

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

Complaint no. : 1851 of 2021
Date of decision : 17.08.2022

Late Sh. Davinder Kumar through legal
representatives

1. Amit Jain S/o Late Sh. Davinder Kumar
Address:- A-2/65, Paschim Vihar, New Delhi-110063

2. Siddharth Jain S/o Late Sh. Davinder Kumar
Address:- A-2/65, Paschim Vihar, New Delhi-110063

Presently residing at 2500 Mystic Valley Pkwy, Apt
406, Medford, MA-02155, United States of America

3. Shikha Jain D/o Late Sh. Davinder Kumar
Address:- 17, New Ram Nagar Colony, Post Office
Gurukul Kangri, Haridwar-249404,

Presently residing at 45, Village View Road, Westford,
MA-01886, United States of America

Complainants

Versus

Emaar MGF Land Ltd.

Registered address: 306-308, Square One, C-2,
District Centre, Saket, New Delhi, Delhi 110017
also, at: ECE, House, 28 Kasturba Gandhi Nagar, New
Delhi - 110001

Respondent

CORAM:

Dr. K.K Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Ms. Charu Rustagi
Shri Harshit Batra

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 19.04.2021 has been filed by the complainants 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 thereunder or to the allottee as per the agreement for sale executed inter se.

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

Sr. No.	Particulars	Details
1.	Name of the project	Imperial Garden, Sector 102, Gurugram, Haryana
2.	Total area of the project	12 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	107 of 2012 dated 10.10.2012
	Validity of license	09.10.2020
	Licensee	Kamdhenu Projects Pvt. Ltd.
	Area for which license was granted	12 acres
5.	Registered/not registered	Registered in two phases i. 208 of 2017 dated 15.09.2017 [Valid up to 31.12.2018 for 49637 sq. mtrs. and extension granted vide no.3/2019 dated 02.08.2019 which is

		extended up to 31.12.2019] ii. 14 of 2019 dated 28.03.2019(Phase II) [Valid up to 17.10.2018 for 4.57 acres]
6.	Occupation certificate granted on	17.10.2019 [annexure R5, page 125 of reply]
7.	Provisional allotment letter	27.02.2013 [annexure R2, page 31 of reply]
8.	Unit no.	IG-06-0602, 6 th floor, building no.6 [annexure R2, page 47 of reply]
9.	Area of the unit (super area)	2025 sq. ft.
10.	Date of execution of buyer's agreement	01.05.2013 [annexure R2, page 44 of reply]
11.	Possession clause	14. POSSESSION (a) Time of handing over the Possession <i>Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee(s) 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 compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 42 (Forty Two) months from the date of start of construction; subject to</i>

		<p><i>timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.</i> (Emphasis supplied) [page 62 of reply]</p>
12.	Date of start of construction as per the statement of account dated 26.07.2021 at page 105 of reply	11.11.2013
13.	Due date of possession	11.05.2017 [Note: Grace period is not included]
14.	Total consideration as per the statement of account dated 26.07.2021 at page 104 of reply	Rs.1,63,85,798/-
15.	Total amount paid by the complainant as per the statement of account dated 26.07.2021 at page 104 of reply	Rs.1,10,44,276/-
16.	Offer of possession	26.10.2019 [annexure R6, page 128 of reply]
17.	Delay in handing over possession w.e.f. due date of handing over possession i.e., 11.05.2017 till date of offer of possession plus 2 months i.e., 26.12.2019	2 years 7 month and 15 days

B. Facts of the complaint

3. The complainants made the following submissions in the complaint:
- i. That the complainants approached the respondent company and after meeting the officials of the respondent company, the complainants paid the booking amount of Rs. 10,00,000/- in order to be allotted a unit/apartment in the aforementioned project, namely, imperial gardens. That the said booking amount was paid by the complainants on 09.01.2013 however, the acknowledgment receipt of the same bears the date 14.01.2013 and printed on 27.02.2013. That the respondent along with the provisional allotment letter, also enclosed copy of annexure-i, being the schedule of payment-instalment payment plan on 27.02.2013, wherein, the bifurcation was made as to at what all stages the respondent would be raising demands for the payment of the instalment amounts from the complainants.
 - ii. That the complainants and the respondent entered into an agreement wherein the complainants were allotted unit no. ig-06-0602, located on the 6th floor, in tower no. 6 having a super area of 188.13 sq. mtrs. (2025 sq. ft. approx..) for a total consideration of Rs. 1,51,85,225/- which is exclusive of service Tax/GST. That the complainants on 08.10.2013 sent a letter to the respondent subjecting that the complainants had booked two residential units with the respondent in two different projects, the details of the units are as follows:
 - a) Unit no. IG-06-0602, 6th floor, tower 6 in the project "Imperial Gardens", sector-102, Gurgaon, Haryana.

- b) Unit was booked in the project "Ekantam", Dwarka Expressway.
- iii. That the complainants had paid an amount of Rs. 15,00,000/- by cheque no. 013361 drawn from IDBI Bank, New Delhi dated 22.03.2013 to the upcoming project of the respondent namely, EKANTAM and due to the depressed financial/ economic conditions, the complainants cannot maintain the payment of the instalment amount for the two units mentioned above simultaneously, thus, the complainants requested the respondent to transfer the amount of Rs. 15,00,000/- to the account of Unit No. IG-06-0602, 6th Floor, Tower 6 in the project "Imperial Gardens", Sector-102. That thereafter, no further demand for the payment of the instalment amount was raised by the respondent to the complainants and no further payment was made by the complainants to the respondent.
- iv. That on 07.09.2014, the complainant, Late Sh. Davinder Kumar left for heavenly abode leaving behind everything. The complainant died intestate and therefore, the present complaint is filed by the Legal representatives, i.e., the wife, the sons and the daughter of the deceased allottee on behalf the complainant and thus, the Legal Representatives are the complainants to the present complaint. It is submitted that the complainant died on 07.09.2014, however, the date of registration in the records of the South Delhi Municipal Corporation was 15.09.2014 and the Death Certificate was issued on 13.10.2014.
- v. That the respondent has cheated the complainant and his family members by extorting the monies from the complainants because

the vacant and peaceful possession of the unit/apartment in question has not been handed over to the complainants even till date despite making the timely payments of the instalments. Already 2 years 8 months has been elapsed since the time the respondent had committed to hand over the possession of the unit in question, i.e., from 01.02.2017 to september 2019. That the complainant Late Sh. Davinder Kumar had purchased the unit in question for the personal dwelling for himself along with his wife, i.e., Late Smt. Kamlesh jain but now in the present scenario both the persons are dead and their legal representatives being their 2 sons and 1 daughter reside outside India. That, therefore, the complainants now are no longer interested in taking the possession of the unit in question as they reside outside India and seeks refund of the entire amount paid so far.

C. The complainants are seeking the following relief:

4. Direct the respondent to refund the entire amount paid by the complainant to the respondent along with interest at the rate of 24% from the date of making payment till the date of actual payment and to pay Rs. 5,00,000/- as compensation for mental harassment

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:
 - I. That the matter with respect to jurisdiction of the hon'ble authority or the hon'ble adjudicating officer is still pending adjudication before the apex, thus no statutory vested jurisdiction being available with either the hon'ble authority or the hon'ble adjudicating officer, present complaint ought to be adjourned sine

- die till the final decision on the subject matter by the hon'ble apex court, vesting jurisdiction to adjudicate upon refund matter either upon the hon'ble authority or the hon'ble adjudicating officer.
- II. That the complainants are estopped by their own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint.
- III. That the complainants have not approached the court with clean hands as have nowhere divulged the hon'ble adjudicating officer with the fact that they have been in constant defaults in making good on their part of the obligations. That the complainants are willful and persistent defaulters in making the payments and have willfully concealed that fact thereof. That approaching this forum with half cooked and manipulated stories is a grave violation of the doctrine of clean hands and hence, this complaint is liable to be dismissed on this ground alone.
- IV. That one Mr. Davinder Kumar being interested in the real estate development of the respondent, known under the name and style of "Imperial Garden" at sector 102 Village, Kherki Majra Dhankot, Tehsil and District Gurgaon tentatively booked a unit no. IG-06-0602, super area 2025 sq. ft. after having conducted extensive and independent enquiries with regard to the project and the respondent and it was only after the allottee was fully satisfied about all aspects of the project, that the allottee took an independent and informed decision, uninfluenced in any manner by the respondent, to book the apartment in question.
- V. That the allottee opted for the construction linked payment plan according to which, the complainants were obliged to pay as per

the linked stages (hereinafter referred to as the “**said payment plan**”). The sale price of the unit was Rs. 1,51,85,225 along with other charges including IDC/EDC, Car Parking, Club Membership, IFMS, PLC, HVAT upon 31.03.2014 and applicable taxes, making the total cost of the Unit to be 1,63,85,798 out of which, the allottee has paid 1,10,44,276 as is evident from the statement of accounts dated 26.07.2021. The allottee has been in continuous default under the said payment plan which is also evident from the statement of accounts annexed herewith.

- VI. That after the death of the allottee in 2014 the rights and obligations of the allottee shall follow to his legal heirs as the agreement in itself deems to include the legal heirs, administrators, executors’ successors & permitted assigns. Hence, after the sad demise of the allottee, the obligation of timely payment fell on the complainants, who consequently defaulted in fulfilling their responsibilities.
- VII. That the obligation of development of the unit and thus the project as a whole is not merely and solely on the respondent but is consequence by the fulfilment of obligations of the respective allottees. That the obligations of the parties under the agreement are reciprocal in nature and in the light of such continuous defaults on part of the complainants since the very beginning, the respondent is not, under any condition whatsoever, obligated to make good on its part of the promises with respect to the development of the unit and the project as a whole. That this is also supported by the agreement wherein Clause 14(a) reads as under:

"...subject to the allottee having timely complied with all the terms and conditions of this agreement and not being in default under any provisions of this agreement and compliance with all provisions, formalities, documentation etc..."

Nonetheless, it must be noted by the hon'ble adjudicating officer that despite the default caused by the complainants in fulfilling their obligations, the respondent did not default in giving the possession and instead completed the construction of the project without having regular payment of monies by the complainants. That as is known and practically understood that regular and timely payments by the allottees are pertinent towards the completion of a real estate project, yet, without the same being done in the present case, the respondent has shown an exemplary conduct as a real estate promoter which should be duly taken into account. The Hon'ble Supreme Court noted in case **Saradmani Kandappan and Ors Vs S. Rajalakshmi and Ors, decided on 04.07.2011, MANU/SC/0717/2011: (2011) 12 SCC 18** held that the payments are to be paid by the purchaser in a time bound manner as per the agreed payment plan and he fails to do so then the seller shall not be obligated to perform its reciprocal obligations and the contract shall be voidable at the option of the seller alone and not the purchaser.

That the respondent went ahead of his obligations also served a number of notices, payment request letters and reminders on the first instance and second instance between the period of 2013 – 2018 in order to ensure timely payment and no complications in

the development process. However, the same was not obliged by the respondent.

VIII. That subject to the timely compliance of payments by the complainants, the respondent proposed to handover the possession of the unit within 42 months from the date of start of construction and additional 3 months grace period for obtaining the occupancy certificate. Moreover, the delivery of possession was further subject to *force majeure* conditions as spelled out in clause 31 of the agreement as under:

"The handover of the unit shall be subject to force majeure clause which, inter alia, includes delay on account of non-availability of steel and/or cement and/or other builder materials, water supply or electric power or slow down strike or due to a dispute with the construction agency employed by the company, civil commotion or by reasons of war, enemy action, earthquake or any act of God. If there is any delay in the delivery of possession of the unit or the company is unable to deliver possession of the unit due to force majeure event or due to any notice, order, rule or notification of the central or state government and/or any other public or competent authority or for any other reason beyond the control of the company, shall be entitled to a reasonable extension of the time for delivery of possession of the unit. The allottee understands and acknowledges that if due to any force majeure conditions, the whole or part of the project is abandoned or abnormally delayed, the allottee shall not be entitled to prefer any claim whatsoever except that the company shall on demand refund the allottee's money without any interest"

It must be brought to light that the respondent was adversely affected by various construction bans, lack of availability of building material, regulation of the construction and development activities by the judicial authorities including NGT in NCR on account of the environmental conditions, restrictions on usage of ground water by the high court of Punjab & Haryana, etc. and other force majeure circumstances, yet, the complainant completed the construction of the project diligently and timely, without imposing any cost implications of the aforementioned circumstances on the complainants and demanding the prices only as and when the construction was being done, as is evident from the statement of accounts annexed herewith.

- IX. That all these circumstances come within the purview of the force majeure clause and hence allow a reasonable time to the respondent builder. That it must also be noted that the respondent had the right to suspend the construction of the project upon happening of circumstances beyond the control of the complainant as per clause 14(b)(i), however, despite all the hardships faced by the respondent, the respondent did not suspend the construction and managed to keep the project afloat through all the adversities.
- X. That the respondent has complied with all of its obligations, not only with respect to the agreement with the complainants but also as per the concerned laws, rules and regulations thereunder and the local authorities. That despite the innumerable hardships being faced by the respondent, the respondent got the project registered with the Haryana real estate regulatory authority and thereafter,

completed the construction of the project and successfully attained the occupancy certificate dated 17.10.2019.

- XI. That thereafter, and only after obtaining the requisite permissions, the respondent legally offered the possession of the unit to the complainants on 26/10/2019 and request the payment of final dues and taking the possession of the unit on or before 27/11/2019. That without admitting or acknowledging in any manner the truth or legality of the frivolous and false allegations levelled by the complainants and without prejudice to the contentions of the respondent that there has been no delay in offering possession of the unit to the complainants, it is respectfully submitted that the respondent has been prevented from timely implementation of the project by reasons beyond its power and control. It is submitted that the respondent had appointed a contractor operating under the name and style of Capacite Infraprojects Ltd. for construction and implementation of the project. The said contractor had assured, represented, warranted and claimed that it has the necessary resources, competence, capacity, capability and expertise for undertaking, performing, effectuating and completing the work undertaken by it. The respondent had no reason to suspect the *bona fide* of the said contractor at the relevant time and awarded the work to the said contractor. However, the said contractor was not able to meet the agreed timeline for construction of the project. The said contractor failed to deploy adequate manpower, shortage of material, etc. The respondent was constrained to issue several notices, requests etc.



to the said contractor to expedite progress of the work at the project site but to no avail.

- XII. It is impertinent to note that the said contractor consciously and deliberately chose to ignore the legitimate and just requests of the respondent on one pretext or the other and defaulted in carrying out the work in a time bound manner. Therefore, no fault or lapse can be attributed to the Respondent in the facts and circumstances of the case.
- XIII. That the complainants, as ever, continued with their defaults and failed to take the possession of the unit. That the real estate sector is not merely dependant on the promoters like the respondent for its upliftment - it is the corresponding and equally weighed obligation of the allottees like the complainants to perform their part of timely payment inter alia other responsibilities. That timely payment against the allotment is the essence of a real estate development and cannot be turned a blind eye against. The Hon'ble Supreme Court in **Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna and Ors., decided on 11.01.2021 - MANU/SC/0013/2021** where, Phase 1 of the project had been issued the occupancy certificate after the completion of construction, consequently, the developer offered the possession to the respective allottees. The Supreme Court directed such allottees to take the possession of their respective allotments.
- XIV. That it is the obligation of the complainants under the Act to make the due payments, as agreed, to take the possession of the allotment within two months of occupancy certificate and to thereafter execute the conveyance deed. The outstanding amount as on

26.07.2021 is 63,50,381 as evident from the statement of accounts annexed herewith. The relevant provisions of the Act are reiterated hereinbelow:

Section 19(6): Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

Section 19(10): Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

Section 19(11): Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act.

- XV. The complainants have a corresponding obligation as per the agreement to make the due payments against the unit, to take the possession within 30 days of offer of possession, and to have the sale deed executed upon full payments being made. the relevant provisions of the agreement are reiterated hereinbelow:

“Clause 20 Events of default and consequences

20.1 It is specifically made clear to the Allottee that the Allottee shall perform, comply, abide by and adhere to all covenants and obligations required to be performed or complied with under this Agreement. Any default, breach or non-compliance of any of the terms and conditions of this Agreement shall be deemed to be an event of default liable for consequences stipulated therein. The

following are the events of default which include but are not limited to the following:

(a) Failure to make payments within the time as stipulated in the Schedule of Payments.

(b) Failure to perform and observe any or all of the Allottee obligation as set forth in this Agreement or to perform any other occupancy obligation, if any, set forth in this or any other related Agreement.

(d) Failure to execute the Sale Deed within the time stipulated by the Company or the relevant authorities.

...

Clause 15 Procedure for taking Possession

(a)...

(b) Upon receiving intimation in writing from the Company, the Allottee shall within thirty (30) days take the possession of the said Unit from the Company by executing necessary indemnities, undertakings and such other documentation as the Company may prescribe....If the Allottee fails to take possession of the Unit as aforesaid within the time limit prescribed by the Company in its notice, then the said Unit shall lie at the risk, responsibility and cost of the Allottee in relation to all the outgoing cesses, taxes, levies, etc.

- XVI. That the defaulting conduct of the complainants is not new and accounts towards its *malafide* intentions towards the non-payment of the unit in the project. It must be noted that the complainants are bound by the agreement and the obligations under them shall and remain unaffected by any change in the market conditions, as may occur, from time to time. The complainants cannot be allowed

to wriggle out from its responsibilities due to any fluctuations in the market or any other reason whatsoever.

XVII. That corresponding to the unlawful and malafide conduct of the complainants, the respondent has always showed good faith towards the complainants. That upon request of the complainants to transfer the sum of 15,00,000 from their unit in another project of the respondent, the respondent, in order to ease and as a token of good faith, proceeded with such transfer as is evident from entry 18 of the statement of accounts annexed herewith.

XVIII. That it also needs to be noted that time was of the essence of the contract and hence, the inordinate delay in payment and the consequent default caused by the complainants is bound to adversely affect the respondent and thus consequently, the complainants are liable to pay the delayed payment charges and interests. The relevant provisions under the agreement and the act are reiterated hereinbelow:

Section 19(7) *The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).*

Clause 12 Time is the Essence

(a) It is specifically and categorically understood and agreed by the Allottee that time is of the essence with respect to Allottee(s)' obligations to perform or observe all the obligations of the Allottee under this Agreement and/or to pay the Total Consideration along with other payments such as applicable stamp duty, registration fee and other charges stipulated under this Agreement to be paid on or before due date or as and when demanded by the Company as the case may be.

(b)...

Clause 17(1) Failure to take possession

17.1 It is agreed by the Allottee that in the event of the failure of the Allottee to take the possession of the said Unit in the manner as aforesaid in Clause 16, then the Company shall have the option to cancel this Agreement and avail of the remedies as stipulated in clause 20 of this Agreement or the Company may, without prejudice to its rights under any of the clauses of this Agreement and at its sole discretion, decide to condone the delay by the Allottee in taking over the said Unit in the manner as stated in this clause on the condition that the Allottee shall pay to the Company the following amounts:

(c) Maintenance Charges from the deemed date of possession as per notice of possession

Further the Company also has the right to withhold conveyance or handing over for occupation and use of the said Unit till the time all outstanding amounts along with overdue interest as prescribed in this Agreement, if any, are fully paid...

XIX. In light of the above-mentioned facts, it is evident that no illegality or lapse can be attributed to the respondent. thus, the allegations levelled by the complainants qua the respondent are totally baseless and do not merit any consideration by this hon'ble adjudicating officer. The present application is nothing but an abuse of the process of law. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

XX. That it is pointed out that the project is 100% complete and no refund can be allowed at this stage or would substantially hamper the project, the respondent and the real estate industry as a whole. That in the interest of equity, justice and fair play, it must be noted that the respondent has always tuned to its obligations and has

waited for an inordinate period of time for clearing of dues and taking of possession by the complainants. The unit is complete and ready to take physical possession as is evident from the pictures of the unit attached herewith.

- XXI. Written submission on behalf of respondent is filed on 24.05.2022 wherein it is stated that the respondent has already offered the possession of the subject unit on 26.10.2019 after receiving OC and it is the obligation of the allottee to take the possession of the unit within 2 months from the date of offer of possession according to section 19(10) of the Act, 2016.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

8. Section 11(4)(a) of the Act 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.

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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
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 Pvt. Ltd. and other Vs. Union of India and other 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 relief sought by the complainants/allottees.

F.I Direct the respondent to refund the entire amount paid by the complainant to the respondent along with interest at the rate of 24% from the date of making payment till the date of actual payment.

F.II Direct the respondent to pay Rs. 5,00,000/- as compensation for mental harassment

12. As per clause 1.2 (i) of the builder buyer's agreement the builder has right to deduct the earnest money in case the allottee has failed to

company the terms and condition of BBA. The relevant clause is reproduced under for ready reference:

(i) Earnest Money

(i) *The Allottee understands and agrees that 15% of the Total Consideration of the Unit shall be treated as Earnest Money by the Company to ensure the fulfilment of terms and condition of the Agreement.*

(ii) *The Allottee hereby agrees that the Company shall have the right to forfeit the Earnest Money along with Non Refundable Amounts in the event of the failure of the Allottee to perform his obligations or non-fulfilment of all/any of the terms and conditions set out in this Agreement executed by the Allottee or in the event of failure of the Allottee to sign and return this Agreement in its original form to the Company within thirty (30) days from the date of its receipt by the Allottee.*

(iii) *The Allottee agrees that the conditions for forfeiture as stated in sub clause (ii) hereinabove shall remain valid and effective till the execution and registration of the Sale Deed for the said Unit and that the Allottee hereby authorizes the Company to effect such forfeiture without any notice to the Allottee.*

13. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

"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."

14. The rule 15 of the rules has determined the prescribed rate of interest and it provides that 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%. 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., 17.08.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.
15. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the balance amount of the unit by deducting the earnest money which shall not exceed the 10% of the sale consideration of the said unit as per builder buyer agreement and shall return the balance amount to the complainant within a period of 90 days from the date of this order. The refund should have been made on the date of surrender i.e., 29.11.2019, accordingly interest at the prescribed rate i.e., 10% is allowed on the balance amount from the date of cancellation to date of actual refund.

F.II Direct the respondent to pay Rs. 5,00,000/- as compensation for mental harassment.

16. The complainants in the aforesaid relief are seeking 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. (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation 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 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. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the authority

17. 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 refund the balance amount of the unit by deducting the earnest money which shall not exceed the 10% of the sale consideration of the said unit as per builder buyer agreement and shall return the balance amount to the complainant within a period of 90 days from the date of this order. The refund should have been made on the date of surrender i.e, 29.11.2019, accordingly interest at the prescribed rate i.e., 10% is allowed on the balance amount from the date of cancellation to date of actual refund.

- 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.

18. Complaint stands disposed of.

19. File be consigned to registry.

V.K.G.
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 17.08.2022

(Signature)
(Dr. K.K. Khandelwal)

Chairman



HARERA
GURUGRAM