

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

Complaint no.	3418 of 2023
Date of complaint	11.08.2023
First date of hearing	14.12.2023
Date of decision	23.05.2024

1. Natasha Gulati 2. Dr. Ruma Gulati Both R/o: E-319, 3 rd Floor, East of Kailash, New Delhi-110065.	Complainants
Versus	
M/s Vatika Ltd. Registered address at: Vatika Triangle, 4 th Floor, Sushant Lok, ph-1, Block-A, MG Road, Gurugram- 122002	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Shri Salil Arora, Advocate	Complainants
Ms. Ankur Berry, 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 allottees as per the agreement for sale executed inter se.

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A. Unit and project-related details

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

S. N.	Particulars	Details
1.	Name and location of the project	"India Next City Centre" at Sector-83, Gurugram.
2.	Project area	10.718 acres
3.	Nature of Project	Commercial Complex
4.	DTCP license no. and validity status	122 of 2008 dated 14.06.2008 Valid upto 13.06.2016
5.	Name of Licensee	M/s Trishul Industries
6.	Rera registered/ not registered and validity status	Un-Registered
7.	Unit No.	415, 4 th floor, Tower/block-F (New Unit) (page 77 of complaint)
8.	Unit area admeasuring (Super Area)	500 sq. ft. (page 107 of complaint)
9.	Application form	23.11.2011 (page 98 of compliant)
10.	Allotment letter	23.11.2011 (page 96 of complaint)
11.	Allocation of unit no. in INXT City Centre	25.04.2013 (page 107 of complaint)
12.	Date of buyer agreement	11.02.2020 (page 46 of complaint)
13.	Possession clause	Not available (as page on which possession clause is not available with BBA annexed with complaint and the same is not furnished by either of the parties)
14.	Due date of possession	11.02.2023 <i>"Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018-SC); MANU/SC/0253/2018 Hon'ble Apex Court observed that "a person cannot be made to wait indefinitely for the possession of the flats</i>



		<p><i>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></p> <p>In view of the above-mentioned reasoning, the date of the execution of buyer's agreement dated 11.02.2020 ought to be taken as the date for calculating the due date of possession. Therefore, the due date for handing over the possession of the unit comes out to be 11.02.2023.</p>
15.	Total Sale Consideration	Rs.23,40,000/- (page 81 of complaint)
16.	Amount paid by complainant	Rs.24,24,825/- (page 104 of compliant)
17.	Occupation certificate	Not obtained
18.	Offer for possession	Not offered
19.	Undertaking for surrendering the unit	06.10.2021 (page 149-150 of complaint)
20.	Amount agreed after deduction of Earnest money and other non-refundable charges	Rs.19,00,000/- (page 149 of complaint)
21.	Amount received by complainants/allottees	Rs.12,00,000/- (as admitted by complainant in its complaint at page no. 41 of complaint)
22.	Legal demand notice (for Final payment of balance amount)	02.03.2023 (page 151 of complaint)
23.	Reminder to legal demand notice	13.04.2023 (page 158 of complaint)

B. Facts of the complaint:

3. The complainants made the following submissions in the complaint: -

- a. That the present complaint has been filed by the complainants/ joint allottees under section 31 of the Real Estate (regulation and Development) Act, 2016 ("RERA Act") read with rule 28 of the Haryana Real Estate

(Regulation and Development) Rules, 2017 ("Rules") for violation of section 11(4)(a) of the RERA Act wherein it is inter-alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions made there or to the allottee as per the agreement for sale executed inter se.

- b. That the respondent is a leading real estate company having various real estate projects in Gurugram and other parts of India. The complainants were approached by one Mr. Kartik Nanda, authorized agent of the respondent, boasting that it is the respondent endeavour to meet the expectations of the buyers and enticed the claimants to invest in two of their projects (i) "Vatika Professional Point", Golf Course Extension Road, Sector-66, Gurugram; and (ii) "Vatika INXT City Centre", Sector-83 Gurugram. He further made tall claims of high-quality production and timely assured returns and possession.
- c. That on being lured by such claims and promises, the complainants purchased a pre allotted unit from an existing allottee in the project "Vatika Professional Point" as the construction of the same had already begun and booked a 500.00 sq. ft. of commercial office space in the respondent project "INXT City Centre" (hereinafter referred to as 'the Project') sometime between 23.11.2011 and 25.11.2011.
- d. That vide letter dated 23.11.2011, the respondent allotted 500 sq. ft on the 2nd floor of the project, bearing unit no. 210A to the complainants. Enclosed with this letter was the builder buyer agreement. The letter also stated that the flat will be completed and ready for lease by 30.09.2014 and accordingly, the complainants would be paid lease rentals at Rs. 65/- per sq. ft. of super area per month w.e.f. 01.10.2014 or from the date from which the building is ready, whichever is later. In the event the premises is leased any time after 01.10.2024, the respondent company shall be

- paying the complainants the rentals. Also enclosed with this letter were 2 cheques towards commitment changes/assured return, drawn by the respondent in favour of the complainants.
- e. That accordingly, on 25.11.2011, the complainants submitted the duly filled in and signed application form along with two cheques for the total sum of Rs.24,00,255/- and the same were accepted and received by the Respondent.
- f. That a builder buyer agreement (hereinafter referred to as the "Old BBA") was also executed between the parties sometime between 23.11.2011 to 25.11.2011. As per the old BBA and as also stated in the form attached with the application for allotment letter dated 25.11.2011, the complainants had made full and final payment at the time of booking and had opted for the assured return payment plan, with monthly rent commitment of Rs.65 per sq. ft. of super area per month w.e.f. 01.10.2014 or from the date from which the building is ready, whichever is later, and assured return of Rs.71.50/- per sq. ft. of super area per month till the time of completion. That the Respondent failed to timely construct and handover the possession of unit on time.
- g. That vide letter dated 25.04.2013, the respondent reallocated unit No.415, 4th floor of Block-F in the project admeasuring 500 sq. ft., in replacement of the previously allocated unit no.210A to the complainants. The complainants had no other option than to accept the reallocation.
- h. That in accordance with the original allocation letter dated 23.11.2011, reallocation letter dated 25.04.2013 and the Old BBA, the project was supposed to be completed and be ready to be leased by 30.09.2014, however, the respondent company failed miserably in standing true to its commitment.



- i. That the respondent company paid assured return at the rate of Rs.71.50/- per sq. ft. of super area per month to the complainants up till sometime in the year 2016. Subsequently, the respondent company suddenly stopped the assured return payments. Upon questioning, the respondent informed the complainants that in light of the RERA Act 2016, the respondent company will not be selling any properties with commitment of assured returns or that pays returns of any kind. All properties will be sold on a down payment basis, possession linked basis or construction linked basis.
- j. That the complainants had paid the entire sale consideration of Rs.23,40,000/- plus applicable taxes at the time of execution of the Old BBA and original allocation letter. Even when in November 2016 fresh demand of Rs.24,570/- for VAT on registration was raised by the respondent, the complainants promptly paid the same. However, whenever the complainants enquired about the status of the project, the respondent company did not give any clear or satisfactory answer.
- k. Subsequently, the complainants were informed that a new builder buyer agreement/Agreement to sell as prescribed in annexure 'A' of the Rules, will have to be executed between the parties in compliance with the RERA Act and Rules. Thus, a new builder buyer agreement/Agreement to sell dated 11.02.2020 (hereinafter referred to as 'the New BBA') was entered between M/s Vatika Limited, Developer and M/s Trishul Industries, Confirming Party of the first part and the complainants as the second part, w.r.t. the same reallocated unit no. No.415, 4th Floor of Block-F in the project admeasuring 500 sq. ft., (hereinafter referred to as 'the Property') against the total consideration of Rs.23,40,000/-, excluding applicable taxes, which were already paid by the complainants in the year 2011 at the time of the execution of the Old BBA. The complainants were also asked to return the original Old BBA to the respondent company, before they could

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execute the New BBA. Having no other option, the complaints had to accede to the demands of the respondent and return the original executed Old BBA.

l. That as per the details of the license obtained by the respondent from Director general, Town and Country Planning Department, Government of Haryana (DTCP), the respondent had purchased land measuring 10.718 acres at village sikhopur, tehsil Sohna & District Gurgaon. The license bearing number 122 of 2008 dated 14.06.2008 was valid up to 14.06.2016 for setting up commercial complex and to develop/construct the commercial complex on the said land. The said license of the respondent has expired as on date.

m. That the respondent has till date not registered its project "Vatika INXT City Centre" with RERA which contravenes the provision of Section 3 of the RERA Act. The first proviso of Section 3(1) of the RERA Act states as follows:

"Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act."

Section 3(2)(b) of the RERA Act states as follows:

*"(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required-
(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;"*

n. Thus, the project of the respondent is 'an ongoing project' since the respondent did not have completion certificate and is liable to get the project registered under the RERA Act which it failed to do so.

That clause 5 of the New BBA reads as follows:

"5. Time Is Essence

The promoter shall abide by the time schedule for completing the project as disclosed at the time of registration of the project with the authority and



towards handing over the commercial space/unit to the allottee(s) and the common areas to the association of allottee's or the competent authority, as the case may be, as provided under rule no.2(1) (f) of the Rules."

- o. That as stated on page 14 of the 'project application' submitted by the respondent and uploaded on HARERA's website, the completion date of the project is stated to be 31.01.2020. Even if we go by the NEW BBA and the revised date of completion of 31.01.2020, the respondent has miserably failed in completing the construction of the project and in handing over the possession of the property to the complainants in accordance with the agreed terms between the parties. The project status still does not state 'completed' on the ("HARERA") website.
- p. That in accordance with Clause 7.5 of the New BBA, the complainants have the right to withdraw their allotment in the project.

Clause 7.5 of the New BBA states as follows:

"Cancellation by Allottee - the Allottee shall have the right to cancel/ withdraw his allotment in the Project as provided in the Act:

Provided that where the allottee proposes to cancel/ withdraw from the Project without any fault of the Promoter, the Promoter herein is entitled to forfeit the earnest money agreed as 10% of Total Price in case the construction is raised up to an extent of 50% of the said Building, or 25% of the Total Price in case the construction raised is over 50% of the building. Such refund amount shall be subject to the deductions of non-refundable amounts like brokerage paid/payable, interest on delayed payments, taxes already paid etc. The rate of interest payable by the Allottee to the Promoter shall be as prescribed by the Rules. The balance amount of money paid by the Allottee shall be returned by the Promoter to the Allottee from the balance available in the account specifically opened for the Project within ninety (90) days of such cancellation;

Provided further that any amount to be returned under the present Clause shall be paid from the Separate account maintained by the Promoter as per requirement of Section 4(2) (1) (D) of the Act"

- q. That as the respondent company had miserably failed in completing the construction of the project and handing over the possession of the unit to the complainants and due to certain other compelling circumstances, the

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- complainants were not in a position to continue with the said project. Accordingly, sometime August 2021, the complainants wanted to avail the option available under clause 7.5 of the new BBA and cancel/withdraw their allotment from the project. To that effect, the complainant No.2 had a telephonic conversation with one of the respondent company's authorized representatives, Mr. Satendra, project manager "INXT City Centre Project", wherein, on behalf of the respondent, he offered to pay back a sum of Rs.20,00,000/- against the cancellation.
- r. That following the telephonic conversation, the complainant no.2 visited the respondent's office at unit no.-A-002, ground floor, block-A, "Vatika INXT City Center", Sector-83, Gurugram, to meet Mr. Satendra and finalise the paperwork for cancellation, when he informed that the respondent can only refund Rs.19,00,000/- against the cancellation of the property. As the complainant no.1 does not stay in India and the complainant no.2 is a senior citizen, they even agreed to receive just Rs.19,00,000/- as they were tired of following up with the respondent company by repeated visits to their office and calls.
- s. That accordingly, complainant no.2, who is also the duly authorised power of attorney holder of her daughter, complainant no.1, signed the undertaking dated 06.10.2021 (drafted by the respondent and provided to complainant no.2), wherein they cancelled their allocation of the property and relinquished all their rights, title interest and claim in the property, for a refund of Rs.19,00,000/-.The refund as proposed by the respondent in the undertaking was never realised in the manner they were stated to be made. Thus, till date total refund amounting of Rs.12,00,000/- has been received by the complainants.
- t. That in accordance with the undertaking, the refund/payments by the respondent were to be made by 21.12.2021. Moreover, in accordance with

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Clause 7.5 of the New BBA and Section 18 of the RERA Act read with Rule 16 of the Rules, the refund/payments had to be made within 90 days of the cancellation. From the date of the undertaking, i.e., from 06.10.2021, 90 days have lapsed on 03.01.2022. However, the complainants have till date not received the complete refund/payments for want of balance of Rs.7,00,000/-.

- u. That the complainant no.2 is a senior citizen, aged 64 years and her daughter, complainant no.1 lives abroad in Malaysia, who is also represented by her, has visited the respondent company's office and has called respondent company's representatives on multiple occasions for an amicable solution, but the same did not yield any positive results. considering complainant no.2's old age and that she has no one to depend upon, her experience has been nothing short of physical and mental trauma for past two years.
- v. That on 23.02.2023, a legal demand notice was sent by the lawyers of the complainants to the respondent, calling out the respondent to pay the outstanding refund amount of Rs.7,00,000/- with upto date interest at the rate 18% p.a. leviable w.e.f. 03.01.2022 till its actual payment within the period of 15 days from the receipt of the notice. The legal demand notice dated 23.02.2023 was sent by registered India Post and was duly received by the respondent at its registered address. But neither the outstanding refund amount nor any reply has been received by the respondent till date.
- w. That with the intention of resolving the matter amicably withing involving the RERA authority, on the instructions of the complainants, the lawyers of the complainants also issued a reminder legal demand notice dated 13.04.2023. But neither the outstanding refund amount nor any reply has been received by the respondent till date.

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- x. That on the basis of the above, it can be concluded that the respondent has failed to abide by the agreed terms between the parties and as stated in the New BBA and the undertaking dated 06.10.2021 and has committed grave unfair practices and breach of the agreed terms between the parties. Being aggrieved by the situation the complainants are filing this present complaint before your good self.
- y. That no similar complaint is pending before any other authority, court of law, consumer commission or any other tribunal.
- z. That this authority has jurisdiction to try and decide this complaint. That the project of the respondent is within the jurisdiction of the authority. Hence this complaint for seeking the balance refund payment is being made.

C. Relief sought by the complainants:

4. The complainants have sought the following relief(s):
 - i. Direct the respondent to pay the balance refund of Rs.7,00,000/- with up-to-date interest at the rate 10.55% p.a. leviable w.e.f. 01.01.2022 till its payment is realized.
 - ii. Pass any other order, directions as the Hon'ble Authority may deem fit.
 - iii. Award cost and legal expenses incurred by the complainants.

D. Reply by respondents:

5. The respondent contested the complaint on following grounds: -
 - a. That the respondent is a company, registered under the Companies Act, 1956 having its office at Unit No A-002, "INXT City Centre" ground floor, block A, Sector 83, Vatika India Next, Gurugram - 122012, Haryana, India. That for the past two decades the respondent has been engaged in the business of Real Estate Sector.
 - b. That the present complaint being filed for refund, cannot be allowed by this Authority in view of the fact that the complainants have intentionally

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hidden the fact that there is no existing and valid BBA, between the respondent and the complainants. Thus, the present complaint ought to be dismissed outrightly.

- c. That the complainants have got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the RERA Act which has been enacted only for resolution of disputes between allottee and builder/promoter, as shall be evident from the submissions made in the following paras of the present reply.
- d. That the reliefs sought of the complaint shows that the only relief for which the complainants have come before this Authority is to pay refund of amount due in terms of undertaking.
- e. That the complainants have failed to show that any of the relief as claimed in the present complaint could be adjudicated by this Authority since the RERA Act, limits its jurisdiction to adjudicate upon issues and grievances between allottee and promoter/builder. It is pertinent to note that the complainants have failed to show/prove that they fall within the definition of 'Allottee' defined within the Act and thus the complaint in its present form ought to be dismissed.
- f. That the complainants have come before this Authority with un-clean hands. The complaint has been filed by the complainants just to harass the respondent and to gain unjust enrichment. The dispute if any, and allegations as raised cannot be decided or adjudicated by this Authority as the complainants have failed to show any violation of the Act. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant, detailed deliberation by leading the evidence and cross-examination is required, thus only the civil court has jurisdiction

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to deal with the cases requiring detailed evidence for proper and fair adjudication.

- g. That the undertaking agreement as attached with the complaint has already been signed and executed thereby the allotment has already been terminated from the date of the undertaking dated 06.10.2021. Thus, the complainants herein are not allottee and rather have before this Authority for specific performance of the terms of the undertaking. The Authority has no jurisdiction to grant relief of specific performance of agreements/contract not being builder buyer agreement and thus the present complaint ought to be dismissed outrightly.
- h. The present complaint of the complainants has been filed on the basis of incorrect understanding of the object and reasons of enactment of the RERA, Act, 2016. The legislature in its great wisdom, understanding the catalytic role played by the real estate sector in fulfilling the needs and demands for housing and infrastructure in the country, and the absence of a regulatory body to provide professionalism and standardization to the said sector and to address all the concerns of both buyers and promoters in the real estate sector, drafted and notified the RERA Act, 2016 aiming to gain a healthy and orderly growth of the industry. The Act has been enacted to balance the interests of consumer and promoter by imposing certain responsibilities on both. Thus, while Section 11 to Section 18 of the RERA Act, 2016 describes and prescribes the function and duties of the promoter/developer, Section 19 provides the rights and duties of Allottees. Hence, the RERA Act, 2016 was never intended to be biased legislation preferring the allottees, rather the intent was to ensure that both the allottee and the developer be kept at par and either of the party should not be made to suffer due to act and/or omission of part of the other.



- i. That in matter titled *Anoop Kumar Rath Vs M/S Sheth Infracore Pvt. Ltd.* in Appeal No. AT00600000010822 vide order dated 30.08.2019 the Maharashtra Appellate Tribunal while adjudicating points be considered while granting relief and the spirit and object behind the enactment of the RERA Act, 2016 in para 24 and para 25 discussed in detail the actual purpose of maintaining a fine balance between the rights and duties of the promoter as well as the allottee. The Ld. Appellate Tribunal vide the said judgment discussed the aim and object of RERA Act, 2016.
- j. That the complainants are attempting to seek an advantage of the slowdown in the real estate sector and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent. Thus, the present complaint is without any basis and no cause of action has arisen till date in favour of the complainants and against the respondent and hence, the complaint deserves to be dismissed.
- k. That it is brought to the knowledge of this Hon'ble Authority that the complainants are guilty of placing untrue facts and is attempting to hide the true colour of the intention of the complainant.
- l. That, it is evident that the entire case of the complainants is nothing but a web of lies and the false and frivolous allegations made against the respondent are nothing but an afterthought, hence the present complaint filed by the complainants deserves to be dismissed with heavy costs.
- m. That the various contentions raised by the complainants are fictitious, baseless, vague, wrong and created to misrepresent and mislead this Hon'ble Authority, for the reasons stated above. That it is further submitted that none of the relief as prayed for by the complainants are sustainable, in the eyes of law. Hence, the complaint is liable to be

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

E. Jurisdiction of the authority:

6. The plea of the respondents regarding lack of jurisdiction of Authority is rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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 the entire Gurugram District for all purposes 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

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per the 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 with the obligations cast upon the promoters, the allottees, and the real estate agents under this Act and the rules and regulations made thereunder.

So, given 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.

F. Findings on the objections raised by the respondent:

F.I Objection regarding maintainability of complaint on account of complainants are not an allottee(s).

7. The respondent took a stand that the complainants are not an allottees, as they had already surrendered their right against the allotted unit on receipt of refund amount and therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. However, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the allotment letter, it is revealed that the complainants are buyer's, and they have paid a considerable amount to the respondent-promoter towards purchase of unit in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

8. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between promoter and complainant, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. Thus, the contention of the promoter that the complainants being not an allottees are not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant:

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G.I Direct the respondent to pay the balance refund of Rs.7,00,000/- with up-to-date interest at the rate 10.55% p.a. leviable w.e.f. 01.01.2022 till its payment is realized.

G.II Pass any other order, direction as the Hon'ble authority may deems fit.

9. The above-mentioned relief sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and the same being interconnected.

10. The complainants vide application form dated 23.11.2011 had applied for allotment of unit in project "Vatika INXT City Centre", Gurgaon and they were allotted a unit bearing no.210A on 2nd floor of block -F, ad measuring 500 sq. ft. (super area) in said project vide allotment letter dated 23.11.2011 for sale consideration of Rs.23,40,000/- against which the they have paid an amount of Rs.24,24,825/-. Thereafter, the complainants were allocated to another unit bearing no.415 on 4th Floor of Block-F, ad measuring 500 sq. ft. in the said project vide allocation letter dated 25.04.2013 and thereafter, an agreement to sell was executed on 11.02.2020 between the parties. As the possession clause is not available and the same is not furnished by either of the parties. Thereafter, the due date of completion of construction is comes to 11.02.2013 as per the "*Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018-SC); MANU/SC/0253/2018*".

11. However, in August 2021, the complainants-allottees make a request to the respondent-promoter through telephonic and wishes to withdraw from the project as per clause 7.5 of buyer's agreement. Thereafter, on 06.10.2021, the complainants-allottees made a request for surrendering their unit and submitted an undertaking dated 06.10.2021 and the same was received by the respondent-promoter. The authority observes that the clause 2.5 of the agreement talks about the cancellation by allottee and the same is reproduced here below: -

"The allottee shall have the right to cancel/withdraw his allotment in the project as provided in the Act:

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Provided, that where the allottee proposes to cancel/withdraw from the project without any fault of the promoter, the promoter herein is entitled to forfeit the earnest money agreed as 10% of total price in case the construction is raised up to an extent of 50% of the said building, or 25% of the total price in case the construction raised is over 50% of the building. such refund amount shall be subject to the deductions of non-refundable amounts like brokerage paid/payable, interest on delayed payments, taxes already paid etc. the rate of interest payable by the allottee to the promoter shall be as prescribed by the rules. The balance amount of money paid by the allottee shall be returned by the promoter to the allottee from the balance available in the account specifically opened for the project within ninety days of such cancellation.....

12. The issue with regard to deduction of earnest money on cancellation of a contract arose in cases of **Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136**, and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in **CC/435/2019 Ramesh Malhotra VS. Emaar MGF Land Limited (decided on 29.06.2020)** and **Mr. Saurav Sanyal VS. M/s IREO Private Limited (decided on 12.04.2022)** and followed in **CC/2766/2017 in case titled as Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022**, held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money". Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was framed providing as under-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law

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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."

13. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainants after deducting 10% of the sale consideration and return the remaining amount along with interest at the rate of 10.85% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of surrender i.e., 06.10.2021 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

14. Further, the respondent-promoter shall also adjust the amount already refunded of Rs.12,00,000/- to the complainants-allottees.

F.III Award cost and legal expenses incurred by the complainants.

15. The complainants are seeking above mentioned relief w.r.t. legal expenses. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating

officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.

H. Directions of the Authority:

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

- i. The respondent/promoter is directed to refund the paid-up amount after deduction of 10% of sale consideration as earnest money and an amount of Rs.12,00,000/- already refunded to the complainants-allottees along with interest on such balance amount at the rate of 10.85% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of surrender i.e., 06.10.2021 till the actual date of refund of the amount.
- ii. A period of 90 days is given to the respondents to comply with the directions given in this order failing which legal consequences would follow.

17. Complaint stands disposed of.

18. File be consigned to the registry.

Dated: 23.05.2024

V.I - 3
(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram