

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

Complaint no.:	1640 of 2024
Date of filing:	16.04.2024
Date of decision:	16.08.2024

Mir Zaffae Un Nabi R/o: E-53, Westend Heights, DLF - Phase - I, Sector -m 53, Gurugram	Complainant
Versus	
Suposha Realcon Private Limited. Regd. Office: Unit no. SB/C/2L/Office/017A, M3M Urbana Sector - 67, Gurugram, Haryana- 122102	Respondent
CORAM:	
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Mr. Varun Chugh (Advocate)	Complainant
Ms. Shriya Takkar (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee in Form CRA 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 to the allottee as per the agreement for sale executed inter se them.

A. Project and unit 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, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Project name and location	'Smart World Orchard, Sector-61, Gurugram
2.	Nature of the project	Residential
3.	DTCP license no. and validity status	68 of 2021 dated 16.09.2021 valid up to 15.09.2026
4.	RERA registered/ not registered	Registered dated 03.11.2021 vide no. 74 of 2021 valid up to 31.12.2024
5.	Welcome letter	28.09.2022 (Page 17 of complaint)
6.	Date of agreement	14.10.2022 - R (Page 23 of the complaint)
7.	Total sale consideration	Rs. 1,73,21,693/- [Page no. 16 of complaint and 10 of reply]
8.	Total amount paid by the complainants	Rs. 51,00,000/- [As per page no. 13 of complaint]
9.	Demand letter	29.10.2022 (Page 89 of reply) (vide which respondent asked complainant to pay and amount of Rs. 96,507/-) 21.11.2023 (page 92 of reply) (vide which respondent asked complainant to pay and amount of Rs. 52,93,014/-)
10.	Final opportunity/ Pre-Cancellation letter dated	01.12.2023 (Page 93 of reply) (Vide which he was called upon to pay the

		outstanding dues within a week)
11.	Cancellation letter dated	05.02.2024 (Page 94 of reply)
12.	RESPONDENT REFUNDED	27.03.2024 (page 9 of reply) Amount - 32,02,863/-
13.	Welcome letter in the name of Pooja Aggarwal	15.05.2024 (page 98 of reply)

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:

- i. That, believing on false assurances and misleading representations made by the Respondent in the advertisements and relying upon the goodwill of the Company, the Complainant booked a unit bearing number G-20 C, situated on the 3rd Floor in the said project by paying an amount of Rs.51,00,000/- towards said booking and the unit was allotted subsequently vide allotment letter dated 28.09.2022 issued by the Respondent company. The total cost of the property in question being Rs 1,73,21,690/-.
- ii. That, thereafter, on 14.10.2022, the Complainant and the Respondent Company had executed a builder buyer agreement for the unit in question and the said agreement was got duly registered in the office of Sub Registrar, Gurugram and the payment towards the sale consideration has to be made in accordance with the payment schedule.
- iii. That, vide demand letter dated 06.11.2023, the Respondent had demanded a sum of Rs 52,93,014/- from the Complainant whilst he

was posted in Russia, owing to exigency of work and hence tried to make remittance of the instalment demanded by the company, however, due to the on-going Russia-Ukraine war, he could not transfer the desired funds as his transactions were freezed because of the sanctions imposed by the U.S. Government and the said fact was duly apprised by the Complainant to the Respondent company's representatives telephonically.

- iv. That, believing the same to be true, the Complainant had applied for a home loan from Jammu & Kashmir Bank, Gurugram Branch and was informed by the bank that documents namely approved site plan, environmental clearance, NOC from fire department/ pollution control board/ airport authority besides undertaking, etc. would be required in order to sanction the loan and accordingly, the Complainant requested the Respondent to provide the necessary documents to the bank.
- v. That, the Complainant as well as the bank sent several written correspondences via emails requesting to provide the aforesaid documents for sanctioning the loan, however the Respondent company failed in providing the necessary documents to the Complainant and instead of replying to the email of the Complainant, raised a final reminder letter dated 01.12.2023 via email and imposed penalty of Rs 1,22,441/- for non-payment of the instalment.
- vi. That, the Respondent Company did not provide the documents to the Complainant as well as the bank, despite the fact of loan being sanctioned by the bank which could not be disbursed due to the

- aforesaid reason and taking advantage of my client's vulnerable situation, the Respondent, vide letter dated 05.02.2024, had cancelled the Complainant's unit. That, the Complainant, vide his email dated 08.02.2024 has duly responded to the unit cancellation letter issued by the Respondent company and registered his protest to the said arbitrary act of the company in cancelling his unit despite the fact that the Complainant has already paid a substantial sum of Rs 51 Lacs towards the sale consideration
- vii. That, feeling aggrieved at the hands of the Respondent, the Complainant was finally constrained to serve the Respondent with a Legal Notice with a direction to withdraw the unit cancellation letter and to restore the allotment of the subject unit besides providing requisite documents to the Complainant, but no heed was paid by the Respondent to the Complainant's request.
- viii. That the Complainant kept painstakingly pursuing the Respondent to restore allotment of the unit and to further provide the desired documents for loan disbursement but to no avail as the Respondent, after the receipt of legal notice, on 27.03.2024 itself, with a malafide intention has remitted Rs 32, 02, 863/- in the account of the Complainant after deducting a huge sum of Rs 18,97,137/- towards forfeiture charges.

C. Relief sought by the complainant

4. The complainant has filed the present compliant for seeking following relief:
- I. Direct the Respondent to withdraw the unit cancellation letter dated 05.02.2024 with respect to the property/Floor to the complainant;

- II. Direct the Respondent to restore the allotment letter dated 28.09.2022 issued to the Complainant;
- III. Direct the Respondent to provide all the requisite documents sought by the Bank for Loan disbursal;
- IV. Direct the Respondent to pay a sum of Rs.50,000/- to the Complainant towards the cost of the litigation;
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the present complaint on the following grounds:
 - i. That in due consideration of the commitments by the Complainant to comply with the terms of the booking/Allotment and make timely payments of demands, the Respondent allotted Unit bearing no. G-20C, 3rd floor in the said project for a total consideration of Rs. 1,73,21,693/- plus other charges vide allotment letter dated 28.09.2022. It is submitted that the Complainant on his own free will and understanding of the legal import and effect opted for a specific payment plan i.e. 30:30:40.
 - ii. Thereafter the Complainant requested that the amount paid towards expression of interest for booking of multiple units be transferred towards the unit in question i.e., Unit No. G-20C, without any deductions. The Answering Respondent being a customer-oriented Company acceded to the request of the

Complainant and accordingly transferred the entire amount paid by the Complainant towards Unit No. G-20C in 'Smartworld Orchard', Sector 61 Gurugram.

- iii. It is submitted that the Complainant collected the copies of the Buyers Agreement for execution at his end. After constant follow ups with the Complainant, the said Agreement was duly executed on 14.10.2022 and the same was duly registered.
- iv. Since, the Complainant failed to clear his outstanding dues raised vide demand letter, the Respondent issued a reminder letter dated 29.10.2022 for payment of Rs. 96,507/- immediately, to avoid further accrual of interest/penal consequences.
- v. That subsequently, the Respondent Company as per the payment plan opted by the Complainant, raised the third demand vide letter dated 06.11.2023 for an amount of Rs. 52,93,014/- out of which an amount of Rs. 96,507/- was payable immediately and an amount of Rs. 51,96,507/- was due on or before 21.11.2023.
- vi. The Complainant failed to make the payment of the dues and continued to breach the terms of the Buyers Agreement, due to which, the Respondent Company issued a reminder letter dated 21.11.2023 of Rs. 52,93,014/- and requested the Complainant to make the payment of the outstanding dues to avoid any further accrual of penal consequences.
- vii. Despite issuance of the reminder letter, the Complainant did not come forward to clear his outstanding dues, therefore the Respondent issued pre-cancellation letter dated 01.12.2023 to the Complainant finally calling upon the Complainant to make payment

of Rs. 52,93,014/- along with interest within 7 days of receipt of the said letter, failing which the allotment/booking shall be cancelled/terminated.

viii. That the Complainant even after the issuance of the abovementioned pre-cancellation letter failed to take advantage of this opportunity and continued to breach the terms of the Buyers Agreement. As a consequence of the same the Respondent was constrained to terminate the allotment of the Complainant vide cancellation letter dated 05.02.2024 and forfeit the amount as per terms of the Buyers Agreement. That the Respondent was constrained to cancel/terminate the unit as per the Buyers Agreement on account of non-payment/failure of pending amounts. It is submitted that the Complainant had paid an amount of Rs. 51,00,000/- against the total sales consideration of Rs. 1,73,21,693/- plus other charges. It is submitted that the Respondent Company is incurring losses/damages on account of the breach of the terms of the Buyers Agreement, which the Complainant is liable to pay to the Respondent Company as per the terms of the Allotment. The losses suffered by the Respondent are as follows:

1. Earnest Money -Rs. 16,49,685/- It is submitted that the Complainant herein had agreed to the forfeiture of the earnest money, in the event of failure to comply with the terms of the Buyers Agreement and perform its obligations.
2. Loss of taxes deposited- Rs. 2,47,452/- It is stated that the Respondent Company has already deposited the

requisite amounts towards GST. It is submitted that these taxes are to be deposited by the Respondent the moment the demands are raised and thus an amount of Rs. 2,47,452/- towards GST has been paid by the Respondent and a loss to the said amount is borne as the same is not refundable to the Respondent.

3. Interest- Sum of Rs. 1,28,735/- was the interest payable by the Complainant for the delayed payments.

- ix. Thus, the total loss calculated comes to Rs. 20,25,872/- (approx.) which includes, earnest money deduction @10% to the tune of Rs. 16,49,685/-, taxes to the tune of Rs. 2,47,452/-, and further sum of Rs. 1,28,735/- was the interest payable by the Complainant for the delayed payments.
- x. The Respondent in full and final settlement has also refunded the amount of Rs. 32,02,863/- to Complainant vide Bank transfer on 27.03.2024 post deduction of earnest money in accordance with terms of the Buyers Agreement and HRERA Regulation. It is submitted that the Complainant is a defaulter and has defaulted in making timely payments and therefore the Respondent was constrained to cancel the allotment of the unit vide cancellation letter dated 05.02.2024. That in furtherance of the cancellation of the subject unit, the Respondent Company has allotted the unit to - Mrs. Pooja Agarwal and Mr. Deepa Agarwal vide allotment letter dated 15.05.2024. . That the unit being cancelled there is no privity of contract between the parties and the Complainant has no right, title or interest in the unit in question and neither is the allottee of the same and therefore the Complaint is infructuous.

xi. The Respondent in full and final settlement has also refunded the amount of Rs.32,02,863/- to Complainant vide Bank transfer on 27.03.2024 post deduction of earnest money in accordance with terms of the Buyer's Agreement and HRERA Regulation dated 05.12.2018. Thus, the present complaint is liable to be dismissed at the very threshold.

7. 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 submissions made by the parties.

E. Jurisdiction of the authority

8. 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

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

10. 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) The promoter shall-

- (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 promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

11. 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 as per provisions of section 11(4)(a) of the Act 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 complainant

- I. Direct the Respondent to withdraw the unit cancellation letter dated 05.02.2024 with respect to the property/Floor to the complainant;
- II. Direct the Respondent to restore the allotment letter dated 28.09.2022 issued to the Complainant;
- III. Direct the Respondent to provide all the requisite documents sought by the Bank for Loan disbursal;
- IV. Direct the Respondent to pay a sum of Rs.50,000/- to the Complainant towards the cost of the litigation;

12. The above-mentioned reliefs sought by the complainant are being taken together as the findings in one relief will definitely affect the finding of the other reliefs and the same being interconnected
13. In the present complaint, the complainant intends to continue with the project and is seeking restoration of the originally allotted unit.
14. The respondent sent demand letter dated 21.11.2023, pre-cancellation notice dated 01.12.2023 to make payment of the outstanding amount. However, the complainant continued with his default and failed to make payment even after receipt of final reminder letter dated 01.12.2023 leading to cancellation of unit vide letter dated 05.02.2024.
15. Vide proceeding dated 09.08.2024, the counsel for the respondent stated that the unit had already been sold to a third party and had refunded the amount to the complainant allottee on 27.03.2024 i.e. before filing of the complaint. The counsel for the complainant stated that the deduction made by the respondent is more than 10% and calculation has also not been provided, hence the respondent be directed to provide the calculation whereas counsel for the respondent stated that they have already provided the details as per reply at page 29 . Further, the counsel for the respondent stated that they had deducted only 10% of the total sale consideration and loss of taxes already deposited with the department
16. On the contrary, the counsel for the respondent stated that since the complainant was not willing to continue with the project and did not pay the amount demanded on 21.11.2023 the unit was already cancelled on 05.02.2024 and further refund was processed and sent to the complainant through bank transfer on 27.03.2024 and the complaint has been filed by

the complainant post receipt of that refund amount, hence, as on the date of filing the complaint, the complainant had no claim of the said unit.

17. 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 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 framed 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."

18. The complainant is seeking relief w.r.t. compensation in the above-mentioned relief. 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.(supra)*, has held that an allottee is entitled to claim compensation & litigation charges 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 & litigation expense 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 & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before the Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.
19. Keeping in view the above-mentioned facts the promoter has already refunded the amount paid after deduction of earnest money, interest and losses of tax before the pendency of the case to the complainant through bank transfer on 27.03.2024 and the same has been accepted by him. Hence, cancellation is deemed to have been accepted by the complainant.
20. Complaint stands disposed of.
21. File be consigned to registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory
Authority, Gurugram

Dated: 16.08.2024