

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

Complaint no. :	1695 of 2022
Date of complaint :	22.04.2022
Order pronounced on:	19.10.2023

Col. A.S. Rekhi

R/o: - 831, Sector 8, Panchkula-134109, Haryana.

Complainant

Versus

M/s S.S. Group Private Limited.

Regd. Office at: - 4th floor, The Plaza, M.G. Road,
Gurugram.

Respondent

CORAM:

Sh. Vijay Kumar Goyal

Member

APPEARANCE:

Ms. Preety Singh proxy counsel (Advocate)

Sh. Priyanka Aggarwal (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	"The Leaf", Sector 85, Gurugram
2.	Nature of project	Group Housing Complex
3.	RERA Registered/ Not Registered	Registered 23 of 2019 dated 01.05.2019
4.	DTPC License no.	81 of 2011 dated 16.09.2011
	Validity upto	15.09.2024
	Licensed area	11.9 Acre
5.	Unit no.	190, 19 th floor, Tower-3 (As per page no. 45 of complaint)
6.	Unit measuring	1575 sq. ft. (As per page no. 45 of complaint)
7.	Date of execution of floor buyer's agreement	12.12.2013 (As per page no. 44 of complaint)
8.	Possession clause	8. Possession 8.1 Time of handing over the possession 8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to handover the

		possession of the flat within a period of thirty six months from the date of signing of this agreement. The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months or such extended period, for applying and obtaining occupation certificate in respect of the Group Housing Complex.
10.	Due date of possession	12.12.2016 (Calculated from the date of buyer's agreement) Grace period not allowed
11.	Total sale consideration	Rs. 88,60,500/- (As per page no. 46 of complaint)
12.	Total amount paid by the complainant	Rs. 28,05,087/- (As per applicant ledger dated 14.09.2022 annexure R1 of WS of the respondent,)
13.	Refunded amount by the respondent to the complainant vide letter dated 16.05.2023	Rs. 14,73,527/- (page 26 of WS of the respondent)
14.	Occupation certificate dated	09.05.2022 (As per page no. 67 of reply)
15.	Offer of possession	Not offered
16.	Grace period utilization	As per the clause for possession, the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six-month (36) months or such extended period for applying and obtaining the occupation certificate in respect of the group housing complex. The promoter has not applied for occupation certificate within the time limit prescribed in the builder buyer agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Therefore, the grace period is not allowed.

17.	Request for refund via email	08.09.2015 (annexure C6, page 71 of reply)
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B. Facts of the complaint:

3. The complainant has made the following submissions: -

- I. That, in the month of July 2012, the representative of the respondent approached the complainant and allured him that, the respondent is launching a project in the name of "The Leaf at SS City" under the banner of S.S. Group Pvt. Ltd. having integrated residential flat along with other amenities at District, Gurugram. Accordingly, being persuaded by the assurance of timely allotment of the unit in the project, the complainant on 20.07.2012 applied for the allotment of a residential unit in the respondent's project. Subsequently, the complainant, received the letter dated 16.08.2012 from the respondent demanding the photocopies of complainant's pan card, address proof and passport size photograph to prepare the buyer's agreement. The complainant duly supplied the same to the respondent.
- II. That, the complainant paid the booking amount of Rs.7,50,000/- through RTGS, upon which the respondent issued the advanced registration form issued by the respondent 20.07.2012. It was assured by the respondent that the project along with its facilities would be completed in a time bound manner and preferably within a period of 36 months from the date of allotment letter and simultaneously a buyer's agreement was executed between the parties. Despite, adhering to all its obligations, the complainant is not able to seek possession of the allotted unit as there has been a delay of over 5 years from the assured date of delivery.

- III. That, the complainant was assured a world class project by the respondent, which would be completed in a time bound manner as stipulated in the allotment letter dated 10.09.2012. The possession of the allotted unit no. 19D, 2BHK having an approximate super area of 1,575 sq.ft. in tower-3 of the project was to be given to him latest within 36 months from the date of the allotment letter, being 10.09.2015.
- IV. That, the respondent promised that it had all the permissions which were required to commence construction of the project. It was also represented and assured to complainant that respondent would hand over the possession of the residential units within a period of 36 months from the date of allotment letter and the buyer's agreement was proposed to be signed simultaneously without any delay and the complainant would be able to enjoy all the other facilities which formed part of the project, being the community center, green cover, school, etc.
- V. That, the parties entered into a buyer's agreement dated 12.12.2013, wherein the complainant was allotted unit no. 19D, location 19th floor of tower no. T-3 having an approximate super area of 1,575 sq. ft. in the project upon making timely payment by the complainant. As per clause 1.2 of the said agreement the total sale consideration for the said unit was worked out to be Rs. 88,60,500/-. However, the complainant was shocked when he was called to sign the agreement on 12.12.2013 to observe that possession of the unit would now be delivered after 36 months of the signing of the agreement and not from the date of allotment letter thereby affectively delaying the possession of the unit by one year and seven months. The revised allotment date was now

revised by the respondent to 12.12.2016 and the same is extendable upto 90 days only.

- VI. Furthermore, on a specific query of the complainant was raised regarding the revised possession date upon which the respondent assured that in case there was any delay in handing over of the possession, the respondent would compensate the complainant reasonably and further would refund the amounts as and when desired by him. However, the respondent intentionally delayed the signing of buyer's agreement in order to delay in handing over the possession of the unit within the agreed time period of 36 months.
- VII. That, it is relevant to mention here that at this point of time, the complainant believed the assurances and representations of the respondent and did not suspect any malafide on its part. However, the complainant was unaware of the unfair trade practice, carried on by the respondent, wherein they duped customers like the complainant in making payment of the sale consideration without having any intention to honour their part of the contract and create circumstances wherein the customer is forced to seek refund of the sale consideration which has already been paid. This is being done solely to finance the project as the commercial rate of borrowing is on the higher side and also has punitive actions attached to it.
- VIII. That, the complainant believed that upon fulfilling its obligation to timely deposit the payment, the respondent must have commenced the construction in the aforesaid project. However, on visiting the said project site, the complainant was shocked to note that no construction activity had yet taken place. Upon enquiring from the officials of the

respondent and from the office of the Director, Town and country Planning, Haryana, the complainant was made aware that respondent was yet to obtain the approval on the building plans from the concerned authorities. In addition to the same, he also got to know that the respondent did not have all the requisite clearances for launching and commencing operations on the said project. It was therefore amply clear that the respondent had kept in dark to the allottees like the complainant and sought to benefit from their hard-earned money without adhering to the obligations and assurances on the basis of which the hard-earned amounts were deposited with the respondent.

- IX. That, it is evident in as much as admittedly on 15.07.2013, a demand was raised on the ground of commencement of construction work. However, as per its own case, the respondent was granted permission for the building plans only on 08.08.2013. It is also pertinent to point out that before this demand, the complainant had already made a payment of more than Rs. 26,00,000/- between 20.07.2012 to 23.02.2013. This clearly shows that the sole purpose of obtaining the monies from the complainant was to fund the project without having any inclination to adhere to the time frame as assured.
- X. That believing the tall claims of the respondent the complainant had paid a sum of Rs. 36,72,087/- as a part payment towards the purchase of the said unit.
- XI. That, though in the buyer's agreement the period in which the respondent was supposed to offer the possession to the complainant was mentioned to be 36 months which was further extendable to 3 months but the respondent had not started the construction and with

the dissatisfaction of the progress of project the complainant wrote an email dated 08.09.2015 to respondent and asked him to refund his deposited amount with interest and a reminder to the e-mail was also sent to respondent on 21.09.2015.

- XII. That in case the respondent had utilized the monies paid by the complainant on the project, the unit along with the basic amenities would have been completed within 36 months from the date of allotment, being by September 2015. The factum of delayed construction was a clear indication that the monies paid by the complainant was diverted by the respondent for the launch or construction of some other project. This fact was brought to the notice of the respondent. However, the respondent failed to reply to the same despite the reminder.
- XIII. That the complainant being aggrieved by the manner in which the respondent was diverting the funds and the fraud played upon by the respondent, the complainant vide letter dated 04.11.2015 wrote to the concerned Station House Officer, Sushant Lok, Gurgaon and requested him to take action against the respondent and its directors.
- XIV. That, despite the above requests there was no response by the respondent. Being aggrieved by the manner in which the respondent was harassing and defrauding the complainant, he approached the respondent and requested to refund of the amounts as already paid. However, the respondent refused to refund the amount and further stated that the amounts would only be refunded upon cancellation/ termination of the agreement. It was further informed to the complainant that in terms of the agreement, the complainant could not

claim compensation and had to unnecessarily wait for a period of 54 months from the date of the agreement.

- XV. That the complainant being senior citizen scrummed to the pressure building tactics of the respondent and waited for the respondent to complete the construction of the unit in question along with the amenities. However, taking advantage of the *bonafide* of the complainant, the respondent started raising illegal demands and imposed interest on the complainant, without any basis as well as no fault of the complainant.
- XVI. That since the respondent failed to deliver the possession of unit in question on time, as such, the complainant requested the respondent to refund the unit amount, but the respondent blatantly refused to refund the money back to the complainant as the respondent completely failed to honour the agreement and was delaying the possession of the unit. Further the respondent is also liable for unfair trade practice in not refunding the money in spite of the default on their part.
- XVII. That there has been a delay of more than 7 years and as a matter of record the respondent had neither offered nor was in a position to offer possession of the said unit to the complainant until the complainant approached the Hon'ble State Consumer Dispute Redressal Commission, Haryana by filing complaint before the Hon'ble SCDRC Haryana, Panchkula on 27.03.2017, seeking refund of its monies on light of the delay in granting of possession of the said unit and as the complainant no longer was in need of the same.
- XVIII. That the complainant had applied for the said unit for their own benefit and for the benefit of their family members for their residential use.

During the pendency of the proceedings before the Hon'ble SCDRC, some documents were received offering possession. However, neither the said unit of any use to the complainant any longer nor the complainant could be forced to at such belated stage, accept possession of the said unit. The Hon'ble SCDRC was pleased to issue notice to the respondent vide its order dated 12.05.2017. However, the proceedings did not proceed at appropriate pace. The complainant thus proceeded to file application under section 71 of the RERA Act before the Hon'ble SCDRC and the same was allowed with liberty on 29.03.2022. Hence the present complaint has been filed before the Authority under the RERA Act.

- XIX. That, the complainant who invested all his life savings to purchase the said unit for his personal use as his residential abode. However, the complainant has been left high and dry due to the non-delivery of the said unit, despite all the false assurances given by the respondents at the time of booking the said unit. The said failure of the respondent not only duped the complainant of his life savings but further added to their miseries and financial burden.
- XX. That, in the light of the aforementioned facts and circumstances, the complainant seeks refund of the entire amount paid for the said unit along with the interest @ 18 % per annum.
- XXI. That the complainant has been running from pillar to post and have been mentally and financially harassed by the conduct of the respondents. The complainant apprehends that the respondent has unjustly enriched itself and misused the funds causing immense losses and harassment to the complainant.

C. Relief sought by the complainant:

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

- I. Direct the respondent to refund deposited with the respondent along with interest from respective date of deposit till its realization.
- II. Direct the respondent to pay Rs. 1,00,000/- towards the litigation charges to the complainant.

5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

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

- i. That the complainant approached the respondent for the booking of the unit in the respondent's project coming up at Sector-85, Gurugram in the year 2012. The request of the complainant was accepted and vide allotment letter dated 10.09.2012 was allotted a residential unit in the project developed by the respondent namely 'The Leaf' situated at Sector-85, Gurugram. On Account of fulfilment of the requisite eligibility for the allotment. After being fully acquainted about the project, the buyer's agreement was executed between the parties on 12.12.2013. The complainant has not come with clean hands, as he has concealed material facts that the draft agreement dated 12.12.2013 had been misplaced by the complainant himself. The respondent was in the process of development of the project in accordance with tentative and consolidated layout plan. The respondent proposed to handover the physical possession of the allotted unit within a period

of 36 months from the date of execution of the buyer's agreement, along with a further grace period of 90 days and extended grace period of 12 months as agreed therein, subject to the buyer is not in default of payment of instalments, and subject to other force majeure circumstances and timely payment of instalments. The respondent has raised each and every demand strictly in consonance with the payment plan opted and agreed at the stage of booking as well as within ambit of the clauses discretionally agreed and accepted by the complainant on execution of buyer's agreement. The complainant opted a construction-link payment plan and was supposed to make payments as and when demands were raised by the respondent. As per the records maintained by the respondent, the complainant has not fulfilled his obligation and has not paid the installments from 15.07.2014 to till date. The respondent several time send reminders to clear outstanding which was due. Out of 17 installments only 4 installments were paid by the complainant. The complainant failed to pay on time that had fallen due, despite receipt of repeated demand letter and reminder letter. The complainant started the default from 2014.

- ii. That the complainant in material breach of the term of unit buyer's agreement failed to pay the dues intsalment as agreed by the complainant. Owing to continuous defaults for non-payment towards demand builder issue the final reminder on dated 06.12.2013. The complainant had only paid Rs.28,05,087/- and now claiming for unjust enrichment a false amount without justifying the claim. The

- complainant stopped making due payment of instalments deliberately and hence breached the provisions under section 19 of the Act, 2016.
- iii. That the respondent has already completed the construction and already obtained the occupation certificate of the said tower in which the unit allotted to the complainant is located.
 - iv. That the construction of the unit of the complainant has been completed by the respondents in terms of the buyer's agreement. Subsequently, an application for the grant of occupation certificate has been applied by the respondent to the Department of Town and Country Planning, Haryana, and received the OC on dated 09.05.2022.
 - v. That the agreement was executed prior to implementation of Act and Rules would be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented buyer's agreement dated 12.12.2014 executed by the partners of the complainant company out of its own free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them.
 - vi. That the relief sought by the complainant are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainant entered into the said agreement with the respondent with open eyes and is bound by the same. The relief(s) sought by the complainant travel way beyond the four walls of the agreement duly executed between the parties. The complainant while entering into the agreement has accepted and was bound by each and every clause of the said agreement.

- vii. That vide present complaint under reply the complainant sought the refund along with the compensation and interest thereon on the pretext that the respondent failed to complete construction. Since the buyer's agreement constitutes the foremost basis of relationship between the parties, both the parties are bound by the terms and conditions of the same and the clause of the same shall read as whole and no clause shall be read in isolation. The complainant while alleging that the respondent has delayed the project chose for the selective reading of the clauses of the buyer's agreement. Clause 8 read with clause 8.3 of the buyer's agreement evince the timelines for the possession whereby it has been agreed by the complainant that the respondent, subject to the complainant not in default and force majeure circumstances, as defined in clause 28 of the buyer's agreement, proposes to handover possession within 36 months from the date of execution of buyer's agreement, grace period of 90 days and extended grace period of 12 months. The buyer's agreement was executed on 12.12.2014. Therefore, in view of the clause 8 r/w clause 8.3 r/w clause 28 of the agreement, the due date of possession arrives out to be 12.03.2018, i.e., 36 months from the date of execution of the buyer's agreement in addition to further grace period of 90 days with extended grace period of 12 months, which is further subject to force majeure. Further, vide clause 8.3 of the buyer's agreement, it was duly agreed between the parties that subject to the conditions mentioned therein, in case the respondent fails to hand over possession within 36 months from the date of execution of buyer's agreement, along with 90 days of grace period with extended grace period of 12 months, the

respondent would be liable to pay to the complainant compensation calculated @ Rs.5/- per sq.ft. for every month of delay. Furthermore, the proposed timelines for possession have been diluted due to serious payment defaults in making payment of instalments by various allottees of the project "The Leaf". It is submitted that with respect to tower-3 where the unit of the complainant exists there stand a huge number of dues pending payment of installment resulting in excessive burden on the respondent. There had been huge defaults in making payments of various instalments by large number of applicants in the tower-3 amount to Rs.16,94,02,866/-.

- viii. That the projected timelines for possession are based on the cash flow. It was not in the contemplation of the respondent that the allottee would hugely default in making payments and hence, cause cash flow crunch in the project. The construction was also affected on account of the NGT order prohibiting construction activity of any kind in the entire NCR by any person, private or Government authority. It is submitted that vide its order NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondent. Further, the Environment Pollution (Prevention and Control) Authority, EPCA, expressing alarm on severe air pollution level in Delhi-NCR issued press note vide which the construction activities were banned within the Delhi-NCR region. The ban was commenced from 31.10.2018 and

was initially subsisted till 10.11.2018 whereas the same was further extended till 12.11.2018.

- ix. That the construction of the project was going on in full swing, however, the changed norms for water usage, not permitting construction after sunset, not allowing sand quarrying in Faridabad area, shortage of labour and construction material, liquidity crunch and non-funding of real estate projects and delay in payment of installments by customers, etc., were the reasons for delay in construction and after that Government took long time in granting necessary approvals owing to its cumbersome process. Furthermore, the construction of the unit was going on in full swing and the respondent was confident to handover possession of the units in question. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), from past 2 years construction came to a halt and it took some time to get the labour mobilized at the site. It was communicated to the complainant vide email dated 26.02.2020 that the construction was nearing completion and the Respondent was confident to handover possession of the unit in question by March 2020. However, it be noted that due to the sudden outbreak of the coronavirus, construction came to a halt, and it took some time to get the labour mobilized at the site.
- x. That despite all aforesaid force majeure circumstances the Respondent has duly completed the construction of project as well as of the tower in which the unit is located has been completed.
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 refuna 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.

F. I Objection regarding force majeure conditions:

13. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by NGT and weather conditions of Delhi NCR region and non-payment of instalment by different allottees of the project, but all the pleas advanced in this regard are devoid of merit. The floor buyer's agreement was executed between the parties on 12.12.2013 and as per terms and conditions of the said agreement the due date of handing over of possession comes out to be 12.12.2016. The events such as various orders by NGT in view of weather condition of Delhi NCR region, were for a shorter duration of time and were not continuous as there is a delay of more than three years and even some happening after due date of handing over of possession. 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 IAs 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 12.12.2016 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 deposited with the respondent along with interest from respective date of deposit till its realization.

16. The complainant has submitted that he booked a unit bearing no. 190, 19th floor, tower 3 admeasuring 1575 sq.ft.. Thereafter a buyer's agreement was executed between the parties on 12.12.2013 for a sale price of Rs. 88,60,500/- and he paid Rs. 28,05,087/- (*vide order dated 24.08.2023, the counsel for the respondent directed for filing the updated statement of amount received as well as amount refunded to the complainant and the same was filed in the Authority, in this regard the complainant has not filed any objection till date*). The due date for completion of the project and offer of possession of the allotted unit as per buyer's agreement was fixed as 12.12.2016 which was not adhered to by the respondent by one reason or the other. After completion of the

project, it received occupation certificate on 09.05.2022. It is pleaded by the complainant that since the unit was not constructed as per the sanctioned building plan, so he was left with no alternative but to withdraw from the project by writing email dated 08.09.2015 and seeking refund of the paid-up amount. On 09.05.2023, the respondent sent a cheque of only Rs. 14,73,527/- against deposit of Rs. 28,05,087/- by mischievously deducting Rs. 9,53,600/- towards earnest money & Rs. 3,78,000/- as brokerage.

17. The version of respondent-builder is otherwise and who took a plea that the refund amount has been made after deduction of 10% earnest money and amount of Rs. 3,78,000/- paid towards brokerage. Further stated that the project was delayed on part of such allottees who chose not to make payments as per schedule of construction.
18. Keeping in view of the above said facts and submissions made by the parties, the authority observes that the complainant has already surrendered his unit vide email dated 08.09.2015. The only dispute is w.r.t deductions. The respondent offered the complainant a refund of Rs. 14,73,527/- against deposit of Rs. 28,05,087/- made by him (*during proceeding of the day dated 24.08.2023, the counsel for the complainant has confirmed that the said amount has been encashed by him*) after deducting certain amounts towards earnest money and brokerage as Rs. 9,53,600, & Rs. 3,78,000/- respectively. The complainant leading to filing of the complaint seeking refund of the remaining amount after deductions as per the law of the land. In cases of ***Maula Bux vs Union of India (1970) 1 SCR, 928 & Sirdar KB Ram Chandera Raj Urs vs Sarah C. Urs (2015) 4 SCC, 136***, the same issue arose as in the present case and

wherein it was held by the hon'ble Apex Court of the land 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 the Contract Act, 1872 are attracted and the party so forfeiting must prove actual damage. After cancellation of allotment the flat remains with the builder as such there is hardly any actual damage. The same view was followed by NCDRC, New Delhi in cases of Ramesh **Malhotra vs EMAAR MGF Land Limited** in case **CC/438/2019** decided on 29.06.2020 and **Mr. Saurav Sanyal vs M/s Ireo Pvt. Ltd.** decided on 12.04.2022 and reaffirmed in consumer case no. 2766 of 2017 titled as **Jayant Singal and Anr. Vs. M/s M3M India Ltd.** decided on 26.07.2022. The authority also framed a regulation in this regard in the year 2018 known as Haryana Real Estate Regulatory (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, 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"

19. Thus, keeping in view the factual as well as legal position detailed above, the respondent-builder was not justified in retaining more than 10% of the sale consideration after accepting surrender of the allotted unit from the complainant and returning the remaining amount. Since the respondent has already refunded an amount of Rs. 14,73,527/- vide cheque bearing no. 736870 dated 09.05.2023 (during proceeding of the day dated 24.08.2023, the counsel for the complainant has confirmed that the said amount has been encashed by him) after retaining the earnest money of Rs. 9,53,600/- & Rs. 3,78,000/- as brokerage charges.
20. The respondent is directed to refund the paid up amount of Rs.28,05,087/- after deduction of 10% of sale consideration amount as earnest money and deduction of Rs. 14,73,527/- already refunded to the complainant-allottee alongwith brokerage charges (limited only upto 0.5%) & refund the balance amount to complainant/allottee within 90 days as per Rules.
21. Further on such balance amount, interest @10.75% shall be paid from the date of cancellation till its realization.

G. II Litigation cost.

22. The complainant is 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.

H. 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 function entrusted to the authority under section 34(f):

- I. The respondent is directed to refund the paid up amount of Rs.28,05,087/- after deduction of 10% of sale consideration amount as earnest money and deduction of Rs. 14,73,527/- already refunded to the complainant-allottee alongwith brokerage charges (limited only upto 0.5%) & refund the balance amount to complainant/allottee within 90 days as per rules.
- II. Further on such balance amount, interest @10.75% shall be paid from the date of cancellation till its realization.
- 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.

24. Complaint stands disposed of.

25. File be consigned to registry.

Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 19.10.2023