

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

Complaint no. : 744 of 2021
First date of hearing: 06.05.2021
Date of decision : 08.03.2022

1. Rajnish Malik
2. Maala Malik
Both R/O: - A-2, 1201, Lok Nirman Heights
CHS Ltd. Dr. Ambedkar Road, Khar West,
Mumbai-400052

Complainants

Versus

Pareena Infrastructure Private Limited
Regd. Office at: - Flat no. 2, Palm Apartment,
Plot no. 13B, Sector-6, Dwarka, New Delhi-
110075

Respondent

CORAM:

Shri KK Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Sukhbir Yadav Advocate for the complainants
Shri Prashant Sheoran Advocate for the respondent

ORDER

1. The present complaint dated 03.03.2021 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 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.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Name and location of the project	"Elite Residencies" at sector 99, Gurugram
2.	Nature of the project	Group Housing
3.	Project area	13.32 acres
4.	DTCP license no.	70 of 2011 dated 22.07.2011 valid up to 21.07.2024
5.	Name of Licensee	Shivnandan Buildtech Pvt. Ltd.
6.	RERA Registered/ not registered	Registered vide no. 46 of 2019 issued on 25.09.2019 up to 31.07.2020
7.	Apartment no.	A-906, 9 th floor [annexure P4 on page no. 45 of complaint]
8.	Unit measuring	2150 sq. ft. [annexure P4 on page no. 45 of complaint]
9.	Date of allotment letter	31.07.2013 [annexure P2 on page no. 37]



		of complaint]
10.	Date of execution of Flat buyer's agreement	23.04.2014 [annexure P4 on page no. 42 of complaint]
11.	Date of start of construction	Not Provided
12.	Total consideration	Rs. 1,39,83,450/- [as per the statement of account on page no. 80 of complaint]
13.	Total amount paid by the complainants	Rs. 82,07,070/- [as per the statement of account on page no. 81 of complaint]
14.	Due date of delivery of possession	23.04.2018 [calculated from the date of execution of agreement]
15.	Possession clause	3.1 POSSESSION 3.1 "That the developer shall, under normal conditions subject to the force majeure, complete construction of tower/building in which the said flat is to be located with 4 years of the start of construction or execution of this agreement whichever is later , as per the said plans and specifications seen and accepted by the Flat Allottee.
16.	Occupation certificate	Not obtained
17.	Offer of possession	Not offered
18.	Delay in handing over of possession till the date of decision i.e., 08.03.2022	3 years 10 months 13 days

B. Facts of the complaint

3. That the complainants Mr. Rajnish Malik & Mrs. Maala Malik are law-abiding citizens and residing at A-2,1201, Lok Nirman Heights Chs Ltd. Dr. Ambedkar Road, Khar West, Mumbai - 400052, Maharashtra.
4. That in June 2013, complainants received a marketing call from a real estate agent namely "property junction realtors pvt. ltd.", who represented himself as an authorized agent of the respondent and marketed a residential project namely "Elite Residences" situated at sector-99, Gurugram. They visited the Gurugram office and project site of the respondent. There they met the marketing staff of builder and got information about the project "Elite Residences". The marketing staff gave them a brochure and pricelist etc. and allured them with a shady picture of the project.
5. That believing on representations and assurances of the respondent, complainants booked flat/apartment bearing no. A 906 on 9th floor for size admeasuring 2150 sq. ft. on 20.06.2013. The apartment was purchased under the construction linked plan for a sale consideration of Rs. 1,39,83, 450/-.Further, on 31.07.2013, respondent issued the allotment letter to the complainants.
6. That on 01.08.2013, the respondent issued a booking amount payment receipt in favour of the complainants for Rs. 12,50,000/-.
7. That after a long follow-up, on 23.04.2014, a pre-printed, unilateral, arbitrary builder buyer's agreement was executed inter-se the respondent and the complainants.

8. That as per the statement of account issued by the respondent, the complainants have paid Rs. 82,07,070/-. It is pertinent to mention here that the complainants have paid more than 58% of the total sale consideration.
9. That on 07.08.2018, the complainants sent an email to the respondent alleging project delay & lack of communication. The complainants visited the project site and found that the work was at standstill and far away from completion. The project was delayed far beyond its intended date of handover and there was no way that this project would be completed until 2019.
10. That further on 13.09.2018, complainants sent another email to the respondent alleging their concerns regarding delay possession.
11. That since 2018, the complainants are contacting the respondent telephonically and sending emails and making efforts to get possession of the allotted flat/apartment, but all went in vain. Despite several telephonic conversations and email requests by the complainants, the respondent did not give possession of the flat/apartment.
12. That the main grievance of complainants in the present complaint is that despite complainants have paid more than 58% of the actual cost of the flat and ready and willing to pay the remaining amount (justified) (if any), the respondent party has failed to deliver the possession of flat on promised time and till date project is without amenities.

13. That the works on other amenities, like external and internal services are not yet complete. Now it is more than 7 years from the date of booking and even the construction of the towers is not complete. It clearly shows the negligence of the builder.

C. Relief sought by the complainants:

14. The complainants have sought the following relief:

- (i) Direct the respondent to handover the physical possession of the apartment along with prescribed rate of interest.
- (ii) Direct the respondent to get the area calculation i.e., carpet area and common loading of flat/ apartment.

15. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

16. That the respondent is in the process of developing several residential group housing colonies in Gurugram, out of them one is "Elite Residences" at sector 99.
17. That the construction of the said project is at an advanced stage and the structure of various towers has already been

completed and remaining work is endeavoured to be completed as soon as possible.

18. That the project is near completion and within a very short span of period it would be completed and thereafter possession would be offered after obtaining occupancy certificate as agreed in builder buyers' agreement.
19. That the respondent is a committed real estate developer, who is developing various residential colonies as per rules and law.
20. That admittedly the completion of project is dependent on a collective payment by all the allottees and just because few of the allottees paid the amount, demand does not fulfil the criteria of collective payment. It is submitted that numerous allottees have defaulted in payment demanded by the respondent, resulted in delaying of completion of project, yet the respondent is trying to complete the project as soon as possible by managing available funds. That certificate of chartered accountant showing the cost incurred till 31-03-2019 and amount spent by builder out of its own fund, due to reason of non-payment by allottees.
21. That other than above stated factor, there are lots of other reasons which either hampered the progress of construction of and in many cases complete stoppage of construction work. Such as detailed below:
 - NGT vide order dated 19.07.2017 had directed that no stone crusher be permitted to operate unless, they obtain consent from the State Pollution Control Board,

no objection from the concerned authorities and the environmental clearance from the competent authority.

- NGT vide order dated 08.11.2016 had directed that all brick kilns operating in NCR, Delhi would be prohibited from working for a period of one week from the date of passing of the order. It had also been directed that no construction activity would be permitted for a period of one week from the date of order.
- Environment Pollution (Prevention and Control) Authority vide its order dated 07.11.2017 had directed to closure of all brick kilns, stone crushers, hot mix plants etc. with effect from 7th of November 2017 till further notice.
- NGT had passed the said order dated 9th of November 2017 completely prohibiting the carrying on of construction by any person, private or government authority in the entire NCR till the next date of hearing (17th of November 2017). By virtue of the said order, National Green Tribunal had only permitted the completion of interior finishing/interior work of projects. The order dated 9th of November 2017 prohibiting construction activity was vacated vide order dated 17th of November 2017.
- Haryana State Pollution Control Board, Panchkula had passed the order dated 29th of October 2018 in furtherance of directions of Environment Pollution

(Prevention and Control) Authority dated 27th of October 2018. By virtue of order dated 29th of October 2018 all construction activities involving excavation, civil construction (excluding internal finishing/work where no construction material was used) were directed to remain closed in Delhi and other NCR Districts from 1st to 10th November 2018.

- NGT vide order dated 24.07.2019 had again directed immediate closure of all illegal stone crushers in Mahender Garh, Haryana who have not complied with the siting criteria, ambient air quality, carrying capacity and assessment of health impact. The Tribunal further directed initiation of action by way of prosecution and recovery of compensation relatable to the cost of restoration.
- That Municipal Corporation, Gurugram had passed order dated 11th of October 2019 whereby construction activity had been prohibited from 11th of October 2019 to 31st of December 2019. It was specifically mentioned in the aforesaid order that construction activity would be completely stopped during this period.

22. That from March 2020 till now, there have been several months where construction work was completely stopped either due to nationwide lock down or regional restrictions, furthermore metro cities like Gurgaon and Delhi suffered

from a major outburst of COVID cases and deaths in such a number which can't be comprehended.

23. That developers were helpless in these times since they had no alternative but to wait for the situation to come under control. That even RERA has extended the time limits for completion of project vide notification dated 26-05-2020, by six months. But the aforesaid was the period evidencing the first wave but the relaxation in restrictions were seen at the end of year 2020 however soon thereafter our country saw a more dangerous variant of COVID from the month of March 2021 and only recently restrictions have been lifted by the government. That whole of this consumed more than 11 months wherein 2/3rd time there could be no construction and rest of the time construction progressed at very slow pace to several restrictions imposed by state government on movement and number of persons allowed etc.
24. That it is the admitted fact that the builder buyer agreement was executed between the parties on 23-04-2014. However, certain extremely important facts were concealed by the complainants while drafting the present complaint. That the complainants have intentionally provided details of payments only but concealed the facts whether the payments were made on time or not. It is submitted that material, labour and other requirements do not come for free and if allottees wish to get the possession on time then it is their legal duty to pay on time, since without money it is not possible to construct on time.

F. 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.

F. I Territorial jurisdiction

26. 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.

F. II Subject matter jurisdiction

27. 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 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; The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for

all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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.

28. 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.

G. Findings on the objections raised by the respondent.

G.I Objection regarding delay due to force majeure.

25. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as national lockdown, shortage of labour due to covid 19 pandemic, stoppage of construction due to various orders and directions passed by hon'ble NGT, New Delhi, Environment Pollution (Control and Prevention) Authority, National Capital Region, Delhi, Haryana State Pollution Control Board, Panchkula and various other authorities from time to time but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 23.04.2014, as per the possession clause of the agreement the possession of the said

unit was to be delivered within 4 years from the date of start of construction or execution of this agreement whichever is later. The due date of possession is calculated from date of execution of agreement i.e., 23.04.2014, which comes out to be 23.04.2018. The authority is of the view that the events taking place do not have any impact on the project being developed by the respondent. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrongs.

G. II. Objection regarding Timely payments:

26. The respondent has alleged that the complainants having breached the terms and conditions of the agreement and contract by defaulting in making timely payments. The authority is of view that the respondent cannot take advantage of this objection of timely payments being himself at wrong firstly by still not obtaining the occupation certificate and offering the possession of the unit despite being delay of 3 years, 10 months, 13 days. Therefore, the respondent itself failed to complete its contractual and statutory obligations. Moreover, there is no document on file to support the contentions of the respondent regarding delay in timely payments.

F. Findings on the relief sought by the complainants.

Relief sought by the complainants: The complainants had sought following relief(s):

- (i) **Direct the respondent to handover the physical possession of the apartment along with prescribed rate of interest.**

28. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

27. Clause 3 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

"Clause 3.1- That the developer shall, under normal conditions subject to the force majeure, complete construction of tower/ building in which the said flat is to be located **with 4 years of the start of construction or execution of this agreement whichever is later**, as per the said plans and specifications seen and accepted by the Flat Allottee (with additional floors for residential units if permissible) with such additions, deletions, alterations, modifications in the layout, tower plans, change in number, dimensions, height, size, area or change of entire scheme the developer may consider necessary or may be required by any competent authority to be made in them or any of them. To implement all or any of these changes, supplementary sale

deed/agreement. If necessary, will be got executed and registered by developer which the flat allottee undertakes to execute. If as a result of the above alteration etc., there is either reduction or increase in the super area of the said flat or its location, no claim, monetary or otherwise will be raised or accepted except that the original agreed rate per sq. mtr./sq. ft. and other charges will be applicable for the changed area i.e., at the same rate at which the said flat was registered/booked or as the developer may decide and as consequence of such reduction or increase in the super area, the developer shall be liable to be refund without any interest only the extra basic price and other pro rate charges recovered or shall be entitled to recover the additional basic price and other proportionate charges without any interest as the case may be. If for any reason, the developer is not in position to allot the said flat applied for, the developer, at its sole discretion, shall consider for any alternative property or refund the amount deposited with simple interest @10% per annum.

28. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this 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 that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of

allottee and the commitment date for handing over possession loses its meaning.

29. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residential, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.
30. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay

possession charges, proviso to section 18 provides that where an allottees does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

31. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

32. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 08.03.2022 is 7.30%. Accordingly, the

prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30% per annum.

33. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

34. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% p.a. by the respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.

- (ii) Direct the respondent to get the area calculation i.e., carpet area and common loading of flat/apartment.**
35. That the complainants in the complaint have prayed for directing the respondent to provide area calculation of the unit. The authority is of the view that as per the section 19(1) of the Act, 2016 the allottee shall be entitled to obtain the information relating to sanction plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter. In view of that the respondent/ promoter is directed to provide the area calculation of the subject unit to the complainants.
36. During the course of arguments, the authority has observed that validity of the registration of project detailed above has already expired on 31.07.2020 as evident from the certificate of registration no. 46 of 2019. In view of that the copy of order be separately sent to the planning branch for initiating penal proceedings against the promoter and also direct him to apply for extension giving firm date of occupation and completion of project. During the period of covid-19 there was complete lockdown and all the activities including construction came to stand still. So, keeping in view the situation the authority gave benefit of 6 months to all the projects for registration vide its notification dated 26.05.2020. So, keeping in view that the grace period is

allowed to the promoter with regard to the registration of project. However, the complainants are also given benefit of 6 months and the promoter cannot charge interest on delayed payments to be made by the them during the period covered under the above-mentioned notification of authority.

37. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. It is a matter of fact that flat buyer's agreement executed between the parties on 23.04.2014, the possession of the booked unit was to be delivered within a period of 4 years of the start of construction or execution of this agreement, whichever is later. The due date of possession is calculated from date of execution of this agreement i.e., 23.04.2014, which comes out to be 23.04.2018.
38. Accordingly, non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by them to the respondent from the due date of possession i.e., 23.04.2018 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the

provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

39. 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 respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 23.04.2018 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier. Grace period of 6 months on account of covid 19 shall be applicable to both the parties.
- ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest to be paid till date of handing over of possession shall be paid on or before the 10th of each succeeding month.
- iii. The complainants are also directed to pay the outstanding dues, if any.
- iv. The respondent shall not charge anything from the complainants which is not part of the builder buyer agreement.

- v. Since the registration of project has already expired on 31.07.2020 and the same has not been renewed up to now, so a copy of order is directed to be sent to the planning branch to initiate penal proceeding against the promoter.

40. Complaint stands disposed of.

41. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 08.03.2022

HARERA
GURUGRAM