

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

Complaint no. : 1186 of 2022
Date of filing : 22.03.2022
Date of decision : 16.01.2024

Alka Chaudhary

R/o: - 101, BDO Campus, BDO Office,
Civil Lines, Gurgaon-122001

Complainant

Versus

M/s Shree Vardhman Infraheights Pvt. Ltd.

Registered Office: 302, 3rd Floor,
Indraprakash Building 21, Barahkhamba Road,
New Delhi-110001

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

Shri Harshit Batra
Shri Gaurav Rawat

Counsel for complainant
Counsel for 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 there under or to the allottees 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. No.	Heads	Information
1.	Name and location of the project	"Shree Vardhman Victoria", Village Badshapur, Sector-70, Gurugram
2.	Project area	10.9687 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	103 of 2010 dated 30.11.2010
	License valid up to	Valid up to 29.11.2020
	Name of the Licensee	Dial Softek Pvt. Ltd. and others
5.	RERA registered/ not registered and validity status	Registered vide no. 70 of 2017 dated 18.08.2017. Valid up to 31.12.2020
6.	Consent to Establish granted on	12.07.2014 [Page 9 of reply]
7.	Unit no.	705, Tower - H (Page 22 of reply)
8.	Unit admeasuring	1950 sq. ft. (Page 22 of reply)
9.	Date of flat buyer's agreement	05.07.2013 (Page 19 of reply)
10.	Payment plan	Construction linked payment plan (Page 38 of reply)
11.	Total consideration	Rs. 1,16,65,500/- (Page 69 of reply) Rs. 1,03,15,500/- (Basis price of the unit - Page 68 of reply)
12.	Total amount paid by the complainant	Rs. 37,26,590/-



		(Page 69 of reply and also as per page 9 of complaint)
13.	Date of commencement of construction	25.11.2014 (As admitted by respondent on page 9 of reply)
14.	Possession clause	14(a) The Construction of the Flat is likely to be completed within a period of forty (40) months of commencement of construction of the particular tower/block in which the Flat is located with a grace period of six (6) months , on receipt of sanction of the building plans/ revised plans and all other approvals subject to force majeure including any restrains/ restrictions from any authorities, non-availability of building materials or dispute with construction agency/ workforce and circumstances beyond the control of Company and subject to timely payments by the Buyer(s) in the Said Complex.... (Emphasis supplied) [Page 29 of reply]
15.	Due date of delivery of possession	25.09.2018 (Calculated from the date of commencement of construction and including grace period)
16.	Occupation certificate	13.07.2022 (Page 130 of reply)
17.	Offer of possession	Not offered
18.	Letter from complainant to the respondent seeking refund of the deposited amount along with interest	30.11.2017 [Additional document placed on record by the respondent vide affidavit dated 05.12.2023]



19.	Creation of third party rights by issuing allotment letter in favour of Mr. Anand Swarup Gupta and Purnima Jindal	16.02.2023 [Additional document placed on record by the respondent vide affidavit dated 05.12.2023]
20.	Conveyance deed executed in favour of Mr. Anand Swarup Gupta and Purnima Jindal	01.06.2023 [Additional document placed on record by the respondent vide affidavit dated 05.12.2023]

B. Facts of the complaint

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

- I. That the complainant had booked a unit in the project of the respondent company namely "Shree Vardhman Victoria" ("**Project**") at Sector 70, Gurugram, Haryana 122001 and hence is an allottee under section 2(d) of the Act. That relying on the assurances, promises, representations and warranties of the respondent, the complainant booked a unit no.705 in Tower H admeasuring super area of 1950 sq. ft. for Rs. 1,16,65,500/- in the project on 06.06.2012 and paid a booking amount of Rs. 10,00,000/-. That the respondent assured that the development of the unit and the project as a whole are going on in a full swing and the unit shall be delivered in almost 3 years from the booking.
- II. That even though the respondent assured the complainant of the swift work and development, the respondent delayed for a year in executing the contract. It was later on 05.07.2013, i.e., after a year of booking that an agreement was executed between the parties, establishing the contractual relationship between the parties. That it is a matter of fact



that the respondent had taken a sum of Rs. 28,88,340/- from the complainant even before the execution of the agreement.

- III. That the complainant was shocked to see that as per clause 14(b) of the agreement, the respondent undertook that the construction of the unit is likely to be completed within a period of 40 months of commencement of construction of the particular tower, on receipt of sanction of building plans/revised plans and all other approvals. The clause further took the complainant's right to claim damages/compensation in case of delay.
- IV. That the complainant was defrauded and cheating by being ensured that all the relevant approvals and permissions are in place for the development process, when, in fact it was later transpired that no sanction plans and approvals were in place. In fact, the complainant was assured that the same had been attained, without having been shown. The respondent has wilfully deceived and defrauded the complainant. That thereafter, a total sum of Rs. 37,26,590/- was taken from the complainant by October 2013 only, as evident from the account statement dated 19.02.2021.
- V. That upon having paid a substantial sum of money, the complainant visited the project site and was shocked to see that no development work was initiated and contrary to the claims and assurances of the Respondent, the completion of development, let alone the delivery of possession, was nowhere near completion. Upon the visit of the complainant, she inquired from the authorised representative at site of the development status of the project and was again assured that the

same is about to begin and shall be carried out in full swing. The complainant was again made to believe on the false and frivolous promises of the respondent.

- VI. That the complainant was shocked to see that until October 2014, the development of the unit had not even begun. The same is evident from the fact that the account statement reveals that the date of commencement of excavation is 13.10.2014. That the complainant again visited the project and again witnessed the non-commencement of the development of the project, despite the promises, assurances and warranties made by the respondent.
- VII. That it needs to be categorically noted that until October 2013, the complainant had rightfully made the payments, however, seeing no development of the project despite a substantial sum of money having been paid to the respondent, the complainant stopped the payment against the unit.
- VIII. That time and again, the complainant kept inquiring about the status of the project, however, at every instance, was falsely assured of the same. That it's been 10 years since the booking was made by the complainant and no reply was received by the complainant and neither any offer of possession has been made.
- IX. That receiving no reply from the respondent and seeing no development progress in the project, the complainant had lost all its trust and faith in the respondent and the project. With no actual development, the respondent kept on demanding payments with exorbitant interest rates.

That having been cheated, defrauded and coerced, the complainant opted to take refund of the deposited amount. That the complainant, at various occasions, wrote to the respondent expressing the concern of no development status, which led the complainant to stop further payments and accordingly, requested the respondent to refund the deposited amount along with interest, as is evident from letters dated 13.06.2017 and 30.11.2017. That it is categorical to note that no reply has been received from the Respondent and the requests of the Complainant have not been adhered to. That in fact, the Respondent did not disclose the true construction status of the Project.

- X. That till date, no occupancy certificate has been obtained by the respondent and the possession of the unit has not been given, till date, even in almost 10 years of booking. That in such a circumstance, the complainant cannot, in any whatsoever, anticipate the delivery of the possession of the unit.
- XI. That the complainant cannot in any manner foresee the delivery of possession and having waited for a substantial amount of time; has lost faith in the *bonafide* conduct of the respondent. The complainant stands well within his rights in claiming the refund as they cannot be expected to wait indefinitely for the delivery of possession as was held in ***Fortune Infrastructure v. Trevor d' lima (2018) 5 scc 442 : (2018) 3 scc (civ) 1*** and was reiterated in ***Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) sc 725*** -"a person cannot be made to wait

indefinitely for possession of the flat allotted to him, and is entitled to seek refund of the amount paid by him, along with compensation”.

XII. That in light of the above facts, the Hon'ble Authority is requested to refund the amount that the Complainant has paid till date in view of section 18 of the Act along with the interest and compensation as she has been unnecessary subjected to mental and financial harassment by the Respondent by illegally retaining her money. It is pertinent to note that the construction work of the project is way behind than its schedule and there is no hope for the completion of the same in the near future, and it is submitted that the complainant cannot be expected to endlessly wait for the possession.

C. Relief sought by the complainant:

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

1. **Direct the respondent to refund the entire money paid by complainant along with prescribed rate of interest from date of deposits till its actual realization.**

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 on the following grounds.

a. The present complaint filed under section 31 of the Act is not maintainable under the said provision. The respondent has not violated any of the provisions of the Act. The complainant has sought relief under



section 18 of the Act, but the said section is not applicable in the facts of the present case and as such the complaint deserves to be dismissed. It is submitted that the operation of section 18 is not retrospective in nature and the same cannot be applied to the transactions that were entered prior to the Act came into force. The parties while entering the said transactions could not have possibly taken into account the provisions of the Act and as such cannot be burdened with the obligations created therein. In the present case also, the flat buyer agreement was executed much prior to the date when the Act came into force and as such section 18 of the Act cannot be made applicable to the present case. Any other interpretation of the Act will not only be against the settled principles of law as to retrospective operation of laws but will also lead to an anomalous situation and would render the very purpose of the Act nugatory. The complaint as such cannot be adjudicated under the provisions of Act.

- b. The project in question i.e., "Shree Vardhman Victoria" (hereinafter as "Project") is being developed by the respondent in Sector 70, Gurugram, Haryana under a license issued by the Director Town and Country Planning Haryana under Haryana Development and Regulation of Urban Areas Act, 1975. The project has also been registered with the Real Estate Regulatory Authority, Haryana under the provisions of the Act. The project is also having other requisite sanctions/ approvals also.
- c. The first phase of the project consisting of residential towers - A, B, C, H, I have already been completed and ready to be occupied. An application



for grant of occupation certificate qua the said 1st phase was filed with the Director Town and Country planning Haryana on 23.02.2021. The Department of Town and Country Planning Haryana allowed the said application and on 13.07.2022 granted OC for the said phase vide its memo No. ZP-686/ AD(RA)/2022/20077 dated 13.07.2022. The second phase of the project consisting of tower D, E and F has also been completed and application for grant of OC in respect of said three towers has been submitted to the DTCP, Haryana on 22.09.2022 and the same is under consideration of the said department.

- d. Consequent to grant of OC, the respondent started the process of delivering possession of the flats in first phase to their respective allottees. Many allottees have already taken possession of their respective flats.
- e. That a flat buyer agreement dated 05.07.2013 was executed in respect of flat H-705 between the complainant and the respondent. The payment plan\opted for payment of the agreed sale consideration and other charges was a construction linked payment plan. The respondent from time to time raised demands as per the agreed payment plan, however the complainant committed severe defaults and failed to make the payments as per the agreed payment plan. The severity of the defaults committed by the complainant can be gauged from the fact that complainant did not make payment of any installment to the respondent that fell due after 23.09.2014. Along with the various demand notices, letters sent to the complainant, the respondent sent



complainant various reminders to make payment dated 05.05.2017, 15.05.2017 and 05.06.2017/ the complainant neither paid the outstanding payments despite aforesaid demand letters/reminders nor even otherwise responded to the same.

- f. That in the said agreement no definite or firm date for handing over possession to the allottee was given. However, clause 14 (a) provided a tentative period within which the project/flat was to be completed and application for OC was to be made to the competent authority was given. As the possession was to be handed over only after receipt of OC from DTCP Haryana and it was not possible to ascertain the period that DTCP, Haryana would take in granting the OC, therefore the period for handing over of possession was not given in the agreement. In this particular case the flat/tower in question was completed in Feb 2021 and the occupancy certificate in respect thereof was applied on 23.02.2021, as such the respondent cannot be held liable for payment of any interest and/ or compensation for the period beyond 23.02.2021. Neither contractually nor in law the respondent can be held liable for the period taken by the concerned government department for granting the OC.
- g. The tentative period i.e., 46 months for the completion as indicated in the flat buyer agreement was to commence from commencement of construction of the particular tower /block in which the flat was located on receipt of sanction of the building plans/ all other approvals. The last approval required for commencement of construction being "Consent



to Establish (CTE)" was granted to the project on 12.07.2014 by Haryana State Pollution Board. Thereafter the construction of the tower in question commenced on 25.11.2014.

- h. The said tentative/estimated period given in clause 14 (a) of the agreement was subject to conditions such as force majeure, restraint/restrictions from authorities, non-availability of building material or dispute with construction agency/work force and circumstances beyond the control of the respondent and timely payment of installments by all the buyers in the said complex including the complainant. As aforesaid many buyers/allottees in the said complex, including the complainant, committed breaches/ defaults by not making timely payments of the installments. Further, various other factors beyond control of OP came into play including the following:

- The construction activity Gurugram has also been hindered due to orders passed by Hon'ble NGT/State Govts./EPCA from time to time putting a complete ban on the construction activities in an effort to curb air pollution.
- The District Administration, Gurugram under the Graded Response Action Plan to curb pollution banned all construction activity in Gurugram, Haryana vide from 01.11.2018 to 10.11.2018 which resulted in hindrance of almost 30 days in construction activity at site.
- The Environmental Pollution (Prevention and Control) Authority for NCR ("EPCA") vide its notification bearing No. EPCAR/2019 /L-49 dated 25/10/2019 banned construction activity in NCR during night hours (06:00 PM to 06:00 AM) from 26.10.2019 to 30.10.2019 which was later on converted into complete 24 hours ban from 01.11.2019 to 05.11.2019.

- The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in Writ Petition No. 13029/1985 titled as "M.C. Mehta Vs. Union of India" completely banned all construction activities which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020.
 - The unprecedented situation created by the Covid-19 pandemic presented yet another force majeure event that brought to halt all activities related to the project including construction of remaining phase, processing of approval files etc. The Ministry of Home Affairs, GOI vide notification dated March 24, 2020 bearing no. 40-3/2020-DM-I(A) recognised that India was threatened with the spread of Covid-19 epidemic and ordered a complete lockdown in the entire country for an initial period of 21 (twenty) days which started from March 25, 2020. It is submitted that all the above factors/force majeure events have resulted so far in wastage of almost **2 and half years**. The stoppage of construction activity even for a small period result in a longer hindrance as it become difficult to re-arrange, re-gather the work force particularly the laborers as they move to other places/their villages.
- i. The said tentative period was also subject to timely payments of the installments by the complainant and other allottees of the project. However, the complainant as well as a large number of allottees committed defaults in making payment of the installments. On this ground alone the complainant is not entitled to the reliefs claimed in the complaint. These defaults adversely affected the pace of the construction of the project. For a multi-level group housing construction, the default in payment committed even by a single allottee adversely affect the entire cash flow, planning and construction schedule for the project as whole. The said defaults caused huge losses to the respondent as they exposed to financial losses. The losses caused



to the respondent cannot be measured with certainty in terms of money, however the same are huge. The allottee, therefore, should be made liable at least for payment of interest at the agreed rate mentioned in the agreement for the defaults committed by her in order compensate the respondent for the losses caused by the complainant.

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 these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:



Section 11

.....

(4) 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.

11. 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.
12. 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 (Civil), 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***, 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."

13. 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. Finding on objections raised by the respondent.

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

14. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.

15. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific



provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of hon'ble Bombay High Court in Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

16. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd.**

Vs. Ishwer Singh Dahiya dated 17.12.2019, the Haryana Real Estate

Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the



terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

17. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the buyer's agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act and are not unreasonable or exorbitant in nature.

F.II Objection regarding force majeure conditions:

18. 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 orders of Hon'ble Supreme Court of India to curb pollution in NCR, various orders passed by NGT, EPCA, lockdown due to outbreak of Covid-19 pandemic which further led to shortage of labour 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 the flat buyer's agreement, the due date of handing over of possession comes out to be



25.09.2018. The events such as Hon'ble Supreme Court of India to curb pollution in NCR, various orders passed by NGT, EPCA were for a shorter duration of time and were not continuous as there is a delay of more than four years after due date of handing over of possession. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons and plea taken by respondent is devoid of merits.

19. 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."

20. The respondent was liable to handover the possession of the said unit by 25.09.2018 and is claiming benefit of lockdown which came into effect on 24.03.2020 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.



21. Further in the judgement of the Hon'ble Supreme Court of India in the case of *Newtech Promoters and Developers Private Limited Vs. State of U.P. and Ors. (Civil Appeal no. 6745-6749 of 2021)*, it was observed-

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.

22. In view of the above, the objection raised by the respondent to extend the due date of handing over possession due to force majeure circumstances due to various authorities/tribunals/courts orders and COVID-19 is declined.

G. Findings on the relief sought by the complainant.

- G.I Direct the respondent to refund the entire amount paid by the complainant.**

23. On 24.04.2023, the complainant moved an application for amendment in relief sought and vide proceedings dated 17.05.2023, the respondent was given 2 weeks' time to file objections to the amendment application of the complainant seeking Possession and DPC instead of refund. But the respondent has failed to file any objection to the same within

stipulated period and hence they cannot be considered at this belated stage. However, during proceedings on 19.09.2023, the counsel for the respondent stated that no objection of the above application is being filed and only additional document pertaining to creation of third party rights are being filed. Further, the counsel for the respondent stated that the unit allotted to the complainant stands cancelled and third party rights are also created and further no alternate unit is available which could be considered for allotment to the complainant. In view of the above, the respondent was directed to file an affidavit stating non-availability of any alternate unit.

24. During proceedings on 05.12.2023, the counsel for the respondent filed an affidavit stating that the unit of the complainant stands allotted to third party and conveyance deed also stands executed in favour of the new allottee after cancellation of the unit of the complainant. The respondent has also stated that no alternate unit is available. It was further stated by the counsel for the respondent that in April 2017, the complainant has requested for cancellation of the unit and refund of the amount deposited.
25. The counsel for the complainant is seeking direction for possession of the unit as earlier in view of slow pace of work in the project, the request for cancellation/refund was made and documentation asked for by the respondent prior to refund was also completed but till date the amount has not been refund to the complainant allottee and no intimation



received and hence requests for possession of the allotted unit or an alternative unit.

26. The authority observes that the complainant has vide letter dated 30.11.2017 has requested the respondent to refund the amount deposited along with the interest. Thereafter, the complainant has filed the present complaint before the authority on 22.03.2022 seeking refund of the amount paid to the respondent along with interest at the prescribed rate. However, only on 24.04.2023, the complainant has filed an application for the amendment of the relief from refund to possession along with delayed possession charges. It is pertinent to note here that the respondent has created third party rights by issuing an allotment letter dated 16.02.2023 and thereafter, execution of conveyance deed dated 01.06.2023 in favour of Mr. Anand Swarup Gupta and Purnima Jindal. Moreover, the respondent has also stated on affidavit that there is no alternative unit which can be allotted to the complainant in lieu of the subject unit. Thus, the complainant has sought amendment of relief at a very belated stage and the same cannot be acceded to keeping in view the aforesaid facts.
27. Now the question before the authority is whether the complainant is entitled to refund of the entire amount or the same is subject to deduction of earnest money.
28. On consideration of documents available on record and submissions by both the parties, the authority is of the view that the unit bearing no. 705, Tower H in the project was allotted to the complainant and



thereafter, the buyer's agreement inter se parties was executed on 05.07.2013 and the complainant has paid Rs. 37,26,590/- against the total sale consideration of Rs. 1,16,65,500/-. The due date of possession as per clause 14(a) of the buyer's agreement was 25.09.2018. However, the complainant has requested for refund of the entire amount along with interest vide letter dated 30.11.2017 which is prior to the due date of possession as per the buyer's agreement. It is also pertinent to mention here that the complainant has paid the last instalment only on 24.10.2013 and has not paid any amount after the said date. The complainant allottee was under an obligation to make payment plan as per the agreed payment plan terms and conditions of the buyer's agreement but having failed to do the same, ultimately lead to the cancellation of unit. No doubt, the complainant did not pay any outstanding amount after 2013 but the respondent while cancelling the unit was under an obligation to forfeit the earnest money out of the amount paid by the complainant and refund the balance amount deposited by allottee but that was not done.

29. The complainant has paid Rs. 37,26,590/- to the respondent/builder and the cancellation of the allotted unit was done by the respondent by retaining the entire amount paid by the complaint beyond 10% which is not legal in view of number of pronouncements of the Hon'ble Apex Court.

30. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that:

"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 amount of the real estate i.e .apartment/plot/building as the case may be in all case 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."

31. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the deposited amount i.e. Rs. 37,26,590/- after forfeiting 10% of the basic sale price of the unit being earnest money along with an interest @10.85% p.a. on the refundable amount, from the date of surrender i.e., 30.11.2017 till the date of realization of amount within the timelines provided in rule 16 of the Rules, 2017.

F. Directions of the authority

32. 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 deposited amount i.e. Rs. 37,26,590/- after forfeiting 10% of the basic sale price of the unit being earnest money along with an interest @10.85% p.a. on the

refundable amount, from the date of surrender i.e., 30.11.2017 till the date of realization of 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 registry.


(Sanjeev Kumar Arora)

Member


(Ashok Sangwan)

Member


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.01.2024

HARERA
GURUGRAM