

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

<b>Complaint no.</b> :	<b>2105 of 2022</b>
<b>Date of complaint</b> :	<b>20.05.2022</b>
<b>Order pronounced on:</b>	<b>19.10.2023</b>

Sumit Garg

R/o: - 602, Tower no. 12, Orchid Petals, Sector 49,  
Sohna Road, Gurugram 122018.

**Complainant**

Versus

M/s VSR Infratech Pvt. Ltd.

**Regd. Office at:** - Plot no. 14, GF, Institutional area,  
Sector 44, Gurugram, Haryana.

**Respondent**

**CORAM:**

Sh. Vijay Kumar Goyal

**Member**

**APPEARANCE:**

Sh. Akhil Aggarwal (Advocate)

Sh. Shriya Takkar (Advocate)

Complainant

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 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 thereunder 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	"114 Avenue", Sector 114 , Gurugram, Haryana
2.	Project area	2.968 acres
3.	Nature of project	Commercial Colony
4.	RERA Registered/ Not Registered	Registered vide no. 53 of 2019 dated 30.09.2019
5.	<b>DTPC License no.</b>	72 of 2011 dated 27.07.2011
	Validity upto	20.07.2024
	Name of licensee	AMD Estate & Developers Pvt. Ltd
6.	Unit no.	5A-04 (Page no. 59 of complaint)
7.	Unit measuring	806 sq. ft. (Page no. 9 of complaint)
8.	Allotment Letter	05.07.2012 (Page 27 of complaint)
9.	Date of execution of floor buyer's agreement	Not executed
10.	Possession clause is taken from draft of sample buyer's agreement	<b>32.</b> That the company shall give possession of the said unit within <b>36 month of signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later.</b>
11.	Date of start of excavation	15.03.2012
12.	Due date of possession	15.03.2015 *Note: Date of signing of buyer's agreement is not given. So, the due date is calculated from the date of start of excavation i.e., 15.03.2012
13.	Total sale consideration	Rs. 46,88,431/-

14.	Total amount paid by the complainant	<b>Rs. 33,07,483/-</b>
15.	Occupation certificate dated	17.02.2021 (As per page no. 188 of reply)
16.	Offer of possession	17.04.2021 (As per page no. 191 of reply)
17.	Surrender letter	14.12.2021 (annexure C-4, page 48 of complaint).
18.	Reminder letters	11.04.2012, 12.08.2013, 24.08.2013, 11.06.2018, 31.05.2017, 06.07.2017 (page 88 of the reply)
19.	Termination/cancellation letter	10.02.2022 (page 194 of reply)

**B. Facts of the complaint:**

3. The complainant has made the following submissions: -

- I. That the complainant was approached by the respondent in 2011 regarding the lucrative investment in the project of the respondent. The respondent made tall assurance and promises. However, to the surprise of the complainant all such claims proved to be completely false and were merely the tactic of the respondent to lure the complainant invest into the project.
- II. That based on the tempting and magnificent claims, assurances and proposals of the respondent, the complainant was lured into buying a unit in the project at the basic sale price of Rs.46,88,431/-. In pursuance of the same, the respondent raised a huge demand from the complainant of Rs.9,37,686/- on 21.12.2011 as booking amount which is almost equivalent to 20% of the BSP.
- III. That even without issuing any allotment letter, the respondent with malicious intentions demanded and collected an amount of Rs.14,54,832/- and the same amounts to almost 30% of the BSP.

- IV. That the allotment letter was finally issued by the respondent to the complainant only on 05.07.2012. However, for reasons best known to the respondent, it has not got executed the builder buyer agreement till date. The complainant has made various visits and phone calls to respondent but to no avail and the respondent has not entered into any builder buyer agreement with the complainant till date.
- V. That the respondent has already collected Rs. 33,07,483/- from the complainant under the threat of forfeiting the payment already made as earnest deposit if the balance payment is not made as per the demand raised by the respondent.
- VI. That failing to give possession of the unit even after the lapse of ten years is unreasonable and cannot be justified by any stretch of imagination. Even otherwise the said time period is also strictly against the law as the licenses issued by the DTCP for development of the project are also time-bound. Therefore, the respondent is in material violation of law as such a huge delay is not just beyond any logic and reason but is also unjustified.
- VII. That the complainant has made multiple calls and visits to the respondent's office but it turned deaf ears to the request of the complainant. To the utter shock and surprise, without even bothering to reply to the various requests of the complainant, the respondent started threatening the complainant of cancelling the unit and kept on raising illegal demands when the project was far from complete as per the construction link plan.
- VIII. That till date the respondent has not informed the complainant about status of the project in any manner, let alone delivering the possession of the unit. This coupled with the respondent's failure to execute the buyer agreement with the complainant even after a lapse of ten years

while having already collected a huge sum of Rs.33,07,483/- abundantly and beyond any doubt clearly and abundantly establish that the respondent had no intention of completing the project since beginning and it was a willful and calculated move of the respondent to make wrongful gains at the costs and expense of the complainant by resorting to fraud, cheating and criminal breach of trust.

IX. That as per the payment schedule, the payments were to be made as per the construction linked payment plan, i.e. payments were to be made as per various stages of construction. However, the respondent demanded and accepted payments for upto second floor which is more than 60% of the BSP, i.e. Rs.46,88,431/- from the complainant by December, 2013 when as per the above-mentioned payment plan, the respondent could have raised a demand only at the time of attaining such construction milestones. However, the complainant has reliable learnt that the construction of the building had barely started even in 2016. The same if viewed from the very fact that the respondent got the project registered with HARERA much belatedly only in 2019, clearly establish that the respondent collected the money from the complainant by fraudulently misrepresenting the stage of construction and infact diverted the entire payment collected from the complainant towards its own use and to make unlawful gains at the costs and expense of our client when the same could only be used for construction of the project. Further, revision of building plans of the project in 2019 also abundantly establish that the payments demands raised by the respondent were nothing but fraudulent as the respondent had claimed to have completed the super structure way back in 2018.

X. That the above fraudulent collection of funds from the complainant and diversion of the same for personal use by the respondent gets

abundantly and clearly established from the very fact that if the respondent had started already achieved more than 60% construction progress way back in 2013 as claimed by it, there was no reason for the respondent to have failed in giving the possession of the above-mentioned unit even after ten long years. This clearly and without any doubt, abundantly establish that the respondent had collected various instalments from the complainant as per construction-linked payment plan by misrepresenting the progress of work and the respondent has committed serious fraud on the complainant by depriving him of his hard earned money for its wrongful gains and profits.

- XI. That when the respondent deliberately chose to ignore the requests raised by the complainant, he again made various visits and phone calls to the respondent for refund of the money. However, it outrightly denied to refund the hard-earned money of the complainant which is contrary to the law.
- XII. That finally the complainant was constrained to issue a legal notice dated 14.12.2021 to the respondent through its counsel for refund of the entire amount. To the utter shock and surprise of the complainant, the respondent chose to outrightly and in high-handed manner not to reply to the said legal notice, let alone refunding the money. Infact, in absolute regard to law and in abuse of its dominance and authoritative position, the respondent issued a termination letter dated 10.02.2022 to the complainant in order to further harass him and forfeited an amount of Rs.22,56,996/- without any basis.
- XIII. That the cause of action first arose on 21.12.2011 when the said unit was booked and on 05.07.2012 when the respondent allotted the said unit to the complainant by making false representations, cause of action then arose on all further dated when the respondent fraudulently

obtained various payments and made various illegal demands from the complainant and forced the complainant to deposit more than 60% of the BSP without even executing and signing BBA, the cause of action further arose on 14.12.2021 and 10.02.2022 when the complainant issued the legal notice and the termination letter was issued by the respondent to strip the complainant of its basic rights under law.

XIV. That the Authority has the jurisdiction to adjudicate the complaint and there is no other pending complaint, petition or appeal in any court or tribunal with regard to the present complaint.

**C. Relief sought by the complainant:**

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

- I. Direct the respondent to refund the entire amount of Rs.33,07,483/- paid by the complainant to the respondent.
- II. Direct the respondent to pay an interest of 18% per annum from the date of receipt of the payment from the complainant till the date of refund.
- III. Direct the respondent to pay Rs.2,00,000/- towards legal costs incurred by 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/builder.**

6. The respondent has contested the complaint by filing reply on the following grounds: -

- i. That at the outset, the respondent denies each and every statement, submissions and contentions set forth in the complaint under reply to the extent the same are contrary to and inconsistent with the true and complete facts of the case and the submissions made on behalf of the

respondent in the present reply. The respondent further humbly submits that the averments and contentions, as stated in the complaint under reply, may not be taken to be deemed to have been admitted by the respondent, save and except what are expressly and specifically admitted and the rest may be read as travesty of facts.

- ii. That the complainant thus has approached the Authority with unclean hands and have suppressed and concealed material facts and proceedings which have a direct bearing on the very maintainability of the purported complaint and if there had been disclosure of these material facts and proceedings, the question of entertaining the purported complainant would not have arisen.
- iii. That the complainant applied for allotment of a unit in the project 114 Avenue vide application form. Accordingly, the complainant was allotted unit bearing no. 5A-04 vide allotment letter dated 05.07.2012. As per the terms of the application form and the allotment letter the buyer's agreement was to be executed and registered in the furtherance of the allotment letter. The buyer's agreement was sent to the complainant for execution at his end vide letter dated 27.03.2015. The terms and conditions of the application form and the allotment letter dated 05.07.2012 were the indicative terms and conditions of the agreement to be executed between the parties. The complainant for the reasons best known to him did not perform his contractual obligation and did not execute the buyer's agreement. As per the application form it was the duty of the complainant to execute the Buyer's agreement.
- iv. That the respondent raised demands as per the terms of the agreed payment plan and in terms of the application form and the allotment letter. However, the complainant failed to make the timely payments



of the said demands despite the complainants' commitment to strictly adhere to the payment plan. The complainant failed to fulfill the contractual obligation of making timely payment even after the issuance of various reminders.

- v. That the total cost of the unit in question is Rs.46,88,431/- plus EDC, IDC, taxes and other charges. The complainant has till date made a payment of Rs. 32,97,713/- only and Rs. 13,90,718/- plus interest is still outstanding at his end. As per the application form, the complainant in addition to the basic sale price was also liable to make other payments such as EDC/IDC, taxes etc.
- vi. That since the complainant failed to execute the buyer's agreement, there is no specified timeline for handing over of possession to the complainant and hence time was not the essence of the contract. Despite exercising diligence and continuous pursuance of project to be completed, project of the respondent could not be completed for the following reasons:
  - i. That it is pertinent to mention here that the project in question was launched in the year 2010 and is right on the Dwarka expressway, which was supposed to be completed by the State of Haryana by the end of 2012. The star purpose of launching the project and object of the complaint buying the project was the connectivity of Dwarka expressway which was promised by the State Government to be completed in the year 2012. It is reiterated that the only approach road to the project in this Dwarka Expressway which is still not complete and is likely to take another year or so. There being no approach road available it was initially not possible to make the heavy trucks carrying construction material to the project site and after a great difficulty and getting some kacha paths developed, materials could be supplied for the project to get completed which took a lot extra time. Even now the Govt has not developed and completed the basic infrastructure, despite the fact that EDC/IDC were both deposited with the State Government on time. The Dwarka Expressway was earlier scheduled to be completed by the year 2012, by the State Government of Haryana, but later failed to develop the said road. In the year 2017, NHAI ( National Highway Authority of India) joined to complete the Dwarka Expressway, but again both State Government as well as NHAI again missed the deadlines and still the Expressway is incomplete, now likely to be

completed by the year 2022, if the deadline is adhered to be these agencies. That in this view of the circumstances as detailed above the respondent developer can by no means be expected to complete a project which does not even have an approach road to be constructed by the State. Thus the respondent cannot be held accountable for the delay in the project and State of Haryana and NHAI, are responsible, hence answerable for the delay in completing Dwarka expressway, which in turn has caused the delay of the present project. That completion of Dwarka expressway which in turn affected the completion of the project in question was beyond the control of the respondent.

- ii. It is submitted that in the year, 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) were regulated. The Hon'ble Supreme Court directed framing of Modern Mineral Concession Rules. Reference in this regard may be had to the judgment of "**Deepak Kumar v. State of Haryana, (2012) 4 SCC 629**". The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce in the NCR as well as areas around it.
- iii. The company faced the problem of sub soil water which persisted for a period of 6 months and hampered excavation and construction work. The problem still persists and we are taking appropriate action to stop the same.
- iv. On 19<sup>th</sup> February 2013, the office of the Executive engineer, Huda, Division No. II, Gurgaon vide Memo No. 3008-3181 has issued instruction to all Developers to lift tertiary treated effluent for construction purpose from Sewerage treatment plant Behrampur. Due to this instruction, the company faced the problem of water supply for a period of 6 months.
- v. The company is facing the labour problem for last 3 years continuously which slowed down the overall progress of the project and in case the company remains to face this problem in future, there is a probability of further delay of project.
- vi. The contractor of the project stopped working due to his own problems and the progress of project was completely at halt due to stoppage of work at site. It took almost 9 months to resolve the issues with contractor and to remobilize the site.
- vii. The building plans were approved in January 2012 and company had timely applied for environment clearances to competent authorities, which was later forwarded to State Level Environment Impact Assessment Authority, Haryana. Despite of our best endeavor we only got environment clearance certificate on 28.05.2013 i.e. almost after a period of 17 month from the date of approval of building plans.
- viii. The typical design of fifth floor slab casting took a period of more than 6 month to design the shutting plans by structural engineer which hampered the overall progress of work.
- ix. The infrastructure facilities are yet to be created by competent authority in this sector is also a reason for delay in overall project. The drainage,

- sewerage and other facility work not yet commenced by competent authority.
- x. It is worth mentioning here that there was a stay on construction in furtherance to the direction passed by the Hon'ble NGT. In furtherance of the above mentioned order passed by the Hon'ble NGT.
  - xi. That the sudden surge requirement of labour and then sudden removal has created a vacuum for labour in NCR region. That the projects of not only the respondent but also of all the other developers/builders have been suffering due to such shortage of labour and has resulted in delays in the project's beyond the control of any of the developers. That in addition the respondent states that this further resulted in increasing the cost of construction to a great extent.
  - xii. That the said fact of labour shortage can be substantiated by way of newspaper articles elaborating on the above mentioned issues hampering the construction projects in NCR. That this was certainly never foreseen or imagined by the opposite party while scheduling the construction activities. That it is submitted that even today in current scenario where innumerable projects are under construction all the developers in the NCR region are suffering from the after-effects of labour shortage on which the whole construction industry so largely depends and on which the respondent have no control whatsoever.
  - xiii. That in addition the current Govt. has on 8<sup>th</sup> Nov. 2016 declared demonetization which severely impacted the operations and project execution on the site as the labourers in absence of having bank accounts were only being paid via cash by the sub-contractors of the company and on the declaration of the demonetization, there was a huge chaos which ensued and resulted in the labourers not accepting demonetized currency after demonetization.
  - xiv. That in July 2017 the Govt. of India further introduced a new regime of taxation under the Goods and Service Tax which further created chaos and confusion owing to lack of clarity in its implementation. That ever since July 2017 since all the materials required for the project of the company were to be taxed under the new regime it was an uphill task of the vendors of building material along with all other necessary materials required for construction of the project wherein the auditors and CA's across the country were advising everyone to wait for clarities to be issued on various unclear subjects of this new regime of taxation which further resulted in delays of procurement of materials required for the completion of the project.
  - xv. Further, Developer was faced with certain other force majeure events including but not limited to non-availability of raw material due to various stay orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal thereby stopping/regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. That in addition to above all the projects in Delhi NCR region are also affected by the Blanket stay on construction every year during winters on account of AIR pollution which leads to further delay the

projects. That such stay orders are passed every year either by Hon'ble Supreme Court, NGT or/and other pollution boards, competent courts, Environment Pollution (Prevention & Control) Authority established under Bhure Lal Committee, which in turn affect the project. That to name few of the orders which affected the construction activity are as follows: (i) Order dated 10.11.2016 and 09.11.2017 passed by the Hon'ble National Green Tribunal, (ii) Notification/ orders passed by the Pollution control board dated 14.06.2018, 29.10.2018 and 24.12.2018 and (iii) Letter dated 01.11.2019 of EPCA along with orders dated 04.11.2019, 06.11.2019 and 25.11.2019 of the Hon'ble Supreme Court of India.

- xvi. It is further submitted that the Government of India declared nationwide lockdown due to COVID 19 Pandemic effective from 24<sup>th</sup> March, 2020 midnight. It is submitted that the construction and development of the project was affected due to this reason as well. This Hon'ble Authority has vide its order dated 26.05.2020 invoked the force majeure clause.
- vii. That after making sincere efforts despite the force majeure conditions, the respondent completed the construction and thereafter applied for the occupancy certificate on 15.07.2020.
- viii. That the OC has been received by the respondent on 17.02.2021. That immediately after the receipt of the OC on 17.02.2021, the respondent offered possession vide letter dated 17.04.2021 and requested the complainant to come forward and clear his dues and take possession. Since the complainant did not come forward to clear his dues and take possession of the unit, the respondent was constrained to issue a termination letter dated 10.02.2022.
- ix. That the respondent was constrained to cancel the unit on account of non-execution of the buyer's agreement and non-payment of the demands as raised by the respondent. The respondent has incurred various losses/damages on account of the breach of the terms of the allotment by the complainant, which the complainant is liable to pay as per the terms of the allotment. Further in accordance with the provisions of the application form, the earnest money amount along with brokerage, HVAT and interest on outstanding payments and other applicable charges are liable to be forfeited.

- x. That since the allotment of the complainant has been cancelled because of his default, the complainant has no right whatsoever over the said unit. Thus, the complainant is not entitled to get any relief as sought for from the Authority. Failure on the part of the complainant to perform his contractual obligations disentitles him from any relief.
  - xi. That the respondent has fulfilled its contractual obligations under the allotment letter however despite that the complainant has failed to clear the outstanding dues. The complainant is in default of his contractual obligations and is raising these frivolous issues in order to escape his liability cast upon him by the virtue of the allotment and unjustly enrich himself. Therefore, the complainant is not entitled to any relief whatsoever.
7. 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 oral as well as written submissions made by the parties.

**E. Jurisdiction of the authority**

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**

8. 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

9. 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) 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.*

10. 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.
11. 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(C), 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*** and 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.*

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case 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 respondent.**

**FI Objection w.r.t. force majeure.**

13. The respondent-promoter alleged that grace period on account of force majeure conditions be allowed to it. It raised the contention that the construction of the project was delayed due to force majeure conditions such as, demonetization, shortage of labour, various orders passed by NGT and weather conditions in Gurugram and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. As per clause 32 of the sample buyer's agreement, the company would hand over the possession of the unit within 36 months from the date of signing of the agreement or within 36 months from the date of start of construction whichever is later. The buyer's agreement was not executed, so the due date is calculated from the date of start of construction i.e., 15.03.2012 which comes out to be 15.03.2015. The events such as demonetization and various orders by NGT in view of weather condition of Delhi NCR region, GST were for a shorter duration of time and were not continuous as there is a delay of

more than six years and even some happening after due date of handing over of possession. The respondent obtained the occupation certificate after the delay of six years i.e., on 17.02.2021. Hence, in view of aforesaid circumstances, no period grace period can be allowed to the respondent- builder. Though some allottee may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrong.

14. As far as delay in construction due to outbreak of Covid-19 is concerned, Hon'ble Delhi High Court in case titled as M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020 dated 29.05.2020 has observed that:

*69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself.*

15. The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by 15.03.2015 and is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said



time period is not excluded while calculating the delay in handing over possession.

**G. Findings on the relief sought by the complainant.**

**G.I Direct the respondent to refund the entire amount of Rs.33, 07,483/- paid by the complainant to the respondent alongwith prescribed rate of interest.**

16. The complainant booked a unit bearing no. 5A-04, admeasuring super area of 806 sq.ft. for a total sale consideration of Rs.46,88,431/- and paid a sum of Rs.33,07,483/- against the same.
17. The counsel for the complainant submitted that no buyer's agreement was executed between the parties but a sample buyer's agreement draft was filed by the respondent. As per clause 32 of the sample buyer's agreement, the company would hand over the possession of the unit within 36 months from the date of signing of the agreement or within 36 months from the date of start of construction whichever is later. The buyer's agreement was not executed between the parties, so the due date is calculated from the date of start of construction i.e., 15.03.2012, which comes out to be 15.03.2015.
18. The counsel for the respondent submitted that the occupation certificate for the project in which the subject unit of the complainant is situated has already been obtained on 17.02.2021 and thereafter, an offer of possession has been made on 17.04.2021. Further, the respondent through its counsel stated that before such offer of possession, the allottee never made any request seeking refund or non-continuation with the project. Moreover, the allotment of unit was cancelled on 10.02.2022 due to non-payment by the allottee.
19. The Authority observes that the respondent has already obtained the occupation certificate from the competent authority on 17.02.2021 and thereafter, has offered the possession of subject unit vide letter

- 17.04.2021. After such offer of possession, the complainant shows his willingness to withdraw from the project vide letter dated 14.12.2021. The respondent, thereafter, cancelled the subject unit of the complainant on account of non-payment by the allottee after serving various reminder notices to him. It is pertinent to mention here that the unit was cancelled after the request of the complainant for surrender of subject unit. Such cancellation was after effect of request of withdrawal by the allottee as the allottee who has already shown his willingness to withdraw from the project will definitely won't pay any heed to the request/demands of payments being raised by the respondent. The respondent should have acted upon the request of the complainant-allottee and should have returned the amount paid the complainant after required deduction. But the same is not done. Hence, it is safe to conclude that the funds of the allottee for that time period were utilized by respondent. Therefore, the respondent is liable to pay interest on such refundable amount from the date of surrender letter i.e., 14.12.2021.
20. Section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. The due date of possession as per sample buyer's agreement was 15.03.2015 and the allottee in this case has filed this complaint on 20.05.2022 after possession of the unit was offered to them after obtaining occupation certificate by the promoter. The OC was received on 17.02.2021, whereas the offer of possession was made on 17.04.2021. The complainant vide letter dated 14.12.2021 requested the respondent that they wish to withdraw from the project and made a request for refund of the paid-up amount on its failure to give

possession of the allotted unit in accordance with the terms of buyer's agreement. It is pertinent to mention here that the respondent has cancelled the unit due to non-payment of dues after sending proper reminder notices. But the complainant already surrendered the unit before the said cancellation. On failure of respondent to refund the same, they have filed this complaint seeking refund.

21. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to them, it impliedly means that the allottee tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee interest for the money they have paid to the promoter is protected accordingly and the same was upheld by in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022; that: -

*"25. The unqualified right of the allottees to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional*

*absolute right to the allottees, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottees/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottees does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed".*

22. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale. This judgement of the Supreme Court of India recognized unqualified right of the allottee and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. But the complainant/allottee failed to exercise the right although it is unqualified one. The complainant has to demand and make their intention clear that they wish to withdraw from the project. Rather, tacitly wished to continue with the project and thus made themselves entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project and when the unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

23. This view is supported by the judgement of Hon'ble Supreme Court of India in case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Civil appeal no. 5785 of 2019)*** wherein the Hon'ble Apex court took a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate and also in consonance with the judgement of Hon'ble Supreme Court of India in case of ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors (Supra)***.
24. The above said unit was allotted to complainant vide allotment letter on 05.07.2012. There is a delay in handing over the possession as due date of possession was 15.03.2012 whereas, the offer of possession was made on 17.04.2021 and thus, becomes a case to grant delay possession charges. The authority observes that interest of every month of delay at the prescribed rate of interest be granted to the complainant/allottee. But now, the peculiar situation is that the complainant want to surrender the unit and want refund. Keeping in view of the aforesaid circumstances that the respondent-builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, and judgment of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.202***, it is concluded that if the complainant/allottee still want to withdraw from the project, the paid-up amount shall be refunded after deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018.
25. The Hon'ble Apex court of the land in cases of ***Maula Bux Vs. Union of India (1973) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs Vs.***

*Sarah C. Urs, (2015) 4 SCC 136*, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as *Jayant Singhal and Anr. Vs. M/s M3M India Ltd.* decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted 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. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under:-

**5. AMOUNT OF EARNEST MONEY**

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

26. Thus, keeping in view the aforesaid factual and legal provisions, the respondent cannot retain the amount paid by the complainant against the allotted unit and is directed to refund the paid-up amount of Rs.33,07,483/- after deducting 10% of the basic sale consideration of Rs.46,88,431/- being earnest money along with an interest @10.75%

p.a. (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 on the refundable amount from the date of surrender i.e., 14.12.2021 till actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

### **G.II Litigation cost.**

27. The complainants are also seeking relief w.r.t. litigation expenses & 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.

### **H. Directions of the authority**

28. 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/builder is directed to refund the paid-up amount of Rs.33,07,483/- after deducting 10% of the basic sale consideration of Rs.46,88,431/- being earnest money along with an interest

@10.75% p.a. on the refundable amount from the date of surrender i.e., 14.12.2021 till date of its actual realization.

- II. The respondent is further directed not to create any third-party rights against the subject unit before full realization of paid-up amount along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainant.
- III. 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.

29. Complaint stands disposed of.

30. File be consigned to registry.

Vijay Kumar Goyal  
Member

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 19.10.2023**