# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

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| **Complaint no.** | **:** | **2307 of 2021** |
| **Date of filing complaint:** | | **01.06.2021** |
| **Date of decision** | **:** | **20.02.2024** |

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| Arihant Kothari<br>R/O: C-104, Greater Kailash-1, New Delhi-110048. | **Complainant** |
| Versus | |
| M/S Advance India Projects Limited<br>Regd. Office: The Materpiece Golf Course Road, Sector 54, Gurugram, Haryana- 122002. | **Respondent** |

| **CORAM:** | |
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| Shri Vijay Kumar Goyal | **Member** |
| Shri Ashok Sangwan | **Member** |
| Shri Sanjeev Kumar Arora | **Member** |

| **APPEARANCE:** | |
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| Sh. Dhruv Lamba (Advocate) | Complainant |
| Sh. M.K Dang (Advocate) | Respondent |

## ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

| S.N. | Particulars | Details |
|---|---|---|
| 1. | Name of the project | "AIPL Joy Central", Sector-65, Gurgaon, Haryana. |
| 2. | Nature of project | Commercial colony |
| 3. | **RERA registered/not registered** | Not registered |
| 4. | **DTPC License no.** | 249 of 2007 dated 02.11.2007 |
| 5. | Validity status | 01.11.2024 |
| 6. | Licensed area | 3.987 acres |
| 7. | Name of licensee | M/s Wellworth Project Developers Pvt. Ltd. |
| 8. | Allotment letter | 27.02.2017<br>[As per page no. 54-55 of reply] |
| 9. | Unit no. | FC 10 on SF<br>[As per page no. 64 of complaint] |
| 10. | Revised unit no. vide letter dated 20.05.2020 on page no. 33 of W.S | K-35<br>[As per page no. 93 of complaint] |
| 11. | Unit area admeasuring | 588.77 sq. ft. [Super area]<br>[As per page no. 64 of complaint] |
| 12. | Increased unit area | 589.62 sq. ft. (+ 0.85 sq. ft. ) |
| 13. | Date of builder buyer agreement | 24.05.2017<br>[As per page no. 62 of complaint] |

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| 14. | Total sale consideration | Rs. 66,08,354/- [BSP]<br>Rs. 70,65,240/- [TSC]<br>[As per payment plan on page no. 56 of complaint] |
| 15. | Amount paid by the complainant | Rs.78,49,822/-<br>[As per statement of account submitted by the respondent] |
| 16. | Possession clause | **Clause 44**<br>*Subject to the aforesaid and subject to the Allottee not being in default under any part of this Agreement including but not limited to the timely payment of the Total Price and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company endeavors to hand over the possession of the Unit to the Allottee* ***within a period of 54 (fifty four) months, with a further grace period of 6 (six) months, from September 2017.*** |
| 17. | Due date of possession | ***September 2022***<br>[Calculated as 54 months from September 2017 + grace period of 6 months] |
| 18. | Demand letter & reminder | 30.03.2017, 04.04.2017, 20.04.2017, 29.04.2017, 26.03.2021, 11.04.2021, 06.05.2021<br>[As per page no. 56-64 of reply] |
| 19. | Pre-termination letter dated | 18.05.2021<br>[As per page no. 65 of reply] |
| 20. | Termination letter dated | 01.07.2021<br>[As per page no. 66 of reply] |
| 21. | Occupation certificate | 24.12.2021<br>(As per DTCP website) |

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| 22. | Offer of possession | 05.09.2022<br>(Offer of constructive possession as per W.S filed on the behalf of the complainant) |

**B. Facts of the complaint:**

3. That the complainant while searching for a retail space were lured by the advertisements/ brochures/ sales representatives of the respondent company to buy a retail space for a food court in the project AIPL Joy Central at Sector 65, Gurugram, Haryana.

4. That the complainant's senior citizen father runs a small food business and the intention was for him to be able to run a food outlet in this kiosk to support himself. The complainant relying on various representations and assurances by the respondent booked a unit in the project by paying a booking amount of Rs.5,00,000/ - vide Cheque no. 004457 dated 13.01.2017 drawn on ICICI Bank Ltd. towards the booking of the said Unit bearing SF/042A at "AIPL Joy Central' " in Sector 65, Gurgaon having super area measuring 775.58 sq. ft. to the respondent.

5. That on 22.02.2017, the complainant made a payment of Rs. 2,36,527 / - vide Cheque No. 004463dated 21.02.2017 drawn on ICICI Bank Ltd. The receipt of the payment was acknowledged by the respondent. The complainant was allotted a unit no. FC-10 vide allotment letter dated 27.02.2017 in the said project measuring 588.77 Sq. Ft. (super area) in the aforesaid project of the developer for a total sale consideration of Rs. 70,65,240/- including basic price of Rs. 66,08,354 / - and Development Charges of Rs. 3,98,009/- and IFMS of Rs. 58,877/-.

6. That on 23.05.2017, the complainant made a payment of Rs. 7,20,000/- vide Cheque No. 343113 dated 22.05.2017 drawn on Axis Bank Ltd. The receipt of the payment was acknowledged by the respondent. A buyer's agreement

was executed between the parties on 24.05.2017. The complainant having dreams of their own food court outlet signed the agreement in the hope that they shall be delivered the food court unit within 54 months from 01.07.2017 as per Clause 44 of the agreement as per their preferred unit location as was discussed with the respondent.

7. That on 25.05.2017, the complainant made a payment of Rs. 10,99,785/- vide Cheque No. 343114 dated 24.05.2017 drawn on Axis Bank Ltd. The receipt of the payment was acknowledged by the respondent. Between 2017 and 2020, the complainant made a payment of approximately 35% of the total consideration towards the basic sale price, development charges, IFMS. The complainant opted for the possession linked payment plan and made payments promptly and in a timely manner as and when the demand letters were raised by the respondent.

8. That the respondent vide DTCP memo no. ZP 322/JD(RD)/2019/28259 dated 18.11.2019 requested for approval on the revision of the building pans. Therein vide point (a) and (b), the respondent was specifically directed to inform the allottees of the amendment in the building plans through an advertisement and registered post and seek objections from the existing allottees. On the contrary, no such information was sent to the complainant. The respondent company at a very later stage, on 20.05.2020, informed the complainant of the change in the numbering of the unit from SF/ FC-10 to K-35 and increase in unit super area from 588.77 sq. ft. to 589.62 sq. ft. The complainant sought more information from the respondent company about the layout plans of the old and the changed location vide email dated 21.05.2020.

9. That on 28.05.2020, the complainant informed the respondent company that the change in the location and the alternative unit in place of FC-10 was

not acceptable as it has resulted in the downgrading of the prime location reserved by the complainant initially. It is submitted that several months later when the respondent notified the complainant of the changes in the unit's numbering and location, the changes were rejected by the complainant. As per the DTCP Memo dated 18.11.2019, the respondent was supposed to notify DTCP of all objections but there is huge doubt if it communicated the complainant's objection to DTCP. The respondent has also altered the layout of the food court and the position of the said unit within the layout, without taking the prior permission from the complainant. Further, in accordance with clause 10 para 3 and 4 of the agreement, this entitles the complainant for refund at 18% per annum with interest.

10. That despite the intimation of non-acceptance of the alternative unit vide email dated 28.05.2020, the respondent company sent an email dated 26.03.2021 with a demand of Rs. 27,46,490.90/- on the completion of the superstructure. The complainant has already intimated the respondent of his willingness to discontinue with the project as the alternative unit is not acceptable and the project is likely to be delayed. That the grievance of the complainants relates to breach of contract, false promises, gross unfair trade practices and deficiencies in the services committed by the respondent company in regard to the unit offered to the complainant.

11. That the respondent has downgraded the location as a result of these changes whereas the selected location was the complainant's primary reason for making the booking given the importance of the location in a retail complex. The respondent is guilty of deceiving the complainant, as the original location and layout that was shown at the time of the execution of the buyer's agreement is not going to be delivered.

12. That as per clause 9 of the buyer's agreement in respect of alterations or modifications in the layout plan is one-sided as the complainant had no option but to accept such terms of the agreement without any negotiation because of the assurance given by the respondent that they will stick to their assurances and promises. However, evidently, the respondent has miserably failed in keeping their promises and assurances causing irreparable losses and injury to the complainant.. As per clause 10, para 3 and 4, the complainant is entitled to refund at 18% per annum within 3 months from the date when he informed the respondent company of the non-acceptance of the alternate unit, i.e., 28.05.2020.

13. It is submitted that the changes sought in the building plan were to obtain higher development rights under the TOD policy which will result in enriching the respondent further and delaying the project as the saleable area has been doubled. On account of the same the complainant does not wish to wait indefinitely for this larger project to be delivered. It is further submitted that the progress on construction of the project has been very slow. It has been more than 4 years since the booking in January 2017 and only 5-6 floors have been cast till now while a total height of 23 floors has been envisaged. Further the post-completion works on the internal structure will take the most time. The respondent, however, in its demand vide email dated 26.03.2021 claims to have completed the superstructure when only 5-6 floors have been cast in the past 4 years. Further, upon communication with the respondent, it was found that it is proposing to complete the retail portion and collect full payment for that earlier while construction of the office component will continue in parallel which will take longer to finish.

## C. Relief sought by the complainant:

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

a) Direct the respondent to refund the total amount paid by the complainant along with interest.

b) Direct the respondent to pay compensation of Rs. 30,00,000/- to the, complainant for indulging into unfair trade practices and provide deficient services to the complainant and litigation cost of Rs. 50,000/-

## D. Reply by respondent:

The respondent by way of written reply made the following submissions:

15. That the complainant, after checking the veracity of the project namely, "AIPL Joy Central, Sector 65, Gurugram had applied for allotment of a unit vide the booking application form. The complainant agreed to be bound by the terms and conditions of the documents executed by him. Based on it, the respondent vide its allotment offer letter dated 27.02.2017 allotted to the complainant unit having tentative super area of 588.77 sq.ft for a sale consideration of Rs. 70,65,240/- (exclusive of the registration charges, stamp duty, service tax and other charges).

16. That as per the terms of the allotment, it was agreed that time is the essence with respect to the due performance by the complainant under the agreement and more specially timely payment of instalments towards sale consideration and other charges, deposits and amounts payable by the complainants. It is important to mention here that it was acknowledged by the complainant that the unit was purchased not for the purpose of self-occupation and use by the complainant but was for the purpose of leasing to third parties.

17. That the complainant had understood vide Recital C, Clauses 9, 10 and 27 / of the agreement that there could be changes/alterations, revision or modifications in the layout plans, building plans and/or drawings by the competent authority or for technical reasons or otherwise required by the respondent in the best interest of the project and that the complainant would not have any object to the same and would abide by such changes. It was agreed vide Clauses 12,14 and 15 of schedule 1 of the booking application form that in the event there is any change in the units location, the same would be acceptable to the complainant.

18. That despite being aware that timely payment of the instalment amount is the essence of the allotment, the complainant defaulted in making payment towards the demanded amount. The respondent had sent a payment demand to the complainant on 03.03.2017. The complainant failed to make the payment and the same was adjusted in the next instalment demand dated 04.04.2017 as Arrears. However, the complainant miserably failed to make any payment towards the next demanded amount as well and the same was paid by the complainant only after reminders dated 20.04.2017 and 29.04.2017.

19. That on account of revision in the building plan, the respondent had invited objections from all the allottees of the project in question. The respondent had invited objections from the complainant vide its letter dated 21.11.2019. However, no objections were received from the complainant and the unit of the complainant was changed as per the terms of the booking application form from SC/FC-10 to K-35. The said change in unit was intimated to the complainant by the respondent vide letter dated 20.05.2020.

20. That vide payment demand dated 26.03.2021, the respondent had sent the demand for the net payable sum of Rs. 27,46,494.29. However, the complainant failed to remit the due amount despite reminders dated 11.04.2021 and 06.05.2021 and even a pre-termination letter dated 18.05.2021. It is pertinent to mention herein that as per clause 44 of the agreement, the time period to handover the possession is 54 months with a further grace period of six months from 1 September, 2017. It is submitted that this period is further subject to occurrence of force majeure conditions. Thus, as per the terms of the agreement, the due date to handover the possession is 1 September, 2022 and the said date has not yet lapsed. The present complaint is liable to be dismissed on this short ground alone.

21. That on account of continuous defaults of the complainant, the respondent was left with no other option but to terminate the allotment vide termination letter dated 01.07.2021. Even otherwise, it is important to mention herein that the respondent is on the verge of completion the construction of the project in question. The complaint is liable to be dismissed with heavy costs payable to the respondent by the complainant.

**E. Clarification by the complainant:**

22. During the course of hearing before this Authority on 16.05.2023, the counsel for the complainant has submitted various grounds for seeking refund. On this, the counsel for the respondent submitted that the complainant has further made a payment of approx. 50 lacs after termination of the subject unit and filing of this complaint and thus, is under process of settlement with respondent-company and is not willing to withdraw from the subject project and so his earlier request for refund may not be further considered. However, the counsel for the complainant objected to the averments made by the counsel of the respondent company

and states that though he had deposited the outstanding amount on 07.09.2022 but now he wants full refund of the amount paid by him in view of the grounds submitted. In view of the aforesaid circumstances, the Authority vide its order dated 16.05.2023 and 14.11.2023 had directed both the parties to submit necessary clarifications w.r.t the amount paid by the complainant against the total sale consideration of the subject unit and further, the counsel for the complainant was directed to file clarification w.r.t relief sought.

23. In compliance of the directions of this Authority dated 16.05.2023 and 14.11.2023, the counsel for the complainant has submitted his clarification on behalf of the complainant on 15.12.2023. In the clarifications submitted on the behalf of the complainant, the counsel for the complainant has submitted as under:

- The complainant continued to make all payments to the respondent for the subject unit in a timely manner until May 2020. The complainant asserted that on 21.05.2020, the respondent sent an email notifying him of a change in the unit that was originally allotted, and the respondent now offered the complainant a different unit namely K-35. The complainant sought the revised layout plans from the respondent and on receiving the same, the complainant found that the new unit being offered is in a very different location from the originally promised location which the complainant had selected because it was right in front of the main entrance to the food court. The coloured photographs showing the location of both, the originally allotted unit as well as the newly allotted unit were also annexed.
- On 28.05.2020, the complainant communicated to the respondent in writing that their unilateral change of the unit and the new location was

not acceptable to him and that if the respondent does not find a solution, the complainant will have to approach this Authority for refund of his money along with interest. The copy of the e-mails is also annexed.

- Further, it is submitted that it was for the first time on 21.05.2020 that the respondent notified the complainant of the changes to the layout plans. That contrary to the claims made by the respondent's counsel before this Authority, the complainant has never received any communication from the respondent prior to 21.05.2020 inviting his objections to the proposed changes to the layout plan. If the respondent is claiming to have sought the complainant's objection via a previous communication then they may please be asked to submit the proof of delivery of that letter to the complainant's address along with the name and signature of the recipient.
- Clause 10 of the buyer's agreement dated 24.05.2017 deals with alterations/ modifications/ variation in plan which clearly states that in the event of modification of the layout plans, Building Plan or any other reason, an alternative unit will be offered to the Allottee and if the alternative unit so offered by the respondent is not acceptable to the allottee then the total price received against the said unit will be refunded to the allottee along with a simple interest of 18% per annum within 3 months.
- Vide orders of this Authority on 12.07.2022, the matter of the complainant was disposed of but subsequently this Authority felt that the proceedings were not complete giving effect to any direction. In view of the natural justice and to ascertain the factual position, the matter was listed for rehearing on 01.12.2022. Meanwhile after the disposal of the matter on 12.07.2022, and before the notification for

rehearing of the case was issued, the executives of the respondent spoke to the complainant and said that the complainant has now lost the case and the best that the respondent can offer to the complainant is a waiver of the delay interest cost if the complainant made full payment immediately. Left with no other option, and not aware at that time that this Authority may rehear the case, the complainant was forced to make all the outstanding payment to the respondent in September 2022, amounting to more than Rs. 50 lakhs and this was the reason why the complainant made the payment despite having filed an application for refund. The statement of account dated 04.02.2023 reflects the payment so made by the complainant.

## F. Written submission submitted by the complainant:

24. The written submissions on the behalf of the complainant were filed in this Authority on 31.01.2024 wherein the complainant has submitted that:

- The complainant allottee booked a unit in subject project on 17.01.2017 and subsequently an allotment letter w.r.t the subject unit dated 27.02.2017 was issued by the respondent. Accordingly, a buyer's agreement completely loaded in the favour of the respondent builder was executed inter se both the parties on 24.05.2017. The complainant allottee made all the payments in a timely manner as and when asked by the respondent till May, 2020, when the respondent notified the complainant about the unilateral change in the originally allotted unit.
- The present complaint has been filed by the complainant against the respondent seeking refund of the entire amount received by the respondent along with interest from the date of each payment as per section 18 (1) of the Act of 2016 on the below mentioned grounds.

- Layout plans of the subject project were unilaterally changed without taking the consent of the allottees. The unit which was agreed inter se parties vide buyer's agreement dated 24.05.2017 cannot be allotted to the present complainant as the layout plan which was promised vide Annexure- C of the above- mentioned agreement has been changed unilaterally without taking the consent of the allottees which is itself a violation of section 14 of the Act and punishable under section 61 of the Act. Section 18 of the Act very clearly states that "If the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale" and the allottee wishes to withdraw from the project then the respondent is liable to refund the amount received by the complainant along with interest. In the light of the aforementioned facts, the respondent is liable to refund the entire amount received by him to the complainant along with interest from the date of each payment as per section 18 (1) of the Act.
- The Letter Dated 05.09.2022 bearing subject "intimation of constructive possession.." is not lawful/valid offer in the eyes of the law and is liable to be struck down. That right from the time of the booking, it was made clear to the respondent company that the father of the complainant Mr. Abhay Kothari (DIN no. 06385951) operates a small food business under the name "The Green Wok". The subject unit was purchased for him to be able to run a small food kiosk to support himself which means that right from the very beginning it was agreed inter se parties that the physical possession of the unit has to be given. Further, it has been submitted that the clause 11 (Procedure for taking possession) and clause 12 (Handing over possession) of the buyer's agreement states that "The Allottee shall be handed over the possession of the Unit..."

makes it amply clear that it was the physical possession of the subject unit that has to be handed over to the complainant allottee. Further, nowhere in the entire allotment letter or the buyer's agreement the words "Constructive Possession" are ever mentioned. When the complainant received the letter dated 05.09.2022, to the utter shock and surprise of the complainant, it is for the first time that the respondent introduced the words "constructive possession". It is also submitted that the "constructive possession" was never agreed inter se parties. Moreover, the complainant had never opted for the "leasing arrangement" mentioned in clause 33 of the buyer's agreement dated 24.05.2017. The clause 33 begins with the words "At the request of the allottee", however no such request has ever been made by the complainant allottee w.r.t leasing of the subject unit. It is pertinent to mention here that the respondent has leased the subject unit without the consent of the complainant allottee which is in clear contravention of the terms of the buyer's agreement dated 24.05.2017.

- The location of the originally allotted unit was in the central heart of the food court which has now been changed unilaterally & arbitrarily towards the end in a fringe location as delineated hereinabove.

25. 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 those undisputed documents and submissions made by the parties.

## G. Jurisdiction of the authority:

26. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**G. I Territorial jurisdiction**

27. 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.

**G. II Subject matter jurisdiction**

28. 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.*

29. 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.

30. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Supra) and*** *reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022***wherein it has been laid down as under:

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

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

**H. Entitlement of the complainant for refund:**

**H.I Direct the respondent to refund the total amount paid by the complainant along with interest at a rate of 18% per annum at the earliest.**

32. The complainant has submitted that on 21.05.2020, the respondent sent an e-mail to the complainant allottee apprising him of the change in the unit originally allotted to him, and the respondent now offered a different unit namely K-35. Correspondingly, the complainant sought the revised layout plan from the respondent and upon receiving the same, it became evidently clear that the new unit being offered to him is in a very different location from the originally promised location which was selected in view of the fact that it was right in front of the entrance to the food court. It is a matter of fact that the respondent has changed the originally allotted unit bearing no. SC/FC 10 which was being allotted to the complainant allottee at the time of booking. Subsequently, the complainant allottee had promptly raised his objection vide e-mail dated 28.05.2020 in writing w.r.t the unilateral change of the unit as the new location of the unit was not acceptable to him. Furthermore, the complainant has evidently mentioned that if the respondent don't find a solution to the grievance of the complainant then he will be left with no other option but to approach this Authority for the redressal of his grievance and the aforementioned e-mail is already placed on record by the complainant allottee. Though, the counsel for the respondent has submitted before this Authority that the respondent had invited objections from all the allottees on account of revision of the building plans but nothing has been placed on record by the respondent to substantiate the same.

33. The Authority is of the considered view that the layout plans of the subject project has been changed after the execution of the buyer's agreement with

the complainant which leads us to a logical conclusion that the original unit which was agreed inter se parties vide Annexure C of the buyer's agreement cannot be allotted to the present complainant as the layout plan stands revised. Further, it is also a matter of fact that as soon as it came to the knowledge of the complainant that his originally allotted unit has been changed, he has swiftly acted and within a week of receiving the aforesaid email he communicated his objections to the respondent in writing w.r.t the change in unit vide email dated 28.05.2020. In simple words, it is matter of record that the respondent company is unable to deliver the unit which was originally promised to the complainant allottee vide buyer's agreement. Also, it is a matter of fact that the location of the unit which was in the central heart of the food court has now been changed. The Authority further observes that the language of Section 18 is very clear and it states that if the promoter fails to complete or is unable to give the possession of the subject unit to the allottee in accordance with the terms of the agreement for sale then he shall be liable on demand of the allottee, 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 the subject unit along with interest at prescribed rate and the present matter is immensely covered under section 18 (1) of the Act which is reproduced below for the 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."***

34. **Validity of offer of constructive possession dated 05.09.2022:** During the course of hearing, the counsel for the complainant has submitted that as per clause 11 and 12 of the buyer's agreement dated 24.05.2017 which deals with the procedure for taking possession and handing over of possession respectively, the respondent is liable to handover the physical possession of the unit within a period of 54 months and not the constructive possession. He further stated that the words "Constructive possession" are nowhere used in the entire agreement rather only the word "possession" is mentioned which clearly means physical handover of possession. The counsel for the respondent objected to the same and submitted that vide clause 43 of the booking application form, it has been made clear to the complainant that the unit is not for the purpose of self-occupation and is for the purpose of leasing to third party along with combined units as larger area. However, the counsel for the complainants clarified w.r.t the aforementioned contention and stated that the clauses of booking application form are superseded on the execution of the detailed buyer's agreement.

35. The counsel for the respondent on 19.12.2023 sought two days' time from this Authority to clarify as to whether the constructive possession or the physical possession has to be handed over and the request regarding the same was allowed in the best interest of justice. Subsequently on next date of hearing i.e., 09.01.2024, on the request of the counsel for the respondent, one more and last opportunity was given to place on record any document

or agreement executed after the buyer's agreement wherein both the parties have agreed for constructive possession and not for physical possession by this Authority. However, the counsel for the respondent has failed to substantiate the same and on 06.02.2024 submitted before this Authority that there is only arrangement for leasing of the unit but there is no provision under which constructive possession has to be given to the complainant allottee and not the physical possession. However, the counsel for the complainant stated that the provisions of application form are superseded on execution of a detailed builder buyer agreement and the same is also provided under clause 36 of the buyer's agreement which specifically provides superseding of all earlier understandings and agreements and hence the provisions of booking application form cannot be relied upon at this stage.

36. In the light of the aforementioned submissions made above, the Authority is of the view that as per the buyer's agreement dated 24.05.2017, both the parties have agreed for handover of the physical possession of the subject unit and consequently, the respondent was liable to handover the physical possession of the subject unit to the complainant allottee and not the constructive possession. Therefore, the offer of constructive possession dated 05.09.2022 cannot be said to be the lawful/ valid offer of possession.

37. Keeping in view the fact that the complainant allottee wishes to withdraw from the project and is seeking return of the amount received by the promoter along with interest on failure of the promoter to complete or inability to give the possession of the subject unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. This Authority is of the view that it is evidently clear from the conduct of the respondent that they had wilfully ignored the legitimate

contractual right of the complainant and the complainant has become entitled to his right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter. Accordingly, the promoter is liable to return the amount received by him from the allottee in respect of that unit along with interest at the prescribed rate.

38. **Admissibility of refund along with prescribed rate of interest:** The complainant allottee is seeking refund of the amount paid by him along with interest as he intends to withdraw from the subject project. Accordingly, proviso to section 18 provides that where an allottee intends to withdraw from the project, he shall be returned the complete amount paid by him to the promoter along with interest at such rate as may be prescribed, and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

40. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e.,20.02.2024

is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85% per annum.

41. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020** decided on 12.05.2022. it was observed

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

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 under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the complainant-allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit along with interest at such rate as may be prescribed. This is without prejudice to

any other remedy available to the allottee including compensation for which he may file an application for adjudging compensation with the adjudicating officer under section 71 read with section 31(1) of the Act of 2016.

43. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by him along with interest at the rate of 10.85% per annum as prescribed under rule 15 of the rules from the date of each payment till the actual date of realisation of the amount refund by the complainant-allottee within the timelines provided in rule 16 of the rules.

**H.II Direct the respondent to pay compensation of Rs. 30,00,000/- to the, complainant for indulging into unfair trade practices and provide deficient services to the complainant and litigation cost of Rs. 50,000/.**

44. The complainant is seeking relief w.r.t. compensation in the above-mentioned relief. ***Hon'ble Supreme Court of India in civil appeal titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.(supra),*** has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before the Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

## I. Directions of the Authority:

45. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondent /promoter is directed to refund the amount received from the complainant i.e., Rs. 78,49,822/- along with interest at the rate of 10.85% p.a. as prescribed under rule 15 of the rules from the date of each payment till the actual date of realisation of the amount by the complainant-allottee.

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.

iii) The respondent builder is directed not to create third party right against the unit before full realization of the amount paid by the complainant. If any transfer is initiated with respect to the subject unit, the receivable from that property shall be first utilized for clearing dues of the complainant-allottee.

46. Complaint stands disposed of.

47. File be consigned to the registry.

**(Sanjeev Kumar Arora)**
**Member**

**(Ashok Sangwan)**
**Member**

**(Vijay Kumar Goyal)**
**Member**

**Haryana Real Estate Regulatory Authority, Gurugram**

**Dated: 20.02.2024**