

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

**Complaint no.:** 4602 of 2023  
**Complaint filed on:** 03.10.2023  
**Date of decision:** 01.08.2024

1. Gaurav Chauhan

2. Jitender Singh

**Both RR/o** - House no. 278, Sector 9, Gurugram, Haryana

**Complainants**

Versus

S.V. Housing Pvt. Ltd.

**Registered Office at:** - 303, 3<sup>rd</sup> floor, Laxmi tower C-1/3, Naniwala Bagh, Azadpur, Delhi-110033

**Respondent**

**CORAM:**

Shri Vijay Kumar Goyal

**Member**

**APPEARANCE:**

In person

Sh. Avinash Kumar Singh (Advocate)

Complainants

Respondent

**ORDER**

1. The present complaint has been filed by the complainant/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 as provided 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.

**A. Unit and project related details**

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

S. No.	Particulars	Details
1.	Name of the project	"83 Metro Street"
2.	Nature of the project	Commercial
3.	DTCP license no. and validity status	110 of 2012 dated 26.10.2012
4.	RERA registration	337 of 2017 dated 27.10.2017
5.	Welcome letter	08.08.2020 (page 14 of complaint)
6.	Unit no.	2012, 2 <sup>nd</sup> floor (page 14 of complaint)
7.	Unit admeasuring	250.354 sq. ft. super area (as per Annexure I of BBA page 96 of reply) 265.818 sq. ft. super area (as per offer of possession page 21 of reply)
8.	Date of execution of Buyers agreement	11.09.2020 (page 57 of reply)
9.	Possession clause	7.(a) <i>Within 60 (sixty) days from the date of issuance of Occupation Certificate by the concerned Authorities, the Company shall offer the possession of the Unit/Space to the Allottee. Subject to Force Majeure and fulfilment by the Allottee of all the terms and conditions of this Agreement including but not limited to timely payment by the Allottee of the Total Sale Value payable in accordance with Payment Plan, along with stamp duty, registration and incidental charges and other charges in connection thereto due and payable by the Allottee and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company shall offer the possession of the Unit to the Allottee on or before SEPTEMBER, 2022</i> (page 74 of reply)
10.	Due date of possession	30.09.2022

A

11.	Basic sale consideration	Rs.25,25,271/- (as per SOA page 25 of reply)
12.	Amount paid by the complainant	Rs.8,00,000/- (as per SOA page 25 of reply)
13.	Payment request letter	19.06.2021, 09.10.2021, 01.03.2022, 01.06.2022, 01.07.2022, 05.09.2022, 30.12.2022, 22.03.2023, 21.04.2023 (page 28-51 of reply)
14.	Notice of possession	01.06.2023 (page 21 of reply)
15.	Legal notice to respondent for refund	07.08.2023 (page 18 of complaint)
16.	Occupation certificate	24.05.2023 (confirmed by the respondent during proceedings dated 02.05.2024)

**B. Facts of the complaint.**

3. The complainants have pleaded the following facts:

- a. That the complainants made an application for booking a shop in respondent's project "83 METRO STREET" for a total price of Rs.23,75,000/- exclusive of external development charges, infrastructural development charges, preference location charges, in addition interest maintenance security (IBMS) and other charges.
- b. That the complainants out of the total sale consideration made a payment of Rs.2,00,000/- as the token booking amount against the purchase of the subject unit vide cheque no. 013646 dated 28.07.2020 and after that the respondent allotted a unit no.2012, 2<sup>nd</sup> floor admeasuring 250sq. ft. super area to the complainants along with welcome letter and acknowledgement slip.
- c. That the complainants have paid Rs.8,00,000/- to the respondent. In the month of July 2023, the respondent sent a letter to the complainants and informed that they have received occupancy certificate along with statement of accounts in which the size of the subject unit was increased from 250 sq.

ft. to 265 sq. ft. The respondent without informing and without taking prior consent increased the unit area from 250 sq. ft. to 265 sq. ft. Moreover, the buyer's agreement between the parties has not been registered yet.

d. That the complainants left with no other option sent a legal notice dated 07.08.2023 and requested the respondent to refund the paid-up amount and informed the respondent to cancel the allotment in the project as unit size has been increased without informing and without taking their consent.

**C. Relief sought by the complainants:**

4. The complainants have sought following reliefs:

- a. Direct the respondent to refund the paid-up amount along with interest.
- b. Direct the respondent to pay litigation cost of Rs.1,00,000/-.

5. On the date of hearing, the authority explained to the respondents /promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

**D. Reply by the respondent:**

6. The respondent has contested the complaint on the following grounds:

a. That the complainants are investors and due to financial crunch, the complainants became defaulters, having deliberately failed to make the payment of instalments within the time prescribed, which resulted in delay payment charges of Rs.23,69,264/-.

b. That the complainants made the booking of a commercial unit no. 2012, 2<sup>nd</sup> floor in the commercial project 83 Metro Street Sector-83, Gurugram which has been developed by the respondent.

c. That the respondent issued a welcome letter after confirmation of the booking of subject unit on 08.08.2020. The complainants concealed the material fact by not disclosing anything about the builder buyer agreement. The builder buyer agreement was executed between the parties on 11.09.2020.

- d. That the complainants were aware about the provisions in buyer's agreement regarding the increase or decrease in the final area of the unit after completion of the project and issuance of the occupation certificate.
- e. That the respondent obtained the occupation certificate on 24.05.2023. However, the complainants rather than making payments preferred to serve a legal notice and thereafter the present complaint under reply alleging the increase in the area of the unit by 15 sq. ft from 250 sq. ft. to 265 sq. ft.
- f. That the model draft agreement to sale provided in the ANNEXURE A of the Rules, 2017 provided in clause no. 1.7 allows the promoter to demand for the increase in the carpet area up to 5%. The complainants after reading all the clauses carefully executed the buyer's agreement.
- g. That despite several adversities, COVID-19 pandemic and epidemic, the respondent has continued with the construction of the project and has offered the possession of the unit to the allottees as per the commitments made with them. There is no delay in handing over the possession to the allottees. So, there is no question of delay possession charges.
7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.

**E. Jurisdiction of the authority**

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

**E.I. Territorial jurisdiction**

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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

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

#### Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) R.C.R. (Civil) 357 and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of***

**India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022** wherein it has been laid down as under:

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

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

**F. Findings on the relief sought by the complainants.**

**F.I Direct the respondent to refund the paid-up amount along with interest.**

14. The complainants entered into a builder-buyer agreement with the respondent on 11.09.2020 for the purchase of commercial unit no. 2012, 2<sup>nd</sup> floor admeasuring super area of 250.354 sq. ft., for a total sale consideration of Rs.25,25,271/-. The complainants made an initial payment of Rs.8,00,000/- towards the unit. Subsequently, the respondent offered possession of the unit on 01.06.2023, following the issuance of an occupation certificate dated 24.05.2023. However, on 07.08.2023 the complainants issued a notice to the respondent seeking a refund of the amount paid and cancellation of the unit, citing an increase in the super area without prior notice and hereby, the

complainants through present complaint are seeking refund of the paid-up amount along with interest.

15. Upon careful examination of the documents submitted by both the parties, it was noted that the original agreement specified a super area of 250.354 sq. ft. However, this super area was later increased to 265.818 sq. ft., representing a 6% increase from the originally agreed-upon super area. The complainants were informed of this increase through the offer of possession.

16. Further, as per clause 6(c) of the builder-buyer agreement, the respondent had agreed not to increase the size of the unit by more than 3% of the subject unit's area. The said clause of the agreement is extracted below: -

*The Company shall confirm the final area of the Unit after the construction of the building is complete and the Occupation Certificate is granted by the Authority. The Total Sale Value payable for the Unit shall be recalculated upon confirmation by the Company. The Parties hereby agree that in the event of reduction in the area, the Company shall refund the excess amounts paid by the Allottee within 90 (ninety) days along with interest at the rate prescribed in the HRERA Rules, from the date when such excess amount was paid by the Allottee or adjust against the sale consideration/dues if any. It is further agreed that in the event of any increase in the measurement of the Unit/Space, which shall not be more than 3% (Three Percent) of the Unit Area as mentioned in this Agreement, the Company shall be entitled to demand the payable amounts along with the next due installment as per Annexure-'V'. The Parties further agree that all such adjustments in the amounts payable or refundable as the case may be shall be made at the same rates as agreed herein.*

17. The relevant clause states that the final area of the unit would be confirmed upon the completion of the building and the issuance of the occupation certificate by the authority. The total sale value would be recalculated accordingly. In the event of a reduction in the area, the respondent would refund the excess amounts paid by the allottee within 90 days along with interest at the rate prescribed in the HRERA Rules. Conversely, if there was an increase in the unit's area, which should not exceed 3%, the respondent would be entitled to demand the additional amount payable with the next



instalment. In the present case, the unit size was increased by 6%, contrary to the agreed limit of 3%. However, the respondent during proceedings dated 02.05.2024 agreed not to charge for the increased area and is ready to offer possession of the subject unit upon payment of the outstanding dues. Despite this assurance, the complainants opted for refund of the paid amount along with interest from the respondent on account of increase in super area. Nevertheless, the complainants' insistence on a refund indicates their clear intention to withdraw from the project.

18. Additionally, clause 8 of the agreement provides that where the allottee proposes to withdraw from the project, the promoter is entitled to forfeit the earnest money along with the interest component on delayed payment, any brokerage paid, and any rebates or discounts availed by the allottee against the unit. The said clause is extracted below:

**Clause 8:**

*Where the allottee proposes to cancel/withdraw from the project without any fault of the Promote Promoter, the Promoter herein is entitled to forfeit the Earnest money along with interest component on delayed payment (payable by the customer for breach of agreement and nonpayment of any due payable to the Promoter), Brokerage Paid and any rebates/discounts availed earlier/margin to the Allottee against the Unit. The rate of interest payable by the allottee to the Promoter shall be the State Bank of India highest marginal cost of lending rate plus two percent. The balance amount, if any, of money paid by the allottee shall be returned by the Promoter to the allottee within ninety days of such cancellation subject to availability of the fund in the separate account to meet the expenses incurred in construction and without disturbing the construction and development of the said Project/Complex. Add this also clause in agreement for withdrawal by complainant.*

19. The authority has observed that the respondent-builder has intimated for the possession of the unit on 01.06.2023 respectively, after obtaining occupation certificate on 24.05.2023 but the complainants want to surrender the unit and refund the amount paid by them.

20. Moreover, the authority has observed that, despite the respondent's repeated efforts to collect outstanding payments, the complainants have not made

*Ar*

payments towards the unit as required. The respondent issued numerous reminders for these payments.

21. Despite these repeated efforts, the complainants deliberately chose not to make the required payments. Their consistent failure to meet payment deadlines, despite numerous reminders submits a clear intent to exit the agreement rather than pay the outstanding dues. Furthermore, even after the respondent agreed not to charge for the increase in the unit's area, the complainants continued to seek refund of the paid-up amount. Nevertheless, the complainants' insistence on a refund indicates their clear intention to withdraw from the project. Also, the complainants' consistent non-payment, despite the respondent's accommodation, underscores their deliberate intent to withdraw from the project and recover the amounts paid, rather than continuing with the project after possession being offered following the issuance of the occupation certificate.
22. Clause 8 of the buyer's agreement executed between the parties provides forfeiture of earnest money along with interest and other charges on cancellation/withdrawal by allottee. Same is extracted below:
8.  
*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 along with interest component on delayed payment (payable by the customer for breach of agreement and nonpayment of any due payable to the Promoter), Brokerage Paid and any rebates/discounts availed earlier/ margin to the Allottee against the Unit. The rate of interest payable by the allottee to the Promoter shall be the State Bank of India highest marginal cost of lending rate plus two percent. The balance amount, if any, of money paid by the allottee shall be returned by the Promoter to the allottee within ninety days of such cancellation subject to availability of the fund in the separate account to meet the expenses incurred in construction and without disturbing the construction and development of the said Project/Complex.*
23. 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 ors. VS. Sarah C. ors., (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 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."*

24. 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, the respondent is directed to refund the paid-up amount of Rs.8,00,000/- after deducting 10% of the sale consideration being earnest money along with an interest @ 11% 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 request for refund made to the respondent through legal notice i.e. 07.08.2023 till its realization within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

**F.II Direct the respondent to pay litigation cost of Rs.1,00,000/-.**

25. The complainants are seeking above mentioned 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. (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.

**G. Directions of the authority.**

26. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

I. The respondent is directed to refund the paid-up amount i.e. Rs.8,00,000/- to complainants after deducting 10% of the sale consideration being earnest money along with interest at the rate of 11% on such balance amount from the date of request for refund made to the respondent through legal notice i.e. 07.08.2023 till its actual 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.

27. The complaint stands disposed of.

28. Files be consigned to registry.

**Dated: 01.08.2024**



*V. I - G*  
**(Vijay Kumar Goyal)**  
Member

Haryana Real Estate Regulatory  
Authority, Gurugram