

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

Complaint no.	:	2089 of 2022
Date of Filing Complaint:		27.05.2022
Date of Decision:		03.11.2023

Damayanti Nayak Sanjay Kumar Malik Both R/O: H. no. 1203, Antriksh Green, Plot no. GH08, Sector-45, Gurugram-122003	Complainants
Versus	
M/s Magic Eye Developers Pvt. Ltd. Regd. office: GF-09, Plaza M6, Jasola District Centre, Jasola, New Delhi-110025	Respondent

CORAM:	
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Parikshit Siwach (Advocate)	Complainants
Sh. Anup Gupta (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/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 provision of the Act or the rules and regulations made there under or to the allottee 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 complainants, 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	"The Plaza at 106-I", Sector 106, Gurugram
2.	Nature of the project	Commercial Complex
3.	DTCP license no.	65 of 2012 dated 21.06.2012 valid upto 21.06.2022
4.	Name of licensee	Magic Eye Developers
5.	RERA Registered/ not registered	72 of 2017 dated 21.08.2017 valid upto 31.12.2021
6.	Unit no.	019, Ground floor, tower B (Page 18 of complaint)
7.	Unit area admeasuring (super area)	613 sq. ft. (Page 18 of complaint)
8.	Allotment letter	04.03.2013 (Page 15 of complaint)
9.	Date of flat buyer agreement	19.04.2013 (Page 17 of complaint)
10.	Possession clause	9.1. The Developer based on its present plans and estimates and subject to all just exceptions / force majeure /



		statutory prohibitions / court's order etc, contemplates to complete the construction of the said Building/said Unit within a period of three years from the date of execution of this Agreement , with two grace periods of Six months each, unless there is a delay for reasons mentioned in Clauses 10.1: 19.2 and Clause 37 or due to failure of Allottee(s) to pay in time the price of the said Unit along with other charges and dues in accordance with the schedule of payments given in Annexure-C or as per the demands raised by the Developer from time to time or any failure on the part of the Allottee(s) to abide by all any of the terms or conditions of this Agreement
11.	Due date of possession	19.10.2016 (Calculated as three years from date of agreement plus grace period of six months as the same is unqualified)
12.	Total Sale consideration	Rs. 67,15,611/- (As per applicant ledger dated 05.02.2020 at page 46 of complaint)
13.	Basic Sale consideration	Rs. 59,46,100/- (BSP) (As per BBA on page 23 of complaint)
14.	Amount paid by the complainants	Rs. 57,54,646/- (As per applicant ledger dated 05.02.2020 at page 46 of complaint)
15.	Occupation certificate	28.11.2019 (As per DTCP website)

16.	Offer of possession	30.11.2019 (Page 47 of complaint)
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B. Facts of the complaint:

3. That believing in the above advertisements and specific representations of the respondent's representatives, complainant Sanjay Kumar Malik (Co-applicant) along with his wife, Mrs. Damayanti Nayak (Applicant) for his/their commercial use/purpose, bought all rights of tower/block no. B2, ground floor, unit no. 19, total super built up area of 613 sq. ft., which had been allotted/confirmed by the respondent for a total basic sale price of Rs. 59,46,100/- @ Rs. 9,700/- per Sq. Ft. along with Rs. 2,61,138/- as External Development charges (EDC) plus Rs. 24,520/- as Infrastructure Development Charges (IDC) plus Rs. 1,22,600/- as interest free maintenance security deposit; aggregating to a total amount of Rs. 62,52,600/-.
4. That to the utter shock and surprise to complainants, respondent came up with a buyer's agreement, on dated 19.04.2013 with a one-sided pre-printed, arbitrary, and unilateral apartment/flat buyer's agreement which was totally against/contrary to the terms agreed between the complainants/buyer and the respondent/builder, which was opposed by the complainants in wholesome, but due to unwarranted, undue and vague pressure owing to the deep pockets and holding of a superior position after getting hefty amount for the said unit, the respondent managed to get signed their one-sided agreement under pressure and coercion.
5. That, according to the above said arbitrary and unilateral buyer's agreement signed between the parties on dated 19.04.2013, the said

project should have been delivered by 18th April, 2016 with two grace periods of 6 months each i.e., 18th April, 2017 and if there is any delay, owing to default of the respondent company, a compensation of Rs. 5/- per square feet is mentioned/provided in the buyer's agreement, but to the contrary of this, huge penalty is imposed/provided for the defaulting allottee/s. Thereby, proving the buyer's agreement as one-sided pre-printed, arbitrary, and unilateral which was totally against/contrary to the terms agreed between the complainants/buyer and the respondent/builder at the time of booking the shop.

6. That the complainants till date have paid an amount of Rs. 56,65,151/- to the respondent company against the said shop. However, the possession was offered on dated 30.11.2019 as a deemed date of possession but the unit was not fully prepared to take actual possession till now. That from time-to-time various deficiencies were pointed out by the complainants to the respondents, but no action was taken by them. Some of the deficiencies and point of concerns are as follows:

- The size of the unit, which was allotted as 613 sq. ft. but when the complainants visited the said unit, its super built-up area was measured, it was found only around 264 sq. ft. of carpet area. After so many explanations sought from the respondent, they were not able to provide any satisfactory explanation to the complainants.
- The quality of construction is not up to the mark, cheap material had been used in the construction which is evident upon seeing the plaster and upon minute detailing of the project.
- Demarcation of the super area, carpet area and super built-up area is never done and never apprised to the complainants even after several requests till now.

- Change in the layout plan of the unit without informing or compensating the complainants.
 - Very high rate of the CAM charges had been charged to the complainants, which were decided arbitrarily and illegally by the respondent.
 - Many of the promised civic amenities have not been provided till date, and hence the unit is not ready as promised to be occupied as commercial entity.
7. That thereby the respondent failed to deliver the timely possession as assured and also failed to explain the concerns pointed out by the complainants, thereby indulging in unfair practice. All the representations and assurances of the respondent company have turned false and fraudulent and it is quite evident that the respondent have been wrongfully availed the monies of the complainants but the possession with all the promised amenities and services still looks distant.
8. That the complainants had been repeatedly visiting the site office but to no avail against the economic might and superior position of the respondent company as none from the respondent company informs anything about the timelines of the project completion with all the promised and the representatives just keep passing the buck.
9. That after offer made to take possession of the allotted unit, complainants noticed the change in layout of the said unit and other changes, but no satisfactory reply was provided by the respondent and no demarcation of the unit was provided to the complainants till date.
10. That the demarcation of the super area, carpet area and super built up area was also sought from the respondent but no reply is given till date



even when offer of possession is made several times. It is pertinent to mention here that a clear instruction is being provided in the act/regulations/rules of the RERA that the registration has to be done only on the carpet area of the unit, not on the super area.

11. Due to non-demarcation of the unit in terms of super area, carpet area and super built-up area, the CAM charges also comes out to be very high.
12. That due to the breach of obligations and wrongful conduct of the respondent the complainants have to suffer doubly on the one hand he has not been delivered the unit noted above in time and on the other hand he has blocked their hard-earned money, for the dream commercial property, as been speculated/dreamt off by the respondent, which would become the monetary source of income in the old age of the complainants.
13. That on the basis of the above it can be concluded that the respondent has miserably failed in completing above captioned project and in handing over the possession of the unit to the complainants in accordance with the agreed terms and has committed grave unfair practices and breach of the agreed terms between the parties. The respondent could not even complete the project and thereby the complainants as per the provisions under Section 31 of the Real Estate (Regulation and Development) Act, 2016 read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on account of violations and for non-compliance of contractual obligations in terms of section 34(f) of Real Estate (Regulation and Development) Act 2016 and under Section 18 (1) (a) of the Real Estate (Regulation and Development Act, 2016 is entitled to withdraw from the project and get the refund of amount of Rs. 56,65,151/- with interest at the rate of 18%

p.a. compounded annually and appropriate remedy/compensation for mental agony and harassment being suffered right from the year 2016.

14. That the cause of action for filing the present complaint is a subsisting and continuing one as the respondent have committed gross breach of their obligations of development of the project since April, 2016. Hence, this complaint to withdraw from the project and refund of amount along with interest and compensation.

C. Relief sought by the complainants:

15. The complainants have sought following relief(s):

- (i) Direct the respondent to refund the amount paid by the complainants along with prevailing rate of interest.
- (ii) Direct the respondent to pay the litigation expenses of Rs. 2,55,000/-.

D. Reply by respondent:

The respondent by way of written reply made following submissions:

16. That respondent has already completed the construction of its commercial project 'Plaza at 106-1', situated at sector-106, Gurugram and has obtained occupation certificate in respect of the same from director general town and country planning, Chandigarh vide Memo bearing no. ZP-833/AD/(RA)/2019/29244 dated 28.11.2019. The respondent after receipt of occupation certificate offered possession of unit to complainants vide its letter of intimation cum offer of possession dated 30.11.2019.
17. That the instant complaint seeking refund is bad for delay and laches, as the same has been filed by the complainants, on 06.05.2022 i.e., about after 5 years of the due date of possession as per clause 9.1 of the



agreement. The complainants never sought refund or even delay compensation charges as per RERA Act prior to filing of the instant complaint. It is submitted that right under section 18(1) accrues to complainants-allottee on failure of respondent-promoter to complete or unable to give possession of Unit in accordance with the terms of agreement for sale or duly completed by the date specified therein, i.e., on 18.04.2017 duly admitted by complainants in para 4(f) of the complaint under reply. At no point of time, complainants sought refund or delay interest for delay, if any in offer of possession. Complainants failed to exercise their rights from the aforesaid due date till the filing of instant complaint and thus, wished to continue with the allotment. Thus, after offer of possession by respondents, complainants are not entitled to seek refund, at this stage.

18. That the complainants had the opportunity to claim refund in terms of clause 10.3 of the agreement and could have served 90 days' notice for terminating the agreement upon respondent upon expiry of the contemplated date of possession as agreed under the agreement i.e., 18.04.2017 as stipulated in clause 9.1 of the said agreement. However, complainants failed to avail the remedy provided under the agreement and thus, are now estopped from raising claim for refund vide the instant petition.
19. That the objective of the enactment of the Real Estate (Regulation and Development) Act, 2016 is not only to secure the interest of the consumers but also to ensure completion of the project and growth of the real estate industry as a whole. And refund at this stage, when the project is already completed, OC received and possession already offered to complainants, the same would render the objective of the Act, otiose and further shall gravely prejudice the interest of the respondent



as the amount received from allottees has already been expended on the construction and also the interest of other allottee(s) who wish to seek possession. It is submitted that majority of allottees have already taken possession of the respective Units.

20. That the Hon'ble Haryana Real Estate Regulatory Authority in its various judgment held a view that where the construction of project is complete, no refund shall be allowed, in the instant complaint the construction of project is completed and respondent has obtained the occupation certificate in respect of the same, thereafter has also offered possession of unit to its respective allottees including complainants on 30.11.2019. The respondent also sent the demand letter dated 20.12.2019 demanding the dues payable at the stage of offer of possession after adjusting the rebate credit of Rs.96,031/- in terms of clause 10.4 of the Agreement. As on date, an actual principal amount of Rs.10,56,996/- is due payable in respect of the said unit alongwith interest @ applicable RERA Rates.
21. That as per section 19(10) of The Real Estate (Regulation and Development) Act of 2016 (hereinafter as the "Act"), "every allottee shall take physical possession of the apartment, plot or building, as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be." However, despite in receipt of intimation of receipt of occupation certificate and letter of offer of possession, complainants have failed to take possession of the unit, till date and clear the pending installments thereby, is in violation of their duties and obligations stipulated in section 19(10) of Act.
22. That timely payment of installments is the essence of the agreement / transaction. However, since the beginning, complainants are



themselves in default in making timely payment of the instalments, as per the payment terms agreed under the agreement dated 19.04.2013 executed prior to coming into force of the Act of 2016 and hence, cannot seek timely possession of unit. Principal amount of Rs. 10,93,164/- is due and payable by complainants to respondent in respect of allotment of unit. Complainants are liable to pay interest in terms of section 19(7) of the Act of 2016 on the defaulted amount for the period of delay.

23. That complainants stopped making payment of the installments due as per the construction linked payment plan w.e.f. 30.03.2019 despite in receipt of the various demand letters and reminders, emails dated 10.09.2019, 20.12.2019, 12.03.2020, 24.04.2020, 05.11.2020, 09.03.2021, 18.12.2021.
24. That complainants never raised any request for refund nor raised any protest at any point of time till filing of the instant complaint that the unit is incomplete, or complainant was made to sign on the pre-printed agreement, or that the unit is without amenities, as alleged. the allegations/claims of complainants are prima-facie malafide, concocted and highly belated, therefore, instant complaint is liable to be dismissed on account of estoppel.
25. That the complainants are not even entitled to any delay possession charges as per the RERA Act in, as much as, proviso to section 18(1) provides for payment of interest by promoter for every month of delay, till the handing over of the possession at such rates as may be prescribed, where the complainants intends not to withdraw from the project.
26. According to the said Proviso, right to demand either the withdrawal from the Project or the interest for every month of delay in possession

accrued to the complainants on failure of the respondent-promoter to complete or unable to give possession of unit in accordance with the terms of agreement for sale or duly completed by the date specified, therein, which accrued to complainants on 18.04.2017 in terms of clause 9.1 of the agreement.

27. Possession has already been offered to complainants, way back on 30.11.2019 while the instant complaint has been filed on 06.05.2022. Therefore, if the allottee failed to exercise his rights to either withdraw or to claim delay interest after due date of possession has expired till the filing of instant complaint, i.e., for approx. 6 years, the claim is liable to be dismissed being barred by estoppel and limitation.
28. Without prejudice, it is submitted that as per the terms of clause 10.4 of the agreement for sale, respondents had also paid the compensation @ Rs.5/- per sq. ft. of super area per month from the date of possession as agreed under the agreement till the date of offer of possession to complainant(s) and adjustment of the same was given as rebate of Rs. 96,031/- from the demands due at the time of offer of possession. However, it is the complainants who has till date failed to make the payment of the amounts due along with the interest which is accruing on day-to-day basis and to take over the physical possession of unit. Thus, complainants are themselves at default and hence, not entitled to seek any relief from this Hon'ble Authority. That it is submitted that in addition to the aforesaid Possession dues along with interest as applicable, complainants are also liable to pay the maintenance charges effective from 01.02.2020.
29. 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:

30. The authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

31. 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

32. 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)(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.

33. 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 complainants at a later stage.

F. Entitlement of the complainants:

(i) Direct the respondent to refund the amount paid by the complainants along with prevailing rate of interest.

34. In the present complaint, the complainants 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)

35. As per 9.1 of the buyer's agreement dated 19.04.2013 provides for handing over of possession and is reproduced below:

9.1*"The Developer based on its present plans and estimates and subject to all just exceptions / force majeure / statutory prohibitions / court's order*



etc, contemplates to complete the construction of the said Building/said Unit within a period of three years from the date of execution of this Agreement, with two grace periods of Six months each, unless there is a delay for reasons mentioned in Clauses 10.1: 19.2 and Clause 37 or due to failure of Allottee(s) to pay in time the price of the said Unit along with other charges and dues in accordance with the schedule of payments given in Annexure-C or as per the demands raised by the Developer from time to time or any failure on the part of the Allottee(s) to abide by all any of the terms or conditions of this Agreement."

36. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
37. **Due date of handing over possession and admissibility of grace period:** As per clause 9.1 of the buyers agreement, the possession of the allotted unit was supposed to be offered within a stipulated timeframe

of 3 years from the date of execution of the buyer's agreement further there was a two grace period of 6 months each after expiry of the said period. The buyer's agreement was executed on 19.04.2013 and therefore, the due date for handing over of possession comes out to be 19.04.2016. Further the authority allows the grace period of 6 months only which comes out to be 19.10.2016.

38. The present complaint was filed on 27.05.2022 and was earlier heard and disposed of vide proceedings dated 06.10.2023 allowing the complainant full refund along with interest at prescribed rate from the date of deposit till its realization. The respondent/builder on 25.10.2023 filed an application for rectification of proceedings dated 06.10.2023 w.r.t full refund and stated that in proceedings dated 06.10.2023, it was inadvertently mentioned that the complainant has surrendered the unit vide letter dated 05.10.2019. Thereafter, the authority observes that the error is clerical in nature and needs to be rectified Hence, the matter was put on hearing on 03.11.2023 wherein it was reheard and rectified by the authority on 03.11.2023 as per the documents and submissions on record.

39. 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.



40. 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 complainants are situated has been obtained by it. The due date of possession as per buyer's agreement was 19.10.2016 and the complainants have surrendered the unit by filing the complaint on 27.05.2022 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The OC was received on 28.11.2019 whereas, offer of possession was made on 30.11.2019. 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.
41. 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.

42. 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.

43. 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.
44. In the instant case, the unit was provisionally allotted vide buyer's agreement dated 19.04.2013 and the due date for handing over for possession was 19.10.2016. The OC was received on 28.11.2019 whereas, offer of possession was made on 30.11.2019. However, the complainants filed the complaint for refund on 27.05.2022. 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"

45. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs. 57,54,646/-/- after deducting 10% of the basic sale consideration of Rs. 59,46,100/- being earnest money along with an interest @10.75% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of surrender i.e., 27.05.2022 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

(iii) **Direct the respondent to pay the litigation expenses of Rs. 2,55,000/-.**

46. The complainants in the aforesaid relief are 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



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


G. Directions of the Authority:

47. 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/builder is directed to refund the paid-up amount of Rs. 57,54,646/- after deducting 10% of the basic sale consideration of Rs. 59,46,100/- being earnest money along with an interest @ 10.75% p.a. on the refundable amount, from the date of surrender i.e., 27.05.2022 till its realization.
- 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.

48. Complaint stands disposed of.

49. File be consigned to the registry.


{Sanjeev Kumar Arora}
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.11.2023

