

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

Date of decision: 02.02.2024

NAME OF THE BUILDER		M/S EXACT DEVELOPERS & PROMOTERS PRIVATE LTD.	
PROJECT NAME		The Ace CIP	
S. No.	Case No.	Case title	Appearance
1	CR/6170/2022	Bawa Mohinder Singh V/S M/S Exact Developers & Promoters Private Ltd. and M/s Vipul Limited	Sh. Venket Rao Sh. Ankur Bansal for R1 Sh. Rishab Gupta for R2
2	CR/6185/2022	Bawa Mohinder Singh V/S M/S Exact Developers & Promoters Private Ltd. and M/s Vipul Limited	Sh. Venket Rao Sh. Ankur Bansal for R1 Sh. Rishab Gupta for R2

CORAM:

Shri Sanjeev Kumar Arora

Member

ORDER

1. This order shall dispose of the two complaints titled above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.

2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, The Ace CIP situated at Sector-80, Gurugram being developed by the same respondent/promoter i.e., M/s Exact Developers & Promoters Private Limited. The terms and conditions of the buyer's agreements fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking possession of the unit along with delayed possession charges.
3. The details of the complaints, reply status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project Name and Location	"The Ace CIP" at sector 80, Gurgaon, Haryana.
Project area DTCP License No.	Cannot be ascertained
Rera Registered	Not Registered
Possession clause: Not mentioned in files as BBA has not been executed in any case.	
Due date of possession: 09.04.2010 [Calculated as per Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018]	
Occupation certificate: 27.03.2014	
Offer of possession: 01.12.2015	

Sr. No	Complaint No., Case Title, and Date of filing of complaint	Unit No.	Unit admeasuring	Date of apartment buyer agreement	Due date of possession	Total Sale Consideration / Total Amount paid by the complainant	Relief Sought



1.	CR/6170/ 2022 Bawa Mohinder Singh V/S M/S Exact Developer s & Promoter s Private Ltd. and M/s Vipul Limited DOF: 14.09.202 2 Reply status: 12.01.202 3	212, Block B	1670 sq. ft.	Not execute d	09.04.201 0	TSC: - Rs. 87,67,50 0/- AP:- Rs. 74,22,12 5/-	Refund
2.	CR/6185/ 2022 Bawa Mohinder Singh V/S M/S Exact Developer s & Promoter s Private Ltd. and M/s Vipul Limited DOF: 14.09.202 2	213, Block B	1273 sq. ft.	Not execute d	09.04.201 0	TSC: - Rs. 70,01,50 0/- AP: - Rs. 61,55,30 0/-	Refund

	Reply status: 12.01.202 3						
<p>Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:</p> <p>Abbreviation Full form TSC Total Sale consideration AP Amount paid by the allottee(s)</p>							

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement executed between the parties in respect of said units for not handing over the possession by the due date, seeking refund of the amount paid.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter /respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of all the complaints filed by the complainant(s)/allottee(s) are similar. Out of the above-mentioned case, the particulars of lead case **CR/6170/2022 Bawa Mohinder Singh V/S M/S Exact Developers & Promoters Private Ltd. and M/s Vipul Limited** are being taken into consideration for determining the rights of the allottee(s) qua refund of the amount paid.

A. Project and unit related details

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

**CR/6170/2022 Bawa Mohinder Singh V/S M/S Exact Developers &
Promoters Private Ltd. and M/s Vipul Limited**

S.n	Particulars	Details
1.	Name of the project	"The Ace CIP", Sector-80, Gurgaon
2.	Nature of the project	Commercial Space
3.	RERA registered/not registered	Not Registered
4.	Allotment Letter	09.04.2007 [page no. 34 of complaint]
5.	Unit No.	212, Block B [page no. 34 of complaint]
6.	Area admeasuring	1670 sq. ft. (super area) [page no. 34 of complaint]
7.	Date of Builder Buyer Agreement	Not executed
8.	Possession clause	Not mentioned
9.	Due date of possession	09.04.2010 [Calculated as per Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018]
10.	Total sale consideration	Rs. 87,67,500/- (As per payment plan on page no. 36 of complaint)

11.	Total amount paid by the complainant	Rs. 74,22,125/- (as per ledger account on page no. 39 A of complaint)
12.	Offer of possession for fit out	06.02.2013 A demand of Rs. 29,58,059/- was raised by respondent (page no. 67 of reply)
13.	Occupation certificate	27.03.2014 (For Office building, retail area and basements) (page no. 68 of reply)
14.	Letter for refund by complainant	25.11.2015 (page no. 45 of complaint)
15.	Offer of possession	01.12.2015, 16.03.2016, 12.05.2016 (page no. 70-72 of reply)
16.	2 nd Letter for refund by complainant	20.03.2016 (page no. 47 of complaint)
17.	Reminders	1. 21.07.2016, 2. 03.11.2016, 3. 03.04.2017 Final reminder 05.05.2017 Final Intimation 06.06.2017 (page no. 73-78of reply)
18.	Legal notice by complainant to know the exact status of the unit	20.07.2022 (page no. 49 of complaint)

19.	Reply by the respondent asking complainant to take possession	01.09.2022 (page no. 81 of reply)
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B. Facts of the complaint

The complainant has made the following submissions in the complaint: -

8. That believing upon the assurances, commitments and representations complainant herein paid an amount of Rs. 17,55,000/- towards the total sale consideration as and when demanded by the respondent. Despite, after taking more than 10% of the total sale consideration the respondents herein had failed either to make any allotment or execute builder buyer agreement in favour of the complainant.
9. That on 06.04.2007, the respondent no. 1, vide allotment letter dated 06.04.2007, allotted a unit bearing no. 212, block - B, admeasuring to 1070 sq. ft. for a total sale consideration of Rs. 87,67,500/-. However, the respondent herein failed to mention any timeline by when a builder buyer agreement will be executed and the due date of possession.
10. That lured by you assurances, commitments and representations the complainant had paid an amount of Rs. 74,22,125/- from 20.02.2007 till 06.08.2008, towards the total sale consideration of Rs. 87,67,500/-. The complainant herein had been adhering to the payment schedule and had timely paid the instalment without any delay or default
11. That inspite after receiving more than 80% of the total sale consideration the respondents have neither executed a builder buyer agreement but have also not intimated the due date of possession in the allotment letter. It is submitted that since inception the complainant herein had been

chasing you the addressees to know the exact status of the project and also for the execution of agreement which has not been executed as on date.

12. That after lapse of 6 (Six) years from the date of booking the respondent no. 1, vide letter dated 06.02.2013, informed the complainant that the unit in question is ready for possession and for fit-outs and arbitrarily called upon the complainant to pay an unfair demand of Rs. 29,58,059/- which included unjustified interest of Rs. 16,12,684/-. The possession offered by the respondent were not legal as neither the construction was complete nor was occupation certificate obtained.
13. That after repeated visits and follow-ups the complainant being aggrieved was constrained to withdraw from the project and called upon the respondent no. 1 to cancel the unit as the possession of the unit was not being offered and the complainant was not at all interested to continue with the project being developed by the respondent no. 1.
14. That on 16.03.2016, the respondent no. 1 is in contravention to earlier statement issued a letter dated 16.03.2016, intimating the complainant that the construction of the unit in question is ready for possession. It is submitted that since inception the respondents herein had failed to provide any due date of possession and had hoodwinked the complainant on pretext or the other.
15. That on 20.03.2016, the complainant herein once again reminded the respondent no. 1 to refund the entire amount paid by the complainant against the unit in question. After intimating the respondents that the complainant herein do not wish to continue with the project and wants to withdraw the respondent no. 1, failed to refund the hard earned money

duped from the complainant on the basis of false assurances, commitments and representations. Further, on 12.05.2016, the respondent no. 1 vide offer for possession letter offered possession to the complainant without even adjusting/settling the compensation for the delay so caused in providing possession and have further raised an unjustified demand of Rs. 27,17,360/- for the said unit. Despite, being aware of the fact, that the construction of the said project is not complete and the amenities so promised at the time of booking have not been provided by the respondents the respondents have made several reminders calling upon the complainant to take the possession of the unit which was incomplete and was completely different than what was stated at the time of the booking.

16. That upon not receiving any response from the respondents the complainant herein served a legal notice dated 20.07.2022, calling upon the respondents to intimate the exact status of the project and to forthwith complete the construction of the same and provide the occupation certificate so received.
17. That since starting the respondents has failed to intimate the exact status of the project and provide any cogent evidence that the hard earned money being paid by the complainant had been utilized for the construction of the project. And, now upon not receiving any update in regard to the project the complainant herein seek the relief of refund of the amount against the total sale consideration.

C. Relief sought by the complainant: -

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

- I. Direct the respondent to refund the entire amount paid by the complainant along with interest @ 18% p.a. from the date of respective deposits till its actual realization.
- II. Direct the respondent to pay the compensation of Rs. 5,00,000/- for causing mental agony, harassment to the complainant.
- III. Direct the respondent to pay an amount of Rs. 3,00,000/- towards the cost of the litigation.

19. 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 no. 1

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

20. That the complainant was asked vide letter dated 06.02.2013 to make payment of outstanding amount with balance principal amount and interest and take possession for fit outs. The respondent no. 1 received occupation certificate dated 27.03.2014 and 05.11.2015 and vide letter dated 01.12.2015 complainant was asked to take possession. Vide letter dated 16.03.2016 the complainant was again asked to take possession after clearing the outstanding dues. That he was further asked to take possession vide letters dated 12.05.2016, 21.07.2016, 03.11.2016, 03.04.2017, 05.05.2017 and 06.06.2017 after clearing the outstanding dues. That vide letter dated 01.2.2017 and 01.05.2019 he was again asked to take possession failing which he was to be liable for holding charges.
21. That the complainant was allotted unit no. 213 in Tower B of respondent's project. The ACE, in Manesar, Gurugram, Haryana. The complainant unit has been ready for possession and respondent no.1 company has received

occupation certificate and other statutory approvals. The respondent has asked complainant to clear outstanding dues and take possession of the unit but complainant has failed to take possession after completing the commercial formalities.

22. That as on 06.06.2017 Rs.21,82,690/-has been outstanding from complainant to the respondent company towards unit no. 213. That complainant is again asked to take the possession of the unit after completing the commercial formalities. That the complainant was further requested vide reply dated 01.09.2022 to his legal notice dated 20.07.2022 to inspect the site exam in all statutory approvals and take possession of the commercial unit.
23. That the project has been completed and respondent has offered possession time and again to the complainant as the occupation certificate from the concerned competent authority has been received but still the complainant with malafide intention chose the Hon'ble Authority to agitate his frivolous claim.
24. That the present complaint is not maintainable and the Hon'ble Regulatory Authority has no jurisdiction whatsoever to decide the present complaint.
25. That it is also most respectfully submitted that the Hon'ble Regulatory Authority has no jurisdiction to entertain the present complaint as the complainant has not come to the Hon'ble Regulatory Authority with clean hands and has concealed the true and material facts.
26. That the complainant is estopped from filing the present complaint by his own acts, conduct, admissions, commissions, omissions, acquiescence and latches. The complainant has moved the instant vexatious complaint to

harass the respondent no.1 to succumb to his illegal demands and to achieve speculative bargains.

27. That it may not be out of place to submit that the statement of objects and reasons of the RERA inter alia is an attempt to balance the interests of consumers and promoters by imposing certain responsibilities on both. It is submitted that the complainant has never been at all aggrieved and do not fall under the definition of aggrieved person, but still by filing such false, frivolous and vexatious complaint, the complainant is not only harassing the respondent company to succumb to his illegal demand, but by filing such false complaint, he is misleading the Hon'ble Authority.

E. Reply by Respondent no. 2

28. That the present complaint is entirely misconceived and an abuse of the process of law and liable to be dismissed on this very threshold. Complainant has no cause of action to file the present complaint against the answering respondent no.2 as the relief sought in the present complaint is not maintainable against the answering respondent no.2.
29. That the answering respondent no.2 has only marketed the project namely "The Ace " at Manesar on NH-8 Road ("the project") being developed by the respondent no.1 and has no other authority whatsoever. The complainant has never paid any amount to the answering respondent no. 2. Thus, the answering respondent no.2 is under no obligation to pay or refund any amount along with interest or compensation thereof to the complainant.
30. That the respondent no.1 who is the owner of land admeasuring 11.25 acres falling in various Khasras of the revenue estate of Village Laknaula Tehsil and District Gurgaon, Haryana by virtue of conveyance deed dated

08/05/1997 registered document No/2165 Addl. Book No.1 Volume 5150 on page 68-69 where the said project is being developed by respondent no. 1. The respondent no.1 has obtained license in its own name from DTCP, Haryana for change of land use for construction over the aforesaid plot and has been carrying out the development of the project on the said land. The respondent no.1 had requested the answering respondent no.2 to handle the marketing of the project. Subsequently, the respondent no.1 had entered into a marketing management agreement dated 01.02.2007 ("Marketing Management Agreement") with the answering respondent no. 2 for marketing of the project.

31. That as per the terms of the marketing management agreement the answering respondent no.2 was only entitled to manage and market the project and for such services is entitled to be paid a fixed management fee by the respondent no.1. The answering respondent no. 2 has no other or further rights either in the project or on the land (including built-up areas) forming part of the project.
32. That in accordance with the terms of marketing management agreement, the answering respondent no.2 had signed agreements with various allottees in the capacity of "Manager" including signing of the flat buyer's agreement ("Buyer's Agreement"). The complaint was well aware that the respondent no.1 is the "vendor" and the answering respondent 2 is only the marketing agent of respondent no.1 in the capacity of a "Manager".
33. That respondent no.2 is neither the owner nor having any share or interest in the said project nor in the land forming part of the project in any manner whatsoever. Whereas respondent no.1 is the owner and in possession of

the property and had obtained the License to develop the land from DTCP, Haryana in its name.

34. That whatever amounts/payments, if any which have been made by the complainant have been paid only to the respondent no.1 and no payment of any nature whatsoever has been paid by the complainant to the answering respondent no.2. There is no privity of contract between the complainant and the answering respondent no.2 with respect to the subject matter of dispute involved in the present complaint as the answering respondent no.2 is neither the owner nor does it have any share or interest in the project in any manner and also not received any amount from the complainant.
35. Copies of all the relevant documents have been filed and placed on the 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.

F. Jurisdiction of the authority

36. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F.I Territorial jurisdiction

37. 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.

F.II Subject matter jurisdiction

38. 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.

39. 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.

40. 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 cases of *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*" 2021-2022(1) RCR(C), 357 & *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 was held 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."

41. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

G. Findings on the objection raised by respondent no. 2.

G.I. Objection regarding refund of the amount by respondent no. 2 as they are not promoter/developer.

42. The respondent no. 2 i.e., M/s Vipul Limited while filing the written reply dated 25.01.2023 has raised an objection regarding maintainability of complaint towards them and stated they are wrongly added as a party to the complaint. The said project is being developed by respondent no. 1 and moreover the payments made by the complainants were also received by them. They further stated that they are only handling the marketing of the

project and had entered into a marketing management agreement with the respondent no. 1 on 01.02.2007. The authority is of the view that the marketing management agreement dated 01.02.2007 was executed between the respondent no. 1 and M/s Vipul Limited. As per the said agreement the respondent no. 2 i.e., M/s Vipul Limited has to handle the sale by applying its marketing skills. Moreover in the allotment letter dated 06.04.2007 it is clearly mentioned that the project is being marketed by M/s Vipul Limited. Even the payments made by the complainants were also received by the respondent no. 1. Moreover, Section 31 of the Act empowers an aggrieved person to file a complaint against any promoter, allottee or real estate agent as the case may be. The respondent no.2 i.e., M/s Vipul Limited is not covered under either of the definitions under the Act. Thus, the present complaint is not maintainable against the respondent no.2.

H. Findings on the relief sought by the complainant

- I. Direct the respondent to refund the entire amount paid by the complainant along with interest @ 18% p.a. from the date of respective deposits till its actual realization.

43. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 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)

44. However, in the present matter no BBA has been executed between the parties therefore the due date of possession cannot be ascertained. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained then a reasonable time period of 3 years has to be taken into consideration. It was held in matter **Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442 : (2018) 3 SCC (civ) 1** and then was reiterated in **Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725 -:**

"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered."

45. Accordingly, the due date of possession is calculated as 3 years from the date of allotment letter i.e., 09.04.2007. Therefore, the due date of possession comes out to be 09.04.2010.
46. The Section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession, the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.
47. After considering the documents available on record as well as submissions made by the parties, it is concluded that the OC/CC of the Tower in which the unit of complainant is situated has been obtained by it. The due date of possession was 09.04.2010 and the complainant has surrendered the unit by sending a letter to the respondent to refund the amount paid by them on 25.11.2015 and 20.03.2016, thereafter the complainant sent a legal notice to know the exact status of the unit and for seeking possession of the unit on 20.07.2022. But subsequently on 14.09.2022 the complainant filed a complaint for refund of the total amount paid by him. In view of the same surrender letter dated 25.11.2015 and 20.03.2016 becomes null and void.
48. In the present matter the respondent on 01.12.2015 offered the possession of the unit and after possession of the unit was offered to him after obtaining occupation certificate by the promoter, complainant sent a reminder letter to refund an amount paid by them. The OC was received on 27.03.2014 whereas, offer of possession was made on 01.12.2015. The allottee never

earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made and demand for due payment was raised, then only, he has filed a complaint before the authority. Moreover, the respondent vide letter dated 01.12.2015, 16.03.2016, 12.05.2016 offered the possession of the unit and subsequently sent reminders vide letter dated 21.07.2016, 03.11.2016, 03.04.2017 and final reminder dated 05.05.2017 and final intimation 06.06.2017 to take possession of the unit.

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



25. The unqualified right of the allottees to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottees, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottees/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottees does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.

50. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. But the complainants-allottee failed to exercise his right although it is unqualified one rather tacitly wished to continue with the project and thus made himself entitled to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or

by way of delay possession charges at prescribed rate of interest for every month of delay.

51. In case the allottee wishes to withdraw from the project, the promoter is liable on demand to return the amount received by it with interest at the prescribed rate if it fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that the allottee has to make intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready then he impliedly agreed to continue with the project i.e. he do not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and the allottees shall be paid interest at the prescribed rate for every month of delay by the promoter.
52. In the instant case, the due date for handing over for possession was 09.04.2010. The OC was received on 27.03.2014 whereas, offer of possession was made on 01.12.2015. However, the complainant filed a complaint on 14.09.2022 for refund of the total amount paid by him. Therefore, in this case, refund can only be granted after certain deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which provides as under: -

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the

forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"

53. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs. 74,22,125/- after deducting 10% of the basic sale consideration of Rs. 87,67,500/- being earnest money along with an interest @10.85% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of filing of complaint i.e., 14.09.2022 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

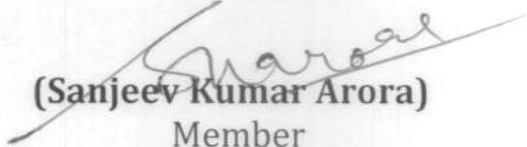
- II. **Direct the respondent to pay the compensation of Rs. 5,00,000/- for causing mental agony, harassment to the complainant.**
- III. **Direct the respondent to pay an amount of Rs. 3,00,000/- towards the cost of the litigation.**

54. The complainant in the aforesaid relief is seeking relief w.r.t 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.** (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation 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 shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is

advised to approach the adjudicating officer for seeking the relief of compensation.

I. Directions of the authority

55. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondent/builder is directed to refund the paid-up amount after deducting 10% of the sale consideration being earnest money along with an interest @10.85% p.a. on the refundable amount from the date of filing of complaint i.e., 14.09.2022 till date of its payment.
 - 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.
56. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
57. The complaints stand disposed of.
58. Files be consigned to registry.


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 02.02.2024