

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

Complaint no. :	3416 of 2020
Date of filing complaint:	05.11.2020
First date of hearing:	14.01.2021
Date of decision :	18.01.2023

1. Sh. Gaurav Chauhan S/o Sh. Gulshan Chauhan R/o: H.No. 3159, Sector 23, Gurugram, Haryana- 122017	Complainants
2. Smt. Karan Singh S/o Sh. Puran Singh Both R/O: H.No. 2292, Housing Board Colony, A, Faridabad, Haryana - 121006	
Versus	
1. M/s Aaliyah Real Estates Private Limited 2. Virendra Kumar Bhatia (Director) 3. Saahil Bhatia (Director) Corporate Office address: 271, Phase-II, Udyog Vihar, Gurugram, Haryana -122016	Respondents

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. K.K. Kohli (Advocate)	Complainants
Sh. Somesh Arora (Advocate)	Respondents

ORDER

- The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 related details

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

S.n.	Particulars	Details		
1.	Name of the project	"Baani City Centre"		
2.	Project location	Sector 63, Village Maidawas, Gurugram, Haryana		
3.	Nature of the project	Commercial Colony		
4.	DTCP license no. and validity status	80 of 2010 dated 15.10.2010 Valid up to 14.10.2023		
5.	Name of licensee	M/s Aaliyah Real Estate Pvt. Ltd. (BIP Holder vide order dated 04.01.2016)		
6.	RERA registration details	Applied on 28.01.2022		
7.	Allotment letter	10.03.2013 [As per annexure C-4, page no. 128 of the CRA]		
8.	Unit details			
	S.no.	Unit No.	Unit Area	Documentary proof
	a.	310, 3 rd floor	1224 sq. ft.	As per allotment letter dated 10.03.2013

	b.	506, 5 th floor	1221 sq. ft.	As per letter dated 14.08.2013 at page no. 176 of CRA
	c.	605, 6 th floor	1221 sq. ft.	As per letter dated 11.09.2013 at page no. 177 of CRA and BBA.
9.	Date of builder buyer's buyer agreement			12.12.2013 [As per page no. 145 of CRA]
10.	Possession clause			<p>2. Possession</p> <p><i>2.1 The intending seller, based upon its present plans and estimates, and subject to all exceptions, proposes to handover possession of the commercial space within a period of forty-two (42) months from the date of approval of building plans of the commercial complex or the date of execution of this agreement, whichever is later ("commitment period"). Should the possession of the commercial unit not be given within the commitment period due to any reason (except delays mentioned in clause 9 below), the intending purchaser agrees to an extension of one hundred and eighty (180) days ("grace period") after expiry of the commitment period for handing over the possession of the commercial unit.</i></p> <p>[As per page no. 147 of CRA]</p>
11.	Date of building plan			24.01.2013 [As per annexure R-5, page no. 28 of the reply]
12.	Due date of possession			12.12.2017 [Calculated from date of buyer's agreement i.e. 12.12.2013, being

		later.] <i>Grace period of 180 days is allowed.</i>
13.	Total sale consideration	Rs. 1,10,70,000/- (BSP) Rs. 1,26,96,475.86/- (TSC) [As per statement of account dated 03.12.2019 at page no. 171 of CRA]
14.	Amount paid by the complainants	Rs. 45,69,950/- [As per statement of account dated 03.12.2019 at page no. 171 of CRA]
15.	Demand letter and reminder letters	22.04.2021 , 14.06.2016, 06.07.2016 22.08.2016 , 27.09.2016 08.06.2017 , 20.09.2017 04.07.2018, 19.11.2018, 18.07.2019, 01.11.2019 [As per page no. 72-75 of complaint]
16.	Final reminder dated	06.02.2020 [As per page no. 76 of complaint]
17.	Cancellation letter dated	There is nothing on record that the unit of the complainants is cancelled by the respondents.
18.	Part occupation certificate	16.01.2018 [As per annexure R-9, page no. 77 of reply]
19.	Notice of possession (Offer of possession)	30.03.2018 [As per annexure R8, page no. 71 of the reply]

B. Facts of the complaint:

3. That the representatives of the respondents-company, somewhere in January 2013, met the complainants and spoke very high on the reputation of the company of delivery of the project on time and also handed over a brochure stating that it has conceived and is in the process of contracting and equipping a multi-storey commercial complex on the said land spread over multiple levels/floors, and proposed to complete the project in all respects with reference to civil finishes, flooring, electrical power to distribution panels on each level / floor plumbing and ventilators, elevators, back up diesel generators etc.
4. That the representatives of the company then handed over a brochure of the company regarding the "Baani City Centre" in the January 2013 itself and the brochure of the company, looked to be a very well designed brochure of international standards speaking high of the respondents and further submitted that the construction of the said project was to be carried out according to the building plans approved by the DTCP and/or all other appropriate Authorities.
5. That the complainants got caught in the web of false promises of the representatives of the respondents and booked a commercial space measuring 1224.00 sq. ft. approximately super area @ basic sale price of Rs. 9,000/- per sq. ft in project "Baani City Centre", Sector 63, Gurugram, Haryana. The respondents named IKON tower in which the space has been allotted whereas the complainants understand from the different sources that there is no such tower named as IKON tower and the

names of the towers are A, B, C & D. However, on enquiry from the respondents, it was repeatedly emphasized that the tower where the space is being allotted is IKON tower.

6. That as per allotment letter dated 10.03.2013, the respondent allotted commercial space bearing no. 310 in IKON Tower admeasuring 1224 sq. ft. super area for basic sale price @ Rs. 9000.00 per sq. ft. exclusive of other charges such as IDC, EDC, PLC, car parking, stamp duty charges, registration fee, interest free maintenance security, monthly maintenance charges, power back up charges, service tax & any other government taxes / charges levied / leviable. The said allotment letter was issued only after payment of Rs. 10,00,000/- to the respondents. The allotment letter had one sided condition which stated the location so given is tentative and can be changed at the sole discretion of the developer, which means without specifying any reasons. It further stated that this provisional allotment was subject the signing of commercial space buyer's agreement and agreeing to abide by the terms and conditions mentioned therein, be provided to the complainants in due course. This also means that the complainants were left with no other option but to sign on the dotted lines.
7. That it is further stated that the letter superseded all the previous oral or written understanding between the parties, agreements, specifications, advertisements, brochure, price lists and any other sale document. Hence, after collecting Rs. 10,00,000/-, the respondent-company under the orders of the respondents no. 2 & 3, now retracts

from all their commitments as they realized that they could not go anywhere now having paid such a huge amount.

8. That the respondents no.1 vide letter dated 06.08.2020, raised a demand of Rs. 85,17,334.06/- and the subject of the demand was "*Reminder of the payment of overdue Installments*" in commercial project. It may kindly be noted that the respondents have been naming the IKON tower where the space has been allotted and whereas the complainants understood from the different sources that there is no such tower named as IKON tower and the names of the towers are A, B, C & D. However, on enquiry from the respondents no.1, it was repeatedly emphasized that the tower where the space is being allotted is IKON tower. Moreover, earlier the space was being mentioned as commercial space and in letter dated 12.04.2013, it is being mentioned as shop though IKON tower and the name of the project remains common in all the letters.
9. That the respondents raised a demand of 10% within 60 days as per the development linked plan and the same was paid by the complainants in the month of April. Subsequently, another demand was raised for payment of another 10% within 100 days and the same was paid by the complainants as well. Demand for another 10% was made on commencement of work on site and the same was again paid by them.
10. That the respondents-company issued letter dated 14.08.2013 wherein it was stated that to enable better vehicular and people traffic movement, optimum parking & better occupational safety, emergency

evacuation and circulation facilities, were advised that in the best interest of the project and its development, the building plans would need to be redrawn and accordingly as per the revised building plans, previous unit no. 310 was revised to unit no. 506 and the super area of the unit was revised from 1224 sq. ft. to 1221 sq. ft. Unit no. 310 was changed to unit no. 506 on their own without any intimation, any notice and any approval from them, mentioning the subject "revised unit with super area for unit no. 506 in our project "Baani Ikon Towers". It would therefore be noticed that the subject does not specify "commercial space" or "shop", the unit number changed from 310 to 506 and the project changed from "Baani City Center" to "Baani Ikon Towers".

11. That it was also noticed that the project has commercial space towers A, B, C & D and there was no tower by the name of IKON tower. The commercial space unit no. 310, which was subsequently changed to unit no. 506 on 14.08.2013 after having collected Rs. 45,69,950.00, without informing the complainants and the size of the same was reduced to 1221 sq. ft. and the project changed from "Baani City Center" to "Baani Ikon Towers".
12. That the complainants were never informed of the change in the plans of the unit and no approvals were even obtained from the office of the District Town Planner, Haryana and if at all such approvals were taken from the Government of Haryana, the same should have first been taken from the buyers.

13. That a commercial space buyer's agreement was finally sent to them on 08.10.2013 and the complainants had no option but to return the same duly signed. The complainants had personally objected to the clauses bearing no. 2.1, 2.7 of the said agreement being absolutely one sided and further relied on judgment of Pioneer Urban Land & Infrastructure Ltd. V. Govindan Raghavan in civil appeal no. 12238 Of 2018 Dated 02.04.2019.
14. That as per the commercial space buyer's agreement wherein the site plan is given which clearly give the towers namely A, B, C, D. It may kindly be noted that the respondents have been naming the IKON tower where the space has been allotted whereas the complainants understand from the commercial space buyer's agreement the names of the towers are A, B, C & D. Having signed the buyer's agreement, the complainants realized that in spite of having paid 40% of the payment, there is no progress at the site and the complainants felt that they have been cheated not only on collection of 40% money but also on the terms and conditions, which are absolutely one sided.
15. That the respondents company makes an application for permission to re-erect the buildings in commercial colony measuring 3.656 acres in Sector 63, Gurgaon, Manesar urban complex in accordance with the plans submitted the building plans which were approved provisionally vide this office memo no. 23390 dated 30.11.2015 for the purposes of inviting objections and suggestion. This therefore means that the entire set of the building plans have been revised and obviously till the

objections/suggestions received are attended to and the no objection is issued by all the objectors the project cannot be proceeded ahead with. What is worth noting here is that the initial deposit of Rs. 45,69,950/- was collected by the respondents and after more than 28 months the building plans are now being submitted to re-erect the building with modifications.

16. That on 18.01.2016 the STP, Gurgaon informed that all the objectors have issued the no objection certificate and the District Town & Country Planner, Chandigarh issued approval of the revised building plans on 03.02.2016.
17. That there was no demand of any kind from the respondents company from July 2014 till 21st April 2016 which meant the respondents was absolutely not working on the construction of the flats because the respondents were getting the plans revised and then getting the same approved hence unless the revised plans are approved the construction would not start at all.
18. That the respondent's company, after collecting the last payment on 23.07.2013, after a lapse of 33 months sent a demand vide letter dated 22.04.2016 for Rs. 27,86,245/- to be paid by 13.05.2016 towards the installment due on casting of 4th floor + 100% IDC + 100% EDC. In the said demand letter, the respondents have put the subject as "Intimation of the Installment for Serviced Apartment No. 605 of the area 1221 sq. ft. in our commercial space project named as "Baani City Center" Sector 63, Gurgaon. They were not convinced with the progress and the

credibility of the respondent's company and therefore decided not to pay the amount. The revised plans were approved only in February 2016 and the delivery of the unit had to be made as per the buyers agreement in December 2017, hence it was absolutely evident that the respondents company would never be able to complete the project within the delivery period as specified in the intentionally delayed buyers agreement. It has been repeatedly submitted by the complainants that the demands being raised were not corresponding to the actual construction on site hence the reluctance by them to go ahead and not to make the payments. Be that as it may be, since the terms and conditions initially agreed upon at the time of booking and the terms and conditions as provided in the brochure were not incorporated in the buyers agreement provided by the respondents, the entire amount paid by the complainants ought to have been refunded by the respondents to the complainants.

19. That the complainants visited the office of the respondents many times and pursued the refund with the representatives of the respondents no. 1 but they never responded and only kept on asking money from them through different demand notes and issued a reminder vide demand letter dated 14.06.2016 for Rs. 27, 86,245/- which included the EDC, IDC, car parking charges and the service tax payable which again the complainants did not want to pay for the reasons the complainants were not at all sure of the seriousness of the respondents towards timely implementation of the project.

20. That the respondent's company, after collecting the last payment in 23.07.2013, after a lapse of 44 months, sent a reminder to the demand for Rs. 27,86,245/- to be paid by 13.05.2016 towards the installment due on casting of 4th floor + 100% IDC + 100% EDC.
21. That the complainants once again visited the office of the respondents, after receiving the above reminder and pursued the status of the construction with the representatives of the respondents but they never responded and only kept on asking money from the complainants through different demand notes, in spite of the very clear message of the complainants to the customer relations manager that the complainants are not interested in paying for the installments unless he is assured of the development on the site and the amount being taken is being spent towards construction of the unit. It is to be noted that by now four years have passed since making the initial payments in March 2013, constituting 40% of the payment but the progress on the site is not matching the payment being asked for hence the complainants decided not to make the payment and hold the same till the time the construction on the site is corresponding to the money already collected.
22. That after 51 months of depositing of initial installments to the respondents, it sent a demand for collection of 20% on completion of super structure plus 100% parking amounting to Rs. 27,86,245/-. It was very evident from this demand that the delivery time being December 2017, the respondents would never be able to give the delivery of the

project by December 2017 as the respondents in June 2017 was at the super structure only. Since the complainants were convinced that the respondents would not be able to deliver the project, the complainants decided to hold the payment and inspect the site. The ground reality on inspection turned out to be very negative as the progress on the site clearly indicated that the builder would take another two years to finish the project.

23. That the respondents through a demand letter dated 06.09.2017 informed them about the applicability of GST in lieu of some indirect taxes including Service Tax, HVAT and Excise duty and enclosed details of dues from the complainants. The said annexure in no uncertain terms stated that "the possession shall be delivered by the company latest by 15.05.2018. This was the first acceptance of the respondents in direct words not to deliver the project on the committed date as per the buyer's agreement which was December 2017. The fact being since the respondents got the revised plans approval only in February 2016, the possibility of completing the project by December 2017 looked to be very remote, which was agreed by the respondents.
24. That the respondents now sends a communication dated 20.09.2017 wherein the subject was "Intimation of the Installment for Serviced Apartment No. 605 of area 1221 sq. ft. in our Commercial Space Project named as "Baani City Center" Sector 63, Gurugram". It is worth noticing here that the unit has now been named as "Serviced Apartment No. 605". Since by now they understood that the builder has no intentions

of delivering the project on time and since the construction on the site was far behind schedule, the complainants lost interest in the project and expressed his desire for the refund of the amount paid towards the purchase of property.

25. That the complainants received a reminder from the respondents for the payments which were due which they did not intend to pay on account of the ground reality of construction of the project. It is abundantly clear that the respondents have played a fraud upon the complainants and have cheated them fraudulently and dishonestly with a false promise to complete the construction over the project site within stipulated period. The respondents have further malafidely failed to implement the commercial space buyer's agreement executed with the complainants. In spite of this, the respondents have malafidely been issuing demand for payment along with the interest, despite the fact that the payments are made under the construction linked plan for which the corresponding construction has not taken place. Hence, the complainants being aggrieved by the offending misconduct, fraudulent activities, deficiency and failure in service of the respondents are filing the present complaint.

26. That the complainants received a statement of account vide letter dated 11.01.2018 wherein the subject was statement of unit no. 605 of area 1221 sq. ft. (super area) tentatively on sixth floor in our commercial project "Bani City Center" Sector 63, Gurugram. It is worth mentioning here that the respondents are now specifically writing "tentatively on

the sixth floor". It was beyond imagination of the complainants to understand why the respondents has used the word tentatively on the sixth floor.

27. That the respondents vide letter no. ZP-668/SD(BS)/2017/2154 dated 16.01.2018 received a part occupation certificate which covered block A ground floor to first floor, block B ground floor to 13th floor, block C ground floor to 2nd floor and block D ground floor to 2nd floor.
28. That on 30.03.2018, the respondents send a final notice for possession when no earlier notice was ever sent and in the said notice the respondents gives the subject as "commercial unit no. 605 in our commercial project "Baani City Center", Golf Course Extension Road, Village Maidawas, Sector 63, Gurgaon (Haryana). In this letter there is no mention of IKON tower at all. This again was a very wrong, false and untrue statement as the development on the site was too slow and there was no possibility of delivering the possession, when the respondents had not even applied for the occupation certificate, as was evident from the records of the Town & Country Planning, Haryana.
29. That the complainants in certain terms told the respondents that they are not interested in the project and wishes to withdraw from the project and hence requested for the complete refund together with the interest from the very first day of making the payment to the respondents. However, the respondents wrote another demand letter dated 04.07.2018 and 19.11.2018.

30. That the respondents had not received the occupation certificate for the unit allotted to the complainants till now. Meanwhile, they came to know that the respondents have made an application dated 21.02.2019 before the Town & Country Planning, Haryana for approval of revised building plans of block A (Part) falling in commercial colony area measuring 3.656 acres (License No. 80 of 2010 dated 15.10.2010) for permission to re-erect the buildings in commercial colony area measuring 3.656 acres. The respondents got the revised approvals vide letter dated 19.02.2020.
31. That the complainants, despite having paid a considerable amount was somehow not feeling comfortable and convinced with no development on the site and hence the respondents could not instil the confidence in the complainants that the respondents will be able to deliver the project in time. Though the complainants made the above payment of 40% amounting to Rs. 45,69,950/-, the actual construction work was not matching the collection of funds, hence the total reluctance on the part of the complainants to make any payment against the project. The respondents have failed to adhere to the schedule of completion attached with the buyer's agreement and kept changing the name of the project very frequently. The unit no. was also being changed at the whims and fancies of the respondents without even seeking the permission of the complainants. The tower which was earlier called the IKON tower in which the complainants were allotted the unit was also subsequently deleted from the correspondences. The respondents kept

on changing the name of the apartment from service apartment to shop to commercial unit and did not mention the tower no. in spite of repeated requests. The respondents not mentioning the tower whether it is A, B, C or D did not specify this in any of the communication though subsequently when the possession was offered the complainants were informed that the unit is in A tower.

32. That on going through the occupation certificate, it was realised that the unit of the complainants were on the sixth floor of tower A whereas the respondents did not have the occupation certificate for the towers above ground & first floor. That the complainants came to know that the respondents have subsequently got the approval for the revised plans in February 2018 and then again in February 2020. The complainants felt that they were being subjected to unethical/unfair trade practice. The above said acts of the respondents clearly states that the respondents with prejudice have been indulging in unfair trade practices and have also been providing gross deficient services and misrepresenting to the complainants. All such acts and omissions on the part of the respondents caused an immeasurable mental stress and agony to the complainants. By having intentionally and knowingly induced and having falsely misrepresented to them on the construction activity at site and by giving false occupation certificates and the delivery schedules and thereby making the complainants to act in accordance to its misrepresentations, and owing to all the deliberate lapses/delays on the part of the respondents, thus, making it liable as being

requisitioned/claimed by the complainants to pay the entire amount collected by them with interest from the date of receipt of the individual payments.

33. That the present complaint sets out the various deficiencies in services, unfair and/or restrictive trade practices adopted by the respondents in sale of their units and the provisions allied to it. The modus operandi adopted by the respondents, from the respondents point of view may be unique and innovative but from the consumers point of view, the strategies used to achieve its objective, invariably bears the irrefutable stamp of impunity and total lack of accountability and transparency, as well as breach of contract and duping of the consumers, be it either through not implementing the services/utilities as promised in the brochure or through not delivering the project in time. The complainants are the ones who have invested their life savings in the said project and are dreaming of a home for themselves and the respondents have not only cheated and betrayed them but also used their hard-earned money for their enjoyment.
34. According to the Real Estate (Regulation and Development) Act, 2016, the buyer has rights to cancel the allotment and claim a refund in case the builder fails to deliver the flat within the stipulated time, as stated in section 18 and further, relied on judgments of various forums.
35. That losing all the hope from the respondent-company and having shattered and scattered dreams of owning a unit and also paying considerable amount (as per the buyer's agreement dated 08.10.2013)

and not seeing the corresponding progress on the ground and also realizing that the respondents is not refunding the amount together with interest to the complainants since the complainants are not interested in purchase of the unit, the complainants decided to approach this authority for redressal of their grievance.

C. Relief sought by the complainants:

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

- i. Direct the respondents to refund the entire amount of Rs. 45,69,950/- along with the interest from the very first date of initial payment
- ii. Direct the respondents to pay interest on the entire amount paid by the complainants at the prescribed rate.
- iii. Direct the respondents to not to raise any fresh demands as the complainants are interested in refund of the amount paid.
- iv. Direct the respondents to pay litigation cost of Rs. 1,00,000.
- v. The authority to take suo-motu action against the respondents for not registering the said project with the authority within the period specified in section 3 of Act as this is an ongoing project.

D. Reply by respondents:

The respondents by way of written reply made following submissions: -

37. That the complainants have failed to place material facts on record and filed the present complaint with the sole intention to cause legal injury to the respondents. All allegations made in this complaint are a figment of the complainant's imagination and do not hold true and further the

complaint is liable to be dismissed for misjoinder of the respondents nos. 2 and 3 in their personal capacity only to harass them.

38. That in the present case, the project was constructed, and the occupancy certificate was applied for before the coming into force of the Haryana Real Estate (Regulation and Development) Rules, 2017 on 28.07.2017. The present scope of the complaint is pre-RERA and that the Act and jurisdiction of the authority does not hold true in the present complaint and should be governed by the commercial space buyer agreement as signed by both parties and consented to by the complainants.
39. That the respondents have filed an application for occupation certificate on 22.05.2017 and the authority did not file any objection to the said application in all respect for the purpose of obtaining the occupation certificate. Further, as per sub code 4.10(5) of the Building Code the occupation certificate is deemed to have been issued after completion of 60 days from the date of filing the application (i.e., 22.05.2017) and the Haryana Real Estate (Regulation and Development) Rules, became applicable with effect from 28.07.2017.
40. That the present matter is also sub-judice as the respondents have filed an appeal in the appellate authority appeal number - H-REAT-470-2020 (GRG) dated 28.12.2020 in the Haryana Real Estate Regulatory Authority Appellate Tribunal, Chandigarh in complaint no. RERA-GRG-3271-2020. It is also pertinent to note that the said matter is also sub judice as personal hearings have been granted to the complainants on the issue of "show cause notice for non-registration of ongoing project

under provisions to section 3(1) of the Real Estate (Regulation and Development) Act, 2016" where the complainants have attended hearings on 20.01.2020, 10.02.2020, 16.03.2020 whereby the said file was merged with another file suo moto, which is pending and therefore the complainants are already in compliance and their averments are being heard by the authorities for exemption from registration.

41. That the complainants are in breach of the said agreement and have not paid close to 60% of the dues of the project since 2013 and refused to take possession of the unit. This act of the complainants is deliberate, wilful and with the intent to cause injury to the respondents. Further, the complainants themselves admitted that they decided to hold the payments as they were convinced that the respondents would not be able to deliver the project and for the reason the complainants had not paid the demand for collection of 20% on completion of super structure plus 100% parking amounting to Rs. 27,86,245/- which was due on 13.05.2016. Moreover, the complainants stated that it was evident from the demand that the delivery time being December 2017 but since they were convinced by their own whims and fancies that the respondents would not be able to complete the project therefore, they became the sole judge and decided "to hold the payment and inspect the site". It is pertinent to mention here that the part occupation certificate was received by respondents on 16.01.2018.

42. That it is pertinent to note that the complainants at their own accord wanted a unit in the service apartment which was allotted to in IKON

tower A nomenclature for tower B with the service apartments. It is also submitted that the complainants who were initially allotted unit 310 had requested & consented for the change of unit from 506 to 605 and thereafter started making defaults in payments whereas the respondents kept assuring timely delivery and updating the status each time a demand was raised.

43. That it is submitted that the present case is also not maintainable under law and the delay of the respondents falls under the provisions of clause 9 - force majeure of the commercial space buyer agreement executed between respondents since the compliances on their part were on time. However, the approvals from the authority(s) were delayed and in spite that the project was completed on time with delay, if any not attributable to the respondents and the complainants and the cause of action does not arise on part of the complainants. Moreover, since the complainants have not approached this authority with clean hands having made defaults in payments, they are not entitled to any relief and the present complaint is liable to be dismissed with costs.
44. That they have placed false facts with regard to the construction status of the project and failed to put on record that the respondents have completed the entire construction of the project for which part OC was received on 16.01.2018.
45. That the respondents no. 1 and their group i.e. the Baani Group are a well-known and respected business in the real estate sector in NCR and Haryana and are known for their commitment towards their projects.

The tower in which the unit of the complainants was allotted in Tower B which was always made clear depending on the location of the said unit and tower. It is reiterated that only the nomenclature of the tower has become alphabetic instead of the name of IKON and the unit so offered to the complainants still remains the same unit i.e. 605 situated on sixth floor in Baani City Center at Sector 63, Gurugram.

46. That the name IKON tower was a mere name given to the tower containing service apartment. The unit so offered to the complainants for possession is still located in the same tower as shown to the complainants, only the nomenclature of the tower has become alphabetic instead of the name of IKON.
47. That the complainants vide a provisional allotment letter were allotted unit no. 310 and informed that the allotment was tentative and subject to change and the same was part of the terms and conditions laid down in the clause 3 of booking form and provisional allotment letter which they agreed to, consented to freely without any objection whatsoever.
48. That the complainants entered into the transaction with respondents of their own free will and with full knowledge that the allotment to be made to them would be tentative and subject to change. They deposited the booking amount of Rs. 10,00,000/- after knowledge of the above facts and were not forced into the transaction by the respondents.
49. That the complainants were allotted a commercial space and the nature, location, price of the said unit remained as was sold and assured to

them. However, there was only a minor increase in the area of unit by 9 sq. ft. i.e. from 1221 sq. ft. to 1230 sq. ft. Vide letter dated 14.08.2013, the unit number and size of the unit so allotted to the complainants was changed from unit no. 310 to unit 506 and super area from 1224 sq. ft to 1221 sq. ft upon finalization of the plans and structure of the entire project. It is submitted that the same was done for the benefit of the entire project and the allottees including the complainants and within the limit of "plus/minus 15%" as provided in clause 3 of the terms and conditions of the booking form and as agreed upon by the complainants.

50. That an email was received from complainants on 13.08.2013 stating that the new unit allotted to them i.e. unit no. 506 is a front side (road facing) unit. However, they have a preference of market facing (back side) unit and requested that their unit be changed to either unit no. 605 or unit no. 705. It is maintained that the letter was sent to the complainants on 11.09.2013 to comply with their request and the averments made by them that no such request was made is blatantly false and aimed to mislead.
51. That the commercial space buyer's agreement was sent to the complainants on 08.10.2013. The said agreement is a standard agreement common in the industry and drawn keeping in mind the interest of the allottees. Also, the said agreement also provides the complainants and other allottees adequate remedies of refund in case of delay in possession. The map attached in the agreement shows the location of the unit allotted to the complainants and the use of A, B, C etc

as tower names is for the general understanding and clarity of the buyers and is not a fixed name given to the towers.

52. That the respondents no.1 made an application before DTCP Haryana for changes in the building plans on 11.01.2015 and the changes so proposed were for change in tower tentatively named as 'Tower B' which has no bearing or relation to the tower in which the complainants' unit is situated. No structural changes were made to affect the rights or unit parameters of the complainants' unit or tower. It is submitted that when any change in any part of a real estate project is proposed then the entire building plan is resubmitted for approval as a whole and thus, the permission from DTCP granted on 30.11.2015 is titled as permission to re-erect the buildings of the commercial colony.
53. That the respondents no.1 raised a demand of instalment vide letter 22.04.2016 for payment towards casting of the 4th Floor +100% IDC +100% EDC as per the special payment structure agreed upon vide letter dated 17.01.2014. From this date till the complainants refused to comply with the payment terms for their unit and systematically stopped paying instalments without any rhyme or reason. Multiple reminders and notices were sent to the complainants which were never answered. Despite having the recourse to cancel the allotment due to non-payment, the respondents no.1 chose to have faith in the commitment and truthfulness of the complainants and kept the construction ongoing and kept sending reminders for payment to the complainants. it is a surprise to the respondents that the complainants

are alleging that they were not satisfied with the construction status and the contents of the agreement when no such complaints were ever received from them. Despite the lapse of 44 months the respondents no.1 chose not to levy any interest on the due amount and raised a fresh notice of payment of instalment for Rs. 27,86,245/-.

54. That vide letter dated 20.09.2017, the respondents no. 1 again raised a demand of payment of dues and applicability of GST in lieu of indirect taxes and be delivered at the latest by 15.05.2018. The complainants would mis-construed the statement to mean that the possession will be delivered on 15.05.2018. It is submitted that the possession of the unit was offered to the complainants on 30.03.2018 which is 4 months and 7 days beyond the date of possession as per the agreement (clause 2.1 of the agreement) due to unavoidable circumstances not in control of the respondents.
55. That the respondents no.1 did not defraud the complainants and kept them apprised of construction and raised demands of instalments as per the construction linked specialized payment plan as agreed upon the parties dated 17.01.2014. Demand and reminder notices are clear proof that demand was only raised once the construction of a particular stage of development was completed. They first breached the agreement by non-payment of dues beyond the 40% initial payment despite which the respondents no.1 did not cancel their allotment.
56. That the respondents no. 1 made offer of possession vide letter dated 30.03.018 after receiving occupation certificate from DTCP which shows

that the it has completed the construction of the complainants' unit and is competent and willing to handover the possession. They were pushed on the back foot by the timely completion of the project by respondents no.1 and realized that they now hold no ground to delay payment anymore and thus decided to come up with this farce and sham of a complaint to evade payment of dues and penalty interests.

57. That the respondents no.1 has received the occupation certificate for the tower in which the unit of the complainants is situated which is noted as block B in the occupancy certificated for ground to 13th floor and that the unit of the complainants is on the 6th floor. The revised plans submitted before the DTCP dated 21.02.2019 is to comply with the construction code to acquire a green certification which would ultimately benefit the allottees. No change in building or unit structure was made at this stage.
58. That there was a delay in handing over of possession by 4 months and 7 days and the delay can be attributed to the force majeure (clause 9) of the agreement due delay in getting the occupancy certificate from DTCP which was applied for within the timeline as defined under clause 2.1 of the agreement. It applied for the occupancy certificate on 23.05.2017 which is within the timeline of 42 months + 6 months grace as defined under the agreement and was granted the occupancy certificate on 16.01.2018 after which possession was offered to the allottees on 30.03.2018. It is submitted that the delay in possession can be attributed to the delay on part of DTCP in giving the occupancy

certificate which delayed the possession which clearly falls under the definition of force majeure under clause 9 of the agreement.

59. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

60. The plea of the respondents 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

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

E. II Subject matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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.

61. 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 and followed in ***M/s Sana Realtors Private Limited & others V/s 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."

Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matters mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the amount paid by them.

F. Findings on the objections raised by the respondents:

F.I Objections regarding that the respondents has made an application for grant of occupation certificate before coming into force of RERA:

62. The respondents-promoter has raised the contention that the said project is a pre-RERA project as the same has already applied for obtaining occupation certificate from the competent authority on 22.05.2017 i.e. before the coming into force of the Haryana Real Estate (Regulation and Development) Rules, 2017 on 28.07.2017. As per proviso to section 3 of Act of 2016, ongoing projects on the date of this Act i.e. 28.07.2017 and for which completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three months from the date of commencement of this Act and the relevant part of the Act is reproduced hereunder:-

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

63. The legislation is very clear in this aspect that a project shall be regarded as an "ongoing project" until receipt of completion certificate.

Since no completion certificate has yet been obtained by the promoter-builder with regards to the concerned project, the plea advanced by it is rejected.

F.II Objections regarding delay in handing over of possession due to force majeure circumstances:

64. The respondents-promoter has raised the contention that the said project of the respondents was delayed due to force majeure circumstances as they applied for grant of occupation certificate to the competent authority on 23.05.2017 and the same was granted on 16.01.2018. Due to such delay in grant of certificate, the respondents got delayed in making offer of possession to the allottees. The authority observed that due date as per clause 2.1 of agreement dated 12.12.2013, comes out to be 12.12.2017 and the respondents builder vide application dated 23.05.2017 i.e. before due date of handing over of possession which is 12.12.2017; applied for grant of occupation certificate and the same was granted on 16.01.2018 by competent authority. The authority is of the considered view that if there is lapse on the part of any competent authority concerned in granting the renewal of license within reasonable time and that the respondents was not at fault in fulfilling the conditions of renewal of license, then they should approach the competent authority for getting this time period i.e. 23.05.2017 till 16.01.2018 be declared as 'zero time period' for computing delay in completing the project. However, for the time being, the authority is not considering this time period as zero period and the respondents are liable for the delay in handing over possession as per provisions of the Act.

G. Entitlement of the complainants for refund:

G.I Direct the respondents to refund the entire amount of Rs. 45,69,950/- along with the interest from the very first date of initial payment

G. II Direct the respondents to pay interest on the entire amount paid by the complainants at the prescribed rate.

65. Subject unit was allotted to the complainants vide allotment letter dated 10.03.2013. An amount of Rs. Rs. 45,69,950/- was received by the respondents against total consideration of Rs. 1,10,70,000/- which constitutes 41.28% of total consideration.
66. The 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. This is an eventuality where the promoter has already offered possession of the unit after obtaining occupation certificate. Moreover, the allottees approached the Authority seeking withdrawal from project after a passage of 2 years from date of offer of possession and never before. The allottees wish to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.
67. The due date of possession as per agreement for sale as mentioned in the table above is 12.12.2017. The allottees in this case has filed this application/complaint on 05.11.2020 after possession of the unit was offered to them on 30.03.2018 after obtaining occupation certificate by the promoter. The allottees never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made and demand for due payment was raised,

then only, they filed a complaint before the authority. The part occupation certificate of the tower where allotted unit of the complainants is situated is received after obtaining occupation certificate. Section 18(1) gives two options to the allottees if the promoter fails to complete or is 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:

- i. Allottees wish to withdraw from the project; or
- ii. Allottees do not intend to withdraw from the project

68. 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 allottee's 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

69. 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 under section 11(4)(a). 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 allottees failed to exercise this right although it is unqualified one. They have to demand and make their intentions clear that the allottees wish to withdraw from the project. Rather tacitly wished to continue with the project and thus

made them 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 never wished to withdraw from the project and when 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.

70. In case allottees wish to withdraw from the project, the promoter is liable on demand to the allottees return of the amount received by the promoter with interest at the prescribed rate if promoter fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that allottees has to make intentions clear to withdraw from the project and a positive action on their part to demand return of the amount with prescribed rate of interest if they have not made any such demand prior to receiving occupation certificate and unit is ready then impliedly agreed to continue with the project i.e. they do not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and allottees shall be paid by the promoter interest at the prescribed rate for every month of delay. 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)*.

71. The unit of the complainants was booked vide allotment letter dated 10.03.2013. The buyer's agreement was executed between the parties on 12.12.2013. So, the due date for completion of the project and handing over possession of the allotted unit comes to be 12.12.2017. There is a delay in handing over the possession as due date of possession was 12.12.2017 whereas the offer of possession was made on 30.03.2018 and thus, becomes a case to grant delay possession charges. The authority has observed that interest of every month of delay at the prescribed rate of interest be granted to the allottees. But now the peculiar situation is that the complainants want to surrender the unit and want refund. During the course of proceeding, the counsel for the complainants requested that they still want to withdraw from the project and do not intends to continue with the same. Keeping in view 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 allottees still want to withdraw from the project, the paid-up amount shall be refunded after deduction as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under-

"5. AMOUNT OF EARNEST MONEY"

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"

72. The respondent is directed to refund the amount after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 within 90 days from the date of this order along with an interest @ 10.60 % p.a. on the refundable amount, from the date of this complaint i.e. 05.11.2020 till the date of realization of payment.

G.III Direct the respondents to not to raise any fresh demands as the complainants are interested in refund of the amount paid.

73. In view of aforesaid relief no. 1 wherein complainants seeking withdrawal from the project of the respondent, the aforesaid relief has become redundant.

G.IV Direct the respondents to pay litigation cost of Rs. 1,00,000/-.

74. 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 allottees 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.IV The authority to take suo-motu action against the respondents for not registering the said project with the authority within the period specified in Section 3 of Act as this is an Ongoing project.

75. Violation of Section 3 of Act attracts punishment under Section 59 of Act of 2016. Vide proceedings dated *21.12.2020 in CRN/3271/2020 titled as Aaliyah Real Estate Pvt. Ltd. Vs Vijaydeep Nandal*, a show cause notice dated 29.11.2019 was issued to the promoter wherein it was

observed that the respondents-promoter has already applied for registration of the project with this authority on 28.01.2022.


H. Directions of the Authority:


76. 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 respondents are directed to refund the complainants, the paid-up amount after deducting 10% of the basic sale consideration of the unit being earnest money along with an interest @ 10.60 % p.a. on the refundable amount, from the date of filing of this complaint i.e. 05.11.2020 till the date of realization of payment.
- ii) The respondents are directed to pay that amount within 90 days from the date of order of this order as per rule 16(2) of the rules.

77. Complaint stands disposed of.

78. File be consigned to the registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.01.2023