

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

Complaint no. : 4979 of 2021
Date of filing complaint: 13.12.2021
First date of hearing: 23.02.2022
Date of decision : 28.09.2023

1. Mr. Vivek Anand
2. Mrs. Shweta Anand

Both RR/O: 165, Pocket -H-24, Sector- 3, Rohini,
Delhi- 110085

Complainants

Versus

1. M/s Advance India Projects Limited
Regd. office: 232-B, 4th floor, Okhla Industrial
Estate, Phase-III, New Delhi-110020
2. Landmark Apartments Private Limited
Regd. Office: A-11, C.R. Park, New Delhi - 110010

Respondents

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE WHEN ARGUED:

Ms. Sonali Karwara (Advocate)

Complainants

Sh. Harshit Batra (Advocate)

Respondent no. 1

None

Respondent no. 2

ORDER

1. The present complaint has been filed by the complainant/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 allottees as per the agreement for sale executed inter se.

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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	"AIPL Joy Street", Sector-66, Gurgaon
2.	Nature of project	Commercial colony
3.	RERA registered/not registered	157 of 2017 dated 28.08.2017 Valid up to 31.12.2020
4.	Application letter dated	26.06.2018 [As per page no. 41 of complaint]
5.	Allotment letter dated	30.07.2018 [As per page no. 41 of complaint]
6.	Unit no.	1218 on 12 th floor (service apartment) [As per page no. 41 of complaint]
7.	Unit area admeasuring	686.74 sq. ft. [Super area] [As per page no. 41 of complaint]
8.	Agreement for sale	27.08.2018 [As per page no. 109 of complaint]
9.	Total sale consideration	Rs.73,83,828/- (excluding IFMS) [As per agreement for sale on page no. 115 of complaint]
10.	Amount paid by the complainant	Rs.37,89,983/- (61.32%) [As per statement of account dated 06.10.2020 on page no. 104 of complaint]
11.	Possession clause	Clause (j) of application form <i>The company shall subject to force majeure conditions proposes to handover possession of the unit on or before December 2022 notified by the company to the authority at the time of</i>

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		<p>registration of the project under the Real Estate (Regulation & Development) Act, 2016 and the Haryana Real Estate (Regulation & Development) Rules, 2017 and regulations made thereunder for completion of the project or as may be further revised/approved by the authorities. The completion of the project shall mean grant of occupation certificate for the project</p> <p>Possession Clauses as per agreement to sale</p> <p>5. TIME IS ESSENCE:</p> <p><i>The Promoter agrees and understands that timely delivery of possession of the unit to allottee and the common areas to the association of allottees or governmental authority , as the case may be , as provided under rule 2(1)(f) of Rules, 2017 is the essence of the agreement.</i></p> <p><i>The Allottee hereby agrees that wherever the reference is made for possession of the Unit in this Agreement or any other document with reference to the Unit, it shall always mean constructive possession of the Unit and not physical handover of the Unit to the Allottee. The Allottee hereby confirms that the Promoter has in no way made any representation or warranty to the Allottee that the Promoter shall offer/ handover physical possession of the Unit to the Allottee except where specifically agreed by the Promoter in writing with the Allottee.</i></p> <p>7. POSSESSION OF THE UNIT</p> <p>7.1. Schedule for possession of the Unit -</p> <p><i>The Allottee hereby agrees that wherever the reference is made for possession of the Unit in this Agreement or any other document with reference to the Unit, it shall always mean constructive possession of the Unit and not physical handover of the Unit to the Allottee.</i></p>
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12.	Due date of possession	December 2022 [As per clause j of application form]
13.	Assured Return Clause	Clause 21 of Agreement <i>Subject to Allottee making the due payments as per the agreed Payment Plan as per Schedule 'F', the Promoter has agreed to pay Rs.28,328.00 (Rupees Twenty-Eight Thousand three Hundred twenty eight Only) per month by way of assured return to the Allottee from _____ or the succeeding day from the date of receipt & realization of Rs.36,91,914 (including taxes) from the Allottee, credited to the bank account of the Promoter, till date of notice of offer of possession of the unit or date of completion of the project as disclosed at the time of registration of the project whichever, is earlier.....</i>
14.	Assured return paid	Rs.4,72,015/- (From Sept 2018 till Mar 2020 & June 2020 till Sept 2020 at page no. 141 of reply)
15.	Occupation certificate	28.09.2020 [As per page no. 128 of reply]
16.	Offer of constructive possession	05.10.2020 [As per page no. 131 of reply]
17.	Reminder letter dated	23.10.2020, 13.01.2021, 18.03.2021, 06.05.2021, 21.05.2021 [As per page no. 133- 138 of reply]
18.	Pre- termination letter dated	16.01.2021 [As per page no. 139 of reply]
19.	Termination letter dated	02.08.2021 [As per page no. 140 of reply]

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B. Facts of the complaint:

3. The complainants have made the following submissions in the complaint: -
- I. That the respondent no. 1 is a promoter/developer of the project and has registered the project under the provisions of the Act, 2016 under the registered with this authority vide registration No. 157 of 2017 dated 20.08.2017. That the project was projected by the respondent no. 1 that they have received a license from the Director General, Town & Country Planning, Haryana to develop the project under license no. 7 of 2008 dated 21.01.2008 and license no. 152 of 2008 dated 30.07.2008.
 - II. That it was also represented by the complainant that M/s. Landmark Apartments Pvt. Ltd. i.e respondent no. 2 is the owner of the land wherein the project was being constructed and it was also represented that the respondent no. 1 had entered into a development agreement dated 31.12.2015 with respondent no. 2 (M/s. Landmark Apartments Pvt. Ltd.) to develop the said project.
 - III. That the complainant is the allottee of unit bearing no. 1218, 12th floor admeasuring super area 686.74 sq. ft. along with one car parking in the project "AIPL Joy Street" situated at Sector-66, Gurugram, and Haryana.
 - IV. That the respondent no. 1 came up with lucrative advertisements and promotions for the said project. It is pertinent to mention herein that the only reason which prevailed upon the complainant to invest in the

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project was the promises and immense. Importance laid down by the respondent no. 1 with regard to quality of the unit, timely possession of the unit and assured returns from the unit which subsequently turned out to be false promises which caused immense hardship, both mental and physical, to the complainants.

- V. That since the unit being a Studio apartment, it was represented and promised by the respondent no. 1 that they have entered into a co-operation agreement dated 25.05.2016 agreement with M/s. Bridge Street Apartments, a global leader in corporate short-term leasing. Thus, on the strength of the alleged Co-operation agreement it was assured by the respondent that assured rental post possession was promised to the complainants.
- VI. That it was also promised and assured to the complainants that apart from the assured rental post possession the complainants would also get assured return of Rs.28,328/- every month till the time the respondent starts to pay assured rental post possession. However, this promise of the respondent no. 1 also turned out to be false and they have not paid the assured return of Rs.28,328/- per month since November 2019. The complainants had sent many E-mails regarding the same and did not receive any reply/reason for the omission of their duty.
- VII. That the respondent has divided the units in the project in two categories. The units which were alleged to be serviced through Bridge

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Street was priced at a premium from the units which were not to be serviced by the Bridge Street. The units which were to be serviced by Bridge-Street was costly by a sum of approximately Rs.20,00,000/- from the units which were not to be serviced by the Bridge Street.

- VIII. That it is relevant to point out that the total area of the unit was 686.74 sq. ft. and the same was allotted to the complainants@ Rs.9000/- per sq. ft. In addition to the same the complainants were also liable to pay Rs.600/- per sq. ft. towards development charges and Rs.100/- per sq. ft. towards IFMS. Thus, the total price of the unit based on the carpet area was Rs.74,52,502/- and the complainants has paid an total amount of Rs.37,89,953/- to the respondent no. 1. Furthermore, the payment plan which was agreed between the parties was 50:50. Thus, the 50% of the sale consideration was to be made at the time of booking and the balance 50% was to be paid at the time of possession.
- IX. That pursuant to the said amount being paid by the complainants to the respondent no. 1, the respondent no.1 issued allotment letter dated 30.07.2018 to the complainants. The allotment letter was issued after much persuasion by the complainants. It is relevant to point out that the respondent no. 1 has shared with the complainants a copy of the sale agreement containing various terms & conditions. The complainants immediately raised objections to various clauses in the agreement. It was assured and promised by the respondents that the said clauses are standard clauses which is required by law and further

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promised that the respondent would not insist on the same. Believing the assurance and promises made by the respondent the complainants signed the agreement.

- X. That the main objection by the complainants to the agreement was as regards the date of possession. It is relevant to point out that the respondent no. 1 at the time of booking of the unit had promised the delivery of possession by end of 3rd Quarter of 2018. To the utter shock and surprise of the complainants in the agreement the respondent had mischievously omitted any specific date of possession and has instead made reference to the same as the date intimated to the authority at the time of registration. It goes without saying that the alleged agreement which was never executed was cunningly worded and device to dupe the allottee(s), complainant being one of them.
- XI. That the Complainants were shocked to receive and alleged offer of Constructive possession on 05.10.2020 wherein it was mentioned in the offer of possession that the respondent has received an occupation certificate from the concerned authority along with tax invoices.
- XII. That the complainants all this while has been communicating with the respondent no. 1 and has been raising all the objections, as regards the shortcomings of the project. However, the respondent no. 1 never addressed the issues raised by them seriously and had always been in a denial mode without ever looking into the issues. In fact the complainants had all this while raised the issue of non- receipt of



assured return as promised and has also made specific complaints regarding absence of collaboration agreement with Bridge Street as the complainants have paid extra for the unit.

XIII. That the relative of the complainants had visited the unit in October 2020 and the same was not ready. In fact, the complainants personally visited the unit in October 2021 and even after one year from the date of issuance of the alleged offer of constructive possession the unit was not ready. The said unit is a still incomplete as only a super structure is standing without any furnishing and finishing. It is submitted that the Unit is a bare-shell and the same is not fit for possession. The complainants that the alleged OC obtained by the respondent has been obtained by playing fraud upon the authority and by illegal means as the unit is still under construction and the same is not fit for possession. It is relevant to point out that in terms of the agreement and understanding between the parties the respondent was to deliver possession of the ready unit to the complainants. However, the respondent has failed in offering the possession of ready unit to the complainants and the unit which allegedly is being offered for possession is not even ready. That thereafter respondent no. 1 had sent a reminder letter, JOY/RTM/B/0576 dated 23.10.2020 with reference to the offer of possession for the amount Rs.41.91,853/-.

XIV. That the respondent after being confronted with all the shortcomings, just to pressurized the complainant and to extort money from the

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complainant, issued pre-termination Letter dated 16.01.2021 wherein the respondent raised an illegal demand of Rs.41,09,198/- which was much more than the balance consideration which the complainants were liable to pay to the respondent no. 1 had the respondent no.1 performed all its obligations and promises. Thereby, threatening the complainants of forfeiture of the amount deposited by them. In case the complainants does not fall in line and does not pay to the respondent the demanded amount. It is relevant to point out that the respondents being in commanding position having received more than Rs.37,89,953/- from the complainants. Further, the respondent no. 1 has been threatening the complainants to ensure that the complainants pays the illegal demands raised by it. It is relevant to point out that the amount demanded by the respondent no. 1 in reminder dated 23.10.2020 was more than the amount demanded by the respondent in the pre-termination letter.

- XV. That the complainants had sent a detailed reply dated 22.02.2021 to the pre termination notice issued by the respondent. It is relevant to point out that neither any reply was received by the complainants nor the defects pointed out by the complainants in the reply were ever rectified. It is submitted that the possession of the Unit/flat was promised by the end of 3rd Quarter 2018, since the promised date it has been more than 2 years and the unit is not even complete. Further in the reply the complainants have also raised various other issues

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which were never resolved by the respondent. The pre- termination notice was nothing but extortive in nature being violation of the law.

XVI. Furthermore, it would be relevant to point out here that "time along with the promised amenities and assured returns" were sine qua non for the complainants to make payment and take possession. That the complainants had send many e-mail regarding the unpaid Assured returns promised by the respondents, but have not received the payment towards the assured return from the respondent since Nov 2019 towards assured returns.

XVII. That through this complaint the complainant herein wishes that the principle amount deposited by the complainant with the respondent in lieu of the allotment to be returned back to the complainant herein along with an interest of 24% p.a. and/or the State Bank Of India highest marginal cost of lending rate plus two percent of the said principal amount in lieu of non-delivery of possession of flat unit and further, an amount of Rs.10,00,000/- as compensation towards mental and physical harassment caused by the respondents herein.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):
 - i. Direct the respondent to restore the allotment of flat no. 1218 and recall termination letter dated 02.08.2021.
 - ii. Direct the respondent to handover the physical possession of the flat no. 1218 in the said project.

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- iii. Direct the respondent to pay the additional amount of Rs.20,00,000/- paid by the complainant towards finishing services of bridge-street.
 - iv. Direct the respondents severally and jointly to pay the amount of Rs.6,48,970/- as rental return to the complainant as per clause 5(a) of addendum of unit buyer's agreement (Annexure-4).
 - v. Direct the respondents to severally and jointly pay a sum of Rs.3,39,936/- for the unpaid assured return.
 - vi. Direct the respondents to grant such a penalty, as may deem fit and proper by this authority, towards the delay in offering of possession of the flat which was promised in the Year 2018 until the day such possession was actually offered at the rate of 18 % per annum along with pendent lite and future compensation at the same rate till the date of actual realization of the amount.
 - vii. Direct the respondent to pay interest on the State Bank of India highest marginal cost of lending rate plus two percent of the principle amount paid by the complainant to the respondents herein, towards exemplary damages, mental agony and harassment to the complainant.
 - viii. Direct the respondents severally and jointly to pay a sum of Rs.2,00,000/- to the complainant towards the cost of litigation.
 - ix. Direct the respondents to pay for the rent of the interim accommodation of the complainant until the position of the flat unit is offered.
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. The respondent no. 1 filed reply on 1312.2021. However, neither the respondent no. 2 put in appearance nor have filed any reply. In view of the

same, the defence of the respondent no. 2 is hereby struck off and proceeded ex parte.

D. Reply by respondent no. 1:

6. The respondent no.1 has contested the complaint on the following grounds:-

- i. That the complainants being interested in the real estate development of the respondent no.1, known under the name and style of "AIPL Joy street" located at Sector 66, village Maidawas and Badshahpur, Gurugram, Haryana booked a service apartment space vide an application form, subsequently, was allotted unit no. 1218, having super area 686.74 sq. ft. and carpet area 307.93 sq. ft. located on 12th floor vide allotment letter dated 30.07.2018. Thereafter an agreement for sale dated 27.08.2018 was executed between the parties along with an addendum dated 27.08.2018. It needs to be categorically noted that the intention of the complainants have been to take the constructive possession of the unit for commercial use, as is evident from clause H, 5, 7.1 & 22 of the agreement.
- ii. That the respondent no. 1 had entered into a collaboration agreement dated 25.05.2016 with JNB Management and Bridge Street Accommodations London Limited for the operation and management of serviced apartments on 10th, 11th, 12th and 14th floors of the project, as is evident from the addendum duly executed between the parties.

- iii. That the complainants have not approached the court with clean hands as has nowhere divulged the authority with the fact that have been in constant defaults in making good on their part of the obligation. At the very outset, it needs to be categorically highlighted that as per clause I of the agreement, the allottee agreed that it shall not delay the payment or withhold the payment, however, the complainants have not made any payment since 24.09.2020 and have made delayed payments as is evident from the account statement dated 15.01.2022 in violation of the said clause of the agreement.
- iv. That it needs to be specifically noted that, vide the agreement dated 27.08.2017, the respondent/promoter at the request of the complainant/allottee agreed to put the unit, on lease by way of merging, from the date of signing of the agreement.
- v. That it needs to be categorically noted that, vide the addendum, the complainants agreed to put the unit in a rental pool for a period of 25 years. That it was also agreed between the parties that the complainants shall be entitled to a minimum rental return of Rs.46,355/- per month, for up to 3 years from the date of notice of offer of possession. This revenue share was subject to an increase upon calculations being made up by the audited report.
- vi. That the relationship between the parties is contractual in nature and is governed by the agreement executed between the parties. The rights and obligations of the parties flow directly from the agreement. At the



outset, it must be noted that the complainants willingly consciously and voluntarily entered into the agreement after reading and understanding the contents thereof to their full satisfaction. Hence, the complainants agreed to be bound by the terms and conditions in the application form and the agreement.

- vii. That the respondent has always fulfilled its obligations as per the terms and conditions of the agreement and the application form. That after completing all the formalities and obtaining permissions from the concerned authorities, the respondent applied for occupancy certificate on 16.07.2020 and rightly received the occupancy certificate on 28.09.2020, subsequent to which, the constructive possession was offered to the complainants on 05.10.2020. It needs to be categorically noted at this instance that there has been no delay in the offer of possession of the unit. The due date of delivery of possession was December 2022 as per clause 5 of the agreement read with clause j of the application form. The possession has been offered two years and two months in advance, before the expiry of due date. The offer of possession clarified that only constructive possession shall be offered and not the physical possession, as has been agreed to between the parties.
- viii. That the respondent no. 1 is one of the renowned developers in the industry. The act of timely offer of possession on part of the respondent no. 1 needs to be appreciated and seen in line with the fact that the

respondent no. 1 has not stood in breach of any obligation. However, on the other hand, the complainants/allottee have miserably violated the terms of the agreement. It needs to be categorically noted that as per clause 7.3 of the agreement, the complainants were obligated to take constructive possession of the unit within 30 days from the notice of offer of possession after having cleared the dues, however, even after over 1.5 years, the same has not been done. That the complainants assented to pay monies against the unit as per the payment plan, schedule F of the agreement for sale and the clause I of the agreement. However, the complainants have defaulted in making the payment against the unit and taking the possession of the unit. The complainants stopped making payment towards the unit after September 2020 and continued defaulting as is evident from the account statement annexed herewith. The upon the default of the complainants, the respondent no. 1 sent reminders at various instances from October 2020 till May 2021, however, even thereafter, the complainants have failed to make the payments and take the constructive possession of the unit.

- ix. That the total demand raised by the respondent no. 1 towards the unit inclusive of total sale consideration and other charges is Rs.84,12,409/- and the complainants have only made a payment of Rs.37,89,953/- which is just 40% of the total demand raised as is evident from the account statement dated 15.01.2022. It is a grave violation of the terms and conditions of the agreement and complainants cannot be allowed to



take benefit of their own wrong. Hence, the complaint is liable to be dismissed with costs against the complainants.

- x. That due to non-payment and not taking the constructive possession of the unit, the complainants stand in default as per clauses 9.3(i) and (ii) of the agreement. That upon the breach of terms and conditions of the agreement by the complainants, the respondent no. 1 has the right to terminate the unit after intimating the complainants as per terms of Clause 9.3(iii) of the agreement.
- xi. That in terms of the above-mentioned clause 9.3(iii), upon breach of the terms and conditions of the agreement, the respondent no. 1 sent an intimation prior to termination letter on 16.01.2021. Despite this, the complainants failed to make the requisite payments. Subsequently a termination letter was sent to the complainants on 02.08.2021.
- xii. That due to non-payment by the complainants and not taking possession of the unit, the assured rental as per the addendum could not be paid by the respondent no. 1. That thereafter, after the termination of the unit, it marked the termination of the contractual relationship between the parties.
- xiii. That the respondent no. 1 has always fulfilled its obligations and has shown an exemplar conduct as a real estate developer. That the respondent no. 1 has also rightly paid the assured returns as per the clause 21 of the agreement. The complainants have paid a sum of Rs.36,91,914/- by 24.09.2018, as is evident from that accounts

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statements. Thereafter, the respondent no. 1 had rightly paid or adjusted the assured returns as the case may be from September 2018 till September 2020. The assured return from March 2020 to September 2020 amounting to Rs.87,816/- were adjusted on final demand on 29.09.2020 along with the payment of interest @12% amounting to of Rs.1,449/- upon the delay in payment of assured returns. The same are evident from the account statement and the assured return calculation sheet. Further, it needs to be categorically noted that the payment of assured returns had to be made only till the date of notice of offer of possession, which was made on 05.10.2020, thus, in accordance with the same, the respondent no. 1 has rightly made the payments towards the assured return. That the respondent no. 1 had abided by its terms and conditions at every point of time and the present case is merely to harass the respondent no. 1.

- xiv. That the complainants, inter alia, seeks assured returns, which, firstly, have been completely and rightly paid by the respondent no. 1 even when the payments have not been completely made by them, and secondly, cannot be paid in the present instance. It is categorically submitted, that the payment of such deposits is banned as per the prevalent laws. On 21.02.2019, the Central Government passed an ordinance, Banning of Unregulated Deposits, 2019, to stop the functioning of unregulated deposits, the Assured Returns Scheme given to the complainants fell under the scope of this ordinance and the payment of such returns became wholly illegal. That later, an act by the



name ***The Banning of Unregulated Deposits Schemes Act, 2019*** (“the **BUDS Act**”) was notified on 31.07.2019 and came into force. That under the said BUDS Act all the unregulated deposit schemes such as Assured Returns have been banned and made punishable with strict penal provisions. It falls within the category of Unregulated Deposit Scheme as under section 2(17) of the BUDS Act and is banned under section 3 of the BUDS Act. That being a law-abiding company, by no stretch of imagination, the respondent no. 1 can continue to make the payments of the assured returns in violation of the BUDS Act. That until the implementation of the said Act, the assured returns have been rightly paid by the respondent no. 1.

That after banning of the assured returns from the BUDS Act, there exists no liability of the respondent no. 1 to pay the assured returns. In any case, whatsoever, the respondent no. 1 has rightly paid all the amounts towards assured returns, as per the terms and conditions of the agreement.

- xv. That the respondent no. 1 has always attempted to benefit the complainants in the best possible manner. That the respondent no. 1, in its utmost *bonafide* offered special offer on early payment vide the letter dated 22.02.2019 and also offered special pre-payment incentive offer @15% vide its letter dated 12.08.2019 to the complainants.
- xvi. That in light of the *bona fide* conduct of the respondent no. 1, the possession, having been offered to the complainants, non-existence of

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cause of action, and the delay in making payments by the complainants, this complaint is bound to be dismissed with costs in favor of the respondent no. 1.

7. The complainants have filed written submissions and the same were taken on record and who reiterated their earlier version as set up in the pleadings.
8. 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 submissions made by the parties.

E. Jurisdiction of the authority:

9. 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

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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.

F. Findings on the relief sought by the complainants:

F.1 Direct the respondent to restore the allotment of flat no. 1218 and recall termination letter dated 02.08.2021

10. The complainants were allotted unit no. 1218, on 12th floor, (service apartments), in the project "AIPL Joy Street" by the respondent/builder for a total consideration of Rs.73,83,828/-. A buyer's agreement was executed on 27.08.2018. The possession of the unit was to be offered within stipulated time period i.e., December 2022. Therefore, the due date of possession comes out to be 31.12.2022.



11. That the subject unit was booked under 50:50 payment plan and it has raised various concerns to the respondent w.r.t. non-payment of assured return since November 2019. It further submitted that at the time of offer of possession on 05.10.2020, it visited the site and observed that the subject unit of the complainant is still not complete despite it agrees to pay extra Rs.20,00,000/- to be serviced by Bridge-Street. It further raised concern to the respondent vide letter dated 22.02.2021 & 16.09.2021 against pre-termination letter dated 16.01.2021 and termination letter dated 02.08.2021. The complainant vide written submissions dated 21.02.2023 submitted that they never denied payment to the respondent and the main attraction for consideration of purchase of unit was service by Bridge street and further submitted that the unit was not as per the specification of buyer's agreement and mere obtaining occupation certificate does not render the unit complete.
12. The respondent on the other hand submitted that the subject unit was booked under leasing agreement and in view of same, it was offered constructive offer of possession vide letter dated 05.10.2020 after obtaining OC on 28.09.2020 along with demand. Despite issuance of various reminders, it failed to make payment towards consideration of allotted unit. It further issued pre-termination letter dated 16.01.2021 followed by termination letter dated 02.08.2021.
13. Accordingly, the complainants failed to abide by the terms of the agreement to sell executed inter-se parties by defaulting in making payments in a time

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bound manner as per payment schedule. The reluctant behavior of complainants led to issuance of notice of termination/cancellation by the respondent on 02.08.2021. Now, the question before the authority is whether this cancellation is valid or not?

14. The authority has gone through the payment plan, which was duly signed by both the parties, which is reproduced for ready reference: -

Payment Plan						
Milestone Name	BSP	PLC	DC	IFMS	Other Charges	Total payable in Rs.
At the time of booking	Any	-	-	-	-	4,46,428.38
30 days from date of booking	10.00%	0.00%	10.00%	0.00%	0.00%	2,12,841.82
90 days from date of booking	40.00%	0.00%	40.00%	0.00%	0.00%	26,37,081.60
On offer of possession	50.00%	0.00%	50.00%	100.00%	0.00%	33,65,026.00
Total	100.00%	-	100.00%	100.00%	-	66,61,378.00

15. In the present case, the complainants booked the aforesaid unit under 50:50 payment plan and paid an amount of Rs.37,89,983/- towards total consideration of Rs.73,83,828/- constituting 61.32%. As per 7.1 of agreement enumerates that the unit was allotted under leasing agreement and process vides clause for constructive possession of the subject unit. The respondent-builder cancelled the unit of the complainants on account of non-payment of demand raised vide offer of constructive possession dated 05.10.2020 followed by various reminders as specified in the table above. The aforesaid demands were followed by pre-cancellation and cancellation letter dated 16.01.2021 & 02.08.2021 respectively.



16. It is observed by the authority that as per section 19(6) & 19(7) of Act of 2016, the allottees were under obligation to make payments towards consideration of allotted unit as per agreement to sale dated 27.08.2018. The respondent has given sufficient opportunities to the complainants and finally cancelled the allotted unit of the complainant vide letter dated 02.08.2021. Therefore, the cancellation dated 02.08.2021 is held to be valid.
17. The respondent company has obtained the occupation certificate for the project of the allotted unit was on 28.09.2020. Thereafter, the respondent/promoter issued demands letter and further, issued termination/cancellation letter to the complainants. The respondent cancelled the unit of the complainants after giving adequate demands notices. Thus, the cancellation of unit is valid. Further, as per clause 9.3 (iii) of the agreement to sell, the respondent/promoter have right to cancel the unit and forfeit the earnest money in case the allottee breached the terms and conditions of the agreement to sell executed between both the parties. clause 9.3 (iii) of the agreement to sell is reproduced as under for ready reference:

*9.3(iii) In case of Default by Allottee under the condition listed above continues for a period beyond 90 (ninety) days after notice from the Promoter in this regard, the Promoter may cancel the Allotment of the Unit in favour of the Allottee and refund the money paid to the Promoter by the Allottee by forfeiting the Booking Amount, interest component on delayed payment and non-payment of any due payable to the Promoter. The rate of interest payable by the Allottee to the Promoter shall be the State Bank of India highest marginal cost of lending rate plus 2% (two percent). Subject to para 2.2, the balance amount of money paid by the Allottee shall be returned by the Promoter to the Allottee within 90 (ninety) days of such cancellation. **On such default, the Agreement and any liability of the Promoter arising out of the same shall thereupon stand terminated. Provided that the Promoter shall intimate the***

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Allottee about such termination at least 30 (thirty) days prior to such termination.

18. The respondent company has already obtained the occupation certificate for the project of the allotted unit on 28.09.2020. Thereafter, the respondent/promoter issued demands letter and further, issued termination/cancellation letter to the complainants. The respondent cancelled the unit of the complainants after giving adequate demands notices. Thus, the cancellation of unit is valid. Further, the complainants-allottees has violated the provision of section 19(6) & (7) of Act of 2016. However, there is nothing on record to show that the amount of the complainant has been refunded to him after deduction as per relevant clause of agreement. (Clause h application form)
19. Now, the second issue for consideration arises as to whether after cancellation the balance amount after deduction of earnest money of the basic sale consideration of the unit has been sent to the claimants or not. Though vide letter dated 02.08.2021, the details of amount to be returned after deductions have been given but it is pleaded by the allottees that they have not received any amount after cancellation of the unit. Even otherwise a perusal of calculations given in letter dated 02.08.2021 shows that besides the amount deducted on account of brokerage, delayed interest, and forfeitable one, more than 50% of the paid-up amount has been deducted which is nothing but in the nature of penalty as per section 74 of the Contract Act, 1872. The issue with regard to deduction of earnest money on cancellation of a contract arose 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., (2015) 4 SCC 136, and 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 section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 **Ramesh Malhotra VS. Emaar MGF Land Limited** (decided on 29.06.2020) and **Mr. Saurav Sanyal VS. M/s IREO Private Limited** (decided on 12.04.2022) and followed in CC/2766/2017 in case titled as **Jayant Singhal and Anr. VS. M3M India Limited** decided on 26.07.2022, held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was framed providing 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."

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20. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complaints after deducting 10% of the basis sale consideration and return the remaining amount along with interest at the rate of 10.75% (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 termination/cancellation 02.08.2021 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*. The amount paid on account of assured return may be adjusted from the refundable amount.

- F.II Direct the respondent to handover the physical possession of the flat no. 1218 in the said project.**
- F.III Direct the respondent to pay the additional amount of Rs.20,00,000 paid by the complainant towards finishing services of bridge-street.**
- F.IV Direct the respondents severally and jointly to pay the amount of Rs.6,48,970/- as rental return to the complainant as per clause 5(a) of addendum of unit buyer's agreement (Annexure-4).**
- F.V Direct the respondents to severally and jointly pay a sum of Rs.3,39,936/- for the unpaid assured return.**
- F.VI Direct the respondents to grant such a penalty, as may deem fit and proper by this authority, towards the delay in offering of possession of the flat which was promised in the Year 2018 until the day such possession was actually offered at the rate of 18 % per annum along with pendent-lite and future compensation at the same rate till the date of actual realization of the amount.**

21. In view of finding of the Authority w.r.t. restoration of unit and setting aside of cancellation of the unit, the aforesaid relief no. 2-6 becomes redundant.

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- F.VII Direct the respondent to pay interest on the State Bank of India highest marginal cost of lending rate plus two percent of the principle amount paid by the complainant to the respondents herein, towards exemplary damages, mental agony and harassment to the complainant.
- F.VIII Direct the respondents severally and jointly to pay a sum of Rs.2,00,000/- to the complainant towards the cost of litigation.
- F.IX Direct the respondents to pay for the rent of the interim accommodation of the complainant until the position of the flat unit is offered.

22. The complainant in above-mentioned reliefs is seeking 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. 2021-2022 (1) RCR (c) 357*, 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. Therefore, the complainant is at liberty to approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the Authority:

23. 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 respondents are directed to refund the paid-up amount of Rs.37,89,983/- after deducting the earnest money which shall not exceed the 10% of the basic sale consideration of Rs.66,61,378/-. The

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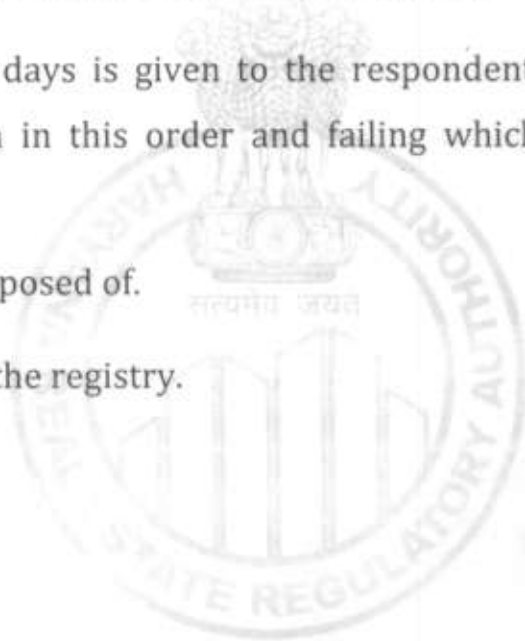
amount paid on account of assured return may be adjusted from the refundable amount and shall return the balance amount to the complainant. The refund should have been made on the date of cancellation i.e., 02.08.2021. Accordingly, the interest at the prescribed rate i.e., 10.75% is allowed on the balance amount from the date of cancellation till the actual date of refund of the amount within the timelines provided in rule 16 of the rules, 2017.

- 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.

24. Complaint stands disposed of.

25. File be consigned to the registry.

Dated: 28.09.2023



V.L - 

(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram

HARERA
GURUGRAM