

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

Date of Decision:	09.08.2024
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NAME OF THE BUILDER		FANTASY BUILDWELL PRIVATE LIMITED	
PROJECT NAME		"PARAS QUARTIER"	
S. No.	Case No.	Case title	APPEARANCE
1.	CR/2670/2021	Fairway Estates Private Limited V/S Fantasy Buildwell Private Limited	Sh. Sukhbir Yadav Advocate Sh. Yogantar Singh Chahan Advocate
2.	CR/2674/2021	Fairway Estates Private Limited V/S Fantasy Buildwell Private Limited	Sh. Sukhbir Yadav Advocate Sh. Yogantar Singh Chahan Advocate

CORAM:

Shri Sanjeev Kumar Arora

Member

ORDER

1. This order shall dispose of both the complaints titled as above filed before this authority 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.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, "Park Street" (Commercial Colony) being developed by the same

respondent/promoter i.e., M/s K S Propmart Private Limited. The terms and conditions of the memorandum of understanding, fulcrum of the issues involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking refund of the paid-up along with interest and other.

3. The details of the complaints, reply to status, unit no., date of apartment buyer's agreement, due date of possession, total sale consideration, total paid amount and relief sought are given in the table below:

Project Name and Location	Fantasy Buildwell Private Limited at "Paras Quartier" situated in Sector- 2, village- Gwal Pahari Gurugram.	
Possession Clause 3. Possession <i>3.1 Subject to clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the seller and any restrain/restriction from any courts/authority and subject to the purchaser having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and having complied with all the provisions, formalities, documentations, etc. as prescribed by the seller, whether under this agreement or otherwise, from time to time the seller proposes to offer to handover the possession of the apartment to the purchaser within a period of 42(forty-two) months within additional grace period of 6(six) months from the date of execution of this agreement or date of obtaining all licenses or approvals for commencement of construction, whichever is later, subject to force majeure. The purchaser(s) agrees and understands the seller shall be entitled to a grace period of 90(ninety) business days, after the expiry of grace period, for offer to han over the possession of the apartment to the purchaser. Any application for the occupation certificate in respect of the project shall be filed in the due course. The seller shall give notice of offer of possession in writing to the purchaser with regard to the handing over the possession, whereafter, within 30(thirty) days, the purchaser shall clear its outstanding dues when complete documentary formalities and take physical possession of the apartment.</i>		
	Occupation certificate: - 04.06.2018	
Complaint No. & Case Title	CR/2670/2021 Fairway Estates Private Limited V/S Fantasy Buildwell Private Limited	CR/2674/2021 Fairway Estates Private Limited V/S Fantasy Buildwell Private Limited
Reply status	08.09.2021	08.09.2021

Unit no.	PL-1/1001 & 10 th floor [As per page no. 70 of the complaint]	PL-1/1501 & 15 th floor [As per page no. 68 of the complaint]
Area admeasuring	5350 sq. ft. (Super area) [As per page no. 70 of the complaint]	5350 sq. ft. (Super area) [As per page no. 68 of the complaint]
Date of execution of apartment buyer's agreement	19.02.2013 [As per page no. 80 of the complaint]	19.02.2013 [As per page no. 76 of the complaint]
Due date of handing over of possession	19.02.2017 (Note: Due date to be calculated 42 months from the date of execution of apartment buyer's agreement i.e.,19.02.2013 plus grace period of 6 months)	19.02.2017 (Note: Due date to be calculated 42 months from the date of execution of apartment buyer's agreement i.e.,19.02.2013 plus grace period of 6 months)
Offer of possession	19.07.2018 (but not for the unit PL-1/1001) (As per page no. 133 of the complaint)	19.07.2018 (for the new unit) (As per page no. 133 of the complaint)
Basic sale consideration	BSC: Rs.3,90,55,000/- (As per payment plan on page no. 116 of the complaint)	BSC: Rs.3,90,55,000/- (As per payment plan on page no. 89 of the complaint)
Total Consideration	TSC: Rs.4,79,87,000/- (As per payment plan on page no. 116 of the complaint)	TSC: Rs.4,79,87,000/- (As per payment plan on page no. 89 of the complaint)
Total Amount paid by the complainant(s)	AP: Rs.1,20,78,540/- (As per SOA dated 19.07.2018 on page no. 136 of the complaint)	AP: Rs.1,20,78,540/- (As per page no. 89 & 92 of the reply)
Surrender by the complainant	20.02.2016 [As per page no. 125 of the complaint]	22.06.2015 [As per page no. 115 of the complaint]
Cancellation letter by respondent	31.05.2021 (for present unit) [As per page no. 47 of the reply for present unit]	31.05.2021 [As per page no. 50 of the reply for present unit]
<p>The complainants in the above complaint(s) have sought the following reliefs:</p> <ol style="list-style-type: none"> 1. Direct the respondent to refund the entire amount of Rs.1,20,78,540/- paid towards unit no. PL-1/1001 by the complainant along with interest @ 18% per annum from the date of respective deposits till its actual realization. 2. 		
<p>Note: In the table referred above, certain abbreviations have been used. They are elaborated as follows:</p> <p>Abbreviation Full form TSC Total Sale consideration</p>		

AP Amount paid by the allottee(s)

4. The aforesaid complaints were filed against the promoter on account of violation of the MOU against the allotment of units in the project of the respondent/builder and for not handing over the possession by the due date, seeking refund of the amount paid along with interest.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of all the complaints filed by the complainant/allottee are also similar. Out of the above-mentioned case, the particulars of lead case **CR/2670/2021 titled as Fairway Estates Private Limited V/S Fantasy Buildwell Private Limited and Mr. Aman Nagar (Director, Fantasy Buildwell Private Limited)** are being taken into consideration for determining the rights of the allottee(s) qua refund of the amount paid.
 - A. Unit and project related details**
7. The particulars of unit details, 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.	Particulars	Details
1.	Name of the project	"Paras Quartier", Sector-2, at Village Gwal Pahari, District- Gurugram
2.	Project area	10.096875 acres
3.	Nature of the project	Residential group housing colony

4.	DTCP license no. and validity status	74 of 2012 dated 31.07.2012 valid up to 30.07.2020
5.	Name of licensee	Maxicon Traders Pvt. Ltd. and 2 others
6.	Date of environment clearances	12.07.2013 [Page 68 of reply]
7.	Date of building plans	20.12.2012 [Page 53 of reply]
8.	RERA Registered/ not registered	Registered vide no. 164 of 2017 dated 28.09.2017
9.	RERA registration valid up to	28.08.2022
10.	Unit No.	PL-1/1001, 10 th floor, Tower/block-PL-1 (Page no. 70 of complaint)
11.	Unit admeasuring	5350 sq. ft. (Page no. 70 of complaint)
12.	Date of execution of apartment buyer agreement	19.02.2013 (Page no. 80 of the complaint)
13.	Allotment letter	22.12.2012 [Page no. 70 of complaint]
14.	Possession clause (Both cases)	3. Possession <i>3.1 subject to clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the seller and any restrain/restriction from any courts/authority and subject to the purchaser having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this</i>



		<p>agreement and having complied with all the provisions, formalities, documentations, etc. as prescribed by the seller, whether under this agreement or otherwise, from time to time the seller proposes to offer to hand over the possession of the apartment to the purchaser with in a period of 42 (Fourty-two) months within additional grace period of 6 (six) months from the date of execution of this agreement or date of obtaining all licenses or approvals for commencement of construction, whichever is later, subject to force majeure. The purchaser(s) agrees and understands the seller shall be entitled to a grace period of 90 (ninety) business days, after the expiry of grace period, for offer to hand over the possession of the apartment to the purchaser. Any application for the occupation certificate in respect of the project shall be filed in the due course. The seller shall give notice of offer of possession in writing to the purchaser with regard to the handing over the possession, whereafter, within 30 (thirty) days, the purchaser shall clear its outstanding dues when complete documentary formalities and take physical possession of the apartment. (Page 92 of the complaint).</p>
15.	Due Date of possession	19.02.2017 (Note: Due date to be calculated 42 months from the date of execution of apartment buyer's agreement i.e.,19.02.2013 plus grace period of 6

		months)
16.	Total sale consideration	Rs.4,79,87,000/- (As per payment plan page no. 116 of complaint)
17.	Amount paid by the complainant	Rs.1,20,78,540 /- (As per statement of account dated 19.07.2018 page no. 136 of complaint)
18.	Occupation certificate	04.06.2018 [Page 45 of reply]
19.	Offer of possession	19.07.2018 but not for the unit PL-1/1001, [Page 133 of the complaint]
20.	Surrender by the complainant	20.02.2016 (Page 125 of complaint)
21.	Cancellation letter by respondent	31.05.2021 [Page 47 of reply for present unit]
		31.05.2021 [Page 49 other unit of reply - PL/1501]

B. Facts of the complaint:

8. The complainant has made the following submissions in the complaint:
- That the complainant is a law abiding company of India having its registered office at D-13/60, First Floor, Sector-8, Rohini, Delhi-110085 had booked a unit/flat in the project "**PARAS QUARTIERS**" situated at Sector 2, Gurugram of the respondent company, M/S Fantasy Buildwell Pvt. Ltd. in August 2012 through its Director Mr. Praveen Aggarwal. The present complainant is filed by Mr. Praveen Aggarwal, being the Authorized Representative of the complainant company, who is duly authorized to act and proceed for and on

- behalf of the complainant vide board resolution dated 31.03.2021. Therefore, Mr. Praveen Aggarwal is competent on behalf of the complainant-company to sign the complaint and all the documents, file, process and proceed with the present complaint.
- ii. That the respondent no. 1 claims to be one of the leading real estate company and respondent no. 2 is a director of respondent no. 1 and responsible for the day to day business activities and for taking decisions on behalf of the company. Both the respondents are jointly referred as respondents.
- iii. That the project "Paras Quartier" at Sector-2, Gurugram-Faridabad Road, Gwal Pahari, Gurugram, Haryana came to the knowledge of Mr. Praveen Aggarwal, the director of the complainant company, through Mr. Harinder Nagar, Mrs. Anjoo Gogia, Mr. Manish Sharma & Mr. Rakesh Arora the authorized marketing representatives of the respondent. That the respondents had promoted the said project with extensive and aggressive print and electronic media advertisements. The respondents have made various tall claims and false representations regarding security, convenience and elegance of the said project for luring the complainant to sign up for an allotment. The marketing representatives approached Mr. Praveen Aggarwal, for and on behalf of the respondent, making tall claims in regard to the project and the respondent. The marketing representatives misrepresented to the Mr. Praveen Aggarwal that all the approvals, Licenses, permissions and sanctions from the concern departments related to sale & commencement of construction of the project have been taken and the complainant was lured by all these utter lies of the representatives of the respondent.

- iv. That relying on such representations, assurances, brochures and meetings, the complainant agreed to book one unit bearing no. PL 01/1001 admeasuring super area 5350 sq. ft. ft for a total sale consideration of Rs.4,79,87,000/- and accordingly paid an amount of Rs.45,00,000/- through cheque dated 14.08.2012 as the booking amount.
- v. That as per the provisions of Haryana Development and Regulation of Urban Areas Act, 1975, when a builder is developing a group residential housing project than the builder cannot sell the apartments to third party or any buyer before the approval/sanction of building plan by the competent authority. However, in contravention to the provisions of the said act, the respondent advertised about the project in early 2012 and accepted the booking for apartments from the complainant on 14.08.2012 and also accepted the advance of payment of Rs.45,00,000/-. It is pertinent to mention that the even though they accepted the payment on 14.08.2012, the respondent did not issue any receipt against the receipt of such payments of Rs.45,00,000/- for advance booking amount at that instant to avoid any action from authority. Also, they did not issue the allotment letter soon after the booking and payment of advance booking amount. That on 20.12.2012, the building plan of the project was approved/sanctioned by the competent authority. It is after the approval of building plans on 20.12.2012, the respondent issued the allotment letter on 22.12.2012 and receipt for payment of Rs.45,00,000/- on 22.12.2012. Further, the complainant was again requested to submit the application form for booking of apartments. Such acts of the respondents are illegal and amounts to cheating.

- vi. That the fraudulent and unprofessional conduct of the respondent has been evident since very inception. That the respondent was acting craftily from the start to cover up his unlawful acts. It is clear that the respondent's only ambition was to dupe the complainant and pocket the hard-earned money of the complainant. The respondent continued to promote the said project and continued taking payments from the complainant and other allottees without having requisite approvals. The complainant got to know about such fact at very later stage after execution of booking form and apartment buyer's agreement. Had the complainant aware about status of all the sanctions, approvals and licences, he would not have booked a unit in the said project.
- vii. That on 28.12.2012, a separate application form was duly submitted by the complainant on request of respondent for the unit. It is pertinent to note herein that the complainant was compelled to submit an application form again after the approval of building plans, whereas the complainant had already submitted an application form on 14.08.2012. The respondent cleverly trying to secure the paper trial at his end, that the application form be dated in such a way that it is subsequent to the approval of building plans.
- viii. That the complainant made a payment of Rs.35,52,360/- through cheque dated 28.12.2012 as per the payment schedule. The same has been acknowledged by the respondent vide receipt dated 22.12.2012. Further, on 22.06.2013 the complainant made a payment of Rs.40,26,180/- through cheque date 22.06.2013 as per the payment schedule. The same has been acknowledged by the respondent vide receipt dated 26.06.2013.

- ix. That prior to execution of the apartment buyer's agreement i.e., between booking of the unit and execution of agreement, the complainant made a total payment of Rs.80,52,360/- for each unit to the respondent which amounts to more than 10% of the total sale consideration, thus, the respondent violated section 13 of the Act of 2016. The complainant having paid such huge amount already had no option but to put his signatures on the dotted lines and proceed with the allotment.
- x. That in January 2013, the respondent sent a letter to the complainant with 2 copies of apartment buyer's agreement for signing and execution directing the complainant to sign the same and return the said copies before 02.02.2013. That the said agreement was plagued with illegalities and one-sided arbitrary clauses. Upon receiving and reviewing the agreement, the applicant realized that the respondent drew an unfair and arbitrary agreement for the apartment terms and conditions of which were detrimental to the applicant. Further, the agreement was one-sided, all important/relevant provisions being drawn in favour of the respondent and absolutely nothing for the applicant. The applicant also realized that he was being denied fair scope of compensation in the agreement in case of delay of possession however, he was liable to pay heavy penalty in case of delay in making instalments.
- xi. That on 29.01.2013, the complainant having no other means having already invested a huge amount of money and seeing that the respondent was in a dominant position sent a letter to the respondent with the signed copies of the said apartment buyer's agreement dated 19.01.2013.

- xii. That in February 2013, the complainant was sent a copy of the apartment buyer's agreement. It is pertinent to note that though the complainant had signed the agreement on 19.01.2013 and sent the copies of the said agreement way back in January 2013, to its utter shock it was found that the date of the said agreement had been overwritten. That for reasons best known to the respondent "January" had been overwritten and changed to "February". The complainant tried its level best to follow up and seek reasons from the respondent for the said arbitrary and unprofessional conduct but to no avail.
- xiii. That as per clause 3.1 of the agreement dated 19.01.2013, the respondent was under obligation to hand over the possession of the unit within 42 months along with grace period of 6 months from the date of agreement. Therefore, the date of handing over of possession was 18.07.2016. The respondent has failed to deliver the said project in the said timeline. It is pertinent to note herein that the said project remains far behind from construction even till today after approx. 2 years of delay. The complainant visited the project site on various occasions and it was pretty clear that the probability of the project being completed was very bleak.
- xiv. That the respondent raised a demand on 30.05.2014 for Rs.36,04,149/- which should have been raised on completion of upper basement roof slab which was disputed by the complainant. The respondent again sent a reminder on 14.11.2014 for the payment due on completion of 3rd floor roof slab and the complainant again disputed the same for being as per the agreed payment schedule. On 03.03.2015, the respondent sent a reminder for the payment due on completion of 8th floor roof slab and was

disputed by the complainant. The complainant again received a arbitrary demand of Rs.1,61,31,867/- on 23.04.2015 from the respondent which should have been raised on completion of 14th floor roof slab.. The complainant time and again raised concern before the respondent about demanding instalments without reaching the actual milestone as per the construction linked plan. It is submitted that the respondent sent such demand arbitrarily and in contravention to the agreement without achieving the particular stage of construction. Being aggrieved, the complainant raised his concern by visiting the office of the respondent regarding raising of demand without achieving the particular stage of construction as the project was far behind from the agreed development schedule of the project.

- xv. That being aggrieved, on 06.05.2015, the complainant visited the office of the respondent and raised his concern over the demand which were being raised without achieving the particular milestone as per the agreed payment schedule and further also expressed his resentment over the delay in development of the project. That a meeting was held on 06.05.2015 at the office of the respondent between the complainant and the authorized representatives of the respondent. The representative of the respondent assured the complainant that they will not raise the said demand in future and agreed to surrender the unit no. PL 01/1001 and transfer the amount paid in the said unit in another unit of the complainant in the same project i.e., PL 01/1501.
- xvi. That instead of abiding by agreed discussion held during the meeting dated 06.05.2015, the respondent with malafide intention sent the reminder dated 17.06.2015 and asked the complainant to

remit the unlawful dues of Rs.1,64,78,227/-. Astonished and startled by such act of the respondent, the complainant vide letter dated 22.06.2015 replied to the demand reminder letter dated 17.06.2015 whereby the respondent demanded an outstanding amount of Rs.1,64,76,133/-. The complainant apprised the respondent is demanding money without reaching the actual milestone as per the construction linked plan. Further, in view of such delayed status of the construction at site and continuous illegal acts committed by the respondent, the complainant asked the respondent to refund of the amount of already paid against the unit No. PL 01/1001 along with interest @ 18% p.a. The respondent having ill intention, again sent a reminder for the payment due on completion of 14th floor roof slab on 12.09.2015.

- xvii. That due to the said trust deficit and no tenable progress at the project site the complainant sent a letter dated 18.02.2016 to the respondent for the refund of the entire amount invested and withdrawal from the said project. Further, on 18.07.2016 the possession of the said apartment became due for delivery, but the construction of the said project was far from completion. The respondent failed to provide any valuable information regarding the said project or any projected date of delivery. The complainant visited the offices of the respondent on various occasions hoping to secure the future of his hard-earned money and respectfully exit the said project and requested the respondent to refund the entire paid amount along with interest but to no avail.
- xviii. That the respondent being at a dominant position again sent a demand of Rs.2,63,30,436/- on 05.11.2016 despite of addressing letters sent by the complainant on 22.06.2015 and 18.02.2016. A

reminder for the same was again sent on 11.02.2017. Further, the respondent sent a mail dated 22.03.2018 asking complainant to return originals of all the documents related to the unit bearing no. PL 01/1001. Further, the respondent asked the complainant to execute "Termination/Settlement Deed" and consent for the said transfer and surrender.

- xix. That on 03.04.2018, the complainant sent a signed "Termination/Settlement Deed" to the respondent for signature recording the Termination/Settlement Deed and the terms thereto along with a letter annexing all the 'Original' copies of documents regarding the unit bearing no. PL 01/1001 as sought by the Respondent to make the transfer or refund of funds and surrender of unit.
- xx. That till date the respondent neither returned duly executed copies of the said "Termination/Settlement Deed" nor has cancelled/surrendered the unit PL 01/1001 or transferred the amount paid for the unit PL 01/1001 in another holding unit bearing PL 01/1501 nor refunded the amount paid for the unit no. PL 01/1001. Again the respondent duped the complainant by initially agreeing to the terms of the settlement and then not acting upon the same. The respondent has been continually misusing the innocence and trust of the complainant.
- xxi. That the respondent continued with its fraudulent actions and sent a letter "Intimation of Physical Possession" on 19.07.2018 for another holding unit bearing no. PL 01/1501 of the complainant in the same project where the amount paid towards unit no. PL 01/1001 was supposed to be transferred and demanded the entire pending sale

consideration. However, the respondent did not transfer the amount or refund the amount paid towards unit no. PL 01/1001.

- xxii. That despite mutual agreement between the parties the respondent continued to act in contravention. It is pertinent to note that the said possession was anyway illegal as the premise continues to be in an uninhabitable state till date. Further, the said letter fails to hold any ground whatsoever as the respondent sent the said letter with a huge demand of residual payments. That contrary to the promises and the agreement thereto the respondent had not transferred the payments made in respect of unit bearing no. PL 01/1001 in another holding unit bearing no. PL 01/1501. That the respondent continues to harass the complainant to make the remainder of payments even though the terms agreed between the parties were totally different. That the respondent is unlawfully holding onto the hard-earned money of the complainant. That instead of redressing the grievances of the complainant, the respondent again sent a letter for intimation of physical handing over of possession for another holding unit no.PL-1/1501 on 15.04.2019.
- xxiii. That the respondent herein is offering unlawful possession of the said unit, the complainant has visited the said Project in recent times and the same is not in a habitable condition. Further it is pertinent to note that the complainant had sought for refund from the said project way back in 2016 and the same was agreed but not acted upon by the respondent. Therefore, at this stage irrespective of the fact whether possession is offered or OC has been granted in respect of the said project, the complainant cannot be compelled to continue with the said project and that the complainant is entitled for refund of the total amounts invested.

xxiv. That inordinate delay in handing over possession of the unit clearly amounts to deficiency of service on account of the respondent and the complainant has rightly claimed to withdraw from the project and claimed total refund of amount along with other interest and compensation and the same right has been granted under section 18 of the Act of 2016. That since the complainant is not interested in taking the possession of the unit and wishes to get the refund of the money already paid; the respondent shall refund the amount with prescribed rate of interest as per the provisions of the Act of 2016.

C. Relief sought by the complainant:

9. The complainant has sought following relief(s):
- i. Direct the respondent to refund the entire amount of Rs.1,2078,540/- paid towards unit no. PL-1/1001 by the complainant along with interest @ 18% per annum from the date of respective deposits till its actual realization.
 - ii. Direct the respondent to pay compensation of Rs.15,00,000/- for causing mental agony, harassment to the complainant.
 - iii. Direct the respondent to pay an amount of Rs.5,00,000/- towards cost of the proceedings/ litigation.
10. On the date of hearing, the authority explained to the respondent/promoter about the contraventions 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 respondents:

11. The respondents have contested the complaint on the following grounds:
- I. That at the outset, it is submitted that the instant complaint itself is not maintainable and the same is liable to be dismissed in as much

as the complainant in the instant complaint has also filed a proceeding before NCLT, New Delhi, being (IB)-103 (PB)/2020; titled Fairways Estates Vs Fantasy Buildwell Pvt. Ltd. The said proceeding was instituted prior in time and is also pending adjudication. The complainant has suppressed this vital fact from this Hon'ble Authority. On this ground alone the complaint is liable to be dismissed. Moreover, the complainant has even suppressed another vital facts from this Hon'ble Authority that it is the complainant who himself has defaulted in payment of its instalments resulting in cancellation of allotment of both of its units bearing no. PL 01/1001 & PL 01/1501 and on this ground alone, the complaint is liable to be dismissed.

- II. That the complaint is liable to be dismissed for misjoinder of parties as the complainant has impleaded respondent no. 2 in its personal capacity. The said person is no longer associated with the company and has no role to play in the matter. The project is constructed by respondent no. 1, the communications, transactions etc. were exchanged in between the complainant and respondent No. 1 alone. The ABA was executed in between the complainant and respondent no. 1 alone. The respondent no. 2 is not a necessary party in the matter and as such his name be deleted from the arrays of the respondents.
- III. That complainant is not a genuine flat purchaser or a consumer and has purchased the said flat for commercial and investment purposes for which the jurisdiction of this Hon'ble Authority cannot be invoked, since the object of RERA Act is to protect the interests of the consumers and not the investors.

- IV. That complainant herein has been himself guilty of not adhering to the payment schedule and in fact has defaulted in payment in same resulting in cancellation of both of its units. The same is not permissible in terms of Act of 2016 and in view of the same, the complaint merits outright dismissal.
- V. That the project in question is a registered project, having registration no. 164 of 2017, dated 29.08.2017. It is also pertinent to mention here that answering respondent has applied for the occupation certificate for towers PL- 01 and was received on 04.06.2018 pursuant to which possession of the unit was offered to the complainant.
- VI. That the unit of the complainant being unit no. PL 01/1001 is already cancelled by the answering respondent vide its letter dated 31.05.2021 along with another holding of the complainant being unit no. PL 01/1501 on account non-payment of instalments.
- VII. That the answering respondent has also offered refund of both of the units to the complainant vide its cancellation letter dated 31.05.2021 after deduction of earnest money in terms of Clause 2.21 of the ABA of both the units but it is the complainant who is not coming forward to claim refund for both of its units.
- VIII. That the present complaint is not maintainable since the possession had to be handed over to the complainant in terms of clause 3.1 and 3.2 of the agreement which clearly provides that subject to the complainant complying with all the terms of the agreement and making its timely payments of instalments as and when the same becomes due and payable the respondent proposes to offer the possession of the apartment within a period of 51 months from the date of execution of the agreement or the date of obtaining all

licences or approvals for commencement of construction, whichever is later, subject to force majeure. Moreover, all the approvals for commencement of the construction work were received towards around the end of the year 2013 and the construction work began only in November, 2013. Thus, it is submitted that the complaint is filed in contravention of the provisions of the Apartment Buyer Agreement dealing with the offer of possession and the complaint merits outright dismissal in view of the same.

- IX. That the complainant has committed several defaults in payment of its timely instalment for which the respondent has even sent several reminder/final reminder letter to the complainant but all of these felt at deaf ears of the complainant and this left with no other choice with the answering respondent then to cancel allotment of units of the complainant.
- X. That the delay on the part of answering Respondent in completing the construction of the project and in offering possession of units to the complainant on time was the result of certain force majeure reasons like illegal blocking, filling and encroachment of natural Nallaa, Gwal Pahari for which considerable time was spent in making applications before the Competent Authority, pendency of several litigations before National Greens Tribunal, stopping of construction activity by order of Hon'ble Apex Court etc. all these resulted in delay in completion of construction at the project site. It lasted for a period of 24 months. If the aforesaid period is taken into account there is virtually no delay on the part of respondent in offering possession of the unit to the complainant.
- XI. That the Hon'ble Authority ought to take note of the fact that the respondent had offered possession to the complainant for both of its

units but failed to deliver possession of the units to the complainant due to default on the part of complainant himself in non-payment of instalments. The respondent had to ultimately cancel the allotment of both the units for non-payment.

- XII. That the Adjudicating Officer does not have jurisdiction to try the complaint in terms of Rule 28 & 29 of Haryana Real Estate (Regulation & Development) Rules, 2017 read with Regulation 25 of the Haryana Real Estate Regulatory Authority, Gurugram (General), Regulation, 2018. The complainant does not have any valid or subsisting cause of action to file the present complaint. It is being made by the Complainant to harass the respondent and make unlawful gains at its expense. In view of the aforesaid submissions, the present complaint be dismissed with costs.

12. 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 those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

13. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire

Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject-matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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.

14. 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.
15. 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.* SCC Online SC 1044 decided on 11.11.2021 and followed in *M/s Sana Realtors Private Limited & others V/s Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022* wherein it has been laid down as under:

"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."

16. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of *M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. and M/s Sana Realtors Private Limited & others V/s Union of India & others (supra)*, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the amount paid by him.

F. Findings on objections raised by the respondents:

F.I Objection regarding the complaint before NCLT, New Delhi, being (IB)-103 (PB)/2020; titled Fairways Estates Vs Fantasy Buildwell Pvt. Ltd.

17. The respondents have raised an objection that the present complaint is not maintainable as the complainant has filed a complaint against the respondents before the Hon'ble NCLT. But the counsel for the complainant during proceedings of the day dated 15.03.2024 has filed an affidavit regarding non-pursuing of the complaint before the Hon'ble NCLT and the same has been taken on record. Thus, in view of the aforementioned fact, the contention of the respondent stands rejected.

F.II Objection regarding delay due to force majeure circumstances

18. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as COVID-19 outbreak, certain environment restrictions, weather conditions in NCR region, shortage of labour, increase in cost of construction material and non-payment of instalment by different allottees of the project, etc. But all the pleas advanced in this regard are devoid of merit. Therefore, it is nothing but obvious that the project of the respondent was already delayed, and no extension can be given to the respondent in this regard. The events taking place such as restriction on construction due to weather conditions were for a shorter period of time and are yearly one and do not impact on the project being developed by the respondent. 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.

F.III Objection regarding the complainant being investor.

19. The respondent has taken a stand that the complainant is the investor and not consumer. Therefore, the complainant is not entitled to the protection of the Act and is not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is

pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the documents placed on record, it is revealed that the complainants are buyers and paid total price of Rs.1,20,78,540/- to the promoter towards purchase of a unit in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

20. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is allottee as the subject unit was allotted to it by the promoter. The concept of investor is not defined or referred to in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred to in the Act. Thus, the contention of the promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant:

- G.I Direct the respondent to refund the entire amount of Rs.1,20,78,540/- paid by the complainant along with interest at

the prescribed rate on the paid amount from the date of payment till actualisation.

21. The complainant was allotted a unit in the project of respondent no. 1 "Paras Quartier", in Sector 2, village-Gwal Pahari, Gurugram vide allotment letter for a total sum of Rs.4,79,87,000/-. An apartment buyer's agreement dated 19.02.2013 was executed between the parties and the complainant started paying the amount due against the allotted unit and paid a total sum of Rs.1,20,78,540/-.
22. The due date of possession as per the possession clause of the apartment buyer's agreement is 19.02.2017. The complainant has surrendered the unit initially on 22.06.2015 and again on 20.02.2016 as per the documents placed on record and the same has been clarified by the counsel for the complainant during the proceedings of the day dated 09.08.2024. Thus, the date of surrender is considered as 22.06.2015.
23. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainants had paid Rs.1,20,78,540/- against the total sale consideration of Rs.4,79,87,000/-. The complainant has made the request for refund way back in 2015 and the due date for possession of the unit was 19.02.2017 i.e., the unit was surrendered before due date.
24. Now when the complainant approached the Authority to seek refund, it is observed that under clause 2.21 of ABA, the respondent-builder is entitled to forfeit the 10% of the basic sale price. The relevant portion of the clause is reproduced herein below:

"The seller and the purchaser(s) hereby agree that 10% (ten percent) of the Basic Sale Price on the Super Area of the apartment shall constitute the "Earnest money". Timely payment of each installment of the sale consideration as stated herein is the essence of this agreement....."

25. That the above mentioned clause provides that the promoter is entitled to forfeit the booking amount/earnest money paid for the allotment and interest component on delayed payment (payable by the allottee for breach of this agreement and non-payment). The Authority is of the view that the drafting of the aforesaid clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee. As per the aforesaid clause the builder is entitled to forfeit 10% of the basic sale price and empowers to promoter to recover interest on delayed payments along with other amount of non-refundable nature. It is unjust condition that exploits the allottee and can be termed as one sided. The clause on the face of it does not give equal bargaining power to the allottee. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
26. 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 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."

27. 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 surrender of unit or cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainant i.e., Rs.1,20,78,540/- after deducting 10% of the sale consideration and return the remaining amount along with interest at the rate of 11% (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 surrender i.e., 22.06.2015 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.II Direct the respondent to pay compensation of Rs.15,00,000/- for causing mental agony, harassment to the complainant.

G.III Direct the respondent to pay an amount of Rs.5,00,000/- towards cost of the proceedings/ litigation.

28. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 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.

H. Directions of the Authority:

29. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondents are directed to refund the amount i.e., **Rs.1,20,78,540/-** received by them from the complainant after deducting 10% of the sale consideration and return the remaining amount along with interest at the rate of 11% (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 surrender i.e., 22.06.2015 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017
ibid

- ii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.
 - iii. The respondents are further directed not to create any third-party rights against the subject unit before full realization of paid-up amount along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainant.
30. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
31. Complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter.
32. Files be consigned to registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.08.2024

HARERA
GURUGRAM