

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

Complaint no. : 1572 of 2021
Date of first hearing: 13.05.2021
Date of decision: 14.02.2023

Mr. Saurabh Rekhi
R/o: - N-11, 2nd floor, Kailash Colony, New Delhi- 110048 **Complainant**

Versus

M/s Bestech India Private Limited.
Regd. Office at: 5D, 5th Floor, Aria Signature Offices, JW
Marriott Hotel Delhi Aero City, Hospitality District, Near
IGI Airport, New Delhi - 110037
Corporate Office at: - Bestech House, 124, Sector-44,
Gurugram - 122002

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Sanjeev Kumar Arora

Member
Member

APPEARANCE:

Sh. Gaurav Bhardwaj (Advocate)
Sh. Ishaan Dang (Advocate)

Complainant
Respondent

HARERA
ORDER
GURUGRAM

1. The present complaint dated 09.04.2021 has been filed by the complainant/allottee 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 allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name of the project	"Park View Sanskruti", Sector- 92, Gurugram.
2.	Project area	12.7875 acres
3.	Nature of the project	Residential group housing
4.	DTCP license no. and validity status	i. 13 of 2009 dated 21.05.2009 valid up to 20.05.2024 ii. 43 of 2011 dated 13.05.2011 valid up to 12.05.2024
5.	Name of licensee	Spring Water Properties Pvt. Ltd. and others
6.	RERA Registered/ not registered	Not Registered
7.	Unit no.	303, 3 rd floor, Tower/block- C (Page no. 21 of the complaint)
8.	Unit area admeasuring	1995 sq. ft. (Super area) (Page no. 21 of the complaint)
9.	Allotment letter	01.06.2013 (Page no. 13 of the complaint)

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10.	Date of execution of agreement to sell	18.08.2014 (Page no. 18 of the complaint)
11.	Possession clause	<p>3. POSSESSION</p> <p>a). Offer of possession</p> <p>That subject to terms of this clause and subject to the APARTMENT ALLOTTEE(S) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and further subject to compliance with all provisions, formalities, registration of sale deed, documentation, payment of all amount due and payable to the Developer by the APARTMENT ALLOTTEE(S) under this agreement etc., as prescribed by the Developer, the Developer proposes to offer the possession of the APARTMENT within a period of <i>Thirty Six (36) months from the date of signing of this Agreement or from the date of approval of Building Plans by Town and Country Planning Department, whichever is later.</i> It is clearly understood and agreed by the APARTMENT ALLOTTEE(S) that the Developer shall be entitled for grace period (beyond a period of 36 months) of Six (6) months. It is however understood</p>

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		<p>between the parties that the possession of various Towers comprised in the Complex as also the various common facilities planned therein shall be ready & completed in phases and will be handed over to the APARTMENT ALLOTTEE(S) of different Towers as and when completed and in a phased manner.</p> <p>(Page no. 26 of the complaint)</p>
12.	Grace period	Grace period of 6 months allowed being unqualified.
13.	Approval of building plans	04.05.2013 [Page no. 53 of the reply]
14.	Due date of possession	18.02.2018 (Note: - 36 months from date of agreement (18.08.2014) or the date of building plans (04.05.2013) whichever is later + 6 months grace period)
15.	Basic sale consideration as per BBA at page no. 14 of the complaint	Rs.1,32,74,980/-
16.	Amount paid by the complainant as per applicant ledger dated 23.07.2020 at page no. 86A of the reply	Rs.47,93,740/-
17.	Payment plan	Installment linked payment plan (Page no. 43 of the complaint)



18.	Occupation certificate /Completion certificate	19.06.2018
19.	Reminder letters	16.08.2013, 07.09.2013, 02.09.2014, 17.09.2014, 03.01.2015, 19.01.2015, 07.04.2015, 23.04.2015, 07.05.2015, 06.08.2015, 21.08.2015, 07.09.2015, 05.11.2015, 20.11.2015, 05.12.2015, 05.03.2016, 26.03.2016, 07.05.2016, 23.05.2016, 07.06.2016, 08.11.2016, 24.11.2016, 08.12.2016, 04.02.2017, 20.02.2017. 08.03.2017 Final Notice (Annexure R-8, on page 60-85 of reply)
20.	Cancellation letter	29.03.2017 (Page no. 87 of the reply)
21.	Offer of possession	15.02.2019 (Annexure R-13, page 90 the reply)

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:-

- I. That the respondent had been proclaiming in general public through newspaper advertisements, marketing emails, SMS and telemarketing that it had launched an integrated residential township in Gurugram (Haryana). The said integrated township as

claimed was being set up after necessary approvals of all the competent authorities. It was further claimed that all the necessary approvals, clearances and procedures had been duly obtained and sanctioned as regards the proposed integrated township and further proclaiming that the location of such site, under development, was prime land and centrally located. The other terms of the scheme, eligibility, registration, and mode of allotment were also prescribed in the brochures.

- II. That lured by those open proclamations through publication in the local newspapers and various advertisements, the complainant booked a flat in the project, namely 'Park View Sanskruti', Sector-92, Village Wazirpur, Tehsil and District Gurgaon, Haryana, for which an amount of Rs.1,29,75, 480/- was payable. In this regard, the respondent issued an allotment letter dated 01.06.2013 for apartment bearing unit no. 303, 3rd floor, tower C, in 'Park View Sanskruti', admeasuring 1995 sq. ft. along with parking.
- III. That thereafter, an apartment buyer's agreement was executed between the parties on 18.08.2014. The possession of the apartment was to be handed over within a period of 36 months from the date of signing of the apartment buyer's agreement or from the date of approval of building plans by Town and Country Planning Department with a grace period of 6 months. However, since the date of approval of the building plans was not conveyed to complainant therefore, in the present case, so effective date of

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completion of the flat was to be reckoned from date of agreement i.e., 18.08.2014.

- IV. That at the time of booking, the complainant was assured by the officials of the respondent that the construction on the project has already commenced as all the necessary approvals have already been taken from the concerned authorities. Further, as per clause C (iii) of the buyer agreement, in case if the allottee fails or neglects to take the possession of the unit, he was liable to pay holding charges @ Rs.5/- per sq. ft. per month of the super area. However, in case of delay by developer in offering the delivery of the flat, the developer was liable to pay compensation calculated @ Rs.5/- per sq. ft. per month for delay in offering the possession.
- V. The complainant made timely payment of the Instalments to the respondent and whenever there was delay in making the payment, it charged exorbitant interest on the delayed payment as per buyer agreement, in clause C (vii)(a) which was @ Rs.18% per annum compounded quarterly.
- VI. That the complainant paid a total amount of Rs. 47,93,059/- in the year 2014. Thereafter, it transpired that the respondent was demanding payments well ahead of the slabs of construction. The complainant visited the office of the respondent and pointed out that the demand was being made before the construction of the slab against which the payment was to be made. The officials of the respondent assured the complainant that they would make the

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corrections in the statement of account. However, no correction was made, and the respondent persisted with the illegal demands and not only that, it also levied heavy interest on the due payments.

VII. That the complainant was always ready and willing to pay the actual amount due towards him. However, the respondent was bent upon to increase the cost of the apartment by levying additional charges on various counts and such demands were illegal, arbitrary, unjustified and unreasonable. The respondent always used arm twisting techniques and pressurized the complainant to succumb to the illegal demands. The flat allotted to the complainant was ultimately cancelled. The cancellation of the flat is absolutely illegal, unjustifiable, arbitrary, non-est and void and is liable to be recalled/set aside/quashed on account of the reasons mentioned in the complaint.

VIII. That the complainant visited the office of the respondent to protest against the illegal cancellation of the flat. The officials of the respondent assured the complainant that they shall refund the amount given by the complainant along with the interest. In this regard, a letter dated 25.07.2018 was issued by the office of the respondent.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).

- I. Direct the respondent to refund an amount of Rs.47,93,059/- along with interest at the prescribed rate from the dates of payment till date of actual realization to the complainant.
 - II. Direct the respondent to make the payment of Rs.55,000/- on account of litigation expenses to the complainant.
5. On the date of hearing, the authority explained to the respondent /promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.
- D. Reply by the respondent.**
6. The respondent contested the complaint on the following grounds: -
- a) That the present complaint is not maintainable in law or on facts. The provisions of the Act, 2016 are not applicable to the project in question. The application for issuance of occupation certificate in respect of the apartment/tower in question was made on 30.06.2017, i.e., well before the notification of the Rules 2017. Subsequently, the occupation certificate has also been issued by the competent authority on 19.06.2018. Thus, the project in question is not an 'Ongoing Project' under Rule 2(1)(o) of the Rules. This authority does not have the jurisdiction to entertain and decide the present complaint. The present complaint is liable to be dismissed on this ground alone.
 - b) That the present complaint is not maintainable on law or on facts. The complainant has filed the present complaint seeking refund and interest while the allotment in favour of the complainant had been cancelled as far back as on 29.03.2017 and thereafter reinstated on

the request of the complainant. The complaint is barred by limitation and liable to be dismissed on this ground as well.

- c) That the present complaint raises issues of such a nature which cannot be decided by way of summary proceedings contemplated under the Act. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint are beyond the purview of the Act and can only be adjudicated by the civil courts. The present complaint deserves to be dismissed on this ground alone.
- d) That the complainant is an investor and not an "aggrieved person" under the Act and as such, the present complaint is not maintainable at his behest. The complainant never intended to reside in the apartment in question but has invested in the same for taking benefits after resale of the apartment. However due to recession in the real estate market, the complainant could not get desired benefits and defaulted in the payments towards respondent.
- e) That the respondent is a reputed and renowned real estate developer, enjoying an impeccable reputation in the real estate industry for the disciplined and time bound execution of projects undertaken by it. The projects implemented by the respondent are considered to be architectural landmarks. The respondent has successfully developed residential, commercial and IT projects in Gurgaon after obtaining necessary permissions and approvals from the competent authorities in accordance with law. The associate companies of the respondent have also constructed and made operational Radisson Hotels in Gurgaon, Indore (Madhya Pradesh) and at Nagpur. The respondent has promoted and developed



"Bestech City", a duly approved residential colony in Dharuhera, District Rewari.

- f) That the complainant had approached the respondent through a property dealer, M/s Shaloo Agencies, and had evinced an interest in purchasing a residential unit in the duly licensed residential project promoted and developed by it known as "Park View Sanskruti" located in Sector 92, Gurgaon, Haryana. Even prior to making the booking, the complainant had made elaborate and detailed enquiries with regard to the nature of sanctions /permissions obtained by the respondent for the purpose of undertaking the development/implementation of the residential project referred to above. The complainant took an independent and informed decision, uninfluenced in any manner by the respondent to book the apartment in question.
- g) That the complainant was provided with the application form containing the terms and conditions of provisional allotment and he was given the opportunity to familiarize himself with the same. As per clause 11 of the terms and conditions of booking was specifically brought to the complainant notice which provided that timely payment of instalments/balance sale consideration/security deposits/charges, shall be the essence of the contract. It was specifically emphasized by the officials of the respondent that interest @ 18% per annum, compounded annually shall be levied on delayed payments and that in the event of delay in payment of outstanding amount along with interest, the allotment was liable to be cancelled and earnest money was liable to be forfeited.
- h) That the attention of the complainant was also drawn to clause 12 of the terms and conditions of booking that specifically provides

that possession of the apartment was proposed to be offered by the respondent, within 36 months (including grace period of 6 months) from the date of approval of building plans *or* date of execution of the buyer's agreement, *whichever is later*, subject to timely payment of the sale price and other charges as per the payment plan. The terms and conditions as set out in the application form were accepted by the complainant and he has agreed and undertook to scrupulously comply with the same.

- i) That after fully satisfying themselves with regard to all aspects of the project including but not confined to the capacity/capability of the respondent to successfully undertake the construction, promotion, implementation of the residential project, the complainant had proceeded to book the unit in question.
- j) That he had opted for a construction linked payment plan and had undertaken to pay the instalments as and when demanded by it. The complainant duly understood and accepted the terms and conditions of booking which were incorporated in the application form and undertook to be bound by the same.
- k) That allotment letter was issued in favour of the complainant on 01.06.2013 whereby apartment bearing number 303 admeasuring 1995 square feet situated on the 3rd floor, Tower C in the said project was provisionally allotted to him. The payment plan was appended along with the allotment letter reflecting the total sale consideration payable by the complainant to be Rs.1,32,74,980/- (exclusive of applicable taxes, stamp duty, power back up charges and other charges payable at the time of possession). buyer's agreement was executed between the parties on 18.08.2014. The buyer's agreement was willingly and voluntarily executed by the

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complainant and the terms and conditions thereof are binding upon him with full force and effect.

- l) That possession of the said unit was to be offered to the complainant within a period of 36 months from the date of execution of buyer's agreement or from the date of approval of building plans by the Town & Country Planning Department, whichever was later subject to other terms and conditions of the agreement. The respondent was also entitled to a grace period of 6 months beyond the aforesaid period of 36 months. The date of approval of the building plans by the Town and Country Planning Department had been clearly indicated in recital F on page 3 of the buyer's agreement, and the building plans for the said project had been sanctioned by the Town & Country Planning Department vide memo bearing number ZP-577/JD(BS)/2013/38657 dated 04.05.2013. Therefore, the date from which the stipulated period for offering possession of the said unit had to be calculated was 18.08.2014.
- m) That right from the very beginning, he was extremely irregular with his payments and hence, the respondent was compelled to issue repeated reminders and requests for payment.
- n) Despite repeated demands for payment and reminders as stated above, the complainant failed to make any payment to it. It was repeatedly brought to the notice of the complainant that timely payment was the essence of the application form/buyer's agreement. The complainant was reminded that delay in remitting payments was attracting penal interest @ 18% per annum compounded quarterly as per the terms and conditions of the application form/buyer's agreement.

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- o) That by final notice dated 08.03.2017, one last opportunity was afforded to the complainant to clear his outstanding payment, which by then had amounted to Rs.83,68,707/- exclusive of interest amounting to Rs. 21,94,466/- within 15 days from the receipt of the said letter, failing which he was informed that the allotment would stand cancelled and payments as per the buyer's agreement would stand forfeited. However, no response was received from the complainant.
- p) That ultimately, the respondent was constrained to cancel the allotment of the complainant vide cancellation letter dated 29.03.2017 and email dated 29.03.2017. It would not be out of place to mention that the aforesaid communication had been duly received by the complainant. Further, he had been duly informed that on account of repeated willful default of his contractual obligations, the provisional allotment made in his favour was cancelled. The complainant was informed that the 20% of the sale consideration paid by him, constituting earnest money stood forfeited and that interest amounting to Rs.23,00,492/- was payable by him. The complainant was further informed that he was not left with any right, title or interest in the said unit. All correspondence was addressed to the address provided by the complainant in the application form and that the said correspondence was duly received by the complainant.
- q) That the complainant in the year 2018 had visited the office of respondent after receiving letter dated 25.07.2018 issued by the respondent to him. The officials of the respondent had met the complainant and had specifically conveyed to him that his allotment had been cancelled on account of non-payment of the outstanding

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amount to the respondent even after several reminders had been issued by it to the complainant. The complainant had also been informed by it that at the relevant point of time, no amount was liable to be refunded to the complainant by it. It had also been conveyed by the respondent that in fact, the total forfeitable amount at the relevant point in time was much more than the total amount paid by the complainant to the respondent.

- r) That thus the allegations levelled by the complainant against the respondent are totally baseless and do not merit any consideration by the authority. The complainant has failed to make the payments as per the agreed payment plan. The complainant has till date only made payment of Rs.47,93,059/- against the consideration amount of Rs.1,32,74,980/- exclusive of taxes (GST, VAT), stamp duty, power back up charges and other charges payable at the time of possession. It is ridiculous on the part of the complainant to claim that the cancellation of his allotment was illegal by paying only approximately 36% of the sale consideration.
- s) That the said project has been completed on time and there has been no delay on the part of the respondent in offering possession to the other allottees of the project who have paid all the dues. In fact, after the request made by the complainant to reinstate his allotment, the respondent vide letter for offer of possession dated 15.02.2019 had offered another opportunity to the complainant to make payment of the outstanding amount and take physical possession of the said unit.
- t) That the respondent had completed construction of the project and applied for the occupation certificate in respect of the same from the competent authority on 30.06.2017 itself. Occupation certificate has

also been granted by the competent authority. Actually, the complainant never had sufficient funds to make payment of the sale consideration and has proceeded to make false and baseless allegations against the Respondent so as to try and cover up his own lapses and wilful defaults.

u) That the following circumstances (which were beyond the reasonable control of the respondent) would comprehensively establish that no lapse can be attributed to the respondent insofar implementation of the aforesaid project by the respondent is concerned: -

- that even till this stage the gas pipeline running through the complex was not earmarked by the Town & Country planning Department in the said site plan forming part of the building plans approved by the Town and country Planning Department Haryana.
- the respondent started excavations of the site for the purpose of carrying out the construction of the complex; somewhere in the month of April-May 2013, the officers of GAIL approached the site and raised objections and apprised the respondent with regard to existence of the Gas Pipeline running through the complex. The respondent made enquiries from GAIL as well as Town and Country Planning Department and explored options for possibility of shifting of the said Gas Pipeline. It was conveyed by GAIL that the shifting of Gas pipeline was not possible. At this stage the respondent once again approached the Town and Country Planning Department for revision of site plan of the complex. The said department advised the respondent that since location of only one tower was to be realigned, the

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respondent could safely commence construction of the complex in its entirety after shifting the location of Tower-H so as to build it beyond the prohibited distance from the Gas Pipeline. The respondent was further intimated by Town and country Planning Department Haryana, that after completing the construction of the complex, the respondent could apply for occupation certificate and at that stage, necessary modifications shall be incorporated in the competition drawings of the complex. With this assurance the respondent commenced the construction of the complex.

- That the process of planning for changing/revising/modifying the building plans/soil testing and shifting of the location of Tower H and services/basement entry etc. of the complex took several months due to which the construction could not be carried. Despite this, the respondent was able to complete the construction and applied for occupation certificate on 30.06.2017.
- That after approaching the Town & Country Planning Department, the department, for issuance of occupation certificate, contrary to the assurance given in the beginning, directed the respondent to get the plans revised with respect to the complex. Thus, the respondent first applied for revision of the building plans.
- That the sanction of the said revised plans was granted by Town & Country planning Department vide memo bearing number ZP-577/Vol-I/SD(BS)/2017/ 17366 dated 20.07.2017.
- vide order 08.11.2016, Haryana State Pollution Control Board, in compliance of order dated 08.11.2016 of Hon'ble National

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Green Tribunal, directed all construction activities in Delhi NCR to be stopped due to rise in pollution levels. The construction activities were stalled for almost 7 to 10 days which led to demobilisation of the labour force at site due to which the construction activities almost came to stand still for a period of almost 1 month.

- That in light of facts submitted above, documents appended, and contractual stipulations agreed between the parties, it has been amply demonstrated that there has not occurred any delay whatsoever in the implementation of the project by it. Even otherwise the facts and circumstances of the present case are required to be harmoniously construed in their correct perspective. In the entire sequence of events, the respondent has conducted itself in a diligent and prompt manner. The existence of the Gas Pipeline had never been disclosed to the respondent by the landowner with whom the respondent had entered into contractual arrangement for undertaking the implementation of the project.
- That it needs to be appreciated that no corresponding advantage would have been derived ever by it by conceptualising the Tower H of the Project within prohibited distance of the Gas Pipeline. In fact, the respondent bona fide and genuinely believed that it would be able to undertake the implementation of the project on the basis of plans initially drawn up and sanctioned. Consequently, there does not exist any circumstance which warrants that any financial liability or penalty or fine be imposed upon the respondent or for that matter any financial

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benefit in the shape of compensation or by any other means be made available to the complainant.

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

E. Jurisdiction of the authority

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

Section 11

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(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all

the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

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

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the

adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

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

F. Findings on the objections raised by the respondents

F.I. Objection regarding entitlement of DPC on ground of complainant being investor.

14. The respondent has taken a stand that the complainant is an investor and not a consumer. Therefore, he is not entitled to the protection of the Act and to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of the consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is a buyer and paid total price of Rs.47,93,059/- towards purchase of an



apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

15. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is an allottee as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 000600000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant.

G.I. Direct the respondent to refund the amount paid by the complainant Rs. 47,93,059/- along with interest.

16. The complainant was allotted unit no 303, 3rd floor in tower C in the project "Park View Sanskruti" by the respondent builder for a total

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consideration of Rs.1,32,74,980/- and he paid a sum of Rs. 47,93,059/- which is approx. 45% of the total sale consideration. A buyer's agreement dated 18.8.2014 was executed between parties with regard to the allotted unit and the due date for completion of the project and offer of possession was fixed on 18.02.2018. The complainant failed to pay amount due against the allotment unit.

17. The respondent had sent reminder letters dated 16.08.2013, 07.09.2013, 02.09.2014, 17.09.2014, 03.01.2015, 19.01.2015, 7.04.2015, 23.04.2015, 07.05.2015, 06.08.2015, 21.08.2015, 07.09.2015, 05.11.2015, 20.11.2015, 05.12.2015, 05.03.2016, 26.03.2016, 07.05.2016, 23.05.2016, 07.06.2016, 08.11.2016, 24.11.2016, 08.12.2016, 04.02.2017, 20.02.2017 and final notice letter dated 08.03.2017 to make payment of outstanding due. The complainant continued with his default and again failed to make payment even after receipt of final reminder letter. The complainant received cancellation notice dated 29.03.2017. There is nothing on the record which shows that respondent-builder had refunded the paid amount by the complainant. Thereafter, the complainant approached the respondent/promoter for refund of the amount deposited and an assurance of the refund after subsequent sale of the unit was issued vide letter dated 25.07.2018 (annexure P-4). But in spite of the above assurance, no refund has been made to the complainant/allottee and request of the refund the amount along with interest. The counsel for the respondent states that an interest liability of Rs.23 Lakhs has arisen

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against the complainant/allottee on the date of cancellation. Further, the respondent has sold the unit at a much lower rate and the respondent be allowed the deduction of statutory taxes and brokerage etc.

18. Accordingly, the complainant failed to abide by the terms of the agreement executed inter-se parties by defaulting in making payments in a time bound manner as per payment schedule. This reluctant behavior of complainant led to issuance of notice of cancellation by the respondent on 29.03.2017. Now, the question before the authority is whether this cancellation is valid?
19. As per clause 1 (L)&(G) of the apartment buyer's agreement, the respondent/promoter has right to cancel the unit and forfeit the earnest money in case the allottee has breached the terms and conditions of the buyer's agreement executed between both the parties. Clause 1(L) & (G) of the buyer's agreement is reproduced as under for ready reference:

Clause 1. Sale of the Apartment and Right thereto:

(L). Failure or delay in payments

In the event the APARTMENT ALLOTTEE(S) fails to pay any installment(s) with interest within 75 days, from the due date, the Developer shall have the right to forfeit the entire amount of Earnest/Registration Money paid by the APARTMENT ALLOTTEE (S) and in such an event the allotment of the Said Apartment shall stand cancelled and the APARTMENT ALLOTTEE (S) shall be left with no right, claim or lien on the said Apartment and the Developer at its sole discretion would be free to allot the Apartment to a third party. The amount paid, over and above the Registration /Earnest Money, if any, shall be refunded by the Developer without interest after adjustment of interest accrued on the delayed payment(s), processing fees, brokerage, if any, and/or any other charges, due from the APARTMENT

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ALLOTTEE(S) under this agreement. However, the Developer may in its sole discretion, waive its right to terminate this Agreement, and enforce all the payments and seek specific performance of this Agreement. In such a case, the Parties agree that the possession of the APARTMENT will be handed over to the APARTMENT ALLOTTEE(S) only upon the payment of all out-standing dues, penalties, interests, litigation costs etc., along with interest by the APARTMENT ALLOTTEE(S) to the satisfaction of the Developer.

G. Earnest Money

The APARTMENT ALLOTTEE (S) has entered into this Agreement on the condition that out of the amount(s) paid/payable towards the SALE PRICE, the Developer shall treat 20% of the SALE PRICE as Earnest Money (hereinafter referred to as the "Earnest Money") to ensure fulfilment, by the ALLOTTEE(S) of the terms and conditions as contained in this Agreement.

20. The respondent issued pre-cancellation letter and thereafter, issued cancellation letter to the complainant. The occupation certificate for the project of the allotted unit was granted on 19.06.2018. The respondent cancelled the unit of the complainant with adequate notices. Thus, the cancellation of unit is valid.
21. Further, as per Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

"5. AMOUNT OF EARNEST MONEY

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

and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."

22. As per the provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, the respondent/builder has to return the remaining amount after deducting 10% of total sale consideration as earnest money, but that was not done. So, the respondent/builder is directed to refund the amount received from the complaint after deducting 10% of the basis sale consideration and return the amount along with interest at the rate of 10.70% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of cancellation 29.03.2017 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid.*

G. II Cost of litigation of Rs. 2,00,000/-.

23. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, 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, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

H. Directions of the authority


24. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to refund the paid-up amount of Rs.47,93,740/- after deducting 10% as earnest money along with brokerage charges to the extent of maximum 0.5% of the total basic consideration of Rs.1,10,72,250/- with the interest at the prescribed rate i.e., 10.70% is allowed on the balance amount, from the date of cancellation till date of actual refund.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

25. Complaint stands disposed of.

26. File be consigned to registry.


(Sanjeev Kumar Arora)
Member
Haryana Real Estate Regulatory Authority, Gurugram


(Vijay Kumar Goyal)
Member

Dated: 14.02.2023