BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1678 of 2022**
Date of filing complaint:		**25.04.2022**
First date of hearing	:	**24.08.2022**
Order reserve on	:	**10.11.2022**
Order pronounce on	:	**18.01.2023**

1. Amolak Gill
2. Sunita Gill

Both RR/o: - Park View House, near Clock Tower, Faridkot, Golf Course Road, Sector 83, Gurgaon **Complainants**

Versus

M/s Vatika Limited
R/o: Unit A-002, INXT City Centre, Ground floor, block A, Sector 83, Vatika India Next, Gurugram 122012, Haryana. **Respondent**

CORAM:
Shri. Ashok Sangwan **Member**
Shri. Sanjeev Kumar Arora **Member**

APPEARANCE:
Mr. Aditya Bharech Advocate for the complainants
Mr. Venket Rao
Pankaj Chandola Advocates for the respondent

ORDER

1. The present 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 to the allottees as per the agreement for sale executed inter-se them.

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:

S. No.	Heads	Information
1.	Name and location of the project	Vatika Towers, Golf course Road, Gurugram (HR.)
2.	Nature of the project	Commercial
3.	RERA Registered/ not registered	Not registered
4.	Date of booking	05.05.2015 (annexure 2, page 41 of complaint)
5.	Date of allotment	03.08.2015(annexure 2, page 41 of complaint)
6.	Unit no.	Priority no. P-197 (annexure 2, page 41 of complaint)
7.	Total consideration	Rs. 80,70,631/- (annexure 1, page 39 of complaint)
8.	Total amount paid by the complainants	Rs. 80,70,631/- (annexure 1, page 39 of complaint)
9.	Provision regarding assured return	The broad terms of assured return are as under: a. Assured monthly commitment of **Rs. 129.72/- per sq.ft. payable till completion of the project**. b. **Post completion of the project an amount equivalent to Rs. 120/- per sq.ft. super area of the unit per month shall be paid as committed return from the date of completion of construction of the said unit, for upto 36 months or till the said unit is put on lease, whichever is earlier**. After the said unit is put on lease, then payment of the

		aforesaid committed return will come to an end from the date of execution of lease deed and the buyer will start receiving lease rental in respect of said commercial unit from the rent commencement date as per the lease deed of the said unit ..... ***(emphasis supplied)*** (Annexure 2, page 41 of complaint)
10	Date of offer of possession to the complainants	**Not offered**
11	Occupation certificate	**Not obtained**
12	Legal notice w.r.t. assured return	29.11.2019 (page 84 of complaint)

B. Facts of the complaint

3. The complainants submitted that they booked a commercial space admeasuring 500 sq.ft. in the respondent project namely "Tower C of Vatika towers on Golf course road, Gurgaon, Haryana. The respondent advertised the project through print media as well as through its channel partners. In 2015, they came across such advertisements and were approached by the channel partners of the respondent seeking investment in the project under the assured return plan. Further, they were assured that the project would be completed in time.

4. The complainants were thus induced into investing in the project and accordingly submitted the prescribed application to the office of the respondent on 04.05.2015 and paid an amount of Rs. 80,70,631/- as booking amount on the same day itself. Subsequently, the application dated 04.05.2015 was duly acknowledged by it *vide* letter dated 03.08.2015 which stated that

pursuant to the application, they had been allotted the unit. It further indicated the broad terms of investment.

5. Thereafter, as per the applicable assured return plan, the complainants received monthly payments of Rs. 64, 860/- less TDS from 06.06.2015 till November 2018.

6. However, on 17.12.2018, the complainants were shocked to receive an email from the respondent with respect to discontinuation of the assured return monthly payments and offering them to switch to another property of the respondent. In the email, it was clearly admitted that the construction of the project had not commenced and was scheduled to commence in April 2019. They duly responded to the above email on 08.01.2019 rejecting the offer to switch to another property and demanding re-payment of the entire amount paid by them along with interest.

7. As no response was received to the abovementioned communication of the respondent, the complainants also issued a letter to the respondent on 10.03.2019 reiterating the contents of their previous communication and demanding refund of the entire payment made along with interest especially in view of the fact that admittedly the project had not commenced even after a lapse of 3 years.

8. After numerous follow ups by the complainants, on 05.04.2019, they finally received an acknowledgement from the respondent wherein it was clearly stated that the amount paid towards the booking would be refunded in four instalments starting from June 2019 onwards.

9. Thereafter, the complainants responded to the above email on 19.04.2019 requesting for a schedule of payment and other

relevant details relating to refund of the entire payment. They also requested post-dated cheques to be issued and handed over to them in view of the four instalments to be made by it.

10. However, no response was received to the abovementioned email. Therefore, the complainants once again wrote to the respondent on 14.05.2019 to which they received a highly evasive and vague reply on the same day from it.

11. That the complainants having dream of their own unit in Gurugram and getting the assured return on investment, booked the unit in the hope that it would be delivered within 2 years from the date of allotment letter dated 16.01.2018. It is most unfortunate that they dream of owning a unit got shattered due to dishonest and unethical attitude of the respondent.

12. Accordingly, the complainants responded firmly to the abovementioned email on 21.05.2019 calling upon it to immediately refund the entire payment as the respondent, though admitting to refund the monies, was intentionally not providing any timeline for making such payment.

13. On the next day, vide email dated 22.05.2019, the respondent confirmed that the investment of the complainants was under cancellation and refund had been raised which would be processed in four instalments starting from June 2019 onwards.

14. The complainants once again wrote to the respondent on 30.05.2019 to clarify the position in view of the inordinate delay in construction of the project and discontinuation of the monthly assured returns. The respondent was once again called upon to refund the entire amount of Rs. 80, 72, 631/- along with interest.

15. The complainants sent reminders to the respondent *via* email on 07.08.2019 and 29.08.2019 as well. However, neither payment was made to them in June 2019 nor did they receive any response to their emails dated 30.05.2019, 07.08.2019 and 29.08.2019.

16. On 02.09.2019, the complainants received yet another vague communication from the respondent wherein it was merely repeated that it was working on processing the refund. In the said email, it once again offered to shift the investment of the complainants to some other project of the respondent.

17. In response to such dilatory tactics of the respondent, the complainants sent out a clear communication on 11.09.2019 once again rejecting the offer of switching the investment to another project and calling upon it to make payment as promised. In the said communication, they also pointed out that despite repeated assurances regarding refund of the monies in instalments starting in June 2019, no such payment had been made.

18. Thereafter, the complainants visited the office of the respondent on 16.10.2019 to meet the executive, Mr. Saini, in person for giving one final opportunity to make amends and honour their commitments. However, the meeting turned out to be futile inasmuch as the executive of the respondent promised to revert on the status of the refund, which he never did.

19. Following up post the meeting, the complainants wrote to the respondent *vide* email dated 31.10.2019 recording failure and whimsical conduct on the part of the respondent to act as committed in the meeting dated 16.10.2019.

20. As the respondent failed to respond to the issue regarding refund of payment made by the complainants even though the same had

been admitted by it on various occasions, they were constrained to seek legal counsel for return of their monies. Accordingly, on behalf of the complainants, a legal notice dated 29.11.2019 was issued to the respondent seeking refund of Rs. 80, 72, 631/- along with interest. The respondent has continued to ignore the emails and the legal notice issued by the complainants. Such conduct of the respondent wreaks of *mala fide* and is impermissible in law and equity.

21. Thereafter, the complainants and the respondent engaged in several telephonic discussions/ meetings in relation to the refund of the monies of the complainant. In fact, on 14.10.2021, they went to the head office of the respondent. Mr. Vishal Saini, executive of the respondent, who had been communicating with the complainants, was on leave. Therefore, they met with Mr. Sumit Arora, another executive of the respondent who was familiar with the present case. At the end of the meetings, they were assured by its executive that he would follow up with senior management regarding the refund of the monies and revert within a couple of days. However, once again, this meeting turned out to be a mere eyewash to pacify the complainants inasmuch as the respondent never got back to them nor responded to the numerous telephone calls made by them.

22. In view of the above, it is crystal clear that the respondent is acting in an arbitrary and whimsical manner in as much as it is not issuing refund of the monies to the complainants despite repeated promises to do so. Admittedly, even after a lapse of more than 7 years, construction of the project has not yet commenced. They

have no alternative but to seek redressal before the authority for the fraud and illegal acts committed upon them by the respondent.

C. Relief sought by the complainants:

23. The complainants have sought following relief(s):

i. Direct the respondent to pay the entire amount paid by them with interest.

ii. Award Rs.1,00,000/- as compensation to the complainant towards costs of litigation.

24. 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

25. The respondent has contested the complaint on the following grounds.

26. The complainants have failed to provide the correct & complete facts and the same are reproduced hereunder for proper adjudication of the present matter. They are raising false, misleading and baseless allegation against the respondent with intent to make unlawful gains.

27. The complainants have booked in the project of the respondent for steady monthly returns. It is an evident fact that they have booked the unit in question considering the same as an investment opportunity.

28. That in the year 2015, the complainants learnt about the commercial project launched by the respondent titled as "Vatika Towers" situated at Sector 54 Gurugram and visited its office to know the details of the said project. They further inquired about

the specifications and veracity of the commercial project and were satisfied with every proposal deemed necessary for the development.

29. That after having shown interest in the commercial project constructed by the respondent the complainants booked a unit via application form, on their own judgement and investigation. It is evident that they were aware of each and every term of the application form and agreed to sign upon the same without any protest or demur.

30. That on 03.08.201, the respondent vide acknowledgement letter allocated a priority bearing no. P-197, admeasuring to 500 Sq. Yards. in the aforesaid project.

31. It is submitted that the complainants were well aware of the fact, that the commercial unit in question was subject to be leased out post completion at a rate mutually agreed upon and the same was evidently mentioned and agreed by them in the letter dated 03.08.2015.

32. That the said letter clearly stipulated provisions for "lease" and admittedly contained a "lease clause". In the light of the said facts and circumstances it can be concluded beyond any reasonable doubt that the complainants are not "consumers" or "allottees".

33. That the complainants are trying to mislead the authority by concealing facts which are detrimental to this complaint at hand. They have approached the respondent as an investor looking for certain investment opportunities. Therefore, the allotment of the said unit contained a "lease clause" which empowers the developer to put a unit of complainants along with the other commercial

space unit on lease and was not having "possession clauses", for physical possession.

34. That in terms of the principle of law declared above, the respondent is constrained to submit that the entire complaint read on a demurrer, does not make out any of the conditions precedent specified in various provisions of the Act, 2016, such as Sections 12, 13, 18 or 19 to name a few, so as to invest the authority with jurisdiction, and a bounden duty therefore remains cast upon the authority to nip this complaint in the bud, once it does not fall within its jurisdiction.

35. In the present case, if the relief of specific performance was sought before a civil court, which alone has the jurisdiction to grant relief in accordance with the Specific Relief Act, 1963, it would have been compulsory to plead and prove readiness and willingness and other statutory preconditions for the grant of specific relief, and the above admission would have been fatal to the grant of specific relief. In such circumstances, entertaining this kind of a complaint for specific performance under the Act, 2016 is nothing but permitting the complainant to do indirectly, what he could not do directly, and the same ought to be nipped in the bud by the authority.

36. Therefore, the authority not being a civil court could not assert to itself the jurisdiction to grant specific performance of the *"assured returns"* which is a relief under the Specific Relief Act, 1963

37. That the complainants have misguided themselves in filing the present complaint before the wrong forum. They are praying for the relief of "assured returns" beyond jurisdiction that the authority has been vested in. From the bare perusal of the Act, it is

clear that the said Act provides for three kinds of remedies in case of any dispute arise between a builder and buyer with respect to the development of the project as per the agreement. Such remedy is provided under section 18 of the Act, 2016 for violation of any provision of the act. The said remedies are of "refund" in case the allottee wants to withdraw from the project and the other being "interest for delay of every month" in case the allottee wants to continue in the project and the last one is for compensation for the loss occurred by the allottee.

38. That it is pertinent to note herein, that nowhere in the said provision the authority has been vested with jurisdiction to grant assured returns or any other arrangement between the parties with respect to investment and returns. Therefore, the complaint is filed with grave illegalities and the same is liable to be dismissed at the very outset and the complainants directed to file pursue their complaint before the civil court for any dispute arises from the agreement pertaining to assured returns.

39. That the respondent cannot pay "assured returns" to the complainant by any stretch of Imagination in the view of prevailing laws. On 21.02.2019, the Central Government passed an ordinance "Banning of Unregulated Deposits, 2019", to stop the menace of unregulated deposits and payment of returns on such unregulated deposits.

40. That later, an act titled as "The Banning of Unregulated Deposits Schemes Act, 2019" notified on 31.07.2019 and came into force. Under the said Act all the unregulated deposit schemes have been banned and made punishable with strict penal provisions. Being a law-abiding company and by no stretch of imagination, the

respondent could have continued to make the payments of the said assured returns in violation of the BUDS Act.

41. Further, it pertinent to mention herein that the BUDS Act provides two forms of deposit schemes, namely Regulated Deposit Schemes and Unregulated Deposit Schemes. Thus, for any deposit scheme, for not to fall foul of the provisions of the BUDS Act, must satisfy the requirement of being a 'Regulated Deposit Scheme' as opposed to Unregulated Deposit Scheme. Hence, the main object of the BUDS Act is to provide for a comprehensive mechanism to ban Unregulated Deposit Scheme.

42. If depositor accepts any deposit, it immediately required to take prior approval from the regulator as mentioned under schedule I of the BUDS Act. Therefore, for the present matter, the regulator shall be Ministry of Corporate Affairs as provided under last entry of Schedule I. Therefore, if the respondent continues paying the assured returns which is deposit as per the relevant provisions of the Companies Act and BUDS Act, the same would be contravention of the provisions of the Acts and it would be exposed to the penal provisions thereunder.

43. Pertinent to mention herein that the BUDS Act is a central Act came subsequent to the Companies Act and the RERA Act, 2016, therefore, directing the respondent to pay Assured Returns shall be violation of the provisions of BUDS Act. It is also pertinent to note herein that for any kind of deposits and return over it shall be tried and adjudicated as per the relevant provisions of the BUDS Act by the competent authority constituted under the Act.

44. Therefore, the agreements or any other understanding of these kinds, may, after Feb 2019, and if any assured return is paid

thereon or continued therewith may be in complete contravention of the provisions of the BUDS Act.

45. Further, any orders or continuation of payment of any assured return or any directions thereof may be completely contrary to the subsequent act passed post the RERA Act, which, is not violating the obligations or provisions of the RERA Act. Therefore, enforcing an obligation on a promoter against a Central Act which is specifically banned, may be contrary to the central legislation which has come up to stop the menace of unregulated deposit.

46. In catena of the above discussion, it is submitted that in the present complaint the respondent has offered assured returns to the complainant in lieu of advance payments received in respect to a unit booked in the project. And upon coming into force of the BUDS Act, any such unregulated deposits which are not approved have become illegal and continuing the same shall expose the respondent to strict penal provisions of the Act.

47. That under the scheme of the statute, the respondent submits that if the authority takes a contrary view it is going to only create undue ambiguity for the real estate sector, which would be contrary to the mandate of the statute. It would create a chaotic situation if the two authorities act at cross purposes with the result that a project giving assured returns.

48. It is pertinent to mention herein that since starting the respondent herein was committed to complete the project and has invested each and every amount so received from the complainants towards the construction of the same. However, the construction was slightly delayed due to the reasons beyond its control and the same are reproduced herein for the ready reference of the authority.

49. That the respondent is committed to complete the development of the project and deliver the units of the allottees as per the terms and conditions of the BBA. It is pertinent to apprise to the authority that the developmental work of the said project was slightly decelerated due to the reasons beyond the control of the respondent due to the impact of Good and Services Act, 2017 which came into force after the effect of demonetisation in last quarter of 2016 which stretched its adverse effect in various industrial, construction, business area even in 2019. The respondent had to undergo huge obstacle due to effect of demonetization and implementation of the GST.

50. In past few years the construction activities have also been hit by repeated bans by the courts to curb pollution in Delhi-NCR Region. In the recent past the Environmental Pollution (Prevention and Control) Authority, NCR (EPCA) vide its notification bearing no. EPCA-R/2019/L-49 dated 25.10.2019 banned construction activity in NCR during night hours (6 pm to 6 am) from 26.10.2019 to 30.10.2019 which was later on converted to complete ban from 1.11.2019 to 05.11.2019 by EPCA vide its notification bearing no. R/2019/L-53 dated 01.11.2019.

51. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ petition bearing no. 13029/1985 titled as "***MC Mehta vs. Union of India***" completely banned all construction activities in Delhi-NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020. These bans forced the migrant labourers to return to their native towns/states/villages creating an acute shortage of labour in the

NCR Region. Due to the said shortage, the construction activities could not resume at full throttle even after the lifting of ban by the Hon'ble Apex Court.

52. Even before the normalcy could resume the world was hit by the Covid-19 pandemic. Therefore, it is safely concluded that the said delay in the seamless execution of the project was due to genuine force majeure circumstances and the said period shall not be added while computing the delay.

53. That the current covid-19 pandemic resulted in serious challenges to the project with no available labour, contractors etc. for the construction of the Project. The Ministry of Home Affairs, GOI vide notification dated March 24, 2020 bearing no. 40-3/2020-DM-I(A) recognised that India was threatened with the spread of Covid-19 pandemic and ordered a complete lockdown in the entire country for an initial period of 21 days which started on March 25,2020. By virtue of various subsequent notifications the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date the same continued in some or the other form to curb the pandemic. Various State Governments, including the Government of Haryana have also enforced various strict measures to prevent the pandemic including imposing curfew, lockdown, stopping all commercial and construction activities. Pursuant to the issuance of advisory by the GOI vide office memorandum dated May 13, 2020 regarding extension of registrations of real estate projects under the provisions of the RERA Act, 2016 due to "Force Majeure", the Haryana Real Estate Regulatory Authority has also extended the registration and completion date by 6 months for all real estate

projects whose registration or completion date expired and or was supposed to expire on or after March 25, 2020.

54. Despite, after above stated obstructions, the nation was yet again hit by the second wave of Covid-19 pandemic and again all the activities in the real estate sector were force to stop. It is pertinent to mention, that considering the wide spread of covid-19, firstly night curfew was imposed followed by weekend curfew and then complete curfew. That period from 12.04.2021 to 24.07.2021, each and every activity including the construction activity was banned in the state.

55. It is a matter of fact that right from the date of booking of the commercial unit, the respondent had been paying the committed return of Rs. 32,500/- every month to the complainants without any delay. It is to note that as on 30.09.2018, the complainants herein have already received an amount of Rs. 25,69,726/ as assured return as agreed by it under the aforesaid agreement.

56. It is an admitted fact that since starting the respondent has always tried level best to comply with the terms of the agreement and intimated the exact status of the project. However, the delay is caused in the payment was bonafide and purely out of the control of the respondent and the same has been explained in detail herein below.

57. That further, the complainants have harped that the respondent has failed to offer timely possession of the respective unit. It is pertinent to note herein that the said agreement was of the nature of an "investment agreement". The same does not stipulate about possession in fact. It clearly specified and as mutually agreed by the complainant.

58. It is pertinent to bring into the knowledge of the authority that the complainants have already received a substantial amount of money right from the date of booking as committed charges. At the time of adjudicating upon this matter, the same may kindly be considered and adjusted against the money paid by the complainants.

59. That, it is evident that the entire case of the complainants is nothing but a web of lies, false and frivolous allegations made against the Respondent. The complainants have not approached the authority with clean hands. Hence, the present complaint deserves to be dismissed with heavy costs. It is brought to the knowledge of the authority that the complainants are guilty of placing untrue facts and are attempting to hide the true colour of them intention.

60. 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 these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

61. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the complaint for the reasons given below.

E. I Territorial jurisdiction

62. 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 completed territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

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

> ***Section 11(4)(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.*

69. So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside the compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

70. 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." SCC Online SC 1044 decided on 11.11.2021 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."*

71. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra),*** the authority has the jurisdiction to entertain a complaint seeking refund of the amount paid by allottee along with interest at the prescribed rate.

F. Findings on the relief sought by the complainants:

F.I Refund entire amount paid by the complainant along with the interest.

72. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them

in respect of subject unit along with interest at @24% p.a. Sec. 18(1) of the Act is reproduced below for ready reference:

> *"**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.-*
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
> ***he shall be liable on demand to the allottees**, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, **to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed** in this behalf including compensation in the manner as provided under this Act:*
> *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."*
>
> *(Emphasis supplied)*

73. The project detailed above was launched by the respondent as commercial complex and the complainants were allotted the subject unit bearing priority no. P-197 admeasuring 500 sq. ft. vide application letter dated 05.05.2015. It has come on record that against the total sale consideration of Rs. 80,70,631/, the complainants paid the entire amount to the respondent. An allotment letter was issued in their favour on 03.08.2015. As per terms and condition of the allotment letter, the complainants were entitled for assured return. It is pertinent to mention here that as per the terms and conditions of the allotment, the respondent paid the assured return amount till 30.09.2018 Thereafter, the respondent stopped the payment of assured return by taking a plea of BUDS Act. The respondent sent an email to the respondent with

respect to discontinuous of the assured return monthly payments and offering the complainants to switch to another property of the respondent. The complainant duly responded to the above email on 08.01.2019 rejecting the offer to switch to another property and demanding re-payment of the entire amount paid by them for the unit. After numerous follows ups by the complainants, on 05.04.2019 they finally received an acknowledgment from the respondent wherein it was clearly stated that the amount paid towards the booking would be refunded in four instalments starting from June 2019 onwards. Thereafter, the complainants responded to the above email on 19.04.2019 requesting for a schedule of payment and other relevant details relating to refund of the entire payment. They also requested to post-dated cheques to be issued and handed over to them in view of the four instalments to be made by it. However, no response was received to the abovementioned email. Therefore, they again wrote an email to the respondent. It has continued to ignore the emails. So, the complainant issued a legal notice to the respondent to seeking refund along with interest. But it again failed to reply the same.

74. Keeping in view the fact that the complainants wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.

75. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the

respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021.***

> *".....The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."*

77. Further 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***, it was observed as under:

> *"25. The unqualified right of the allottee 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 allottee, 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 allottee/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 allottee 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."*

78. 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 allottee as per agreement for sale under section 11(4)(a) of the Act. The promoter has failed 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. Accordingly, the promoter is liable to the allottees, as they wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

79. This is without prejudice to any other remedy available to the allottee including compensation for which they may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

80. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund of the amount paid along with interest at @24% p.a. However, section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the respondent shall refund the amount paid by him in respect of the subject unit with interest at prescribed rate as provided 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."

81. 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.

82. 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., **18.01.2023** is 8.60%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.60%.

83. The authority hereby directs the promoter to return the amount received by him i.e., Rs 80,70,631/- with interest at the rate of 10.60% (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 each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Rules ibid.

84. The respondent through its counsel stated at bar, that it has paid assured return to the complainants and requested to adjust the same. The respondent is directed that out of amount so assessed, the amount paid on account of assured return, shall be deducted.

F.II Compensation

The complainants are seeking relief w.r.t. compensation in the above-mentioned reliefs. 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.,*** has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

G. Directions of the authority

85. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i. The respondent/promoter is directed to refund the entire amount of Rs.80,70,631/- paid by the complainants along with interest @ 10.60% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 from the date of each payment till the date of refund of the deposited amount.

ii. It is directed that out of amount so assessed, the amount paid on account of assured return shall be deducted.

iii. A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

86. Complaint stands disposed of.

87. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.01.2023