

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

Complaint no. :	4572 of 2022
Date of filing complaint:	27.06.2022
First date of hearing:	22.09.2022
Date of decision :	18.07.2023

Sh. Avinash Chandra Varshney S/o Sh. S.P. Gupta R/O: B-503, Chitrakoot Apartments, Plot no. 9, Sector 22, Dwarka, New Delhi - 110077	Complainant
Versus	
M/s Ashiana Housing Limited Regd. office: Ashiana Housing Ltd. Block 1, 8th Floor, Vatika Business Park, Sohna Road, Sec-49, Gurugram- 122018	Respondent
CORAM:	
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Abhinash Chander Varshney (Advocate)	Complainant
Sh. Sukhbir Yadav (Advocate)	Respondent

ORDER

1. The present complaint 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 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made 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 the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.no.	Particulars	Details
1.	Name of the project	Ashiana Anmol, Sector-33, Gurgaon
2.	Project type	Group Housing Project
3.	RERA registered/not registered	Registered vide registration no. 26 of 2017 dated 28.07.2017
	Validity status	31.10.2019
4.	DTPC License no.	20 of 2014 dated 11.06.2014
	Validity status	10.06.2021
	Licensed area	13.3357 acres
	Name of licensee	Universe Heights (India) Pvt. Ltd.
5.	Request for transfer of project from "Ashiana Nirmay" at Bhiwadi to "Ashiana Anmol" at Gurgaon	17.08.2017 (As per page no. 75-76 of complaint)
6.	Allotment dated	21.09.2017 (As per page no. 77 of complaint)
7.	Unit no.	M-1109 on 11 th floor, tower B-3 (As per page no. 77 of complaint)
8.	Unit area admeasuring	1275 sq. ft. (As per page no. 77 of complaint)

9.	Agreement for sale dated	14.10.2017 (As on page no. 60 of reply)
10	Possession clause	<p>Clause 7.1 of agreement for sale</p> <p>The The Promoter assures to handover possession of the Unit along with ready and complete Common Areas and Facilities of the Said Project with all specifications, amenities and facilities of the Said Project <u>in place on or before October 2019 including a grace period of six months, unless there is delay or failure due to war, flood, drought, fire, cyclone earthquake or any other calamity caused by nature effecting the regular development of the Said Project ("Force Majeure")</u>. If, however, the completion of Said Project is delayed due to the Force Majeure conditions then the Allottee(s) agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the Unit and the Promoter shall not be liable to pay any penalty/interest/compensation</p>
11	Due date of possession	October 2019
12	Payment plan	Construction linked payment plan (As on page no. 55 of reply)
13	Total sale consideration	Rs. 63,93,917/- (As on page no. 55 of reply)
14	Amount paid by the complainants	Rs 19,56,090/- (As per notice for cancellation dated 28.06.2019 on page 124 of reply)
15	Demand letter and reminders dated	16.09.2017, 18.11.2017, 01.12.2017, 01.02.2018, 01.04.2018, 01.01.2019,



		01.02.2019, 01.03.2019, 01.04.2019, 01.05.2019 (As per page no. 111-122 of reply)
16	Cancellation letter dated	28.06.2019 (As per page no. 85 of complaint)
17	Occupation certificate	19.06.2019 (As per page no. 105 of reply)
18	Offer of possession	Not offered

B. Facts of the complaint:

3. That the respondent approached the complainant, in the year 2016 for purchasing a residential unit in their project "Ashiana Nirmay" at Bhiwadi, Rajasthan for sale consideration of Rs. 62,39,524/-. The complainant being a retired CPWD official, required a residential accommodation for himself and his family. He was ready and willing to execute the agreement and paid Rs. 19,56,090/-, i.e., more than 30% of the total sale consideration.
4. That after receiving the said amount of Rs. 19,56,090/- in October 2016, the respondent sent a draft agreement for signatures, vide a separate letter dated 05.11.2016 and also informed that the flat No. T-901 in Phase-I would be allotted to the complainant. It is submitted that upon perusal of the draft agreement, it came to the knowledge of the complainant that the land on which construction to be done is a lease-hold land. Further, the agreement also provided for clauses for unilateral extension of time for completion of construction of the project and number of other penal default clauses such as clause 2 of said agreement.

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5. That despite making payment of more than 30% of the amount from October, 2016 till the date of receipt of the agreement, the respondent' progress of the work was not satisfactory and it was evident that there was no possibility of the respondent providing possession of the unit to the complainant in the stipulated time. The complainant, being a retired CPWD civil engineer himself and having vast experience in construction matters, was aware that such delay and extremely slow progress of work would inevitably lead to delay in completion of the project by December, 2017, vis-à-vis, stipulated time for handing over of possession of the residential unit. Therefore, the complainant, taking into consideration the delay and clauses of the agreement, vide email dated 02.12.2016, requested the respondent to cancel the booking of unit no. T-901 in Ashiana Niramay and refund the amount deposited by him. Further, it was clarified by letter dated 15.12.2016 of respondent, that the work was stopped from 08.11.2016 to 15.11.2016.
6. That the respondent, vide letter dated 05.01.2017 duly accepted the request for cancellation of the project, however, due to sheer malafides, failed to refund the amount. Further, the lease agreement of 11 months was also cancelled.
7. That despite email dated 02.12.2016, issued by him, the respondent, out of extreme malafides, failed to refund the money paid by him. The complainant has invested his life savings into procuring the residential unit for himself and his family and paid huge amount of Rs. 19,56,090/-. Upon failure on its part to refund the amount. The complainant further, vide email dated

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16.01.2017, reiterated the request for cancellation of the booking of unit No. T-901 in Ashiana Nirmay and requested for refund of Rs. 19,56,090/- along with interest and compensation.

8. That the complainant, vide letter dated 25.01.2017, once again requested for cancellation of allotment in Ashiana Nirmay and reiterated his request for refund of Rs. 19,56,090/- along with interest and compensation. The complainant did not want any dispute to arise and wanted to put an end to things peacefully, therefore, in all the communications, vide which cancellation of allotment and refund have been sought for, the complainant had chosen not to level any allegations against the respondent or to put his grievances in writing, because the complainant being a retired senior citizen, litigation of any sort would have added to his financial burden.
9. That despite several requests and issuance of a number of letters, the respondent refused to refund the hard earned money paid by him and out of malafides conveyed to him that the only option available was to invest in any other project of Ashiana Group, as the amount already paid by the complainant would not be refunded. He was helpless and had no other option but to accede to the illegal proposal of the respondent. It is therefore, submitted that the complainant, vide email dated 17.08.2017, requested the respondent to transfer the amount already paid to the respondent, from Ashiana Nirmay, Bhiwadi to Ashiana Anmol, Sohna Road, Gurgaon.
10. That with the assurance that possession of the residential units would be delivered in the stipulated time, the respondent allotted unit No. M-1109 at

Ashiana Anmol, Sohna Road, Gurugram, Haryana to the complainant and the amount already paid by the complainant was transferred and adjusted against the said unit. It is submitted that pursuant to such transfer, the respondent, vide letter dated 21.09.2017, informed the complainant that the total cost price of the unit no. M-1109 is now Rs. 63,93,917/-.

11. That the respondent, vide letters dated 21.09.2017 and 30.11.2017, informed that the sum of Rs. 4,48,000 and Rs. 15,08,090/- has been transferred by the respondent from the earlier unit no. T-901, Ashiana Nirmay, Bhiwadi, Rajasthan to the present unit no. M-1109, Ashiana Anmol, Sohna Road, Gurugram, Haryana.
12. That the respondent, in spite of receiving approximately Rs. 20 lakh in the year 2017 against a total sale consideration of Rs. 60 lakh approx., failed to execute the project by utilising its full resources, and were unable to deliver the possession of the residential accommodation even within a span of 2 years, in spite of receipt of more than 30% of the sale consideration.
13. That the complainant visited the respondent and sought clarifications with respect to the progress of the project and the time for completion of the project and delivery of the possession of the residential flats. It is submitted that upon receipt of an unsatisfactory reply from the respondent, with respect to the completion of the projects, he conveyed that further amounts would be paid only when the project progresses with the pace as indicated in the agreement.

14. That vide letter dated 28.06.2019, the respondent out of extreme malafides, cancelled the allotment of the complainant against unit no. M-1109 on the frivolous ground that the payment of Rs. 3,75,725/- has not been paid by the complainant as demanded. The respondent, further, vide email dated 01.04.2021, cancelled the allotment of unit no. M-1109 made to the complainant. It is respectfully submitted that the respondent have cancelled the allotment of the complainant for unit No. M-1109 in Ashiana Anmol, however, has failed to refund the money already paid by the complainant. It is therefore, submitted that the complainant has no other option but to approach this Authority for refund of the money.
15. That a perusal of clause 2(A) of the draft agreement sent by the respondent in November, 2016, makes it clear that the respondent did not even have any title over the plot on which the project was being constructed. It was being leased to the respondent by the Urban Improvement Trust (UIT), Bhiwadi by way of a lease deed. It is submitted that such a huge project is being undertaken by the respondent, without having proper title on the land, would leave the door open for future litigation. The complainant and other purchasers, are spending their life savings, would be purchasing a property with defective title as well as have to contest prolonged litigations for no fault of their own.
16. That despite repeated requests by the complainant for cancellation of allotment as well as refund of the amount deposited, the respondent refused to accede to the same and even refused to refund the money. Since the

respondent blatantly refused to refund the money, he was left with no other option but to transfer of the money deposited from Ashiana Nirmay to Ashiana Anmol. It is respectfully submitted that such transfer was concluded in 2017, however, the respondent, out of extreme malafides and ill motive, illegally and arbitrarily cancelled the allotment of the complainant in Ashiana Anmol and forfeited the entire amount paid. Such an act on the part of the respondent clearly shows that it was always their intention to usurp the hard-earned money of the buyers under one pretext or the other.

17. That as per clause 1.9 of the draft agreement, upon termination, the respondent will only be entitled to a liquidated damages @ 10% of the entire sale consideration. The total sale consideration of the residential unit No. M-1109 in Ashiana Anmol was Rs. 63,93,917/-. Therefore, as per Clause 1.9, the respondent will allegedly be entitled to only 10% of such amount, i.e., Rs. 6,39,392/-. The complainant has paid Rs. 19,56,090/- already. Therefore, the complainant will at least be entitled to Rs. 13,53,979/-. However, the respondent, vide letter dated 28.06.2019, illegally and arbitrarily made unlawful deductions, including cancellation charges @ 20% of the unit cost along with 18% GST, which is absolutely against the agreement and therefore, cannot sustain. It is respectfully submitted that such action on the part of the respondent only makes their ill motive and malafides apparent. Further, the conditions of liquidated damages, etc., would have been applicable to the complainant only once the agreement was signed between the parties. The complainant has not signed the draft agreement sent by the

respondent. Therefore, it cannot levy liquidated damages or any other deductions/penalties on the complainant and the entire amount of Rs. 19,56,090/- has to be refunded to the complainant, along with interest @ 24% per annum from the date of deposit till realisation and compensation.

18. That as stated by *Hon'ble Supreme Court in Pioneer Urban Land & Infrastructure Ltd. v. Govindan Raghavan, (2019) 5 SCC 725*, that inordinate delay in handing over possession of the flat clearly amounts to deficiency of service and thus, the buyer, i.e., the complainant herein, is entitled to refund. It is therefore, most respectfully submitted that the Respondent had failed to complete the project within the stipulated/reasonable time period and has deliberately cancelled the allotment of the complainant solely to cover up the laches on its part and with the mala fide motive to usurp the hard earned money of the complainant. It is respectfully submitted that the service for which the complainant had made the payment to the respondent, was utterly deficient and thus, the complainant is entitled to receive compensation.
19. That the agreements entered into between the parties are never equitable and are absolutely one sided, as the parties, including the complainant, are never on equal footing with the developers, i.e., the respondent, in terms of bargaining power. It is most respectfully submitted that the *Hon'ble Supreme Court of India, in Pioneer Urban Land & Infrastructure Ltd. v. Govindan Raghavan, (2019) 5 SCC 725*, has held that a term of a contract

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will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder.

20. That a total sum of Rs. 19,56,090/- towards the allotted unit already deposited with the respondent in the year 2017. It is submitted that despite such payment, the respondent, illegally and arbitrarily cancelled the allotment of the complainant solely with the ill intention to misappropriate the hard-earned money of the complainant. However, the respondent, with utmost malafides, cancelled his allotment and has been enjoying the benefits of such amount since 2017, i.e., for over 4 years now. The deductions made by the respondent vide letter dated 28.06.2019, are completely illegal and unfounded. It is respectfully submitted that the letter dated 28.06.2019, has been issued illegally only to cover up the failure on the part of the respondent in performing their reciprocal contractual obligations.

C. Relief sought by the complainant:

21. The complainant has sought following relief(s):
- i. Direct the respondent to refund the amount paid by the complainant along with interest.
 - ii. Direct the respondent to pay cost of litigation of Rs. 12,00,000/-.

D. Reply by respondent:

22. The respondent by way of written reply made following submissions
- a. That the present complaint is not maintainable in law or on facts. The present complaint is not maintainable before the Authority. The present

complaint raises several such issues which cannot be decided in summary proceedings. 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 Authority and can only be adjudicated by the Adjudicating Officer/Civil Court. The present complaint deserves to be dismissed on this ground alone.

- b. That the complainant has no locus standi or cause of action to file the present complaint. It is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the agreement for sale dated 14.10.2017, as shall be evident from the submissions made in the following paras of the reply.
- c. That the complainant has approached respondent-builder sometime in the year 2016 for the purchase of a unit in its residential project "Ashiana Nirmay" situated at Bhiwadi, Rajasthan. It is submitted that the complainant before approaching the respondent, has conducted extensive and independent inquiries regarding the project and it was only after the complainant was fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the respondent to undertake the development of the same, that the complainant took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent.

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- d. That thereafter, the complainant made an application to the respondent for provisional allotment of a unit in the project – Ashiana Nirmay. In pursuance of the aforesaid application form, he was allotted unit no. T-901 in phase- 1 of Ashiana Nirmay in the project vide provisional allotment letter dated 05.11.2016. The complainant consciously and willingly opted for a construction link payment plan and the complainant agreed and undertook to remit the sale consideration for the unit in question on time as per the payment schedule. It is pertinent to mention here that as per the said document, the complainant had to pay Rs. 45,64,210/- by 31.12.2016.
- e. That respondent-builder sent two sets of builder buyer's agreement ("BBA") dated 05.11.2016 to the complainant for execution, but he did not execute the said BBA. As per clause no. 2.1 of the said BBA, the due date of possession was December 2017 and with a grace period of six months, hence, the due date of possession was June 2018. It is highly pertinent to mention here that the respondent has obtained the completion certificate and occupation certificate for phase-1 on 19.02.2018 and 29.01.2018 well within the timeline as stipulated in the BBA dated 05.11.2016.
- f. That being a customer-centric company, the respondent arranged a flat for the complainant in project Ashiana Utsav, Bhiwadi, and a lease deed was also executed inter-se the parties for the time being. The said flat was vacated by the complainant in 2017.

- g. That the complainant sent an email to the respondent-builder on 02.12.2016 and 16.01.2017 to cancel the booking of flat no. T-901, Ashiana Nirmay. Without quoting any reason, the complainant sent these emails for the cancelation of the unit. No complaints regarding the alleged delay in construction were raised by him. It is pertinent to mention here that the complainant failed to upkeep his side of the promise as per the booking terms of the allotment letter dated 05.11.2016. He neither executed the agreement for sale nor paid the balance sale consideration on the due date and defaulted in payment, thereafter due to non-payment of the installments and considering the request of the complainant, it rightfully cancelled the allotment of the flat. As per terms no. 14 & 15 of the application form, as well as the BBA, dated 05.11.2016 the respondent is entitled to deduct 10% of the total cost of the said unit. Therefore, the respondent asked the complainant to collect the balance amount after the deduction of earnest money, but the complainant did not come forward to collect the balance money. As per the agreed payment schedule Rs. 26,08,120/- was payable by the complainant out of a total called amount of Rs. 45,64,210/- as per the demand raised. Hence, it is clear that the complainant defaulted in making the payments.
- h. Thereafter, the complainant requested to the management of respondent and shows his willingness to purchase a flat in project Ashiana Anmol, Sohna, and sent an email dated 17.08.2017 and requested for transfer of

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the deposit money of Rs. 19,56,090/- from Ashiana Niramay to Ashiana Anmol project.

- i. That after considering the request of the complainant, it agreed to transfer Rs. 19,56,090/- from project Ashiana Niramay to Ashiana Anmol Phase I. Thereafter, on 05.09.2017, the complainant submitted an application form and requested for the allotment of a flat in project Ashiana Anmol in Tower - M (Magnolia). Subsequent to which, an allotment letter dated 21.09.2017 was issued for flat no. M-1109 in tower B-3 Magnolia in favour of complainant for a basic sale price of Rs. 63,93,917/-. It is pertinent to mention here that the respondent gave a benefit/ discount of Rs. 6,05,583/- to the complainant. As per said allotment letter, the complainant has to pay Rs. 69,26,490/- on or before 20.11.2017.
- j. That an agreement for sale was executed between the parties on 14.10.2017 and the same was registered in the office of the Sub-registrar, Sohna on 17.11.2017. The project of the respondent is duly registered with HARERA and having registration certificate no. 26 of 2017 dated 28.07.2017. As per the said registration certificate, the project completion date was represented as 31.10.2019, moreover, as per clause no. 7.1 of the said agreement, the due date of possession of the flat was on or before October 2019.

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- k. That as per clause 1.18, 1.19 & 9.3 of agreement dated 14.10.2017, the complainant was duty bound to make the payment on or before the stipulated due dates.
- l. That the rights and obligations of the complainant and respondent-builder are completely and entirely determined by the covenants incorporated in the agreement for sale/ BBA which continue to be binding upon the parties thereto with full force and effect. As per the agreement, Ashiana Housing Limited has represented that the phase would be completed by October 2019. In furtherance of the same, the occupancy certificate in turn was procured on 19.06.2019, which is well within the timeline promised by it.
- m. That it sent numerous demand letters/reminders dated 16.09.2017, 18.11.2017, 01.12.2017, 01.02.2018, 01.04.2018, 01.01.2019, 01.02.2019, 01.03.2019, 15.03.2019, 01.04.2019, 27.04.2019 & 01.05.2019 and requested him to clear the outstanding dues along with the applicable delay charges but he completely ignored these requests and failed to make the payment.
- n. That on 15.03.2019, the respondent send a letter to the complainant and asked for the payment of the due amount, thereafter, on 27.04.2019, the respondent again sent a letter to the complainant giving the last and final opportunity towards payment of due installments. But he blatantly ignored this request cum demand letter and did not pay the due amount.

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- o. That on 28.06.2019, the respondent send the cancellation letter of unit no. M-1109 in Ashiana Anmol Phase - 1, Sohna to the complainant.
- p. That, however, even after receipt of the OC, the complainant did not come forward to obtain possession of the subject unit. His elusive behaviour in making the payments which were due points toward the fact that the sole motivation of the complainant was to extract profit from the resale of the unit. The excuses for delay in construction fall flat on the face of the occupancy certificate well within the promised timeline. Hence, the only reason why he did not uphold his part of the agreement is that he did not see returns in the unit and has now preferred the instant false and frivolous complaint on wholly extraneous and fallacious grounds in order to extract the money from the respondent. The complainant needlessly avoided the completion of the transaction with the intent of evading the consequences as enumerated in the agreement for sale for the delay in obtaining of possession. Therefore, there is no equity in favour of the complainant. The present complaint is nothing but an abuse of the process of law. In fact, he never had any intention of purchasing the unit for his own use, hence, the complainant is not an "aggrieved person" under the Act.
- q. That without admitting or acknowledging in any manner the truth or correctness of the frivolous allegations levelled by the complainant and without prejudice to the contentions of the respondent, it is ready to pay Rs. 4,95,728/-.

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Sr. No.	Particular	Amount
	Basic Cost	6393917
	EDC/IDC	660450
A	Total Cost	7054367
	Earnest Money @ 10%	705437
	GST deposited on demands	751925
B	Total deduction	1457362
C	Amount Received	1956090
D	Amount Payable After deduction (C - B)	498728

- r. That it is submitted that all demands which have been raised by the respondent are strictly in accordance with the terms and conditions of the buyer's agreement between the parties. There is no default or lapse on the part of the respondent. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.
- s. At this juncture, it is important to point out that the complainant's grievance of delay in construction same for both the projects, i.e., Ashiana Nirmay and Ashiana Anmol per contra respondent finished completion of both the projects well within the timeline represented in the agreements for sale. Hence, the contention of the complainant falls flat on the face of it and the compliant under reply is liable to be rejected.

23. All other averments made in the complaint were denied in toto.

24. The complainant filed the complaint on 27.06.2022 and impleaded two respondents; Ashiana Housing Limited as respondent no. 1 and Bhawna Gupta (Manager Customer Service) as respondent no. 02. Application under Order 1 Rule 10 of Code of Civil Procedure, 1908 read with Section 151 of CPC for deletion of the name of respondent no. 2 namely Bhawna Gupta from an array of the parties has been filed on behalf of respondent no. 2 along with reply on behalf of respondent no. 1 on 27.09.2022. As per said application, respondent no. 2 took a plea that since there is no privity of contract inter-se parties, her name be deleted from the array of parties. In view of fact that all the payment has been made in favour of respondent no. 1 i.e. Ashiana Housing Limited and no specific claim has been established against the respondent no. 2; the Authority is of considered view that the name of the respondent no. 2 i.e; Bhawna Gupta is hereby deleted from array of parties vide this order.
25. 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 those undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

26. 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 allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 allottee 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 complainant at a later stage.

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27. 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."

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

F. Entitlement of the complainant for refund:

F.I Direct the respondent to refund the amount paid by the complainant along with interest.

29. The complainant submitted that initially he booked a unit in project "Ashiana Nirmay", Bhiwadi, Rajasthan in 2016 and paid an amount of Rs. 19,56,090/- towards allotted unit. Keeping in view the slow progress at project site and

the fact that the said land was under lease from Urban Improvement Trust, he requested the respondent to refund the amount paid sent email dated 02.12.2016. Despite several request of the complainant, it failed to refund the amount paid by him. Thus, left with no option the complainant was constrained to vide email dated 17.08.2017, requesting the respondent to transfer the amount paid by him in project "Ashiana Anmol", Sohna Road, Gurugram. The complainant further observed that the said project of the respondent is also delayed and thus, planned a visit to the project site. The complainant visited the project site and clarified to the respondent that further amount shall be paid as per the construction at the site only. But the respondent cancelled the unit of the complainant vide letter dated 28.06.2019. The complainant further submitted that as per agreement for sale dated 14.10.2017, executed between the parties, the due date of handing over of possession was October 2019 and despite payment of Rs. 19,56,090/- in 2017 vide transfer, it has cancelled the allotment of the complainant and has forfeited the entire amount.

30. The respondent-builder submitted that the said transfer was done on the request of the complainant only and denied the fact that there was any delay in previous project of the respondent i.e. "Ashiana Nirmay" and the same is evident from the fact that the occupation certificate of same was obtained on January 2018.
31. The Authority observes that it is an admitted fact that the complainant was initially allotted unit in some other project of the respondent namely

"Ashiana Nirmay", Bhiwadi, Rajasthan. The factual position is very clear that whatsoever being the circumstances for such transfer, both the parties agreed to the request dated 17.08.2017, for transfer of fund of the complainant from previous project to the project in question of the complaint. Further, both the parties, duly complied with the process of application and allotment of the unit in the said project i.e.; "Ashiana Anmol", Sohna Road, Gurugram; which led execution of agreement for sale between the parties on 14.10.2017 wherein detailing the terms and conditions of allotment, total sale consideration of the allotted unit, its dimensions, due date of possession, etc. Thus, keeping in view, the provisions of *Doctrine of Waiver*, it is concluded that the agreement for sale dated 14.10.2017, took over any previous allotment or agreement executed inter-se parties w.r.t previous project.

32. As per his request, he was allotted unit no. M-1109 in project "Ashiana Anmol", Sohna Road, Gurugram vide letter dated 21.09.2017 and subsequently, an agreement for sale in this regard was executed on 14.10.2017. As per said agreement for sale, the sale consideration of the subject unit was Rs. 63,93,917/- and the complainant has already paid an amount of Rs. 19,56,090/- constituting 30.60% of sale consideration. As per schedule of payment annexed with allotment letter, the said unit was booked under construction linked plan and as per clause 7.1 of agreement to sale dated 14.10.2017, the completion of the project was provided as October 2019. The respondent issued various demand letters dated 16.09.2017,

18.11.2017, 01.12.2017, 01.02.2018, 01.04.2018, 01.01.2019, 01.02.2019, 01.03.2019, 01.04.2019, 01.05.2019 followed by cancellation letter dated 28.06.2019 on account of non-payment of consideration toward allotted unit. The complainant took a plea that the construction of the project was itself delayed but the said plea of the complainant is rejected as it is evident from documents available on record that as per agreement for sale dated 14.10.2017, the due date for handing over of possession was October 2019 and its occupation certificate was received by the respondent from the competent authority on 19.06.2019 i.e.; before due date on handing over of possession. Thus, the plea of the complainant that the construction was not as per the schedule, is rejected.

33. Despite several requests, the complainant has failed to make payment towards consideration of allotted unit. It issued various demand/reminder letters as detailed in the table above, followed by cancellation letter dated 28.06.2019. As per Section 19(6) & (7) of Act of 2016, the complainant-allottee was under obligation to make payment towards consideration of allotted unit. Despite issuance of several reminders as detailed above in the table followed by termination letter dated 28.06.2019, the complainant has failed to adhere to the obligation conferred over him vide provision of Section 19(6) & (7) of Act of 2016. Sufficient opportunities have been given by the respondent-builder to the complainant before cancellation of subject unit vide letter dated 28.06.2019. Thus, the said cancellation considered to be valid. However, there is nothing on record to show that after cancellation

of the allotted unit vide letter dated 28.06.2019, the respondent-builder returned the remaining paid-up amount to the complainant after deducting earnest money of the said unit as per said agreement dated 14.10.2017.

34. The complainants has admittedly paid a sum of Rs. 19,56,090/- against basic sale consideration of Rs. 63,93,917/- and while cancelling the allotment, the respondent has forfeited whole of the amount and which is not legally permissible in view of law laid down by the Hon'ble Apex Court of land in cases of *Maula Bux Vs. Union of India, (1970) 1 SCR 928* and *Sirdar K.B. Ram Chandra Raj Urs Vs. Sarah C. Urs, (2016) 4 SCC 136*, wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of the section 74 of the Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. A similar view was taken by the *Hon'ble National Consumer Dispute Redressal Commission in consumer case no. 2766 of 2017 titled as Jayant Singhal & Anr. Vs M/s M3M India Limited decided on 26.07.2022*. Even keeping in view, the principles laid down in the first two cases, the Haryana Real Estate Regulatory Authority Gurugram framed regulation 11(5) known as (Forfeiture of earnest money by the builder) Regulations, 2018, providing as under-

"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"

35. Thus, keeping in view of aforesaid circumstances and the law of the land, though the cancellation of the allotted unit is held to be valid, but the respondent was not justified in retaining whole of the paid-up amount on cancellation. It could have retained 10% of the basic sale consideration of the unit and was require to return the remainder/balance amount on cancellation. Since that was not done, so the respondent is directed to refund the paid-up amount after deducting 10% of the basic sale consideration of the unit being earnest money from the date of cancellation i.e., 28.06.2019 within 90 days from the date of this order along with an interest @10.75 % p.a. on the refundable amount, till the date of realization. *(rate of interest inadvertently mentioned as 10.70% in proceedings dated 18.07.2023)*

F.II Direct the respondent to pay cost of litigation of Rs. 12,00,000/-.

36. The complainant is 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. (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.

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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 complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority:

37. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:
- i) The respondent/promoter is directed to refund the paid-up amount of Rs. 19,56,090/- to complainant-allottee after deducting 10% as earnest money of the basic sale consideration of Rs. 63,93,917/- with interest at the prescribed rate i.e., 10.75% on such balance amount, from the date of cancellation i.e., 28.06.2019 till the date of realization.
 - 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.
38. Complaint stands disposed of.
39. File be consigned to the registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.07.2023