BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	**113 of 2020**
Date of complaint:	**09.01.2020**
Date of order:	**30.05.2023**

1. Mr. Anil Sharma
2. Mrs. Smita Joshi

Both RR/o: - 6A, Tower-9, Central Park-2, Sohna Road, Sector- 48, Gurugram Haryana - 122003 **Complainants**

Versus

M/s Tata Housing Development Company Limited.
Regd. office: Ground Floor -3, Naurang House, 21, KG Marg, New Delhi- 110001 **Respondent**

CORAM:

Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:

Sh. Amit Kumar (Advocate)	Complainants
Sh. Mohit Jolley and Mayank Yadav (Advocates)	Respondent

ORDER

1. This complaint has been filed by the complainant/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 provisions 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 details

2. The particulars of unit, 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. N.	Particulars	Details	
1.	Name of the project	"Tata Primanti", Sector 72, Gurugram, Haryana	
2.	Project area	36.25 acres	
3.	Nature of the project	Group Housing Colony	
4.	DTCP license no. and validity status	155 of 2008 dated 14.08.2008 valid upto 14.08.2008	
5.	Name of licensee	Unitech Infratech Pvt. Ltd	
6.	RERA Registered/ not registered	Registered vide no. 98 of 2017 dated 28.08.2017	
7.	Unit no.	**3201, Tower/block- 6** (Page no. 54 of reply)	**3001, Tower/ block-6** (Substituted Unit) (As per written submission of the respondent on page 2)

8.	Unit area admeasuring	**Area of 3201, T-6:** 4250 sq. ft. (super area) 2419 sq. ft (carpet area) (Page 21 of the Complaint)	**Area of 3001, T-6:** 4300 sq. ft. (super area) (Page 29 of the Complaint) 2271.15 sq. ft (carpet area) (Annexure-G, page 135 of the Reply to Complaint)
9.	Date of Application Form for Booking	**Unit no. 3201, T-6** 20.03.2017	**Unit no. 3001, T-6** 26.03.2018
10.	Allotment Letter	27.04.2017 (Unit no. 3201, T-6)	
11.	Date of Transfer from Unit 3201 to Unit 3001 both in Tower 6	Not mentioned	
12.	Date of execution of agreement to sell	Not signed Of unit 3001, Tower/block 6, (As mentioned by the respondent in written submission of facts)	
13.	Possession clause (Taken from BBA not signed by either of the parties)	**4. "Possession Time and Compensation"** Tata Housing shall endeavor to give possession of the apartment to the	

		allotee on or before **30.09.2018**. The date of possession and time schedule of completion shall be subject to force majeure circumstances and reasons beyond the control of the promoter. In case the possession is delayed beyond the agreed date as specified above, the promoter shall be entitled **to extension of 12 months for handover of possession and completion of construction**. (As per clause 4 of BBA on page 16 and annexure-G on page 135 of Reply)	
14.	Total sale consideration	Rs. 3,84,03,300/- (substituted/ transferred apartment) (Page 135 of reply)	
15.	Amount paid by the complainants	Rs.98,56,858/- (As pleaded by the complainant on page 12 of complaint.)	
16.	Occupation certificate /Completion certificate	09.03.2018 (As per on page 40 of reply)	
17.	Due date of possession for new unit	30.09.2018 (As per BBA)	
18.	Offer of possession	**3201**	**3001**
		19.03.2018	Not offered

		(Page 42 of reply)	

B. Fact of the complaint

3. The complainants have made the following submissions: -

   I. That in the year 2017, the complainants were desirous of purchasing a residential property in a gated society in Gurugram and approached the respondent to explore their offered options through its Deputy Manager cum Marketing & Sales, Vikas Garg, in the housing project namely "Tata Primanti", located in Sector-72, Southern Peripheral Road, Gurugram-122101, (Haryana).

   II. That on 11.03.2017, the representative of the respondent company sent an email to the complainants sharing the layout of apartment no. 3201 in Tower 6, with super area of 4250 sq. ft. Since the tower 6 at that point of time was under construction, therefore the physical inspection of the apartment was not possible. On 15.03.2017, the respondent through its Dy. Manager sent another email confirming the carpet area of the apartment no. 3201 in tower 6, excluding balconies, to be 2419 sq. ft. and again reconfirmed the same vide another email dated 18.03.2017.

   III. That the complainants thereafter booked a unit as four- bedroom apartment being no. 3201 in Tower 6 with the respondent in the said project consisting of super area of 4250 square feet vide their

application form dated 28 .03.2017. They paid an amount of Rs.10,00,000/- vide cheque no. 391204 dated 26.03.2017 drawn on SBI bank to the respondent towards advance money w.r.t. booking of the said unit.

IV. That the respondent got an application form signed from the complainants. The said application form contained some broad terms and conditions of the agreement to be executed between the parties. On being enquired by the complainants, the respondent's officials informed them that these are draft terms and conditions of the agreement, to be executed between the parties and the respondent would provide the copy of the said application form to them once the cheque given by them was encashed on presentation for the perusal. They can deliberate upon the same only thereafter and to which the complainants agreed.

V. That the said cheque was duly encashed by the respondent. However, the copy of the application form which was got signed at the time of accepting the cheque from the complainants was not supplied to them for their perusal of the terms and conditions contained therein.

VI. That on 21.04.2017, the respondent through its Dy. Manager Vikas Garg, sent an email, informing the total cost of the said unit to be Rs. 3,65,50,000/- i.e., (4250 x Rs 8,600/- per sq. ft.) On 02.05.2017, the Dy. Manager sent another email with an attachment of a copy of the

letter issued by Mr. Muhammad Shuaib, authorised signatory of the respondent mentioning the payment terms agreed upon between the parties at the time of making the advance payment of Rs.10 Lakhs. They have paid a sum of Rs.97,56,858/-to the respondent on 25.09.2017. An email dated 25.09.2017 received by the complainants acknowledging the receipt of an amount of Rs.97,56,858/- is enclosed herewith, and forms part of the list of documents, to this complaint.

VII. That in the first week of March 2018, the complainants were informed that due to technical reasons, the said unit booked by the complainants would be substituted with unit no. 3001 in Tower 6. No reasons whatsoever were given by the respondent at the time of communicating the change in the said unit to substituted unit. However, when the respondent assured to the complainants that the size of substituted unit i.e., unit no. 3001 in Tower 6 is exactly the same as the size of the original unit 3201, in Tower 6 with only an addition of a balcony in the master bedroom, the complainant agreed to continue with the substituted unit 3001 in Tower 6.

VIII. That the statement of account dated 02.06.2018 as shared shows that out of the total sum of Rs. 98,56,858/- paid by the complainants, only a sum of Rs.94,40,834/- was adjusted towards the substituted unit changed by the respondent showing malafide manner.

IX. That during the month of July 2018 when the tower became accessible for physical inspection, they visited the building and noticed that the size of the rooms actually constructed were different from the size offered and agreed between the parties at the time of booking of the said unit or while substituting the said unit with originally booked unit. It is submitted that the said unit was booked by the complainants with an intention to live in it. Therefore, the size of the rooms was carefully considered and selected by the complainants while booking the said unit. However much to the dismay of the complainants not only the size of the unit was changed, but the size of the master bedroom was changed from their preferred choice i.e., 18'- 10.5" x 18'-7.5" to 16'- 1" x 18'- 6.5" much smaller than the actual size offered of the said unit. It is submitted that the complainants tried to contact the persons, they were in touch with all along from making booking of the said unit to making a payment of Rs.98,56,858/-.

X. That on 14.12.2018, they engaged the services of two qualified architects to physically measure the actual size if the substituted unit being offered by it. On measurement of the substituted unit, it came to fore that the size of master bedroom and other areas were found to be smaller in carpet area than the layout plan on which the booking

was done and/or which was subsequently changed from unit no. 3201 in Tower 6 to unit no. 3001 in Tower 6.

XI. That on 24.12.2018, an email was sent by the complainants to the respondent wherein a response was sought w.r.t. smaller size of the master bedroom than the layout plan. The respondent was apprised about the fact that the actual size of the master bedroom was 15'11" x 18'6" whereas they have offered a room-size 18'- 10.5" x 18'-7.5" as per the layout plan. However, no response was received from the respondent even after the reminder email dated 28.01.2019.

XII. That after much chase and persuasion by them an evasive email dated 11.02.2019 was received much to the disappointment of the complainants. On 13.02.2019, an email was received from the respondent wherein it admitted that the revised layout plan of the substituted unit is smaller and different from the original layout plan shared with the complainants. The new revised layout not only shows the smaller master bedroom. Even the overall carpet area of the apartment was also reduced from 2419 to 2252.830 sq. ft, i.e., 166.17 sq. ft. smaller than the original plan in carpet area excluding the balconies.

XIII. That the complainants sent an email dated 07.03.2019 to the respondent wherein the issue of smaller carpet area of the master bedroom and the overall apartment size was raised, and it was

intimated that the smaller size of the apartment now being offered is no longer suitable to them and the sum of Rs.98,56,858/- paid by them may kindly be refunded along with prescribed interest at the earliest. Finally, on 02.04.2019, they received an email from the respondent refusing to refund the amount so paid and shifting of the substituted unit with another unit of the size originally offered by the respondent.

XIV. That till date for the want of agreeability of both the parties with regard to size initially offered and subsequently changed to a smaller size no concluded contract has been executed between the parties. Further, the apartment (having the agreed upon specifications), as promised to be delivered to the complainant is not being made available. Therefore, the entire amount is liable to be refunded by the respondent as it cannot force the complainants to sign the apartment buyer's agreement of smaller size than what was actually offered to them at the time of accepting a sum of Rs.10,00,000/- from them which is not acceptable to the complainants, and which was duly communicated to the respondent.

XV. That without prejudice to the rights of the complainants as there is no concluding contract (no apartment buyer's agreement having been signed by the complainants for want of acceptability of size actually offered being smaller than initially offered) between the

parties, the respondent is liable to refund an amount of Rs.98,56,858/- along with prescribed rate of interest per annum from the receipt till the date of realisation.

C. Relief sought by the complainants:

4. The complainants sought following relief(s):
   I. Direct the respondent to refund an amount of Rs. 98,56,858/- to the complainants along with interest at the prescribed rate in terms of section 18 and 19 of the Act of 2016 from the date of respective payments made to the respondent till realisation.
   II. Any other just and proper direction with this Hon'ble authority deem fit and just in the facts and circumstances of the present case.
5. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent contested the complaint on the following grounds.
   i. That the complainants initially vide application form dated 26.03.2017 booked a unit under the payment plan i.e., 25:75 being apartment no. 3201 admeasuring 4250 sq. ft chargeable area, on 31st floor in Tower No. 6 with four car parking in the said project for basic sale consideration @ Rs.8600/- per sq. ft. for Rs.3,65,50,000/- excluding taxes and other charges. Pursuant to the payment of the application

money of Rs.1,00,000/- by them, the respondent issued allotment letter towards the said original apartment to the complainants.

ii. That issuing the allotment letter dated 27.04.2017, the draft of buyer agreement in respect of the said apartment was sent to the complainants to read the agreement carefully and to execute the same towards purchase of the said original apartment and send the same within 30 days from the date of receipt of the aforementioned letter. However, the complainants failed to execute the same.

iii. That subsequently, as mandatory under the Act, 2016, vide letter dated 24.11.2017, the respondent sent an intimation to the complainants, for registration of the apartment buyer's agreement and thereafter the reminder letter dated 26.02.2018 was sent to them. However, they completely failed neglected to comply the mandatory requirement of executing and registering the agreement.

iv. That the respondent/promoter has obtained the occupation certificate on 09.03.2018 which was well within the agreed period as per the terms of the apartment buyer agreement. Hence, there is neither delay in completion of the construction of Tower No. 6 nor the complainants raised any dispute with regard to delay in handing over the possession of the original apartment.

v. Thereafter immediately, pursuant to the terms of the allotment, the respondent issued the offer letter dated 19.03.2019, for possession of

the original apartment whereby requested (i) to pay the balance 75% of the sale consideration by 17.06.2018, (ii) pay the registration fees and (iii) stamp duty and (iv) take the possession of the original apartment.

vi. That in the meantime, the complainants addressed a letter to the respondent thereby requested it for transfer of booking from original apartment being apartment no. 3201 on 31st floor to another apartment being apartment no. 3001 in Tower No. 6 in the project. The request was made for transfer of the apartment and not for substituting the apartment. The respondent did not promise/agree with the complainants that the area of the bedroom of the apartment and sale price of both apartment and size of the master bedrooms would be identical as allegedly claimed by them.

vii. Accordingly, the complainants submitted the fresh application form on 20.03.2018 with the respondent towards booking of the new apartment being apartment no. 3001 in Tower No. 6 in the said project having carpet area as per 2271.15 sq. ft equivalent to 210.995 sq. Mtrs. and carpet area of enclosed balcony area i.e., 497 sq. ft. carpet area, for a total sale consideration of unit of Rs.3,84,03,300/- excluding club house, EDC/IDC, taxes, and other charges with a payment plan to pay the balance consideration within 90 days i.e., by 28.06.2018.

viii. That the respondent vide letter dated 26.04.2018, shared the draft of the apartment buyer agreement, in respect of new apartment with the complainants with a request to read the same carefully before signing the agreement and return the same after signatures within 30 days from the date of the date of the letter. Since they did not sign the buyer's agreement, the respondent sent reminder 1, vide letter 08.06.2018 to the complainants and whereby again requested them to sign the agreement and sent the same by 23.06.2018. Despite that they have failed and neglected to sign the buyer's agreement.

ix. Further, as per the agreed terms of the allotment of the new apartment being apartment no. 3001, they were required to pay 75% being balance consideration at the time of offer of possession of the apartment i.e., by June 2018. However, being the centric approached towards its customer, the respondent on request of the complainants had agreed to give further extension to pay the balance 75% consideration by March 2019. However, the complainants with malafide intention and ulterior motive addressed emails on 30.11.2018 and 01.12.2018 whereby insisted for allowing to make the balance payment by end of 2019 and thereby also sought clarity on transfer of the of the booked apartment to another party which was duly replied by the respondent on 01.12.2018 and 04.12.2018 respectively. It was informed that the extended date of payment was

March,2019 which cannot be further extended and also confirmed that the new apartment cannot be transferred to third party. They have suppressed the aforementioned facts and deliberately did not annexe the aforesaid emails exchanged between the parties.

x. That the respondent addressed an email to the complainants on 12.03.2018 on their request for booking of the new apartment and not as substitute for original apartment. Being the existing customer, the respondent has given the liberty/offer to the complainants to pay 25% by 30.03.2018 and 75% balance by 30.03.2019. Further, it is stated in the said email to the complainants that on visit in March 2019, they find the new apartment being no. 3001 is not liveable, the respondent would give further extension of 6 months to make the payment and take the possession of the new apartment being 3001. However, in any event, the new apartment was kept ready at the time of booking of the apartment and despite that, being a centric approach towards its customer, the respondent has permitted to pay by March 2019 even for case of transfer from original apartment to new apartment.

7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents as well as written submissions made by the parties.

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

9. 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

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11***
>
> .....
>
> *(4) The promoter shall-*
>
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the*

allottees, or the common areas to the association of allottees or the competent authority, as the case may be.

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

11. 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.

12. 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. 2020-2021 (1) RCR (C), 357 and*** *reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022***wherein it has been laid down as under:

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine,*

keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

13. 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

F. I Direct the respondent to refund an amount of Rs. 98,56,858/- to the complainants along with interest at the prescribed rate in terms of section 18 and 19 of the Act of 2016 from the date of respective payments made to the respondents till realisation.

14. The complainants were allotted a unit bearing no. 3203, at 31st floor, in tower-6 in the project of the respondent detailed above on 26.03.2017 for a total sale consideration of Rs.3,65,50,000/-. No builder buyer's agreement was executed till date. Thereafter, the complainants addressed a letter to the respondent thereby requested it for transfer of booking from original apartment being apartment no. 3201 on 31st floor to another apartment being apartment no. 3001 in Tower No. 6 in the project. Accordingly, for the same they submitted a fresh application form on 20.03.2018 with the respondent towards booking of the new apartment being apartment no. 3001 in Tower No. 6 in the said project having carpet area as per 2271.15 sq. ft equivalent to 210.995 sq. Mtrs. and carpet area of enclosed balcony area i.e., 497 sq. ft. carpet area, for a total sale

consideration of unit of Rs.3,84,03,300/- excluding club house, EDC/IDC, taxes, and other charges with a payment plan to pay the balance consideration within 90 days i.e., by 28.06.2018. Further, as per the agreed terms of the allotment of the new apartment being apartment no. 3001, they were required to pay 75% being balance consideration at the time of offer of possession of the apartment i.e., by June 2018. However, being the centric approached towards its customer, the respondent on request of the complainants had agreed to give further extension to pay the balance 75% consideration by March 2019. However, the complainants with a malafide intention and ulterior motive addressed an email on 30.11.2018 and 01.12.2018 whereby insisted for allowing to make the balance payment by end of 2019 and thereby also sought clarity on transfer of the of the booked apartment to another party which was duly replied by the respondent dated 01.12.2018 and 04.12.2018 and thereby it was informed that the extended date of payment is March,2019 which cannot be further extended and also further confirmed that the new apartment cannot be transferred to third party. They have suppressed the aforementioned facts and deliberately did not annexe the aforesaid emails exchanged between the parties. However, the complainants have approached the authority on 09.01.2020 i.e., after valid offer of possession and the occupation certificate was obtained on 09.03.2018 from the

competent authority, seeking refund the paid-up amount against the allotted unit.

15. Section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. The due date of possession as per buyer's agreement was 06.09.2017 and the allottees in this case have filed this complaint on 16.07.2021 after possession of the unit was offered to them after obtaining occupation certificate by the promoter. The OC was received on 15.01.2019 whereas the offer of possession was made on 24.01.2019. The complainants vide email dated 09.12.2020 requested the respondent that they wish to withdraw from the project and made a request for refund of the paid-up amount on its failure to give possession of the allotted unit in accordance with the terms of buyer's agreement. On failure of respondent to refund the same, they have filed this complaint seeking refund.

16. The right under section 18(1)/19(4) accrues to the allottees on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottees have not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to them, it impliedly means that the allottees tacitly wished to continue with the project. The promoter has already

invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottees interest for the money they have paid to the promoter is protected accordingly and the same was upheld by in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) 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; that: -

> *25. The unqualified right of the allottees to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottees, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottees/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottees does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.*

17. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and

regulations made thereunder or to the allottees as per agreement for sale. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. But the complainant/allottees failed to exercise the right although it is unqualified one. The complainants have to demand and make their intention clear that they wish to withdraw from the project. Rather, tacitly wished to continue with the project and thus made themselves entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottees invest in the project for obtaining the allotted unit and on delay in completion of the project and when the unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

18. This view is supported by the judgement of Hon'ble Supreme Court of India in case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Civil appeal no. 5785 of 2019)*** wherein the Hon'ble Apex court took

a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate and also in consonance with the judgement of Hon'ble Supreme Court of India in case of ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors (Supra).***

19. The above said unit was allotted to complainants on 26.03.2018. There was no delay in handing over the possession as due date of possession was 30.09.2018 whereas, the offer of possession was made on 19.03.2018 and thus, becomes a case no delayed possession charges. The authority observes that interest of every month of delay at the prescribed rate of interest be granted to the complainant/allottees in case the delay in handing over of physical possession of the allotted unit. But now, the peculiar situation is that the complainants want to surrender the unit and want refund. Keeping in view of the aforesaid circumstances that the respondent-builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, and judgment of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.202,*** it is concluded that if the complainant/allottees still want to withdraw from the project, the paid-up amount shall be refunded after deductions as prescribed under

the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018.

20. The Hon'ble Apex court of the land in cases of ***Maula Bux Vs. Union of India (1973) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136***, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as ***Jayant Singhal and Anr. Vs. M/s M3M India Ltd***. decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted 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. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under-

> ***"5. AMOUNT OF EARNEST MONEY***
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> *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.*

21. Further, clause 5(VI) of the buyer's agreement (annexed but not executed), talks about cancellation/withdraw by allottee. The relevant part of the clause is reproduced as under: -

> *The Allottee(s) hereby agrees that in case the Allottee(s) fails to respond and/or neglects to take possession of the Unit within the aforementioned time as stipulated by the* ***Promoter and/or cancel/ terminate this Agreement, then the Promoter shall also be entitled to reserve his right to forfeit the entire amount received by the Promoter towards the Unit along with interest on default in payment of instalments*** *(if any), applicable taxes and any other charges and amounts.*

22. It is evident from the above mentions facts that the complainant paid a sum of Rs.98,56,858/- against basic sale consideration of Rs.3,84,03,300/- of the unit allotted. There is nothing on the record to show that the respondent acted on the representations of the complainant. Though the amount paid by the complainants against the allotted unit is about 25.6% of the basic sale consideration but the respondent/promoter was bound to act and respond to the pleas for surrender/withdrawal and refund of the paid-up amount.

23. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainants against

the allotted unit and is directed to refund the same in view of the agreement to sell for allotment by forfeiting the earnest money which shall not exceed the 10% of the basic sale consideration of the said unit as per payment schedule and return the balance amount along with interest at the rate of 10.70% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of surrender/filing of complaint i.e., 09.01.2020 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the authority

24. 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 paid-up amount of Rs.98,56,858/- after deducting 10% as earnest money of the basic sale consideration of Rs.3,84,03,300/- with interest at the prescribed rate i.e., 10.70% on the balance amount, from the date of surrender/filing of the compliant i.e., 09.01.2020 till 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.

25. Complaint stands disposed of.

26. File be consigned to registry.

(Sanjeev Kumar Arora)	(Ashok Sangwan)	(Vijay Kumar Goyal)
Member	Member	Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.05.2023