

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

Complaint no. :	992 of 2023
Date of filing complaint:	06.03.2023
Date of decision :	05.07.2024

M/s Vogue Associates Pvt. Ltd. R/O: Ca/42a Shalimar Bagh New Delhi 110088	Complainant
versus	
Experion Developers Private Limited R/O: F-9, First Floor, Manish Plaza-1, Plot No-7, Mlu, Sector-10, Dwarka, New Delhi- 110075	Respondent

CORAM:	
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Gaurav Rawat (Advocate)	Complainant
Sh. Pankaj Chandola (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of

the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Name of the project	"The Heartsong", Sector 108 , Gurugram
2.	Nature of the project	Residential
3.	Registered / not registered	306 of 2017 dated 17.10.2017 valid upto 16.10.2018.
4.	Application Form	21.11.2012 (Page 32 of reply)
5.	Allotment letter	06.12.2012 (Annexure R 3 at page 51 of reply)
6.	Unit no.	B5/0901 (Page 52 of reply)
7.	Unit admeasuring	1758 sq. ft. (Page 52 of reply)
8.	Date of execution of buyer's agreement	Not Executed
9.	Possession clause	Estimated project completion schedule

	<p>(13) Subject to the terms of this and charges by the Applicant Matured to timely payment of Total Sale Consideration stamp duty and other costs and charges by the Applicant,</p> <p>"Force Majeure and subject to the Applicant having complied with the necessary formalities and the documentation as may be prescribed by the Company from time to time and especially, as may be prescribed in the Notice of Possession, the Company shall endeavor to hand over the possession of the Apartment within a period of 36 (thirty-six months from the date of execution of the Agreement or any revision in the sanctioned Building Plans, whichever is later Commitment Period"). The Applicant further accepts, agrees and understands that in addition, a period of 180 (one hundred and eighty) days ("Grace Period"), her expiry of the Commitment Period will be available to the Company to account for unforeseen circumstances Project uncertainties. Subject to receipt of the Occupation Certificate upon completion of the Project, the Company shall issue a notice of offer of possession ("Notice of Possession") requiring the Applicant to me possession of the Apartment within a time period as may be specified</p>
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		therein subject to the full payment of the Total Sale Consideration for the Apartment, procurement of stamp papers, execution of Conveyance Deed, payment of registration charges for registration of the Conveyance Deed and other costs charges, deposits, dues, duties, interest, Holding Charges interest on delayed payments, taxes, etc. against the said Apartment Project as may then be applicable (At page 42 of reply)
10.	Due date of delivery of possession	06.12.2015 (when calculated from 36 months from the date of allotment) [Calculated as per <i>Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors.</i> (12.03.2018 - SC); MANU/SC/0253/2018]
11.	Total sale consideration	Rs. 1,08,78,250/- (On page no. 55 of reply)
12.	Total amount paid by the complainant	Rs. 1,04,78,288/- (Page 55 of reply)
13.	Reminder letter	18.05.2017, 29.06.2017, 29.08.2019, 12.09.2019, 03.02.2022 and 19.04.2022
14.	Occupation certificate	02.03.2017

		(Page 59 of reply)
15.	Possession Notice	03.03.2017 (Page 115 of complaint)
16.	Cancellation letter	19.04.2022 (Page 94 of reply)
17.	Refund of amount	Mail dated 02.12.2022 states that RTGS has already been done from our end and also as per page 10 of reply money has already been refunded. The same has been agreed by the complainant at page 32 of complaint

B. Facts of the complaint:

3. The respondent issued an application form dated 21.11.2012 by paying a booking amount of Rs. 700,000/- for the unit bearing No0. B5/901 measuring 1758 Sq. ft. with the total consideration of Rs. 1,00,19,000/- which was signed by the complainant but not by the respondent.
4. Relying on various representations and assurances given by the respondent and on belief of such assurances. The respondent sent a provisional allotment letter dated 06.12.2012 to the complainant. The respondent sent a final notice dated 10.07.2013 to it stating that the it has failed to meet the obligation of payment as per the application form. Accordingly, it has to pay the due of Rs. 11,50,889/- along with the delayed interest of Rs. 27,811/-

5. The complainant sent a mail dated:29.05.2015 to the respondent stating that it has received a letter dated 12.05.2015 along with the builder buyer agreement and pointed out various objections to be resolved as many of terms were one sided and was not in its best of interest. The respondent sent a notice of possession to the complainant dated 03.03.2017 with the final payment request letter of Rs. 1,24,16,704/- which is due to be paid by the complainant.
6. The respondent sent a handover letter to the complainant for the subject unit dated 03.03.2017. Further sent a mail dated 19.04.2019 to the complainant stating their regrets that the complainant have ignored the final notice dated 12.09.2019 and they are sending a cancellation letter through post. The complainant sent an e-mail on 20.08.2019 and 01.03.2021 to the respondent that they observed no progress in subject unit despite regular follow ups and interactions. The respondent sent a cancellation letter to them for the unit and stating that the total amount paid by them is Rs. 1,04,45,713/-, amount forfeited by the respondent as earnest money Rs. 19,88,595/- which is 19.84% of the total consideration and the amount refunded to the complainant is Rs. 84,57,118/-.
7. It is to be taken in to consideration that the respondent have forfeited more than 10% of the Earnest Money of the total Consideration of the unit which is 19.84% also, Under Clause 25 of the application form you have stated that

earnest money amount to be 15% which is also not legal as in the case of:- *M/s DLF V/s Bhagwanti Narula decided on 06.01.2015 by the Hon'ble National Consumer Disputes Redressal Commission in Revision Petition No.3860 of 2014*

8. It further sent a mail dated 22.04.2022 to the respondent stating that they received a cancellation letter from the respondent on 19.04.2022 and further states that they have made all the efforts to get the agreeable builder buyer agreement from the respondent as the agreement contained illegal, unfair clauses meant to safeguard only the respondent's interest without any consideration to rightfully. Also, without signature of the agreement the respondent have been sending the payment request which the they are paying regularly.
9. The respondent sent an e-mail dated 03.06.2022 to them stating that the respondent won't be able to share any details for the unit as the unit was cancelled due to delay payment form the their side and requested them to return back all the original documents of the unit, so that the cheque od amount refundable can be issued. Further the complainant mailed a first notice to the builder dated 16.11.2022 stating that the builder has delayed the possession for 7 years form the due date of possession, but the possession is still awaited. The complainant sent a mail dated 07.12.2022 to the respondent as the final notice to the respondent stating that the builder buyer agreement is never executed till date and the application form is not duly

signed by the respondent on which the respondent have sent a cancellation letter on the account of the unit.

C. Relief sought by the complainant:

10. The complainant has sought the following relief(s):

- i. Direct the respondent – builder to refund the paid-up amount.
- ii. Direct the respondent to pay Rs. 10,00,000/- for compensation and harassment and Rs. 2,00,000 on account of litigation.

D. Reply by respondent:

The answering respondent by way of written reply made the following submissions:

11. The complainant sought allotment of a unit in the group housing project "THE HEARTSONG" being developed by the respondent and thereby submitted a booking application form dated 21.11.2012 after carefully reading and understanding all the terms and conditions of allotment contained therein. That, accordingly, the unit bearing no. b5/0901 admeasuring sale area of approx. 163.32 Sq. Mtr/1758 Sq. Ft. was provisionally allotted to them in the project for a total sale consideration of Rs. 1,12,98,035 /- as per provisional allotment letter. The said unit was provisionally allotted to them vide provisional allotment letter dated 06.12.2012 against his booking done through the booking application form dated 21.11.2012.

12. The respondent had completed the construction of the concerned apartment and applied for grant of the occupation certificate as on 16.08.2016. The occupation certificate for the phase in which the

unit of the complainant is located was granted by the competent authority on 02.03.2017 i.e. prior to the coming into force of the Real Estate (Regulation & Development) Act, 2016. The respondent had also offered possession of the said unit to them on 03.03.2017 i.e. immediately after receiving the occupation certificate. Further, even as per Haryana RERA Rules the relevant phase of the project for which occupation certificate was issued / obtained prior applicability of RERA Act / Rules is not required to be registered under the RERA Act / Rules. After sending offer of possession dated 03.03.2017, the respondent continued to send reminder letters to the complainant to clear all the dues, take over the possession and execute the conveyance deed. The details are as follows:

Payment Raised On	Particular
03.03.2017	Notice of Possession and payment request for final dues
18.05.2017	Reminder to take Possession and clear pending dues
29.06.2017	Final Notice
29.08.2019	Email Reminder
12.09.2019	Final Notice of Possession
03.02.2022	Reminder

13. The respondent had already issued notice of possession vide letter dated 03.03.2017. However, despite repeated reminder for taking over the possession, the complainant failed in taking over the Possession for over 5 years till cancellation of the unit by the respondent.

14. Since even after lapse of 5 years and serving a final notice in 12.09.2019, the Complainant failed to take over the possession of the Unit and execute the conveyance deed as per the provisions the Act, the respondent was left with no other option but to cancel the provisional allotment and forfeit the amounts paid by them in accordance with the agreed terms and conditions of the application form and provisional allotment as well in terms of the apartment buyer agreement which the complainant failed to execute. Therefore, the provisional allotment was cancelled vide letter dated 19.04.2022 and the complainant was left with no right, title or interest whatsoever in the unit.
15. It is further submitted that as per schedule v- clause 20: timely payment- of the application form, *if the Complainant defaults in payment of any amount due and payable then the Respondent shall have the right to cancel the allotment of the apartment and forfeit the amounts specified therein paid by the Complainant.* Further, the allotment and occupation certificate is pre-RERA, therefore as per schedule v- definition clause 26: earnest money means 15% of BSP+PLC+ car parking charges. The relevant clause is reiterated herein below:
- "26. "Earnest Money"-shall mean and refer to 15% (Fifteen percent)of the BSP+ PLC (if applicable) + car parking use charges."*
16. The complainant has been aware since the time of application for allotment of a unit and even prior to making any payment to the respondent of the terms of allotment, especially the obligation to make timely payments, execute the apartment buyer agreement, taking over possession and execution of the conveyance deed and the consequences thereof as well as the calculation for the amount

of forfeiture upon cancellation of allotment due to default of the complainant.

17. It is to be noted that as on date the respondent already refunded the refundable amount of Rs. 84,57,118/-, to them as per the terms and conditions of application form/allotment letter, vide RTGS Bearing no. PUNBR5202212031902834120319028341/VOGUE ASSOCIATES PVT. on 03.12.2022.
18. Initially the respondent had sent a cheque dated 28.09.2022 of the refundable amount of Rs. 84,57,118/- to them registered address as per the books of the company. They were intimated about the same by email dated 16.11.2022. However, the cheque was returned back with the observation that "No one present at the address". This too was intimated to them vide email dated 24.11.2022. In the same email, the respondent asked for the current correspondence address so that the cheque may be re-sent. The complainant replied with the updated address on 25.11.2022. The respondent immediately dispatched the cheque to the complainant's new address, which was received and deposited by them in the bank.
19. The complainant again sent an email on 29.11.2022 stating as follows: *"Cheque Returned: Cheque 418261 for INR 84,57,118.00 from HDFC Bank A/c XX0715 was returned unpaid. Reason:CHQ DEP RET- Advice Not Received"*. To this the respondent immediately sought the RTGS details which the complainant provided. The RTGS was duly done and the same was intimated to the complainant.

20. The complainant duly received and acknowledged the payment of Rs. 84,57,118/- as the refundable amount and did not raise any objections to the same at any point of time. In fact, the complainant itself deposited the cheque in the bank and provided the RTGS details, therefore, the amount of refund was duly agreed and accepted by them without any protest or demure.
21. It is pertinent to mention that the cancellation of their unit by the respondent was done after 5 years from the grant of occupation certificate on grounds of deliberate default of the complainant for not clearing the outstanding dues against the unit allotted to them despite repeated reminders by the respondent. It is to be noted that as soon as the respondent received the occupation certificate on 02.03.2017, the respondent on 03.03.2017 issued notice of possession to complainant for taking over the possession of the unit and accordingly sufficiently waited and reminded them to take the possession for next 5 years.
22. Thereafter, the respondent sent several reminders to the complainant to execute the agreement on 05.08.2013, 24.10.2013, 22.01.2015 and 12.05.2015 afterwards respondent was constrained to issue cancellation letter to them thereby cancelling their unit.
23. All other averments made in the complaint were denied in toto.
24. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be denied on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

25. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

26. 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.

27. 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.
28. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(C)357 and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"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."

29. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainant:

F.I Direct the respondent to refund the paid-up amount

30. The complainant-allottees booked a residential plot in the project of the respondent named as "The Heartsong" situated at sector 108-A, Gurgaon, Haryana for a total sale consideration of Rs. 1,08,78,250/-. The allotment of the unit was made on 06.12.2012. Moreover, buyer's agreement was not executed between the parties and so the due date for possession comes out to be 06.12.2015 [Calculated as per Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018].

31. The respondent started raising payments demands from the complainant from the year 2017 but they defaulted to make the payments. The complainant-allottee in total has made a payment of Rs. 1,04,78,288/-. The respondent has sent various demand letters and reminder letters on 03.03.2017, 18.05.2017, 29.06.2017, 29.08.2019, 12.09.2019 and 03.02.2022.

32. Thereafter the respondent cancelled the allotment of the plot vide letter dated 19.04.2022. The occupation certificate of the tower where the allotted unit is situated has been received on 02.03.2017.

33. As per schedule v- definition clause 26: earnest money means 15% of BSP+PLC+ car parking charges. Thereby the respondent has forfeited 15% of paid amount along with other charges. Whereas as per the settled law of the land in the various pronouncements of the Hon'ble Apex Court and as per Regulation 11(5) of 2018 known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder), the respondent could have deducted 10% of the sale consideration from the paid-up amount and was bound to return the remaining amount.
34. The due date for completion of the project was 06.12.2015 and offer of possession of the allotted unit was made on 03.03.2017. No doubt the complainant had already paid a significant amount of the sale consideration but it was also required to pay the amount due on the basis of payment plan. Also, the respondent has sent various reminders before cancelling the unit.
35. Thus, the respondent cannot retain the amount paid by the complainant against the subject unit and is directed to refund the same in view of the agreement by forfeiting the earnest money which shall not exceed the 10% of the sale consideration of the said unit and shall return the balance amount along with interest at the rate of 10.95% (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 cancellation i.e., 19.04.2022 till the actual date of refund of the amount after adjusting the amount already credited in the account of the

complainant, if any, within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

36. As per averments made by the respondent RTGS was done by the respondent to the complainant of Rs. 84,57,118/-.

F.II Direct the respondent to pay Rs. 10,00,000/- for compensation and harassment and Rs. 2,00,000 on account of litigation.

37. 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.

G. Directions of the Authority:

38. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the


functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent is directed to refund the deposited amount of Rs. 1,04,78,288/- after deducting 10% of the sale consideration being earnest money⁺ after adjusting the amount already credited in the account of the complainant, if any along with an interest @10.95% on the refundable amount, from the date of cancellation i.e., 19.04.2022 till the date of realization of payment.
- ii) A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

39. Complaint stands disposed of.

40. File be consigned to the registry.

HARERA


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.07.2024