

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

Complaint no: 6104 of 2022
Date of Filing: 29.09.2022
Date of First Hearing: 25.01.2023
Date of decision: 08.08.2024

1. Mrs. Nilam Singh 2. Mr. Birendra Prasad Singh Both R/o F-82/FF, Shushant Lok-II, Shalimar Residency, Sector-57, Gurugram, Haryana.	Complainants
Versus	
M/s VSR Infratech Private Limited Office address: Plot No. 14, Ground Floor, Sector-44, Industrial Area, Gurugram-122003.	Respondent

CORAM:

Shri Vijay Kumar Goyal

Member**Appearance:**

Shri Abhinav Anand (Advocate)

Complainants

Ms. Shriya Takkar (Advocate)

Respondent**ORDER**

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the provision of the Act or the rules and regulations made there under or to the allottees as per the memorandum of understanding executed *inter se*.



A. Project and unit related details.

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

S. N.	Particulars	Details
1.	Name and location of the project	"68 Avenue" at Sector-86, Gurugram.
2.	Project area	3.231 Acres
3.	Nature of Project	Commercial Colony
4.	DTCP license no. and validity status	04 of 2012 dated 23.01.2012 Valid upto 22.01.2020
5.	Name of Licensee	M/s Shamrock Infrastructure Pvt. Ltd.
6.	Rera registered/ not registered and validity status	Registered Vide no. 119 of 2017 dated 28.08.2017 Valid upto 30.06.2018
7.	Unit No.	G-09, Ground Floor (Old Unit) In project " 85 Avenue " (page 51 of reply) FB-150, Tower-B, First Floor (New Unit) In project " 68 Avenue " (page 84 of reply)
8.	Unit area admeasuring	682 sq. ft. (super area) for New Unit (page 84 of reply)
9.	Application form	Undated (For old unit) (Marked as annexure R-1 in reply) Undated (For new unit) (Marked as annexure R-4 in reply)
10.	MOU	02.07.2014 (Old unit) In the name of 1. Mr. Raj Gaurav & 2. Mrs. Nilam Singh In project " 85 Avenue " (page 48 of reply) 12.05.2018 (New unit) In the name of Mrs. Nilam Singh & 2. Mr. Birendra Prasad Singh.

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		In project " 68 Avenue " (page 81 of reply)
11.	Assured return clause	<p>3.1 (Old Unit) <i>"It is hereby agreed and undertaken by the developer that till the notice for offer of possession is issued, the developer shall pay to the allottee an assured return at the rate of Rs.90.50/- per sq. ft. of super area of premises per month. The assured return shall be subject to tax deduction at source, which shall be payable on due date of every English colander month in due basis."</i></p> <p>3.1 (New Unit) <i>"It is hereby agreed and undertaken by the developer that from 08.12.2017 till the application for offer of possession is issued, the developer shall pay to the allottee an assured return at the rate of Rs.105.87/- per sq. ft. of super area of premises per month. (hereinafter referred to as the assured return)"</i></p>
12.	Lease clause	<p>2. Lease of unit. <i>"2.1 That upon completion of the complex the developer issue offer of possession to the allottee and after payment of all dues as demanded by the developer, the developer shall find out a suitable lessee the lease the premises to on such terms and conditions as may be determined by the developer..."</i> (Emphasis supplied) (page 85 of reply)</p>
13.	Buyer's agreement	Not executed
14.	Possession clause	Not available
15.	Due date of possession	<p>12.11.2021 <i>"Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018-SC); MANU/SC/0253/2018 Hon'ble Apex Court observed that "a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of</i></p>

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		<p><i>the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract."</i></p> <p>In view of the above-mentioned reasoning, the date of the execution of MoU dated 12.05.2018 ought to be taken as the date for calculating the due date of possession. Therefore, the due date for handing over the possession of the unit comes out to be 12.05.2021 + Grace period of 6 months allowed as per HARERA notification no. 9/3-2020 dated 26.05.2020</p>
16.	Sale Consideration	Rs.79,45,300/- (page 84 of reply)
17.	Amount paid by complainants	Rs.95,53,000/- (As confirmed by both the parties during proceedings dated 23.05.2024) (Note: This amount is exclusive of Rs.2,79,349/- as credit note given by the respondent.)
18.	Occupation certificate	02.08.2019 (page no. 123 of reply)
19.	Offer of Possession for fit out	01.01.2019 (page 121 of reply)
20.	No dues Certificate	10.01.2020 (page 125 of reply)
21.	Legal Notice	14.07.2022 - for refund (page 46 of complaint)
22.	Demand letter	18.11.2022 (page 126 of reply)
23.	Paid Assured return [Against unit in project "68 Avenue"]	Rs.4,15,619/- (page 97 of reply)

B. Facts of the complaint:

3. The complainants have made the following submissions in the complaint: -
- That the complainant saw the lucrative advertisements and promotions regarding the real estate project "85 Avenue", Sector 85, Gurugram, Haryana. Floated by the respondent company with the enticing assurances



- of handing over the possession within the promised period, facilitation in bank loan , assured returns and lease facility etc. got induced and booked a commercial unit bearing G-09 Ground Floor in "85 Avenue", Sector 85, Gurugram, Haryana Admeasuring 692.56 sq. ft. along with car parking EDC/IDC, PLC, IFMS, electricity connection charges, air conditioning charges, service tax, VAT etc. for a total sale of consideration of Rs.80,68,324/- by entering into MoU and the space buyers agreement. It is apposite to submit that the complainant made an initial payment of Rs.65,00,000/-.
- ii. That despite complainant had duly made the payments on time as per the demands you the respondent in contravention to the MoU and space buyer's agreement failed to complete the project within promised time duration even after lapse of almost 102 months. That in the month of December 2017, due to unreasonable and undefined delay in the completion of the project on defendants' part, the complainant got an offer to switching over to other projects where the construction was about to be completed in near future. The complainant under the compulsion had opted to switch-over to the project located at 68 Avenue situated at 68, village Badshahpur, Tehsil & District Gurugram, Haryana.
- iii. A fresh MoU was been executed between the complainant and respondent on dated 12.05.2018. In that the unit which was allotted to the complainant that was FB-150 located at tower B on the first-floor admeasuring total aggregate area of 682 sq. ft. for a total consideration of Rs.79,45,300/- at the rate of Rs.11,650/- per sq. ft. It is apposite to state that apart from payment of Rs.65,00,000/- the complainant had again made a payment of Rs.10,45,000/- total amounting to Rs.75,45,000/-.

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- iv. That as per the terms of agreement, the complainant agreed that the remaining payment towards the consideration amount shall be paid at the time of offer of possession.
- v. That vide offer of possession letter dt 01.01.2019, the respondent informed the petitioner no 1 & 2 that the building of 68 Avenue situated at Sector 68, Village Badshahpur, Tehsil Gurugram, Haryana is ready for possession and the respondent advised the petitioner to take the possession within 30 days along with the demand of payment of Rs.22,67,935/- as reflected in the demand letter. In the demand letter of the asking amount includes all the registration charges and taxes as well as even the advance maintenance charge also. It is also to be mention here that the said demand was not as per the agreed terms and condition. When the petitioner approached the respondent then he replied that the demand was a tentative and, in this petitioner, asked for some discount in the said asking amount. Petitioner made the payment of Rs.22,42,018/- against which on dated 10.01.2020 respondent issued the no dues letter in favour of the petitioner.
- vi. After obtaining the no dues letter the petitioner approached the respondent for the possession of the unit many times. But the respondent was citing unjustifiable and inappropriate reasons to avoiding the hand over the possession of the unit, respondent had disregarded his own issued no dues letter. That the above said acts of the respondent falls within the definition of unfair & illegal business practices provided under the Consumer Protection Act and other laws.
- vii. That the petitioner had invested all their hard-earned money in your project with high hopes & expectations that they will have their own commercial space to carry on their business for their livelihood, however after seeking the conduct of the respondent the petitioner had lost his trust on the respondent company and he feels deceived. It is further to put forth

that the above said act of the respondents caused the financial loss and have inflicted immense mental tension & insecurity to the petitioner.

C. Relief sought by the complainants: -

4. The complainants have sought following relief(s)
 - a. Pass an appropriate award directing the respondent to refund the paid amount i.e., Rs.97,87,018/- and compensate with interest @ 18% from 02.07.2014 to the date of refund on paid amount by the complainant to the respondent.
 - b. That in the interest of justice, this Hon'ble Authority may pass strict and stringent orders against errant promoters and developers who take huge investments from innocent purchaser and then deny them the right to take possession as agreed at the time of booking/agreement. The purpose and legislative intent may be considered for setting up this Hon'ble Regulatory Authority while deciding the present complaint as the respondent has not only treated the complainant unfairly but may other buyers also.
 - c. Direct the developer to compensate the complainant to the tune of Rs.1,00,000/- towards legal expenses and or other expenses for this serious lapse and harassment.
5. On the date of hearing, the authority explained to the respondent /promoter about the contraventions 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 contested the complaint on the following grounds: -
 - i. That respondent company is a company of repute having immense goodwill, reputation and enjoying market leadership in the real estate industry.

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- ii. That the complainant no.1 i.e. Mrs. Nilam Singh along with her son Mr. Raj Gaurav had made an application for provisional allotment of unit G-09 in the project known as VSR 85 Avenue which is now known as Park Street vide an application form.
- iii. That one of the offers made by the respondent at that point of time was that the unit will have a benefit of assured return till the notice for offer of possession subject to force majeure conditions and other conditions mentioned in the MOU. That the complainant no.1 i.e. Mrs. Nilam Singh along with her son Mr. Raj Gaurav accordingly entered into an MOU dated 02.08.2014 with the respondent determining all the rights and liabilities of the parties.
- iv. That as per the Memorandum of Understanding (MOU) dated 02.08.2014 the price of the unit for an area admeasuring 692.56 sq. ft. was Rs.80,68,324/- exclusive of PLC, EDC, IDC, IFMS, electricity connection charges, power back up charges, air conditioning charges, service tax and such other levies/cessess/VAT as may be imposed by any statutory authority.
- v. The complainant no.1 i.e. Mrs. Nilam Singh along with her son Mr. Raj Gaurav made payment of Rs.65,00,000/- including service tax of Rs.2,32,403/- to the respondent at the time of allotment. However, in addition to the above the complainant no.1 i.e. Mrs. Nilam Singh along with her son Mr. Raj Gaurav were also supposed to make other payments in the nature of EDC, IDC as and when demanded by the respondent and were also supposed to make payment of Rs.18,00,727/- being balance of agreed sales consideration plus PLC, Service tax, VAT, IFMS, electricity connection charges, power back up charges, air conditioning charges, IFCRF, stamp duty, registration and such other charges as per the MOU.

- vi. That there was no time limit provided under the MOU for handing over the possession of the unit. Thus, time was not the essence of the contract for delivering the possession, however it was mutually agreed upon that the complainant no.1 i.e. Mrs. Nilam Singh along with her son Mr. Raj Gaurav will be entitled to the benefit of assured returns/lease rental as per the terms of the MOU.
- vii. That as per the terms of the MOU, it was also agreed that the respondent will pay an assured return at the rate of Rs.90.50/- per sq. ft. of the super area till the notice of possession is issued. That the complainant no.1 i.e. Mrs. Nilam Singh along with her son Mr. Raj Gaurav received an amount of Rs.24,81,952/- towards assured return by the respondent company.
- viii. That thereafter a request was received on behalf of Mr. Raj Gaurav to cancel the present allotment and thereafter allocating a unit in another project of the respondent known as '68 Avenue'. That as good will gesture, the respondent company cancelled the allotment of complainant no.1 i.e. Mrs. Nilam Singh and her son Mr. Raj Gaurav in the project VSR 85 Avenue which is now known as Park Street.
- ix. After cancellation of the earlier allotment, the complainants herein i.e. Mrs. Nilam Singh (complainant no.1) along with her husband Mr. Birendra Prasad Singh made an application for provisional allotment of a retail unit FB-150 on 1st Floor, Block B in the project developed by the respondent known as 68 Avenue.
- x. That one of the offers made by the respondent at that point of time was that the unit will have a benefit of assured return from 08.12.2017 till the notice for offer of possession subject to force majeure conditions and other conditions mentioned in the MOU. That the complainants accordingly entered into an MOU dated 12.05.2018 with the respondent determining all the rights and liabilities of the parties.

- xi. That as per the memorandum of understanding (MOU) the price of the retail unit for an area admeasuring 682 sq. ft. was Rs.79,45,300/- exclusive of EDC, IDC, IFMS, electricity connection charges, power back up charges, air conditioning charges, service tax and such other levies/cessess/VAT as may be imposed by any statutory authority.
- xii. That the amount to the tune of Rs.65,00,000/- paid by the complainant no.1 for the earlier unit in 85 Avenue (now known as Park Street) was transferred to the present unit in 68 Avenue. That in addition to the above the complainants made a payment of Rs.10,45,000/- to the respondent at the time of allotment. However, in addition to the above the complainants were also supposed to make other payments in the nature of EDC, IDC as and when demanded by the respondent and were also supposed to make payment of Rs.7,25,204/- being balance of agreed sales consideration plus PLC, Service tax, VAT, IFMS, electricity connection charges, power back up charges, air conditioning charges, IFCRF, stamp duty, registration and such other charges as per the MOU.
- xiii. That there was no time limit provided under the MOU for handing over the possession of the unit. Thus, time was not the essence of the contract for delivering the possession, however it was mutually agreed upon that the complainants will be entitled to the benefit of assured returns/lease rental as per the terms of the MOU.
- xiv. That the as per the terms of the MOU, it was also agreed that the respondent will pay an assured return at the rate of Rs.105.87/- per sq. ft of the super area from 08.12.2017 till the notice of possession is issued. However, the payment of assured return was subject to force majeure clause as provided under clause 6.1 of the MOU and other clauses of the MOU.
- xv. That as per clause 6.1 i.e., force majeure it becomes quite evident that the complainants were entitled to assured return subject to force majeure

conditions in developing the said project. That it is pertinent to mention here that the respondent despite facing the force majeure conditions has already paid the assured return to the tune of Rs.4,15,619/- till September 2018. That the payment of the assured return was stopped in the September 2018 solely for the force majeure conditions which continued is still continuing i.e. COVID 19 Pandemic. That this Hon'ble Authority vide its order dated 26.05.2020 has invoked the force majeure clause.

- xvi. That the legislature passed a legislation titled as 'The Banning of Unregulated Deposit Schemes Act, 2019' (hereinafter referred to as "BUDS Act"), with the aim and objective to provide for a comprehensive mechanism to ban the unregulated deposit schemes, other than deposits taken in the ordinary course of business, and to protect the interest of depositors and for matters connected therewith or incidental thereto. With the enactment of the BUDS Act, the investment return plan/ assured return/assured rental linked fell within the ambit of "deposit" and "Unregulated Deposit Scheme" under the BUDS Act. Thus, in pursuant to the provisions of Section 3 of the BUDS Act, all the "Unregulated Deposit Schemes" were barred and all the deposit takers including the respondent dealing in "Unregulated Deposit Schemes" were stopped from operating such schemes. It is further submitted that in terms of clause 6.10 of the MOU and all such provisions of the said MOU were void, illegal and unenforceable under the BUDS Act. In view of the above, the respondent is under no obligation to pay the assured returns to the complainants.
- xvii. That the construction and development of the project was affected due to force majeure conditions and the same are enumerated herein below:
- a. That on 19th February, 2013, The Huda Division No. II, Gurgaon vide Memo No. 3008-3181 had issued instruction to all Developers to lift tertiary treated effluent for construction purpose for Sewerage Treatment Plant Behrampur.

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- b. Orders passed Hon'ble High Court of Punjab and Haryana wherein the Court has restricted use of groundwater in construction activity.
- c. The respondent faced the problem of sub soil water which persisted for a period of 6 months and hampered excavation and construction work.
- d. The respondent is facing the labour problem for last 3 years continuously which slowed down the overall progress of the project.
- e. The infrastructure facilities are yet to be created by competent authority in this sector.
- f. Ban by Hon'ble NGT on construction.
- g. That the Ministry of environment and Forest and the Ministry of mines had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of Sand which is the most basic ingredient of construction activity.
- h. That in addition the current Govt. has on 8th Nov. 2016 declared demonetization which severely impacted the operations and project execution on the site as the labourers in absence of having bank accounts were only being paid via cash by the sub- contractors of the company and on the declaration of the demonetization, there was a huge chaos which ensued and resulted in the labourers not accepting demonetized currency after demonetization.
- i. That in July 2017 the Govt. of India further introduced a new regime of taxation under the Goods and Service Tax which further created chaos and confusion owing to lack of clarity in its implementation.
- j. That it is further submitted that there was a delay in the project also on account of violations of the terms of the agreement by several allottees.
- k. It is further submitted that the Government of India declared nationwide lockdown due to COVID 19 Pandemic effective from 24th March 2020 midnight.
- l. That delay has also been caused as the OC could not be issued since there was an order passed by the Hon'ble Punjab and Haryana in the matter titled as: Mukesh Sharma vs. State of Haryana and Ors. (CWP No. 23839 of 2014). The occupation certificate was held up on account of directions of Hon'ble Punjab and Haryana High Court in CWP No. 23839 of 2014 titled as: Mukesh Sharma versus State of Haryana wherein vide order dated 16.7.2015, the Hon'ble Court passed the following directions:
"...However, no occupation certificate be issued in the sector/area or for the building where water supply connection has not been made available by HUDA.."

- xviii. That the respondent after completing the construction had applied for the issuance of occupation certificate in the office of the Director General, Town & Country Planning Department, Haryana vide application dated 28.03.2018. That since the construction was complete and the respondent herein had applied for the occupancy certificate, the respondent herein sent a letter dated 01.01.2019 to the complainants requesting them to clear their dues and start the process of fit outs. That along with the fit outs letter, the respondent company also issued a statement of accounts depicting that Rs.24,13,156/- are due on part of the complainants for payment. That the OC was granted on 02.08.2019 after due verification and inspection.
- xix. That after the receipt of OC, the respondent herein on various occasions requested the complainants to come forward and clear their dues and take possession. That it was only in the year 2020 that the complainants came forward and made a payment of Rs.22,42,018/- against which the respondent company issued a no dues letter dated 10.01.2020 to the complainants herein. That the complainants have not only accepted the discount towards GST of Rs.36,746/- but have also made the complete payment towards basic sale price and other charges such as IFMS, ECC, PBC, ACC, stamp duty and registration charges on 10.01.2020 except charges towards maintenance and Bulk-electricity. That after taking the said benefits, accepting discount towards GST and making further payments, the complainants cannot seek refund by way of filing the present complaint. That the complainants are estopped from seeking refund of the amount paid.
- xx. That it was informed to the complainants that the no dues letter pertains only to the charges that have already been raised/demanded by the respondent company as per the MOU such balance sales consideration, EDC/IDC, power back up charges, air conditioning charges, stamp duty and

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registration charges and the same does not include the charges for which demand has not been raised by the respondent till date such as bulk electricity charges. The complainants were also informed that the complainants will be liable to pay charges towards maintenance as specified in the MOU executed between the parties.

- xxi. That as per the MOU executed between the parties, upon completion of the project and after payment of all dues as demanded by the respondent, the respondent had to find a suitable lessee to lease the premises. That in accordance with the clause 2.1, the respondent herein issued a letter dated 18.11.2022 informing the complainants that the respondent had received a leasing offer from LOTS. That vide the said letter dated 18.11.2022, the respondent herein requested the complainants to clear their dues towards bulk electricity, MCG and maintenance charges and further also requested them to execute the conveyance deed. That along with the letter dated 18.11.2022 the respondent herein also issued a performa invoice towards payment of common area maintenance charges to the tune of Rs.1,52,322/- . That the demand for maintenance charges has been raised as per the MOU executed between the parties and the same are due since the company has to maintain the common area. That the complainants till date have made a payment of Rs.95,53,000/- (excluding GST discount and AR adjustment to the tune of Rs.2,79,349/-) and are liable to pay charges towards maintenance, MCG and bulk electricity.
- xxii. That from the facts as narrated above it become quite evident that despite the tower/unit of the complainants being complete in all respect, the answering respondent could not have offered possession of the unit because of the force majeure conditions as detailed above. However, in the present case, the issue is not related to delay in handing over the possession

of the unit since time was not an essence of the contract and there was no time limit provided under the agreement between the parties.

xxiii. That once the project is complete and occupation certificate has been granted on 02.08.2019 then no case of refund is made out. That the construction of the project is complete in all respects and the same would be clear from the report of the local commissioner as submitted in the matter titled as Azad Dabas vs. VSR Infratech pending adjudication before this Hon'ble Authority. That if refund is allowed, other buyers/ customers who have invested their hard-earned money in the complex will suffer irreparable losses and the complex will never be made fully occupied if such an approach continues. Thus, to protect the interest of one person, the Hon'ble Authority can't jeopardize the interest of others who are genuine purchasers and are not mere speculators.

7. 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 based on these undisputed documents and submission made by the parties.

E. Written submission made by the respondent

8. The respondent has filed the written submission on 01.08.2024, and made the following submissions: -

- Since, the complainants are seeking refund of the amount deposited the same can only be refunded post necessary deduction of 10% earnest money, assured returns paid of Rs.28,97,571/- and non-refundable statutory dues and 0.5% brokerage.

F. Jurisdiction of the authority

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

F. I Territorial jurisdiction

10. 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.

F. II Subject matter jurisdiction

11. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per flat buyer's agreement. 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.

12. 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.

G. Findings on the objections raised by the respondent

G.1 Objection regarding non-payment of assured return due to implementation of BUDS Act.

13. The respondent/promoter raised the contention that the respondent has stopped the payment of assured return due to implementation of

BUDS Act by legislature, as the BUDS Act bars the respondent for making payment of assured return and assured rental linked with sale consideration of immovable property of allottee(s). But the plea advanced in this regard is devoid of merits as the complainants wishes to withdraw from the project and are seeking refund of the amount paid against the allotted unit. Hence, the plea w.r.t. non-payment of assured return is hereby dismissed.

G.II Objection regarding delay in project due to force majeure circumstances.

14. The respondent/promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as NGT in NCR on account of the environmental conditions, restrictions on usage of ground water by High court of Punjab and Haryana, demonetization, GST, adverse effects of Covid-19 etc. and others force majeure circumstances and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. Firstly, the memorandum of understanding was executed between the parties on 12.05.2018 and the due date to complete the construction is comes to 12.11.2021 as per the "**Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018-SC); MANU/SC/0253/2018**" including grace period of 6 months in view of notification no. 9/3-2020 dated 26.05.2020, on account of force majeure conditions due to outbreak of Covid-19 pandemic and Secondly, the events taking place such as orders of NGT in NCR on account of the environmental conditions, demonetization, GST are for short duration, which does not made any impact on the construction of the developer, and the respondent-promoter is required to consider all such eventualities before fixing the due date of possession. In the instant complaint, the due date of handing over of possession comes out

to be 12.11.2021 and grace period of 6 months on account of force majeure has already been granted in this regard and thus, no period over and above grace period of 6 months can be given to the respondent-builders. Though some allottees may not be regular in paying the amount due but the interest of all the stakeholders concerned in the said project cannot be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter/ respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrongs.

H. Findings on the relief sought by the complainants.

- H.1 Direct the respondent to refund the amount received from the complainant in the respect to the allotted unit with interest as per RERA rules.**
15. In the present complaint, the complainants intends to withdraw from the project and are seeking refund as provided under the proviso to section 18(1) of the Act. Section 18(1) proviso reads as under.

"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"

16. The complainants were claiming refund of amount paid to the respondent-promoter under the provision (18) of the Act, 2016,



Though after the request for refund from the complainants-allottees through legal notice letter dated 14.07.2022, the respondent-promoter failed to refund the amount paid by the complainants, failing which the complainants-allottees filed the present complaint and seeking refund with interest.

17. The complainants were allotted a unit bearing no. FB-150 at First Floor in Tower-B, having admeasuring 682 sq. ft. super area vide Memorandum of understanding dated 12.05.2018 in the project "68 Avenue" being developed by M/s VSR Infratech Private Limited for a sale consideration of Rs.79,45,300/- exclusive of EDC, IDC IFMS, electricity connection charges, fire-fighting charges, power backup charges, GST and such other levies/cesses out of which the complainants have paid an amount of Rs.95,53,000/-.
18. **Due date of handing over of possession:** As per the documents available on record, no BBA has been executed between the parties and the due date of possession cannot be ascertained. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained then a reasonable time period of 3 years has to be taken into consideration. It was held in matter *Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442 : (2018) 3 SCC (civ) 1* and then was reiterated in *Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725 -:*

"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion

that there is deficiency of service on the part of the appellants and accordingly the issue is answered."

19. Accordingly, the due date of possession is calculated as 3 years from the execution of memorandum of understanding i.e., 12.05.2018. Therefore, the due date of handing over of the possession for the flat/unit comes out to be 12.05.2021. Further, vide HARERA notification no. 9/3-2020 dated 26.05.2020, the extension of 6 months is granted for the projects having completion date on or after 25.03.2020. The completion date of the aforesaid project in which the subject unit is being allotted to the complainants is 12.05.2021 i.e., after 25.03.2020. Thus, an extension of 6 months is to be given over and above the due date of handing over possession in view of notification no. 9/3-2020 dated 26.05.2020, on account of force majeure conditions due to outbreak of Covid-19 pandemic. Therefore, the due date of handing over possession comes out to be 12.11.2021.
20. The respondent company has completed the construction and development of the project and got the occupation certificate on 02.08.2019 and the complainant made a request for refund through legal notice letter dated 14.07.2022. Although, till date neither the possession of the allotted unit has been handed over nor the unit is put on lease. This is a case where the promoter has obtained the occupation certificate. Moreover, the allottee's have approached the Authority seeking withdrawal from the project after a passage of more than 3 years from the date of occupation certificate and never before. The complainants earlier opted/wished to withdraw form the project even after due date of possession.
21. In the instant case, the unit was allotted vide MoU dated 12.05.2018 and the due date of possession is 12.11.2021. The occupation certificate was

received on 02.08.2019. However, the complainants surrendered the unit through legal notice on 14.07.2022 and thereafter filed the present complaint seeking withdrawal from the project. Therefore, in this case, refund can only be granted after certain deductions as prescribed under the Haryana Real Estate Regulatory Authority, Gurugram (Forfeiture of Earnest Money by the builder) Regulations, 11(5) of 2018.

22. **Admissibility of refund along with prescribed rate of interest:** The section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the respondent shall refund of the amount paid by the allottee in respect of the subject unit with interest at prescribed rate as provided 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."*

23. 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.
24. 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., 08.08.2024 is 9%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11%.

25. It is contended by the respondent that they are liable to forfeit amount towards earnest money, statutory charges, brokerage etc. However, the issue with regard to deduction of earnest money on cancellation of a contract arose in cases of **Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136**, and wherein it was held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. National Consumer Disputes Redressal Commissions in **CC/438/2019 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."

26. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/builder can't retain more than 10% of sale consideration as earnest money. So, the respondent/builder is directed to refund the amount received from the complainants after deducting 10% of the sale consideration and return the remaining amount along with interest at the rate of 11% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of request of withdrawn/surrender i.e., 14.07.2022 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H.II Direct the respondent to compensate an amount of Rs.1,00,000/- on account of litigation expenses and harassment .

27. The complainants are seeking above mentioned relief w.r.t. compensation and litigation expenses. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.



I. Directions of the authority

28. 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 paid-up amount of Rs.95,53,000/- after deduction of 10% of the sale consideration as earnest money along with interest at the rate of 11% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of request of withdrawn/surrender i.e., 14.07.2022 till its realization.
 - ii. The amount of assured return of Rs.4,15,519/- already paid w.r.t. unit in project "68 Avenue" shall be adjusted/deducted from the payable amount.
 - iii. 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.
29. Complaint stands disposed of.
30. File be consigned to registry.

Dated: 08.08.2024


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