850 of 2021
Date of filing: 15.02.2021
Date of decision : 27.02.2024

Arvind Datt Semwal & Reva Semwal
R/o 305 Wembley Estate Rosewood City, Sector 50
Gurugram.

Complainants

Versus

M/s Hans Propcon Pvt. Ltd.
Regd Office at: Paras twin towers, tower b, 6th floor,
golf course road, sector-54, gurugram-122002
M/s Tata Capital Housing Finance Limited
Regd Office at: 4th Floor, I Think Techno Campus, Off
Pokhran Road II Thane West 400607

Respondents

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

Sh. Arvind Datt Semwal
Ms. Shriya Takkar

Complainant in person
Advocate for the respondents

ORDER

1. The present complaint has been filed on 15.02.2021 by the complainant/allottees 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 the parties.

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:

S. N.	Particulars	Details
1.	Name of the project	M3M Sierra, Sector 68
2.	Project Area	13.2118 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	93 of 2014 dated 13.08.2014 valid up to 12.08.2024
5.	Name of licensee	Glory Infracon Pvt. Ltd. and 3 others
6.	RERA Registered/ not registered	Registered vide no. 57(a) of 2017 dated 17.08.2017
7.	RERA registration valid up to	30.11.2022
8.	Unit no.	MS S2/0302 (Page no. 21 of the complaint)
9.	Unit area admeasuring	1478 Sq. Ft.



10.	Allotment Letter	26.05.2016 (Annexure 3 of the complaint)
11.	Date of execution of apartment agreement by buyer	16.08.2016
12.	Possession clause	17.1 Possession Of The Apartment The Company, based upon its present plans and estimates, and subject to all exceptions, proposes to handover possession of the Apartment within a period of Sixty (60) months/ from the date of commencement of construction which shall mean the date of laying of the first plain cement concrete/ mud-mat slab of the Tower in which the Apartment is located or the date of execution of this Agreement, whichever is later ("Commitment Period") . In case of failure of the Allottee to make timely payments of any of the installments as per the Payment Plan, along with other charges and dues as applicable or otherwise payable in accordance with the Payment Plan or as per the demands raised by the Company from time to time in this respect, despite acceptance of delayed payment alongwith interest or any failure on the part of the Allottee to abide by any of the terms and conditions of this Agreement, the time periods mentioned in this clause shall not be binding upon the Company with respect to the handing over of the possession of the Apartment.
13.	Due date of possession	After 09.12.2019

		(confirmed by respondent vide letter dated 05.10.2016)
14.	Total sale consideration	Rs. 1,05,61,720/-
15.	Amount paid by the complainants	Rs.82,69,122 /- (As alleged by the respondent) Rs. 86,43,685/- (Rs-11,43,685 (paid by the complainant) + Rs. 75,00,000/- (bank Loan)
16.	Occupation certificate /Completion certificate	14.09.2020 (Annexure R-10 page 7 of reply)
17.	Offer of possession	01.10.2020 (as per page no. 141 of reply)
18.	Pre-Cancellation Letters	12.04.2017, 02.06.2017, 18.01.2019, 13.02.2019, (Mentioned in the facts)
19	Cancellation	02.08.2022

B. Facts of the complaint

3. That the respondent No.1 is a developer of a residential project known as *M3M SIERRA 68' at Sector 68, Gurugram, Haryana & respondent No.2 is financier. In December, 2015, being persuaded by the various advertisements issued in electronic and print media (i.e. Hindustan Times of 30th July 2016 Saturday which was mentioning retain or refuse with the layout plan (copy attached as Annexure-67) the complainants made up their minds and visited the office of the respondent where the complainants were given a rosy picture about the aforesaid project of the

- respondent no.1. The respondent/promoter no.1 induced the complainants by stating that the project shall have unmatched facilities from world class swimming pool to a power yoga centre & Yachtt Club etc.
4. That believing upon the representations of the respondent no.1, the complainants booked a residential apartment bearing unit no. MS S2/0302 in Tower S2 at Level 03. Vide its letter dated 26.05.2016, the respondent no.1 issued allotment letter to the complainants in respect of the apartment/flat in question. The complainant entered into apartment buyer's agreement with the respondents on 16.08.2016. The respondent No.1/promoter/builder had confirmed the Yachtt Club, but the same is missing now. Also sold the units confirming out road good connectivity which is still lacking.
5. That the respondent/promoter has promised garden facing flat but the respondent has now changed it to lake facing by interchanging garden area with Lake Area. The respondent never communicated that high tension wire is going through the land of the colony. The respondent also increased super area in following manner: -
- At time of booking Super Area was 1450 Sq. Ft. with same layout. Then it came to 1478 Sq. Ft. with same layout, and Later at the time of alleged offer of possession its 1507 with same layout*
- That the respondent claim 833.33 sq. ft. of carpet area as per RERA but it is actually coming around 775 Sq. Ft.
6. That the respondent no.1 has not obtained occupancy certificate and is forcing the complainants to make payment at the earliest. The respondent sold unit confirming out road good connectivity which is still lacking. It was also represented that all necessary sanctions and approvals had been obtained to complete the project within the promised time frame. That at the time of booking, the respondent/promoter represented that the

payments would be in easy instalments and there would be a buy back agreement and in case, the complainant is not able to pay any instalments, he can get his booking cancelled without any charges; and in such a scenario respondent would also pay interest for the period, money remains with the respondents.

7. That buy back agreement sent by respondent no.1 to the complainant was handed over by the complainant to the respondent/promoter on 01.04.2020 after signing it, but its copy has not been received by the complainant till date, after counter-signatures of the respondent/promoter. As per clause 7(a) of buy back agreement, in case the complainant(s) chooses to exercise his/their booking and/or allotment, the respondent/ promoter/builder had to pay a lump sum amount of Rs.10,49,692/- and taxes to be paid back extra, to the complainant against the agreement value of Rs.5,37,125/- paid initially. Besides this, the respondents have also extracted a sum of Rs.4, 71,755/- + two EMIS of Rs.67, 400/- each (Totalling to Rs.6,06,555/-) from the complainant on one pretext or the other, towards the aforesaid apartment from December, 2015 as and when demanded by respondents, and the respondents have forced the complainants to pay more money. The apartment/flat was on subvention scheme, but the respondent no.1 has not paid the instalments since March,2020. The builder no. I raised a loan to the tune of Rs.75,00,000/- on behalf of the complainants from M/s Tata Capitals Housing Finance Limited/Respondent no.2. Vide letter dated 05.10.2016 respondents confirmed that in the event the possession of the unit is offered to the complainants/allottee after 09.12.2019 (i.e. the subvention period) the company shall bear the interest component, if any and as applicable, on the loan amount taken/sanctioned and as disbursed

to the company in accordance with the subvention scheme, till the date of notice of possession. The complainants continued to pay the remaining instalments as per the payment schedule and have already paid the more than 99% amount along with interest and other charges of actual purchase price. The respondents had collected 99% of the sale consideration as per the payment schedule annexed with the buyer's agreement, however still the respondent no.1 has failed to handover the possession of the booked unit, thereby violating the very fundamental term of the buyer's agreement. The respondent/promoter had accepted the booking from the complainant and other innocent purchasers in year 2015, however the respondent deliberately and with malafide intentions delayed the execution of the buyer's agreement in order to safeguard itself from the compensation clause as enshrined under the buyer's agreement and hence the delay in execution of the agreement and completion of project is solely attributable to the respondent/promoter. Thus, the period of 60 months should begin from the date of first payment i.e. 18.12.2015.

8. That the complainants have visited the site and inspected the apartment/unit and observed that there are serious quality issues with respect to the construction carried out by respondent till now. There are various deviations from the initial representations. The construction was/is totally unplanned, with sub-standard low grade defective and despicable construction quality. The respondent No.1 has breached the fundamental term of the contract by inordinately delaying delivery of the possession.
9. The complainants have never been able to understand/know the actual state of construction though towers seem to be built up, but no progress

was observed on finishing and landscaping work. The respondent no.1 has not provided the complainant with status of the project. That there is a deficiency of service on the part of the respondent no. I and as such respondent no.1 is liable to be punished and compensate the complainants.

10. That GST should not have been charged on the final payment, if the builder has received completion certificate and that the VAT was to be charged only from contractors and not from the customers as VAT on sale of flats amounts to be doubled taxed, as taxes are already paid for when buying material for construction.
11. That cause of action to file the present complaint firstly arose on 09.12.2019. when respondent no.1 failed to handover the possession of the apartment/flat to the complainants as per letter dated 05.10.2016 and cause of action to file the present complaint further arose in April,2020 when communication took place between the complainants and respondent no.1 through several emails and lastly the cause of action again arose on various occasions, including on 06.10.2020 to 13.01.2021 and on many time till date, when the protests were lodged with the respondent no.1 about its failure to deliver the project and the assurances were given by the respondents that since it is a buy back agreement, the payment would be made to the complainants shortly.
12. That the respondent No.1/promoter failed to fulfil his obligations and responsibilities as per the allotment letter dated 26.05.2016, letter dated 05.10.2016, buy back agreement dated 16.08.2016, and thus, respondent No.1 failed to perform his duty as given in section 17 of the RERA Act, and the promoter has also failed to fulfil his obligation under section 11, thus, the promoter is liable to pay interest and compensation to the

complainant, as provided under section 18(1) proviso. The relevant part of letter dated 05.10.2016 (Annexure-9) is reproduced here below:-

"We hereby confirm that in the event the possession of the unit is offered to the allottee after 09.12.2019 (i.e. the subvention period) the company shall make all possible endeavours to get extension of subvention period, in accordance with the existing laws, rules, regulations, notifications and the company for such extended period shall bear the interest component, if any and as applicable, on the loan amount taken/sanctioned and as disbursed to the company in accordance with the subvention scheme, till the date of notice of possession for the said apartment/Unit, as per the terms of the Buyer's agreement. Thus, there shall be no liability of payment of any interest on the allottee towards the "Lender" under the arrangement for the loan as disbursed till notice of possession for the said apartment/unit, subject to the condition that the allottee shall co-operate by executing all such documents may be required for execution

13. That as per allotment letter dated 26.05.2016, the possession was to be handed over by 09.12.2019, but the Promoter/respondent no.1 has failed to handover the possession to the complainants. The respondent No. 1/builder has miserably failed in completing the project and handing over the unit to the allottees to which they have paid from their own pocket an amount of Rs.12 lacs approximately against the total consideration of Rs.93 lacs. Since respondent No.1/builder has miserably failed in completing his obligations as per Section 18(1) of the RERA Act the allottee is entitled to seek refund or possession at prescribed rate of interest till the actual handing over the possession. The respondent No.1/builder failed to fulfil its obligations and responsibilities as per the allotment letter dated 26.05.2016 and letter dated 05.10.2016 (Annexure-9) to handover the possession within stipulated period. Accordingly, the non-compliance of the mandate contained in section 11 (4) (a) read with

section 18(1) of the Act on the part of the respondents stands established. Moreover, the apartment/unit was under subvention scheme.

C. Relief sought by the complainant:

- a. Direct the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest.
- b. Litigation Cost

D Reply by the respondent

The respondent has contested the complaint on the following grounds:

14. That in consideration of the booking amount paid by the alleged complainants and their commitments to comply with the terms of the booking/allotment and make timely payments of demands the respondent company allotted apartment no. MS S2/0302 ("**Apartment**") in the project M3M Sierra68 ("**Project**") vide allotment letter dated 26.05.2016 along with the schedule of payment (payment plan) opted by the alleged complainants. That the complainants had booked the apartment under the subvention scheme and had opted for the construction linked payment plan. It is submitted that the cost of the apartment as per the allotment letter dated 26.05.2016 for an area admeasuring 1478 sq. ft. was Rs. 1,05,61,720/- plus taxes and other charges, as stated in the schedule of payment.
15. That thereafter the respondent company on 27.07.2016 sent copies of the buyer's agreement to the complainants for execution. After having read, understood and agreed with all the terms therein, the buyer's agreement was executed on 16.08.2016. It is pertinent to mention that the Buyers Agreement duly covers all the liabilities and rights of both the parties. It is submitted that the amount paid by the Complainant till date is Rs. 82,69,122/-.

16. That the complainants have defaulted and breached their contractual commitment to make timely payment of the demands raised by the respondent company. Therefore, the respondent company was constrained to issue a pre-cancellation letter dated 27.12.2016.
17. It is submitted that the construction of the project was completed well within the stipulated time period and the OC was applied on 13.11.2019. That the competent authorities on being satisfied with the construction of the tower and after verifying that the same has been constructed in accordance with the approved plans and permissions granted the Occupation Certificate dated 14.09.2020.
18. That since the respondent company offered the possession to the complainants after 09.12.2020, the company had sent a letter extending the subvention arrangement with respect to the flat allotted to the complainants.
19. All other averments made in the complaint were denied in toto.
20. Copies of all the relevant documents have been 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 submission made by the parties

E. Jurisdiction of the authority

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

21. 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

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.

22. 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 relief sought by the complainants

F. I Direct the respondent to refund the entire amount paid by the complainant alongwith prescribed rate of interest.

23. The complainant states that he had booked a unit on 26.05.2016 and has paid an amount of Rs.82,69,122/- against a total sale consideration of Rs.1,05,61,720/-.An offer of possession was made on 01.10.2020 and on visiting the unit, the complainant found that the unit was not upto his

expectations as the PLC attributes were missing and all the amenities promised by the respondent were not provided. The unit was purchased under a buyback plan as mentioned in para 7 (a) of the agreement dated Nil.

24. The respondent states that the buyback agreement mentioned by the complainant was never executed. In fact, the buyer agreement was signed between the parties according to which the due date for handing over of possession within a period 60 months from the date of commencement of construction. The possession was offered on 01.10.2020. The PLC attributes with respect to the apartment are very much there and all amenities and facilities have been provided as per the BBA including the lake. The photographs have been placed on record. The OC of the project was granted on 14.09.2020. The respondent further states that since the unit was allotted under subvention scheme, unit was offered on 01.10.2020 and cancelled on 02.08.2022 and after the cancellation of the unit, the amount of Rs. 72, 59,605/- has been refunded to the concerned institution and remaining amount being less than 10% earnest money, no refund to the complainant is to be made.
25. Keeping in view of the above facts and circumstances, it is observed that the buyer agreement was executed between the parties on 16.08.2016 and an additional agreement for buyback was offered by the respondent which was accepted by the complainant on 01.04.2020 but no buy back agreement was actually executed between the parties till date as per the records. In the present case, the respondent-builder has offered possession of the unit on 01.10.2020 after obtaining occupation certificate on 14.09.2020 and on demand of due payment at the time of offer of possession the allottee wishes to withdraw from the project and demand

return of the amount received by the promoter in respect of the unit with interest at the prescribed rate. The allottee has filed this complaint on 15.02.2021 after possession of the unit was offered to him after obtaining occupation certificate. The respondent-builder cancelled the subject-unit on 02.08.2022 after the complaint filed by the complainant before the authority. So, the cancellation made by the respondent is invalid in the eyes of law as the complainant already withdrew from the project before the cancellation.

26. It is pertinent to mention here that the allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made and demand for due payment was raised, then only, he filed a complaint before the authority.
27. The right under section 18(1)/19(4) accrues to the allottees on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottees have not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to them, it impliedly means that the allottees tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit.
28. The complainant wants to surrender the unit and obtain refund of the amount paid by him. Keeping in view the aforesaid circumstances, that the respondent builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, and judgment of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.***



Civil appeal no. 5785 of 2019 decided on 11.01.202, it is concluded that if allottees still want to withdraw from the project, the paid-up amount shall be refunded after deduction as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 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"

29. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up by the complainant after deducting 10% of the sale consideration being earnest money after adjustment of the amount of Rs. 72,59,605/- already paid to the Bank/institution 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 filing of this complaint i.e., 15.02.2021 requesting for refund of the amount till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*. The respondent shall also obtain

NoC from the bank/financial institution w.r.t. the loan amount and provide same to the complainant.

F.II Compensation

30. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation.

G. Directions of the Authority:

31. 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):
- The respondent is directed to refund the paid-up amount by the complainant after deducting 10% of the sale consideration of Rs. 85,72,400/- (page no. 60 of complaint) being earnest money and after adjustment of the amount of Rs. 72,59,605/- already paid to the Bank/institution with interest at the prescribed rate i.e., 10.85%, from the date of filing of this complaint i.e., 15.02.2021 seeking refund of the amount till the date of realization of payment. The respondent shall also obtain NoC from the bank/financial institution w.r.t. the loan amount and provide same to the complainant.



ii. The above-mentioned amount if any, be refunded to the complainant within a period of 90 days and failing which legal consequence would follow.

32. The Complaint stands disposed of.

33. File be consigned to registry.

(Ashok Sangwan)
Member

(Sanjeev Kumar Arora)
(Member)

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Date: 27.02.2024

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