BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: **1844 of 2022**
Date of filing: **02.05.2022**
Order pronounced on: **08.08.2024**

1.Meenakshi Gupta
2.Arvind Kumar
Both R/O: - Block A1, House No. 126, Sushant Lok Phase II, Sector 55, Gurgaon, Haryana 122011 **Complainants**

Versus

M/s Spaze Towers Private Limited
Regd. Office at: - H.No.36A, Power Apartments, AD Block, Pitampura-110034 **Respondent**

CORAM:
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Mordhwaj (Advocate) Complainants
Shri Harshit Barta (Advocate) 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 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	Spaze Towers, "Tristar", Sector – 92, Gurugram
2.	Total project area	2.718 acres
3.	Nature of the project	Commercial Complex
4.	DTCP license no. and validity status	72 of 2013 dated 27.07.2013 valid upto 26.07.2017
5.	Name of licensee	M/s Spaze Towers Pvt. Ltd.
6.	RERA Registered/ not registered	Registered vide no. 247 of 2017 dated 26.09.2017 valid up to 30.06.2020
1.	Unit no.	1072, 1st floor (Page 35 of complaint)
2.	Unit area admeasuring	303 sq. ft. (Page 35 of complaint)
3.	Date of allotment	31.10.2014 (Page 29 of complaint)
4.	Date of execution of BBA	09.12.2014 (Page 31 of complaint)
5.	Possession clause	***11.*** ***(a). Schedule for possession of the Said Unit*** *The Developer based on its present plans and estimates and subject to all just exceptions endeavours to complete construction of the Said Building/Said Unit in terms of the approvals (including the renewal/extended period described therein) and in accordance with the terms of this Agreement unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the Developer or Force Majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total Consideration or any part thereof and other charges and dues/payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement. In case there is any delay on the part of the Allottee(s) in making of payments to the Developer then notwithstanding rights available to the Developer elsewhere in this Agreement, the period for implementation of the*

		project shall also be extended by a span of time equivalent to each delay on the part of the Allottee(s) in remitting payment(s) to the Developer. ***(No time period specified)***
6.	Due date of possession	09.12.2017 *(Calculated as* ***per Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU /SC /0253 /2018*** *from the date of buyer agreement i.e. 09.12.2014)*
7.	Total sale consideration	Rs.30,04,881/- (as per SOA Page 44 of reply)
8.	Amount paid by the complainant	Rs.33,96,655 /- (Page 8 of complaint) Rs. 33,41,306/- (as per SOA dated 27.06.2022 Page 45 and 49 of reply)
9.	Revised building plan	14.10.2019 (page 10 of counter claim)
14.	Occupation certificate	03.05.2021 (Page 38 of reply)
15.	Offer of possession	05.05.2021 (Page 41 of reply)

B. Facts of the complaint.

3. The complainants have made the following submissions: -

a) That on 19.05.2014 the complainants made an application for booking a unit in the project "Spaze Tristar". A total booking amount of Rs.3,00,000/- was paid to the respondent via cheque no. 035786 and a payment plan was shared by the respondent for the future payments. As, per the payment plan the complainants were bound to make a payment of Rs.2,25,826/- within 60 days of booking, therefore the complainants on 07.07.2014 paid an amount of Rs.2,34,200/- to respondent via cheque no. 047181.

b) Thereafter on 31.10.2014 the complainants received an allotment letter. As per the allotment letter unit no.1072, first floor, block-A, admeasuring

super area 303 sq. ft. was allotted to the complainants for the sale consideration of Rs.29,24,071/- inclusive of EDC/IDC and PLC.

c) That the complainants have also paid sinking fund of Rs.60,600/- and IFMS of Rs.45,450/- to Preserve Faciliteez Pvt. Ltd. on the direction of respondent on 20.05.2021.

d) That the complainants have paid all the amount as per the specified date of payment plan so provided by the respondent and till date has made payment of Rs.33,96,655/-. However, no physical possession has been handed over by the respondent. The construction of the project is still going on. The booking of the subject unit was made on 19.05.2014 and the allotment letter to the complainants was issued on 31.10.2014 whereas the builder buyer agreement was executed on 09.12.2014. Since then, it has been more than 7 years the issuance of the allotment letter and no physical possession of the subject unit has been given till date.

e) That the respondent has only issued the possession of the said unit only on paper but no physical possession has been handed over to the complainants till date. As per the sanctioned plan of the project and as per the layout of the project annexed with the builder buyer agreement the unit no. 1072 was a corner shop and the instalment/payment so demanded by the respondent were also according to the corner shop/unit as PLC charges along with the GST were paid to the respondent on 23.08.2017 and 25.09.2017. However, the possession of the subject unit so being provided by the respondent is not a corner unit.

f) That as per clause 1.9 (ii) (a) of the buyer's agreement if a unit ceases to be a preferentially located, then the amount of PLC paid by the allotee shall be refunded and such refund shall be through adjustment in the next instalment. However, no such step has been taken by the respondent. At the time of offer of possession in the demand letter issued

by the respondent, nor refunded any amount for shift in location of the allotted unit from corner shop to non-corner shop.

g) That there has been, not only a delay in offering the possession of the subject unit but the said unit has also been shifted from its location i.e corner shop to non–corner shop, which clearly defeats the purpose of the complainants for which they indent to purchase the subject unit. The complainants herein wishes to withdraw from the project and seeks the refund along with interest.

C. Relief sought by the complainants.

4. The complainants have sought following relief:

i. Direct the respondent to refund the paid amount along with interest.
ii. Direct the respondent to pay litigation cost.

D. Reply by the respondent.

5. The respondent contested the complaint on the following grounds:-

a) That the complainants, being interested in the real estate development of the respondent known under the name and style of "TRISTAR" Sec-92, Village Dhorka, Gurugram, tentatively booked a unit in the project of the respondent on 19.05.2014 and were allotted a unit no. 1072 in Tower A admeasuring 303 sq. ft. vide allotment letter dated 31.10.2014.

b) Thereafter, the buyer's agreement was executed on 09.12.2014 between the parties. As per the Clause 11 of the agreement, the due date for the delivery of possession was subject to the approvals (*including the renewal/extension period*) and in accordance with the terms of the agreement. However, the parties did not agree to a specific date for the offer of possession. In such circumstances, the Authority has been noted to have considered the date of expiry of the registration certificate. The validity of the registration certificate was 30.06.2020 and after the extension granted by the Authority, the validity extended to 30.12.2020.

Thus, the proposed due date for the offer of possession can be regarded as 30.12.2020.

c) Moreover, the due date for the offer of possession was extendable if there was a delay or failure by the department or force majeure conditions that are beyond the power and control of the developer. The construction of the project was gravely hit by various force majeure conditions beyond the control of the respondent which are directly consequential to timely completion of the construction of the project and allows extension of timelines for completion.

d) The construction of the project faced significant delays due to various force majeure events, such as restrictions on diesel vehicles, stone crushers, and brick kilns imposed by the NGT and other certain orders passed by the authorities. These directives hindered the supply of raw materials essential for construction activities, leading to a total delay of 377 days. Additionally, orders from environmental authorities and courts further impacted construction activities. Despite these challenges, the respondent managed to progress with the construction, obtain necessary approvals, and offer possession of the unit. Given the circumstances were beyond the control, the respondent should be granted an extension of 377 days and the complaint should be dismissed, considering the external factors that caused delays in the project completion including covid-19 pandemic.

e) That period of 377 days was consumed on account of circumstances beyond the power and control of the respondent, owing to the passing of orders of statutory authorities and the Covid-19 Pandemic. One day of hindrance in the construction industry leads to a gigantic delay and has a deep effect on the overall construction process of the real estate project. All these circumstances come within the meaning of force majeure.

However, despite all odds, the respondent was able to carry out construction/development at the project site and obtain the necessary approvals, sanctions and has duly offered possession of the unit.

f) That the respondent, despite such delay, earnestly fulfilled its obligation under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. The default committed by the complainants and various factors beyond the control of the respondent are the factors responsible for delayed development of the project. The respondent cannot be penalised and held responsible for the default of its customers or due to force majeure circumstances. Thus, the present complaint deserves to be dismissed at the very threshold.

g) That despite innumerable hardships being faced by the respondent, the respondent completed the construction of the project and applied for the occupation application vide application dated 09.10.2020 before the concerned authority and successfully attained the occupation certificate on 03.05.2021. Once an application for grant of occupation certificate is submitted to the concerned statutory authority the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any influence in any manner whatsoever over the same. There is a delay of around 7 months caused due to the non-issuance of the occupation certificate by the statutory authority while calculating the period of delay. Therefore, the time period utilised by the concerned statutory authority for granting the occupation certificate is liable to be excluded from the time period utilised for the implementation of the project.

h) That there is no delay on part of the respondent in offering the possession. The due date comes out to be 30.12.2020, and the application

for the grant of occupancy certificate was made on 09.10.2020, i.e., before the expiry of the due date and before the expiry of the validation of the RERA Certificate. That there arose no cause of action whatsoever, in the present instance. The respondent has not defaulted the agreement or the Act, in any manner whatsoever.

i) Thereafter, only after obtaining the requisite permissions, the respondent offered possession of the unit to the complainant on 05.05.2021. However, the complainants miserably delayed in taking possession.

j) That the complainants have not approached the Authority with clean hands as has nowhere divulged with the fact that they have been already offered possession of the said unit on 05.05.2021.

k) That after the grant of occupancy certificate and offer of possession being made, it is a mandate on part of the allottee to take the possession. No other circumstance arises at this stage. The use of word "Shall" in section 19(10) of the RERA Act, 2016 denotes the mandatory nature of the obligation bestowed upon the allottee, out of which the allottee cannot rightly wriggle out. With the use of the word "shall", the intention of the legislature also needs to be seen as regards the literal interpretation of "shall" which denotes the mandatory obligation of taking possession by the allottee.

l) That the Act, 2016 is not retrospective in nature but retroactive hence, the interest on delay caused by the respondent, if any, shall be subjected to retroactive effect and not retrospective. The respondent shall only be liable to issue interest on payments made by the complainant against the said unit, as per the terms defined in the builder buyer agreement, and only against the payments made after the enactment and implementation of RERA, the provision of the act would prevail as the RERA Act is only

retroactive in nature. The retroactive nature of any act creates a new obligation on the transactions but does not affect the previous ones. For the projects which are ongoing after the implementation of RERA, the act will apply prospectively, meaning new rights will be conferred to the parties only from the date of enactment and not before. Thus, the right of allottee to claim interest as per the provisions of the Act, shall also be retroactive in its nature and shall only be attracted to payments made after the enactment and implementation of RERA 2016.

m) Furthermore, at this instance, the prices of the unit have decreased from the time of booking. The complainants being an investor, is seeking to withdraw from the project because of the anticipated monetary loss. That at the sake of repetition, it is stated that the possession has already been delivered by the respondent and the complainants stand in default of not taking the same. In such cases the interests of the builder need to be kept at par with the interests of the allottee, as was also the legislative intent of the Act, 2016. That if, withdrawal even after deduction of earnest money and other non-refundable amounts, is allowed in such cases, it will be gravely prejudicial to the respondent and against the development of the project and will curb the entire real estate sector. Therefore, withdrawal should not be allowed, with or without deduction, in any manner whatsoever, the allottees should be directed to take possession of the unit and make payment of the balance amount.

n) That no cause of action arose under section 18 as there was no default of the respondent in offering the possession of the unit. The subjective and extendable due date of giving the possession was 30.12.2020 as per the RERA registration certificate and the occupancy certificate was obtained on 03.05.2021, the application for which was made on 09.10.2020. The

delay of the competent authority in offering the possession is not accountable to the respondent.

o) That the complainants themselves are at the default and cannot benefit from their own wrongs. The complainants have caused inordinate delay in taking possession of the unit which was issued by the respondent on 05.05.2021, violating Section 19(10) of the Act as have failed to take possession of the unit even after 1 year and 5 months (515 days) of offer of possession in violation Section 19(10) and 19(11) of the Act.

p) That the offer of possession has been made. So, no withdrawal can be sought by the complainant. If the said withdrawal is allowed at this stage, i.e., without any inordinate delay and after 1 year and 5 months of offer of possession, the same would cause irreparable harm to the respondent and would cause gross injustice to the respondent. Therefore, the complaint should be dismissed as the same is devoid of merits and barred by limitation, being filed at a belated stage.

q) That the complainant has already been offered timely and legal possession by the respondent and the complainant has defaulted in taking the possession of the unit offered by the respondent under the agreement, and therefore the complainants are liable to pay delay possession charges to the respondent and to take delivery of the subject unit as per the terms and conditions of the agreement.

r) That the withdrawal, if allowed has to be after deductions of the earnest money, statutory dues, tax etc. as per clause 52 of the agreement.

s) That in case of delayed interest, if any has to be calculated only on the amounts deposited by the complainant towards the basic principal amount of the subject unit and not on any amount credited by the respondent, or any payment made by the allottees/complainants towards delayed payment charges or any taxes/statutory payments etc.

t) That the complaint has been preferred on absolutely baseless, unfounded and legally and factually unsustainable surmises which can never inspire the confidence of the Authority. The accusations levelled up by the complainants are completely void and baseless and devoid of merits. Thus, the instant Complaint needs to be dismissed.

E. Written arguments made by complainant.

6. The complainants submitted the written arguments on 07.06.2024 and made following submissions.

a) That the Act mandates that when any alteration not being minor alteration is made in sanctioned plans, layout plans, etc. the promoter shall obtain written consent of at least 2/3rd allottees of the said project. In the instant case, even though the respondent has produced documents pertaining to the intimation to the complainant inviting objections to changes in plans, or public notice in newspaper, it has failed to show that it has obtained the written consent of the allottees. The written consent of 2/3rd allotees was necessary and not necessarily of the complainant.

b) That after the revised building plans the unit of complainants ceases to be a non-corner unit, the respondent was under an obligation to refund the amount received under the head PLC and such refund be done via adjustment in the next instalment. As per the submission of respondent the revised building plan came into effect from November 2018 and since the respondent has issue four demand letters to the complainants but has failed to adjust the PLC amount in those demand letters. The respondent has issued offer of possession on 05.05.2021 and even in the offer of possession the respondent failed to adjust such PLC amount.

c) That the complainants have not been offered a valid offer of possession. The offer of possession as claimed to be made by the respondent on 05.05.2021 is not valid as it comes with unscrupulous, illegal and as

such there has been no offer of possession in the eyes of law. The complainants have already paid a total amount of Rs.33,41,306/- against the total consideration amount of Rs.29,24,071/- inclusive of EDC, IDC, and PLC. The complainants have paid PLC charges for its unit being a corner unit but when the complainant approached the respondent for taking the physical possession of the unit, a non-corner unit was offered.

F. Additional submissions made by respondent.

7. The respondent submitted the additional submissions with counter claim on 31.08.2023 and made following submissions.

a) That in accordance with the agreed terms and conditions and in compliance of the laws, rules and regulations, the respondent sought to revise the building plans from the earlier approved building plan vide DTCP Memo No. ZP-925/AD(RA)/2018/16527 dated 31.05.2018 to the in-principal approval vide DTCP Memo No. ZP-95//AD(RA)/2018/31440 dated 13.11.2018.

b) That the respondent put forth public notices in regard to the said revision in the project in an English Newspaper (Indian Express), Hindi Newspaper (Dainik Bhaskar) and a local Newspaper (The Tribune, Gurugram). The respondent vide the said Public Notices, invited objections of the said revision. The plans being available at the website of the respondent and its office, the same were also made available at the project site, and in the offer of STP, Gurugram. The proposed changes were also marked in different colours.

c) That no objections/suggestions were obtained by the complainants. The approval of the revision was obtained on 14.01.2019 vide Memo No. ZP-95//AD(RA)/2018/1065.

d) That accordingly, the respondent has at all times, ensured the compliance of not only the Act and the Agreement but also the DTCP

rules and regulations. The complainants did not object to the revision, they cannot be allowed to make any objections at this instance. Furthermore, the location of the subject unit was also tentative until the construction of the said project is complete.

e) That upon the revision of the building plan, the offer of possession of the final unit was made to the complainants, which is already a part of record.

8. All other averments made in the complaint were denied in toto.

9. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

G. Jurisdiction of the authority

10. 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

11. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

12. 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.

13. 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.

14. 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." SCC Online SC 1044 decided on 11.11.2021*** 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."

15. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra),*** the authority has the jurisdiction

to entertain a complaint seeking refund of the amount and interest on the refund amount.

H. Finding on objections raised by the respondent

H.I. Objection regarding the complainants being investors.

16. The respondent has taken a stand that the complainants are investors and not consumers, 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. The respondents also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondents are correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. 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;"*

17. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and

"allottee" and there cannot be a party having a status of "investor". Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

H.II Objection regarding the force majeure.

18. The respondent-promoter has raised the contention that the construction of the project has been delayed due to force majeure circumstances such as orders passed by the Hon'ble NGT to stop construction, notification of the Municipal corporations Gurugram, Haryana state pollution control authority, etc. The plea of the respondent regarding various orders of the NGT, etc, and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region were for a very short period of time, and such exigencies should have been accounted for at the very inception itself and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Thus, the promoter respondent cannot be given any leniency on the basis of aforesaid reasons and it is a well-settled principle that a person cannot take benefit of his own wrong.

19. Furthermore, the respondent-promoter has raised the contention that the construction of the project was delayed due to reasons beyond the control of the respondent such as COVID-19 outbreak, lockdown due to outbreak of such pandemic and shortage of labour on this account. The authority put reliance judgment of Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020*** dated 29.05.2020 which has observed that-

> *"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-*

performance of a contract for which the deadlines were much before the outbreak itself."

20. In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 09.12.2017. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession.

I. Findings on the relief sought by the complainants.

I.I Direct the respondents to refund the total amount paid by the complainants along with the prescribed rate of interest.

21. In the present complaint the complainants are seeking relief w.r.t to refund of the paid-up amount along with interest. The complainants were allotted a unit no. 1072, 1st floor admeasuring 303 sq. ft. by the respondent in its project Spaze Tristar for a sale consideration of Rs.30,04,881/- against which they have paid a sum of Rs.33,96,655/-.

22. The complainants took a plea that the respondent has only issued the possession of the said unit only on paper but no physical possession has been handed over to the complainants till date. As per the sanctioned plan of the project and as per the layout of the project annexed with the builder buyer agreement the subject unit was a corner shop and the instalment/payment so demanded by the respondent were made according to the corner shop/unit as PLC charges along with the GST were paid to the respondent on 23.08.2017 and 25.09.2017. However, the possession of the subject unit being offered by the respondent is not a corner unit.

23. On the contrary, the counsel for the respondent argues that the change in location of the unit was due to the change in building plans which was duly approved by the concerned authority i.e. the Director general town and country planning (DTCP). Further, submitted that the complainants were duly intimated regarding the proposed changes in building plans and the public notices regarding the change in building pian was made in newspapers and only after obtaining the requisite approvals from the DTCP on 31.08.2018 the building plans changed.

24. On perusal of the records brought before this Authority, and the submissions made by both the parties. it is of the view that the respondent is in violation of section 14(2) of the Real Estate (Regulation & Development) Act, 2016. The said section is reproduced below:

> *(2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—*
>
> *(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person: Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee*
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> *Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc. (ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building. Explanation—For the purpose of this clause, the allottees,*

irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only

25. It is the view of this Authority that the respondent was obligated to comply with the provisions of the Act of 2016 since the project was "ongoing" in nature and it had been registered with the Authority vide no. 247 of 2017 dated 26.09.2017. Since the respondent had already registered with this Authority and it was still "ongoing", it should have complied with all the provisions of the Act of 2016. The authority is of the view that the provisions of the Act are quasi-retroactive to some extent in operation and would apply to the agreements for sale entered into even prior to coming into operation of the Act where the transaction is still in the process of completion. Therefore, the provisions of the Act, rules, and agreements have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situations in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Therefore, the process provided in the Act for alterations in plans, etc. has to be followed and not the one provided in the agreement dated 09.12.2014. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. VOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 and which provides as under:

"119 Under the provisions of Section. 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...

122. We have already discussed, that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions

of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports.

26. It is the view of this Authority that the building plans were proposed to be changed in November 2018, long after coming into force of the Act of 2016. Since the Act had come into force by the said date, the respondent was under an obligation to comply with the provisions of the Act w.r.t the change in building plans. The Act mandates that when any alteration not being minor alteration is made in sanctioned plans, layout plans, etc. the promoter shall obtain written consent of at least 2/3 allottees of the said project. In the instant case, even though the respondent has produced documents pertaining to the intimation to the complainant inviting objections to changes in plans, or public notices in newspaper, it has failed to show that it has obtained written consent of the allottees. It is important to emphasise that the written consent of 2/3rd allottees was necessary and not necessarily of the complainants. Since, it failed to produce any such document, it can be said that the respondent is in violation of the section 14(2) of the Act of 2016.

27. It has come on record that against the sale consideration of Rs.30,04,881/, the complainants have paid a sum of Rs.33,41,305/- to the respondent. However, the complainants contended that the unit offered to them was in violation of the agreement to sell dated 09.12.2014 executed between parties as the unit was not corner unit as was agreed upon. The complainants contended that they had paid PLC charges as per the schedule of payment as preferential location charge for corner facing unit, and now the respondent had allotted them another non corner unit without complying with the procedure prescribed in the Act, 2016. On perusal of

record brought before the Authority, it is of the view that the respondent has violated the provisions of the Act of 2016 and the agreement to sell.

28. Hence, in present case allottees wishes to withdraw from the project, the promoter is liable on demand to return the amount received by the promoter with interest at the prescribed rate if it fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale. This view was taken by 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 the case of M/s Sana Realtors Private Limited & other vs. Union of India & others SLP (Civil) (supra)*** wherein it was observed as under: -

> *"The unqualified right of the allottees to seek refund re/erred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof, It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottees, if the promoter fails to give possession of the apart rent, 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 to either way not attributable to the allottees/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottees does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed"*

29. 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 allottees as per the agreement for sale under section 11(4)(a) of the Act. The promoter is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by respondent/promoter in respect of the unit with interest at such rate as may be prescribed.

30. Thus, in such a situation, the complainants cannot be compelled to take possession of the unit and he is well within the right to seek a refund of the paid-up amount.

31. Keeping in view the fact that the allottee/complainants wishes to withdraw from the project and is demanding a return of the amount received by the promoter in respect of the unit with interest on the failure of the promoter to complete or inability to give possession of the unit in accordance with the terms agreed between them. The matter is covered under section 18(1) of the Act of 2016.

32. 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 complainants are entitled to a refund of the entire amount paid by them at the prescribed rate of interest i.e. @ 11% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as of date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

I.II Direct the respondent to pay litigation cost.

33. The complainants are seeking above mentioned relief w.r.t. compensation and litigation. Hon'ble Supreme Court of India in case titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. 2021-2022(1) RCR (C), 357*** 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

34. 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/promoter is directed to refund the entire amount paid by the complainants along with prescribed rate of interest @ 11% p.a. from the date of each payment till the actual date of refund of the deposited amount as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.

    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.

35. Complaint stands disposed of.

36. File be consigned to registry.

Dated: 08.08.2024

(Vijay Kumar Goyal)
Member
Haryana Real Estate Regulatory
Authority, Gurugram