

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

Complaint no.:

5138 of 2023

Date of decision:

16.10.2024

1. Rajeev Pratap Singh

2. Meenu Singh

Both R/o:- H.No.-D1102, Park View City-1,
Sohna Road, Sector-48, South City, Gurugram,
122001.

Also At: Flat No.-16A, Tower-2, Phase-2, M3M,
Golf Estate, Near St. Xavier School, Sector-65,
Gurugram-122001.

Complainants

Versus

1. M/s BPTP Limited

Registered Office at: OT 14, Floor-3rd,
Next Door Parklands, Sector-76, Faridabad,
Haryana-121004.

**Respondent
no.1**

2. M/s. Native Buildcon Pvt. Ltd.

Registered Office at: Park Centra, Basement-1,
Opposite 32 Milestone, Sector-30, Gurugram,
Haryana-122001.

**Respondent
no. 2**

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Shri Jaswant Singh Kataria (Advocate)

Complainants

Shri Harshit Batra (Advocate)

Respondents

ORDER

1. The present complaint has been filed by the complainants/allottees 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 provision of the Act or the rules and regulations made there under or to the allottees 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 complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name and location of the project	"VISIONNAIRE", Sector-70A, Gurugram, Haryana.
2.	Project area	102.20 acres
3.	Nature of Project	Independent Residential Villas
4.	DTCP license no. and validity status	15 of 2011 dated 07.03.2011 Valid upto 06.03.2024
5.	Name of Licensee	M/s Countrywide Promoters Pvt. Ltd.
6.	Rera registered/ not registered and validity status	Un-registered
7.	Unit No.	B199, in Visionnaire (As per page no.58 of complaint)
8.	Unit area admeasuring	290 sq. yds. (As per page no.58 of complaint)
9.	Booking application form	25.09.2014 (As per page no.28 of reply)
10.	Allotment letter	01.10.2014 (As per page no.58 of complaint)
11.	Revised allotment letter and revised payment schedule	13.11.2014 (As per page no.63 of complaint)
12.	Date of execution of buyer's agreement	Not executed
13.	Possession clause	G Possession:



	(as per Booking application form)	1 "... The company proposes to offer possession of the unit to the applicant(s) within a period of 36 months from the date of execution of villas buyer's agreement. The applicant(s) further agrees and understands that the company shall additionally be entitle to a period of 180 days (grace period) after the expiry of the said commitment period for making an offer of possession of unit. (As per page no.41 of complaint)
14.	Due date of possession	<p>01.10.2017</p> <p><i>"Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018-SC); MANU/SC/0253/2018 Hon'ble Apex Court observed that "a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract."</i></p> <p>In view of the above-mentioned reasoning, the date of the issuance of allotment letter dated 01.10.2014 ought to be taken as the date for calculating the due date of possession. Therefore, the due date for handing over the possession of the unit comes out to be 01.10.2017.</p>
15.	Total Sale Consideration	Rs.3,90,93,130/-

		(As per page no.64 of complaint)
16.	Amount paid by complainant	Rs.60,46,000/- (as per SOA dated 15.11.2014 at page no.67 of complaint)
17.	Occupation Certificate	(To be ascertained)
18.	Offer of possession	08.05.2020 (As per page no.98 of reply)
19.	Demand and reminder letters	08.05.2020, 28.05.2020 & 29.06.2020
20.	Notice for Termination	08.04.2022 (As per page no.117 of reply)

B. Facts of the complaint:

3. The complainants made the following submissions in the complaint.

- I. That the respondents in the year 2014 started residential project under the project name "BPTP Visionnair Villas" to be developed on the land situated at Sector 70A, Gurugram, Haryana.
- II. That the complainants on 08.09.2014 through email enquired and expressed his willingness about the availability of villas at Sector 70 and Sector 70A and also updated the respondents that the complainants had seen the sample of the same 4 months back. The respondents sent an application form on 10.09.2014 and the villa costing etc. to the complainant.
- III. That as per clause "G (1)" of the application form

"Subject to, Force Majeure circumstances; intervention of statutory Authorities and Applicants(s) having timely complied with all its obligations, formalities or documents, as prescribed by company and not being in default under any part thereof and villa buyer agreement, including but not limited to the timely payments of installments of the cost of property and other charges as per the payment plan opted, Stamp Duty and registration charges, the company proposes to offer possession of the unit to the applicants within a period of 36 months from the date of execution of villa buyer's Agreement (Commitment Period). The Applicant further agrees and understands that the company shall be entitled to an additional period of One Eighty Days (180 Days) after the expiry of the said commitment period for making an offer of possession of the unit."

- IV. That the respondents on 13.09.2014 and 15.09.2014 sent emails to the complainants informing about the difference between the bare shell and fully build villas along with costing for bare shell villa bearing no. B-199 admeasuring 290 sq. yd. The complainant opted for a bare shell villa under the Subvention Payment Scheme. The total cost of the villa was Rs.4,32,59,860/- but the respondents agreed for Rs.3,94,11,360/- (including corner + two side open + 24 mtr. road) as the total cost of the villa. It is pertinent to mention here that the complainants had to pay only 15% of the above agreed cost of the villa and the rest was to be paid at the time of the possession.
- V. That the complainants paid a booking amount of Rs.25,00,000/- on 25.09.2014 to the respondents and the same was duly received by the respondents. Thereafter, the complainants received an Allotment Letter on 01.10.2014 whereby the complainants were allotted unit bearing no. B-199, measuring 290 sq. yards in the project.
- VI. That the complainants received revised an allotment letter with revised payment schedule on 13.11.2014. According to the revised payment schedule, the total cost of the villa was Rs.3,90,93,130.10/-.
- VII. That the complainants made another payment of Rs.35,46,000/- on 15.11.2014. The complainants also received Statement of Accounts from the respondents on 15.11.2014. According to the Statement of Accounts, the respondents have received and acknowledged a payment of Rs.60,46,000/- from the complainants.
- VIII. That the complainants sent various emails from 06.07.2015 to 20.02.2023 to the respondent regarding completion of the construction and possession. The respondents also kept on sending e-mails giving false assurance to the complainants.

- IX. That the complainants were shocked and astonished on receiving a cancellation email from the respondents on 23.02.2023. The respondents cancelled the allotment of the complainants taking lame and false excuses of non-payments on behalf of the complainants. It is pertinent to mention here that complainant made all the payments on time as on the demand of the respondents..
- X. That the complainants sent various emails to the respondents from dated 23.02.2023 to 11.07.2023 to resolve the issue of cancellation of the allotment but the respondents did not paid any heed to the legitimate right of the complainants. It is pertinent to mention here that the respondents did not executed any agreement intentionally to dupe the complainants.
- XI. That as per the Application Form, the possession of the unit in question was to be handed over within a period of 36 months from date of execution of agreement and from the date of booking in case of non-execution of agreement, which comes out to be 25.09.2017. Relying upon the same, the complainant entered into the booking of the unit in question.
- XII. That the respondent has failed to deliver possession of the unit even after a continuing delay of 6 years till date from the due date of possession. That after receiving the notice of cancellation, the complainants demanded refund of the amount which the complainants have paid to the respondent. Initially the respondent promised the complainants to refund the entire amount with interest but later on postponed the matter taking lame excuses.

XIII. That the complainants have been repeatedly and continuously expressing discontent and objecting to the malafide attitude of the respondent towards its allottees.

C. Relief sought by the complainants:

4. The complainants have filed the present compliant for seeking following reliefs:

i. Direct the respondent to refund the entire deposited amount along with interest from the various dates of deposit till the entire amount is refunded to the complainants.

ii. Direct the respondent to pay the litigation cost of Rs.1,50,000/-

iii. Direct the respondent to pay a sum of Rs.5,00,000/-

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 respondents:

6. The respondents have contested the present complaint on the following grounds:

i. That after making independent enquiries and only after being fully satisfied with the details of the project the complainants submitted a Booking Form expressing their interest and willingness to purchase a villa in project "Visionnaire" situated at Sector-70A, Gurugram, Haryana.

ii. Thereafter, the complainants made payment of Rs.25,00,000/- towards booking amount and the respondents duly acknowledged the same vide receipt dated 25.09.2014. The respondents raised demand vide Payment Request Letter dated 28.10.2014 payable on or before 12.11.2014 as per payment plan opted by the complainants.

- iii. That the complainants did not come forward to make payment of outstanding dues amounting to Rs.4,02,23,645/- and the respondent requested the complainant by issuing reminder notice-1 in 28.05.2020. Thereafter, the respondents issued Reminder Notice-II on 29.06.2020 requesting the complainants to make payment of outstanding dues immediately. However, the complainants yet again did not come forward to make payment of dues despite repeated reminders and follow ups.
- iv. That the respondents vide letter dated 08.05.2020 offered possession to the complainants and requested them to make payment of outstanding dues but to no avail. The respondents vide email dated 14.08.2020 duly provided list of requisite documents for registration however the complainants for reasons best known to themselves did not come forward for the registration process. Thereafter, the respondent sent reminder email dated 24.09.2020 requesting the complainants to make payment of outstanding dues and take possession of the unit, but to no avail.
- v. That the complainants are chronic defaulters who have time and again failed to come forward to make payment of outstanding dues despite repeated reminders and notices. Thus, the respondents were constrained to issue Termination/cancellation of allotment on 08.04.2022.
- vi. That after termination of the allotment, the respondents had right to forfeit earnest money deposited along with delayed interest and total tax against the unit. that since the termination was solely due to the defaults of the complainants, the respondents are entitle to forfeiture of the non0refundable charges including earnest money, GSt and delay interest, which accounted for Rs.34,08,318/- (deduction of 10% of Total Sales value i.e 38,74,366/- and interest @10.75% on Net Balance Amount till realization of payment i.e. Rs.4,66,048/- as per model agreement)

vii. That the right of the respondents to validly cancel/terminate the unit arises not only from the Booking Form but also from the model agreement which also recognises the default of the allottee and the forfeiture of the interest on the delayed payments upon cancellation of the unit in case of default of the allottee. Thus, the present complaint should be dismissed accordingly.

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 submission 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

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

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)(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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;

9. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
10. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"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."

11. 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 reliefs sought by the complainants

F.I. Direct the respondent to refund the entire deposited amount along with interest from the various dates of deposit till the entire amount is refunded to the complainants.

12. In the present case, the complainants made an application for provisional allotment of Villa/unit in the project "Visionnaire" situated at Sector-70-A, Gurugram. The allotted complainants were allotted a villa bearing no. B-199, an area admeasuring 290 sq. yrds. in the project of respondent "Visionnaire", in Sector 70, Gurugram vide allotment letter dated 01.10.2014 in favour of the complainants for the sale consideration of Rs. 3,90,93,130/-.
13. Thereafter, the complainants made payment of Rs.25,00,000/- towards booking amount and the same was acknowledged by the respondent vide receipt dated 25.09.2014. Further, payment of Rs.35,46,000/- was made by the complainants on 15.11.2014. As per the Statement of Accounts on page no. 67 of the complaint, the complainants have paid Rs.60,46,886/- in total till 15.11.2014. Last payment was made by the complainants on 15.11.2014, thereafter no payment has been made by the complainants to the respondent.
14. No Buyer's Agreement has been executed between the complainants and the respondent. The complainants have on numerous occasions enquired about the construction status of the villa and the respondent have replied the same. There has been continuous conversations between the complainants and the respondent but no agreement has

been executed between the parties. The respondent has submitted that the buyer's agreement was sent to the complainants twice but they never agreed to it and hence, the same was never executed. The due date for handing over possession of the unit has been calculated from the date of allotment. As per *Civil appeal no(s). 3533-3534 of 2017 M/s. Fortune Infrastructure (now known as m/s. hicon infrastructure) & Anr. versus Trevor D'lima & Ors. (12.03.2018-SC); MANU/SC/0253/2018* Hon'ble Apex Court observed that *"a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract."*

15. In view of the above-mentioned reasoning, the date of the issuance of allotment letter dated 01.10.2014 ought to be taken as the date for calculating the due date of possession. Therefore, the due date for handing over the possession of the unit comes out to be 01.10.2017. The respondent has obtained the occupation certificate from the competent Authority in respect of the said project on 02.07.2020. The complainants paid a sum of Rs.60,46,000 /- out of the sale consideration of Rs.3,90,93,130/-. The respondents have raised various demands but the complainants refrained from paying the same and thus various reminders were issued to the complainants and on 08.04.2022, the allotment of the unit was terminated by the respondents.
16. Moreover, as per Clause 10 of the Application Form

10. Timely payment of instalments as per the Payment Plan shall be the essence of this transaction. It shall be incumbent on the Applicant(s) to comply with the terms and conditions of the Allotment. The Applicant(s) acknowledges that failure to adhere to the payment schedule and failure to make full and timely payment impacts the Company's ability to fulfil its reciprocal promises and obligations to the Applicant(s) and other customers and consequently prejudicially affects as well as results in the waiver and extinguishment of the Applicant's rights under these terms and Conditions and the Villa Buyer's Agreement, including but not limited to the right to claim any compensation for delay in making offer for possession of the Unit, the right to require the company to perform any of its obligations within a given timeframe and the cancellation of allotment amongst other rights. Accordingly, in the event that the Applicant(s) fails to strictly adhere to these Terms and Conditions and the Villa Buyer's Agreement, such action shall amount to a voluntary, conscious and intentional waiver and relinquishment of all rights and privileges of these Terms and Conditions and the Villa Buyer's Agreement and could at the option of the Company be treated as termination/cancellation of allotment and the Applicant(s) shall cease to have any right, title or interest whatsoever in the unit and shall also be liable to forfeiture of earnest money deposit, non-refundable amounts in terms of clause "E" hereinbelow.

17. 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.
18. 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."

19. 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, and the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainants after deducting 10% of the sale consideration and return the remaining amount along with interest at the rate of 11.10% (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., 08.04.2022 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

F.II. Direct the respondent to pay the litigation cost of Rs.1,50,000/-

20. The complainants are seeking the above mentioned relief w.r.t. compensation. The Hon'ble Supreme Court of India in Civil Appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Ltd. V/s State of UP & Ors.(supra)* has held that an allottee is entitled to claim compensation and 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 and litigation expense shall be adjudged by the adjudicating officer having due regards to the factors mentioned in Section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation and legal expenses. Therefore, the complainant may approach the adjudicating officer for seeking the relief of compensation

G. Directions of the Authority:

21. 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) of the Act.
- i. The respondent/promoter is directed to refund the paid-up amount of Rs.60,46,000/-, after deducting 10% of the sale consideration being earnest money along with interest on such balance amount at the rate of 11.10% as prescribed under rule 15 of the Haryana Real

Estate (Regulation and Development) Rules, 2017, from the date of termination of the unit i.e., 08.04.2022 till its actual realization.

- 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.
22. Complaint stands disposed of.
23. File be consigned to the registry.

Dated: 16.10.2024



(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram