BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**3140 of 2021**
Date of filing complaint:		**02.09.2021**
Date of decision	**:**	**05.12.2023**

Dev Kumar Aggarwal **R/o:** House No. 1677, Khanna New Abadi, Khanna Tehsil, Ludhiana, Punjab-141401.	**Complainant**
Versus	
M/s Vatika Limited **Address:** Vatika Triangle, 4th Floor, Sushant Lok, Phase-I, Block A, M.G. Road, Gurugram, Haryana-122002.	**Respondent**

CORAM:	
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:	
Ms. Priyanka Aggarwal (Advocate)	Complainant
Ms. Ankur Berry (Advocate)	Respondent

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 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 allottees as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name and location of the project	"Town Square 2", Sector 82, Vatika India Next, Gurugram.
2.	RERA Registered/ not registered	Registered vide registration no. 40 of 2021 dated 10.08.2021 Valid up to 31.03.2022
3.	DTCP license no.	• 113 of 2008 dated 01.06.2008 Valid up to 31.05.2018 • 71 of 2010 dated 15.09.2010 Valid up to 14.09.2018 • 62 of 2011 dated 02.07.2011 Valid up to 01.07.2024 • 76 of 2011 dated 07.09.2011 Valid up to 06.09.2017
4.	Unit no.	261, 1st floor, block B (Page 22 of complaint)
5.	Unit admeasuring	465 sq. ft. (super area)
6.	Date of allotment	14.08.2014 (Page 17 of complaint)
7.	Date of builder buyer agreement	06.11.2015 (Page 20 of complaint)
8.	Possession clause	***17. Handing over possession of the commercial unit*** *The Developer based on its present plans and estimates and subject to all just*

		exceptions contemplates ***to complete construction of the said building/said commercial unit within a period of 48 months from the date of execution of this Agreement*** *unless there shall be delay or there shall be failure due to reasons mentioned in this agreement or due to failure of Buyer(s) to pay in time the price of the said commercial unit along with all other charges and dues in accordance with the schedule of payments.* ***(Emphasis supplied)*** (Page 34 of complaint)
9.	Due date of possession	06.11.2019
10.	Total sale consideration	Rs.49,75,500/- (As per allotment letter dated 14.08.2014) Rs.1,29,96,352/- (As per SOA dated 07.09.2021, annexure R2, page 25 of reply)
11.	Amount paid by the complainant	Rs.16,37,213/- (As per SOA dated 07.09.2021, annexure R2, page 25 of reply)
12.	Occupation certificate	Not obtained
13.	Intimation of possession	12.03.2020 (Page 52 of complaint) Note: Not valid as OC is not obtained till date.
14.	Emails by complainant w.r.t seeking refund along with interest as the increase in size was not acceptable	15.03.2020, 17.08.2020 (Page 57 of complaint)

15.	Legal Notice sent by the complainant seeking refund of the entire deposited amount along with interest	06.10.2020 (Page 54 of complaint)
16.	Notice termination letter to remit the outstanding within 7 days otherwise the allotment stand cancelled with immediate effect	27.07.2021 (Page 62 of complaint)

B. Facts of the complaint:

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

a. That the complainant bought a commercial unit which was booked on 07.01.2014 in the name of Mr. Dev Kumar Aggarwal with booking amount of Rs. 4,53,000/- through cheque dated 07.01.2014. Vide allotment letter dated 14.08.2014, the complainant was allotted unit no. 261 in tower-B, admeasuring 465 sq. ft. in the project "Vatika Town Square-2, Sector-82, Vatika India Next, Gurugram.

b. That the respondent to dupe the complainant in their nefarious net even executed buyer's agreement signed between complainant and the respondent on 06.11.2015, just to create a false belief that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainant.

c. That the total sale consideration of the said unit is Rs. 49,75,500/- as per the allotment letter dated 14.08.2014. As

per account statement dated 12.03.2020, the complainant paid a sum of Rs. 16,37,213/- in time bound manner or otherwise paid the interest on delay period. Further, no payment is remaining as per schedule of payment plan. Only last installment is to be paid at the time of offer of possession after obtaining occupancy certificate amounting to Rs. 33,96,825/-. The respondent is raising demand without doing appropriate work on the said project which is illegal and arbitrary.

d. That as per clause 17 of the agreement, the respondent was liable to hand over the possession of the same unit with same size as mentioned in agreement on or before 05.11.2019 which is far from completion. That the complainant was surprised when he got the offer of possession dated 12.03.2020 as the respondent increased the area from 465 sq. ft. to 950 sq. ft. which is 104% of total super area and demanded Rs. 1,27,83,909.35 from complainant which is illegal and arbitrary. The said increase has been done without any prior consent from the complainant. After this, the complainant raised the objection to the respondent. As per clause 5.2 of the agreement, the respondent shall not increase /decrease the area by + 10% and the respondent has violated the said provisions of the agreement. In this regard, the complainant placed reliance on order passed by Hon'ble NCDRC in Case No. 285 and 286 of 2018 dated 26.08.2020.

e. That the respondent breached the trust by terminating the unit on 27.07.2021 and forfeited the amount without any prior information. As per offer of possession, the respondent

increased the super area by approx. 104%, thereby increasing the cost of the unit from Rs. 49,75,500/- to Rs. 1,28,84,734/- which the pocket of the complainant did not allowed. After offer of possession, the complainant e-mail to the respondent for refund of money with interest but the respondent did not get any satisfactory reply. After long perusal, the complainant also sent him legal notice on 06.10.2020 but did not get any reply. After the legal notice on 06.10.2020, the respondent terminated the unit on 27.07.2021 and forfeited the amount without any prior information.

f. That the builder in last 7 years, many time made false promises for possession of unit and current status of project still desolated and raw after extracting 100% amount of demanded amount, builder breach the trust and agreement. That as per sections 14 and 19 (6) the Act, the complainant has fulfilled his responsibility in regard to making the necessary payments in the manner and within the time specified in the said agreement. Therefore, the complainant herein is not in breach of any of its terms of the agreement. The cause of action to file the instant complaint has occurred within the jurisdiction of this Hon'ble Authority as the plot which is the subject matter of this complaint is situated in Gurugram, Haryana which is within the jurisdiction of this Hon'ble Authority.

C. Relief sought by the complainant:

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

i. Direct the respondent to refund the entire amount paid by the complainant i.e., Rs. 16,37,213/- with interest at the prescribed

rate of interest in the Act calculated from the date of respective deposit till the date of actual realization.

ii. Direct the respondent to pay Rs. 12,00,000/- as damage/ compensation to the complainant for subjecting him to long period of mental harassment and agony, and litigation charges Rs. 2,00,000/-.

iii. Any other relief that the Hon'ble Authority deems fit in the facts and circumstances of the case.

D. Reply by respondent:

5. The respondent made the following submissions in its reply:

a. That the complainant has got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the agreement dated 06.11.2015.

b. That the present complainant has himself violated the obligations under section 19 of the Act and has further breached the terms of the agreement dated 06.11.2015. The complainant has failed to make payments as per the agreed payment plan. It is most pertinent to submit that even after numerous opportunities, reminders, notice of termination and further chances, the complainant has ignored to fulfil his promise of paying the consideration amount as mutually decided and hence there being no fault on the part of respondent, the respondent is entitled to cancel the booking. That the respondent issued several reminders to the complainant to pay the balance amount of Rs.

1,59,97,719.79/- (as per the account statement), yet the complainant failed to do so.

c. That the respondent had issued letter of termination on 27.07.2021 being tired of waiting for due payments from the complainant. The complainant even though was aware of the payment plan and that a payment was due on completion of 6 months from the date of booking, yet failed to make due payment. That even after repeated reminders by the respondent company, the complainant chose not to fulfil its duties and the respondent company had no choice but to issue the termination notice dated 27.07.2021.

d. That as per clause 2(e) of the agreement, the respondent was legally entitled to cancel the allotment on account of non-payment of due instalments and to forfeit the earnest money. The complainant had committed breach of understanding arrived at between the parties and failed to make any payment towards the unit. The complainant has wilfully defaulted against the payments of due instalments with regard to offer of possession. The continued failure of the complainant to fulfil its obligations under the agreement dated 06.11.2015 and also under section 19 of the Act resulted in issuance of second notice of termination on 27.07.2021 and thus the booking and allotment of the complainant has already been terminated and accordingly cancelled by the respondent vide termination letter dated 27.07.2021.

e. That the complainant entered into agreement dated 06.11.2015 with the respondent company owing to the name, good will and reputation of the respondent company. The respondent in terms with the agreement, promised to deliver the possession of the

residential unit/ flat within the time frame as defined under clause 17 of the agreement whereby the respondent intended to deliver the possession with 48 months, however this period of 48 months was tentative and heavily relied on external factors defined under clause 14 of the agreement i.e., force majeure. It is pertinent to mention that the time period mentioned in the agreement was an intended date of handing over the possession of commercial unit in question which is subject to reasons beyond the control of respondent. From the bare reading of the clause 14 of the agreement dated 06.11.2015, it is clear that the obligation of the complainant to make timely payment of instalments was utmost importance. The complainant's failure to make timely payments by abiding by the payment plan has led to the termination of the allotment on 27.07.2021.

f. That the respondent company was facing umpteen roadblocks in construction and development work in its projects which have been beyond the control of the respondent such as the follows:

- Construction, laying down and/ or re-routing of Chainsa-Gurgaon-Jhajjar-Hissar ***Gas Pipeline*** by Gas Authority of India Limited (Gail) for supplying natural gas and the consequent litigation for the same, due to which the Company was forced to change its building plans, project drawings, green areas, laying down of the connecting roads and complete lay-out of the Township, including that of Independent floors.
- Non acquisition of land by Haryana Urban Development Authority (HUDA) to lay down of ***Sector roads*** 75 mtr. and 60 mtr. wide and the consequent litigation for the same, the issue is even yet not settled completely;
- Labour issue, disruptions/delays in supply of stone aggregate and sand due to court orders of the Courts, unusually heavy rains, delay in supply of cement and steel, declaration of Gurgaon as 'Notified Area' for the purpose of Ground Water,

- Delay in removal/ re-routing of ***defunct High Tension Line of 66KVA*** in Licenses Land, despite deposition of charges/ fee with HVBPNL, Haryana.
- Total and Partial ***Ban on Construction*** due to the directives issued by the National Green Tribunal during various times since 2015.
- The National Green Tribunal (NGT)/Environment Pollution Control Authority (EPCA) issued directives and measures (GRAP) to counter the deterioration in Air quality in Delhi-NCR region especially during the winter months over the last few years. Among various measures NGT, EPCA, HSPCB and Hon'ble Supreme Court imposed a complete ban on construction activities for a total of 35 days over various periods from November 2015 to December 2017.
- ***Additionally*** NGT imposed a set of ***partial restrictions***, some of which are
  i. No construction activities between 6 pm till 6 am (174 days)
  ii. Stop the usage of Diesel Generator Sets (128 days).
  iii. Stop entry of Truck Traffic into Delhi.
  iv. Close brick kilns, Hot Mix plants and Stone Crushers.
  v. Stringently enforced rules for dust control in construction activities and close non-compliant sites.
- The several stretches of total and partial construction ***restrictions*** have led to ***significant loss of productivity in construction*** of our projects. We have also suffered from demobilization of the labor working on the projects, and it took several additional weeks to resume the construction activities with the required momentum.
- The entire world was hit by Covid-19 pandemic in year 2020 and 2021 which led to stoppage of construction work, due to lack of availability of manpower and raw materials.
- That the Respondent had been issued the license, by the Director Town & Country Planning, Haryana, for the development and completion of an integrated township, in terms with the Haryana Development and Regulation of Urban Areas Rules, 1976 (hereinafter HUDA Rules, 1976) in terms of form LC-IV-A, which were timely renewed as per the HUDA Rules, 1976. The said HUDA Act, 1975 and the Rules of 1976 prescribe a duty upon the HUDA and the Director Town and Country Planning to provide External Development Works & Infrastructure Development Works

- That upon the issuance of the DTCP license, the concerned government department levied a certain fee in order to fulfil the EDC and IDC development work, which has been delayed and not completed by the Government authorities. The incompletion of such Development Works resulted in minor alterations in timelines of the project. It is pertinent to mention that in the matter titled, Credai-NCR vs. Department of Town and Country Planning, Government of Haryana & Anr. before the Competition Commission of India – Case No. 40 of 2017 it has been opined and well conveyed by the Hon'ble Commission that there is a dependency of a project vis-à-vis the concerned department's responsibilities and failure of government departments in providing the necessary development work subsequently, impact the project timelines.

Thus, the altered timelines were never intended and the respondent lacked any control in the subsequent deference of the project. It is further submitted that, it was never the intention of the respondent company to not complete the project, and the only effect of all the obstructions was that the timelines as proposed initially could not be fulfilled.

g. That the complainant is attempting to seek an advantage of the slowdown in the real estate sector and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent company. Thus, the present complaint is without any basis and no cause of action has arisen till date in favour of the complainant and against the respondent and hence, the complaint deserves to be dismissed.

h. That the various contentions raised by the complainant is fictitious, baseless, vague, wrong and created to misrepresent and mislead the Hon'ble Authority, for the reasons stated above. That it is further submitted that none of the relief as prayed for by the

complainant is sustainable, in the eyes of law. Hence, the complaint is liable to be dismissed with imposition of exemplary cost for wasting the precious time and efforts of the Hon'ble Authority. That the present complaint is an utter abuse of the process of law, and hence deserves to be dismissed.

6. 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 these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

7. 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)(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." SCC Online SC 1044*** decided on 11.11.2021 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. Furthermore, the said view has been reiterated by the Division Bench of Hon'ble Punjab and Haryana High Court in "***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021***. The relevant paras of the above said judgment reads as under:

"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court, the Rules have to be in tandem with the substantive Act.

> *25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."*

13. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)***, and the Division Bench of Hon'ble Punjab and Haryana High Court in "***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others. (supra)***, the authority has the jurisdiction to entertain a complaint seeking refund of the amount paid by allottee along with interest at the prescribed rate.

G. Findings on the relief sought by the complainant:

G.I Refund of the amount paid by the complainant along with interest.

14. The complainant is seeking refund of the amount of Rs. 16,37,213/- deposited against the allotment of the subject unit for an area of 465 sq. ft. with respect to which agreement dated 06.11.2015 was executed between the parties for total sale consideration of Rs. 49,75,500/-. The complainant states that the respondent arbitrarily increased the area of the unit from 465 sq. ft. to 950 sq. ft. and increase the demand to 1,29,96,352/- by sending invalid

offer of possession dated 12.03.2020 without obtaining occupation certificate.

15. The counsel for the respondent refers to clause 5.2 of the agreement, as per which, in case of increase/decrease in super area of the unit up to 10%, the same shall be deemed as within the permissible limit and price of the same shall be payable/refundable by the builder accordingly. However, in case of any major alternation/modification, in excess of 10% or substantial change in specifications etc., the developer shall intimate the buyer in writing the changes thereof and the resulted change in price of the said commercial unit, shall be paid /refunded by him. However, in case the area is increased by more than 10%, the buyer agrees to convey the developer his/her consent/objection to the changes within 30 days from the date of dispatch by the developer of such notice failing which the buyer shall be deemed to have given his/her full and unconditional consent to such alternation/modification... The counsel for the respondent states that the complainant failed to respond to the condition mentioned under clause 5.2 of the agreement, and was thereof bound by the same. The complainant defaulted in making payment of the demanded amount in the offer of possession and therefore, the respondent had no option but to terminate the allotment on 27.07.2021.

16. The counsel for the complainant states that at least 10 e-mails and written communications were sent to the respondent stating that the increase in area was not acceptable to the complainant and sought refund of the amount deposited.

17. The brief facts are that the complainant booked a unit bearing no. 261, 1st floor, building B admeasuring 465 sq. ft in the above-mentioned project of respondent and the same led to execution of buyers' agreement on 06.11.2015 for a total sale consideration of Rs.49,75,500/- and the complainant paid a sum of Rs. 16,37,213/- to the respondent. Thereafter, vide offer of possession letter dated 12.03.2020, the respondent increased the area of the unit from 465 sq. ft. to 950 sq. ft. and also increased the total sale consideration of the subject unit to Rs. 1,29,96,352/-. After the intimation of possession letter, the complainant sent an email dated 15.03.2020 to the respondent for refund of money with interest as the increased area is not acceptable to him. Thereafter, the complainant also sent legal notice dated 06.10.2020 to the respondent. As the complainant objected to the said increase, the respondent terminated the allotment in respect of the subject unit vide letter dated 27.07.2021 as the complainant did not pay the increased demand.

18. Now the proposition before the authority is that whether the cancellation done by the respondent vide letter dated 27.07.2021 and forfeiture of the amount paid by the complainant, is valid and legal.

19. The authority observes that clause 5.2 of the agreement deals with the increase in area of the unit and the same is reproduced as under for ready reference:

> "5.2 *It is agreed between the parties that in case of increase /decrease in the super area of the Said Commercial Unit upto ± 10%, the same shall be deemed as within the permissible limit and the price of the same shall be payable/ refundable according. However, in case of any major alteration/ modification resulting in excess of ± 10%*

change in the super area of the Said Commercial Unit or material/substantial change in the specification, any time prior to and or upon the completion of construction, the Developer shall intimate the Buyer in writing the changes thereof and the resultant change, if any ,and difference in the price of the Said Commercial Unit to be paid by him or to be refunded to him by the Developer as the case may be. It is clarified that up to ± 10% change in the super area, the same rate shall be applicable and if the area exceeds by more than 10%, then the rate then applicable shall be charged for area above 10% .The Buyer agrees to convey to the Developer his/her written consent or objection to the change within thirty (30) days from the date of dispatch by the Developer of such notice failing which the Buyer shall be deemed to have given his/ her full and unconditional consent to all such alteration/modifications and for sums, if any to be paid in consequence thereof. If the written notice of Buyer is received by the Developer within thirty (30) days of intimation in writing by the Developer indicating his/her rejection /non -consent /objection to such alternations/modifications as intimated by the Developer to the Buyer and requests for cancellation of the Agreement enclosing and his copy of the Agreement, then, in such case the Developer may agree to the same and refund the entire money received from the Buyer, excluding interests on delayed payments, brokerages paid and non-refundable deposit, along with simple interest @8% per annum within thirty (30) days from the date of intimation received by the Developer from the Buyer and upon dispatch of such refund by registered post ,the Developer shall be released and discharged from all its obligation and liabilities under this Agreement and the Buyer agrees and authorizes the Developer to resell or deal with the Said Commercial Unit thereafter in any manner whatsoever at the sole discretion of the Developer."

20. The authority is of the view that the respondent intimated about the increase in area of the subject unit to the complainant vide letter dated 12.03.2020. Vide letter dated 12.03.2020, the respondent increased the area of the unit from 465 sq. ft. to 950 sq. ft. and also increased the total sale consideration of the subject unit to Rs. 1,29,96,352/-. The aforesaid increase in area of the unit is far beyond 10%. Exercising the option given under clause 5.2 of the agreement, the complainant sent an email dated 15.03.2020 to the respondent expressing that the increase in area of the unit is not acceptable and sought refund of the amount paid by him. However,

the respondent did not accede to the legitimate request of the complainant and failed to refund the amount paid by him. Thereafter, the complainant has sent a legal notice dated 06.10.2020 to the respondent seeking refund of the entire deposited amount along with interest. Instead of refunding the amount, the respondent terminated the allotment vide cancellation letter dated 27.07.2021. The cancellation of the allotment vide letter dated 27.07.2021 is not valid as the respondent has increased the area of the unit by more than 100% and upon request regarding refund made the complainant, the respondent failed to refund the same. Moreover, the letter of offer of possession dated 12.03.2020 issued by the respondent is per se invalid as the same was issued by the respondent without obtaining the occupation certificate issued by the competent authority and also increased the area in the said letter which is not as per the terms and condition of the agreement. Thus, the authority is of the view that the cancellation vide letter dated 27.07.2021 and forfeiture of the entire amount is not legal and valid for not being in consonance with clause 5.2 of the agreement and for the reasons detailed above.

21. The complainant through the present complaint is seeking refund of the paid-up amount besides interest from the respondent. Section 18(1) of the Act is reproduced below for ready reference:

> *"**Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-*
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*

> ***he shall be liable on demand to the allottees,*** *in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available,* ***to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed*** *in this behalf including compensation in the manner as provided under this Act: Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*
>
> *(Emphasis supplied)*

22. Clause 17 of the buyer's agreement dated 06.11.2015 provides for schedule for possession of unit in question and is reproduced below for the reference:

> ***17. Handing over possession of the commercial unit***
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> *The Developer based on its present plans and estimates and subject to all just exceptions contemplates* ***to complete construction of the said building/said commercial unit within a period of 48 months from the date of execution of this Agreement*** *unless there shall be delay or there shall be failure due to reasons mentioned in this agreement or due to failure of Buyer(s) to pay in time the price of the said commercial unit along with all other charges and dues in accordance with the schedule of payments*
>
> ***Emphasis supplied***

23. **Entitlement of the complainant for refund**: The respondent has proposed to hand over the possession of the subject unit within a period of 48 months from date of execution of builder buyer's agreement. The builder buyer's agreement was executed *inter se* parties on 06.11.2015, therefore, the due date of possession comes out to be 06.11.2019.

24. It is observed that the respondent promoter has failed to handover the subject unit to the complainant as per the committed date in terms of the builder buyer agreement executed inter se parties. Also, the occupation certificate in respect of the project where the

subject unit is situated has not obtained by the respondent till date. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021:***

> *".....The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."*

25. Further 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***, it was observed as under:

> *"25. The unqualified right of the allottee 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 allottee, 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 allottee/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 allottee 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."*

26. The promoter is 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 agreement for

sale under section 11(4)(a). The promoter has failed 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. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

27. **Admissibility of refund along with prescribed rate of interest:** Section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the respondent shall refund of the amount paid by the allottee in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."*

28. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

29. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., **05.12.2023** is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.

30. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 16,37,213/- 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 each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the rules ibid.

G.II Litigation expenses & compensation

31. 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. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal

expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

H. Directions of the Authority:

32. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

    i. The respondent/promoter is directed to refund the entire amount of Rs. 16,37,213/- paid by the complainant along with prescribed rate of interest @ 10.75 % p.a. as prescribed under rule 15 of the rules from the date of each payment till the actual date of refund of the amount.

    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.

33. Complaint stands disposed of.

34. File be consigned to the registry.

Sanjeev Kumar Arora
Member

Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 05.12.2023