

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

Complaint no.	:	4225 of 2022
First date of hearing:		20.09.2022
Date of Decision:		05.09.2024

Sh. Parveen Kumar

R/o: House no.-239, Near Girls Primary
School U-28A DLF City Phase-3, Nathupur,
Gurugram-122002

Complainant

Versus

1. Roshni Builders Private Limited
Regd. Office at: Sushant Shopping Arcade
LGF, F-22, Sushant Lok Phase-I, Gurugram-
122002

2. Highrise Propbuild Private Limited
Regd. Office at: 1221-A, Devika Tower,
12th floor, 6 Nehru Place, New Delhi-
110019

Respondents

CORAM:

Shri Vijay Kumar Goyal

APPEARANCE:

Sh. Vijay Vipul Lamba(Advocate)

Ms. Shriya Takkar and Ms. Smriti Srivastava
(Advocates)

Member

Complainant

Respondents

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Particulars	Details
1.	Name of the project	"M3M Broadway, Sector- 71, Gurugram.
2.	Project area	7.84875 acres
3.	Nature of the project	Commercial Complex
4.	DTCP license no. and validity status	71 of 2018 dated 25.02.2018 valid till 24.10.2023
5.	Name of licensee	Roshni Builders Pvt. Ltd., Highrise Propbuild Pvt. Ltd
6.	RERA Registered/ not registered	Registered vide no. 31 of 2018 dated 14.12.2018 valid up to 31.10.2023
7.	Unit no.	R- 5 UG 05A, Upper Ground Floor, Tower-5 (As per page no. 56 of the complaint)
8.	Area admeasuring	240.58(Carpet area) and 494.95 sq. ft.(Super Area) (As per page no. 56 of the complaint)
9.	Allotment letter	05.03.2019 (As per page no. 17 of the complaint)
10.	Date of execution of	08.08.2019



	agreement for sale	(As per page no. 52 of the complaint)
11.	Possession clause	7. POSSESSION OF THE UNIT 7.1 Schedule for possession of the said Unit: - <i>The Developer agrees and understands that timely delivery of possession of the Unit along with the car parking space(s), if any, to the Allottee and the Common Areas to the Association of Allottee or the competent Authority, as the case may be, as provided under the Act and Rules 2(1)(f) of the Rules, 2017, is the essence of the Agreement.</i> (As per page no. 72 of the complaint)
12.	Due date of possession	31.10.2023 [As mentioned in the RERA registration]
13.	Payment Plan	Construction linked plan
14.	Total sale consideration	Rs.92,94,133/- (As per payment plan on page no. 33 of the complaint)
15.	Amount paid by the complainant	Rs.18,58,825/- (As per applicant ledger on page no. 126 of the reply)
16.	Pre-handover amount paid by the respondent	Rs.3,76,162/- (As per page no. 2 of the application filed by the respondent to place on record additional facts)
17.	Occupation certificate /Completion certificate	13.12.2021 (As per page no. 135 of the reply)
18.	Offer of possession	Not offered
19.	Pre cancellation notice	07.09.2021 and 11.11.2021

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		(As per page no. 131 and 133 of the reply)
20.	Cancellation letter	27.11.2021 (As per page no. 134 of the reply)
21.	Creation of third-party rights	01.05.2022 (As per page no. 137 of the reply)
22.	Allotment letter of Mr. Paramjeet Singh	02.05.2022 (As per page no. 138 of the reply)

B. Facts of the complaint:

3. That the complainant has made following submissions:
- i. That sometime towards the end of 2018, marketing officials of respondent no. 1 approached the complainant for investing in the said project. It was stated by representatives of respondent no. 1 that respondent no. 1 is undertaking development and implementation of the project in collaboration with M3M India Pvt. Ltd. which is an extremely successful builder having conceptualized, implemented and developed various projects in India. However, respondent no. 1 did not disclose to the complainant that the use of "M3M" was only under a licensing arrangement and M3M India Pvt. Ltd. would not be responsible for developing and implementing the project.
 - ii. That it was further represented by respondent no. 1 that the aforesaid commercial complex would comprise of giant showrooms of luxurious brands, multiplex, food courts and would be conducive for high-street shopping.
 - iii. The sales representative of respondent no. 1 assured the complainant that all the sanctions pertaining to the said project had been obtained by it. It was further represented to the complainant that the project

- is registered with RERA. Respondent no. 1 further stated that the units in the project are selling out rapidly and it would be in the interest of the complainant to secure allotment of a unit by paying a certain sum to respondent no. 1. Relying upon the representations offered by respondent no. 1, the complainant proceeded to book a unit in the said project.
- iv. That after receipt of the booking amount, the respondent no. 1 issued an allotment letter dated 15.03.2019 whereby unit bearing no. R5 UG 05A located on upper ground floor in block 5 in the project and having 240.58 sq. ft. of carpet area was provisionally allotted to the complainant. The complainant was further provided an application form along with the aforesaid letter.
- v. That respondent no. 1, thereafter, provided an "Agreement for sale" to the complainant and demanded that the same shall be registered and stamped at the cost of the complainant. It was for the first time that the complainant had been acquainted with the fact that the costs for registration and stamping of the said agreement have to be paid by him. Furthermore, upon perusing the contents of the said agreement, the complainant was left completely shocked and dismayed upon realizing that respondent no. 1 had surreptitiously incorporated various terms and conditions in the said agreement which were not intimated to the complainant at the time of receiving the booking amount from the complainant. It is pertinent to mention that certain terms and conditions incorporated in the said agreement are absolutely unfair, biased, whimsical and arbitrary.
- vi. That the complainant raised objections against the aforesaid clauses incorporated in the said agreement but respondent no. 1 did not pay any heed to the legitimate, fair and just demands of the complainant

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- and threatened the complainant with cancellation of the allotment of the said unit if he failed to execute the said agreement. As a result, the complainant had no choice but to go ahead and execute the said agreement on 08.08.2019 containing biased and prejudicial terms which had been unilaterally incorporated by respondent no. 1.
- vii. That it needs to be emphasized that respondent no. 1 had collected an amount of Rs.18,42,229/- by March, 2019. The complainant had remitted all the amounts as per the demands of respondent no. 1. It is evident that respondent no. 1 had deliberately demanded amounts from the complainant prior to revealing the terms and conditions of the buyer's agreement in order to leave no option for the complainant to back out of the transaction. The aforesaid act of respondent no. 1 is violation of Section 13 of the Act.
- viii. It is submitted that the complainant had always been ready and willing to pay the due and payable amounts to respondent no. 1. Moreover, respondent no. 1 was liable and obliged to pay pre-handover amount to the complainant from 04.04.2019 till the date of notice of offer of possession. However, respondent no. 1 omitted to pay any pre-handover amount for April, 2019 to the complainant. Furthermore, respondent no. 1 wantonly stopped remitting the pre handover amount to the complainant as promised from August, 2021 without issuing any notice of offer of possession to the complainant.
- ix. That consequently the complainant visited the office of respondent no. 1 and requested its officials to disclose the status of construction of the project. The officials of respondent no. 1, however, evaded the requests of the complainant and stated that the status of the project is being regularly updated on web portal of HARERA.

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- x. That the complainant was constrained to visit the site of the project only to realize that there was no significant progress in the construction of the project. The complainant was left extremely dejected and disheartened by the unprofessional conduct exhibited by respondent no. 1 throughout the transaction. The complainant realized that respondent no. 1 had demanded the installments without achieving the corresponding construction milestone at the site. The complainant further realized that all the representations offered by respondent no. 1 were false, exaggerated and misleading.
- xi. That the complainant confronted the officials of respondent no. 1 with the facts narrated above but the officials of respondent no. 1 trivialized the matter and brazenly stated that the complainant had no choice but to wait for completion of construction of the project. Additionally, respondent no. 1 blatantly refused to pay any pre-handover amount to the complainant without giving any cogent or plausible explanation. It is submitted that the complainant has not received any pre-handover amount after August, 2021. Respondent no. 1 has consciously failed to discharge its financial and legal liabilities, duties and obligations towards the complainant. The complainant has suffered immense mental agony and harassment on account of the arbitrary, capricious and dishonorable conduct of respondent no. 1.
- xii. That from the facts stated hereinabove, it is comprehensively established that respondent no. 1 has failed to live up to its representations. Furthermore, respondent no. 1 has consciously and willfully defaulted in fulfilling its obligations and duties under the said agreement.

- xiii. That in light of the facts and circumstances mentioned hereinabove, it is submitted that the faith of the complainant in respondent no. 1 has been eroded irreversibly. Moreover, respondent no. 1 has failed to abide by the directions/orders of the Hon'ble Authority and has, thereby, jeopardized the whole project. In any event, the construction of the project is far from completion and even basic amenities are absent therefrom. Furthermore, respondent no. 1 has miserably failed to fulfil its obligations and duties under the said agreement. The rights and interests of the complainant have been jeopardized by the unprofessional, unlawful and arbitrary conduct of respondent no. 1. The complainant has invested huge amount of money and time in the project but the same has proven to be a fruitless exercise.
- xiv. That accordingly, the complainant approached respondent no. 1 and requested it to refund the amount paid by the complainant. However, the officials of respondent no. 1 blatantly refused to accede to the legitimate requests of the complainant. The representatives of respondent no. 1 threatened the complainant to continue with the transaction otherwise the entire amount paid by the complainant would be forfeited by respondent no. 1 in terms of the cancellation clause incorporated in the said agreement. The complainant tried to reason with the officials of respondent no. 1 and explained to its officials that their unilateral claim for deducting interest, rebates, brokerage etc. from the amount paid by the complainant is completely unjust, wholly unwarranted and utterly whimsical. However, respondent no. 1 remained obstinate and outrightly refused to refund any amount to the complainant.

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- xv. That the cancellation clause unilaterally incorporated by respondent no. 1 in the said agreement is fallacious, unwarranted and unsustainable in law and on facts. The said clause is liable to be struck down by the Hon'ble Authority for being illegal, arbitrary and unjust. Moreover, respondent no. 1 cannot legally be permitted to forfeit any amount paid by the complainant in the facts and circumstances of the case. It is reiterated that respondent no. 1 has wantonly failed to raise any demand upon the complainant or serve any letter communicating the same to complainant after March, 2019. Moreover, respondent no. 1 has miserably failed to perform the construction of the project in accordance with the Act. There is an inordinate delay in construction of the project. Therefore, respondent no. 1 cannot legally claim any interest on account of supposed delay in remittance of payments by the complainant nor respondent no. 1 can take undue advantage of its own unlawful acts.
- xvi. That accordingly the complainant has been constrained to institute the present complaint. It is pertinent to mention that there has been deliberate misrepresentation on the part of respondent no. 1. There is gross deficiency in services on the part of respondent no. 1.
- xvii. That no lapse or default of any nature can be imputed to the complainant in the entire sequence of events. The complainant has fulfilled his contractual obligations arising out of the said agreement. The complainant deserves to be compensated for loss of finances and as well as for the harassment and mental agony on account of deceitful and unfair trade practices adopted by respondent no. 1. The complainant reserves his right to institute a separate complaint before the appropriate forum for seeking compensation for the losses, mental agony and harassment incurred by him.

- xviii. That the subject matter of the claim falls within the jurisdiction of the Hon'ble Authority. The said project is located within the territorial jurisdiction of the Hon'ble Authority. Hence, the Hon'ble Authority has got the jurisdiction to try and decide the present complaint.
- xix. That cause of action for filing the present complaint is a recurring one and it accrued in favour of the complainant each time respondent no. 1 failed to refund the amount paid by the complainant. The cause of action lastly accrued to the complainant about a week ago on the final refusal of respondent no. 1 to refund the amount paid by him.
- xx. That no other complaint between the complainant and the respondents is pending adjudication before any authority/court/forum regarding the subject matter of the instant complaint.

C. Relief sought by the complainant:

4. The complainants have sought following relief(s):
- i. Direct the respondent no. 1 to refund the amount paid by the complainant along with interest at the prescribed rate calculated from March, 2019.
 - ii. Direct the respondent no. 1 to pay the pre-handover to the complainant for April, 2019.
 - iii. Direct the respondent no. 1 to cancel the allotment of the unit in question and pay pre-handover amount to the complainant from August, 2021 till the date of cancellation of allotment.
 - iv. Direct the respondent no. 1 to not penalize the complainant with interest on any payment after March, 2019. And in the alternative, if this Hon'ble Authority comes to the conclusion that the complainant is liable to pay interest on delayed payments then respondent no. 1 may very kindly be directed to adjust the same from the unpaid pre-

handover amount due and payable to the complainant till the date of cancellation of allotment of the unit in question.

- v. Direct the respondent no. 1 to pay an amount of Rs.1,00,000/- as litigation expenses incurred by the complainant.
- vi. Penalize the respondent no. 1 for contravention of the provisions of the Act as well as for cheating and defrauding the intending allottee including the complainant.

D. Reply by the respondent:

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

- a. That at the very outset, the complaint filed by the complainant is baseless, vexatious and is not tenable in the eyes of law. The complainant has approached the Hon'ble Authority with unclean hands and has tried to mislead the Hon'ble Authority by making incorrect and false averments and stating untrue and/or incomplete facts and as such, is guilty of *suppressio very suggestion falsi*. The complainant has suppressed and/or mis-stated the facts and, as such, the complaint apart from being wholly misconceived is rather the abuse of the process of law. On this short ground alone, the complaint is liable to be dismissed.
- b. **Complainant is not entitled to any relief whatsoever:**
 - i. That after making independent enquiries and only after being fully satisfied about the project "M3M Broadway", a commercial project being developed in a planned and phased manner consisting of modern office spaces, entertainment, food and beverage outlets, upscale efficient lofts situated in Sector-71, Gurugram, Haryana, India. The complainant through his broker M/s. Elite Landbase Private Limited had submitted application form along with an

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- amount of Rs.2,00,000/- towards booking of a unit in the project 'M3M Broadway', an under construction project after conducting his own due diligence and requested for allotment of commercial unit in his favour.
- ii. Thereafter, the complainant, on his own, requested the respondent for allotment of unit no. R5 UG 05A on UGF in Block-5. The respondent being a customer oriented company acceded to the said request of complainant. Accordingly, the respondent allotted the unit bearing no. R5 UG 05A on UGF in Block-5 in favour of the complainant vide provisional allotment letter dated 15.03.2019 along with welcome letter confirming the allotment of said commercial unit. It is submitted that the cost of the unit for carpet area admeasuring 240.58 sq. ft. as per allotment letter is Rs. 92,94,133/- plus other charges. The complainant paid an amount of Rs.2,00,000/- towards the part booking of the unit in the commercial project 'M3M Broadway'.
 - iii. That in furtherance of the allotment letter, the respondent herein sent copies of buyer's agreement to the complainant for due execution at his end along with cover letter dated 11.04.2019. The buyer's agreement was executed between the parties and registered on 08.08.2019. The buyer's agreement duly covers all the right and liabilities for both the parties.
 - iv. That in view of the booking and commitment to make timely payments, the respondent vide acknowledgement letter offered the complainant a monthly pre-handover amount to provide the complainant the comfort of the respondent's

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commitment to deliver the unit on time. It is submitted that as per the letter, the respondent shall pay the pre-handover amount of Rs.14,522/- to the complainant per month from 04.04.2019 till the date of notice of offer of possession however, the same was subject to timely payment of demands by the allottee. The respondent in compliance of the said letter duly paid the pre-handover amounts to the complainant. It is submitted that an amount of Rs.3,76,166/- has been paid to the complainant as pre-handover amount from 04.04.2019 till 01.08.2021.

- v. That the complainant had also applied for booking of a ready to move in unit in one of the projects of M/s. M3M India Pvt. Ltd. The complainant had expressed his interest to book a ready to move in unit in an OC received project of the associate company M/s. M3M India Pvt. Ltd. and had paid an amount of Rs.12,50,000/- towards the booking of same. On the specific request of the complainant, an amount of Rs.12,50,000/- paid towards booking of a ready to move in unit was also adjusted/transferred towards the retail unit no. R5 UG 05A in M3M Broadway without any deductions in September, 2019.
- vi. Thereafter the respondent raised the demands in accordance with the payment plan opted by the complainant on the achievement of relevant construction milestone. The amount of Rs.12,50,000/- was duly adjusted in the demands raised by the respondent.
- vii. That in furtherance of the said demand being raised, the complainant failed to make the payment of the outstanding

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- dues and the respondent issued reminder letter dated 23.08.2021 in reference to demand notices dated 03.08.2021 requesting the complainant to clear outstanding dues.
- viii. That the respondent completed the construction and development of the retail component of the complex well within time and the applied to the competent Authority for the grant of Occupation Certificate on 31.08.2021 after complying with all the requisite formalities.
- ix. That the complainant even after continuous demand notices and reminders failed to come forward to clear his outstanding dues, therefore the respondent issued pre-cancellation notice dated 07.09.2021 requesting the complainant to clear outstanding dues amounting to Rs.58,78,836/- being due till 07.09.2021 which was to be paid within 15 days from the date of this notice.
- x. That the respondent vide demand letter dated 22.10.2021 raised demand which was due on application of Occupation certificate and requested the complainant to pay an amount of Rs.67,38,247/- which was to be paid on or before 10.11.2021. However, the complainant failed to make payments and continued to breach the terms of buyer's agreement by failing to clear the outstanding dues.
- xi. That the respondent as a goodwill gesture offered the complainant, a last and final opportunity to correct the breach of the terms of buyer's agreement vide pre-cancellation notice dated 11.11.2021 calling upon the complainant to clear outstanding dues amounting to

Rs.69,16,265/- being total due till 11.11.2021. It is submitted that the complainant had paid an amount of Rs.18,58,825/- against the total dues of Rs.92,94,133/- plus other charges. However, the complainant failed to adhere to this opportunity and continued to breach the terms of buyer's agreement.

- xii. That on account of wilful breach of the terms of the allotment and the buyer's agreement by failing to clear outstanding dues despite repeated requests, the respondent was constrained to terminate the allotment of the unit vide cancellation notice dated 27.11.2021. That the default of the complainant in making timely payments and complying with other obligations is duly covered under the buyer's agreement and the cancellation and forfeiture of the earnest money along with other refundable amounts has been in accordance with clause 9.3 of the buyer's agreement.
- xiii. That the respondent had allotted the unit to the complainant at the price prevalent in the market on the assurance that the complainant would make timely payments and conclude the transaction. However, the complainant defaulted in making payment. The respondent kept giving the complainant an opportunity to make the payment and thus could not allot the said unit to any third party who was willing to book the unit at a higher price. The complainant has thus caused the company to incur loss of opportunity cost and is thus liable to indemnify the respondent towards the same. Thus, the total loss calculated comes to Rs.25,49,876/- (approx.) which includes earnest

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money deduction @10% to the tune of Rs.9,29,413/- along with the GST on earnest money of Rs.1,67,294/-, taxes to the tune of Rs.1,99,160/-, pre-handover amount to the tune of Rs.3,76,162/-, brokerage of Rs.513,383/-, statutory dues of Rs.199,160/- and further sum of Rs.1,65,304/- was the interest payable by the complainant for the delayed payments. It is submitted that the complainant is raising these frivolous issues as an afterthought in order to unjustly enrich himself.

xiv. That the respondent has fulfilled its contractual obligations under the buyer's agreement however despite that the complainant failed to clear the outstanding dues as a result of which the respondent was constrained to cancel the allotment of the complainant vide cancellation notice dated 27.11.2021. The complainant was in default of his contractual obligations and is raising these frivolous issues in order to unjustly enrich himself. Therefore, the complainant is not entitled to any relief whatsoever.

c. The complainant is not a genuine consumer:

i. That the complainant is not a genuine consumer and an end user since he had booked the said unit in question purely for commercial purpose as a speculative investor and to make profits and gains. Further, the complainant has invested in many projects of different companies which prove that the complainant is not a consumer but only an investor. Thus, it is clear that the complainant has invested in the unit in question for commercial gains, i.e., to earn income by way of rent and/or re-sale of the property at an

appreciated value and to earn premium thereon. Since the investment has been made for the aforesaid purpose, it is for commercial purpose and as such the complainant is not a consumer/end user. The complaint is liable to be dismissed on this ground alone.

- d. That it is submitted that the cancellation of the unit and forfeiture of the amount has been done in accordance with the terms of buyer's agreement. It is submitted that the complainant himself has violated the agreed terms and hence is not entitled to get any reliefs from the Hon'ble Authority. That it is further submitted that the said unit has been re-allotted to one Mr. Paramjeet Singh vide allotment letter dated 02.05.2022 and hence the present complaint is liable to be dismissed. In view of the fact that third party right has already been created, the relief prayed for in the present complaint cannot be granted and the present complaint is liable to be dismissed.
6. The respondent no. 2 i.e., Highrise Propbuild Pvt. Ltd. was granted licence by the Director, Town and Country Planning, Haryana vide licence no. 71 of 2018 to develop and construct the commercial colony in Sector-71, Gurugram. Though the agreement for sale has been executed with both R1 and R2 and payments have also been made to the respondent no. 1 but the respondent no. 2 cannot escape its responsibility and obligations to the allottees of the project being licensee of the project and is covered under the definition of promoter within the meaning of 2(zk)(i), (v).
7. The promoter has been defined in section 2(zk) of the Act of 2016. The relevant portion of this section reads as under:

"2. Definitions. — In this Act, unless the context otherwise requires —
(zk) "promoter" means, —

- (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or
- (ii) xxx
- (iii) xxx
- (iv) Xxx
- (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale;"
8. As per aforesaid provisions of law, respondent no.1 & 2 will be jointly and severally liable for the completion of the project. Whereas the primary responsibility to discharge the responsibilities of promoter lies with respective promoter in whose allocated share the apartments have been bought by the buyers.
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.

E. Jurisdiction of the authority:

10. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 promoter, the allottee 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 complainant at a later stage.

F. Findings on objections raised by the respondent:

F.1 Objection regarding the complainant being investor.

12. The respondent has taken a stand that the complainant is the investor and not consumer. Therefore, he is not entitled to the protection of the Act and is not entitled to file the complaint under section 31 of the Act. The respondent 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 observes that the respondent is 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 the preamble is an introduction of a statute and states main aims & objects of enacting a

statute but at the same time the 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. Upon careful perusal of all the terms and conditions of the documents placed on record, it is revealed that the complainant is buyer and paid a price of Rs.18,58,825/- to the promoter towards purchase of a unit in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference.

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

13. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is allottee 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". The concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

G. Findings on relief sought by the complainant:

G.I Direct the respondent no. 1 to refund the amount paid by the complainant along with interest at the prescribed rate calculated from March, 2019.

14. The complainant was allotted a unit in the project of respondent "M3M Broadway" in Sector-71, Gurugram vide allotment letter dated

05.03.2019 for a total sum of Rs.92,94,133/-. The agreement for sale was executed on 08.08.2019 itself and the complainant started paying the amount due against the allotted unit and paid a total sum of Rs.18,58,825/-.

15. The respondent has cancelled the unit vide cancellation letter dated 27.11.2021 before the due date of handing over of possession i.e., 31.10.2023 on account of outstanding dues after issuing two pre-cancellation notices dated 07.09.2021 and 11.11.2021. The complainant has paid an amount of Rs.18,58,825/- i.e., 20% of the sale consideration of Rs.92,94,133/-. The payment plan opted by the complainant is construction linked and as per the payment plan, the 45% of the total sale consideration is to be paid on start of excavation but the complainant has just paid 20% of the total sale consideration till date. The respondent has received the occupation certificate on 13.12.2021 but the respondent has cancelled the unit before that on account of non-payment as the complainant is supposed to pay an amount of almost 92% of the total sale consideration but only 20% has been paid till date. Thus, in view of the aforementioned facts, the cancellation of the unit stands valid and the respondent is entitled for deduction of earnest money.
16. It is evident from the documents placed on record that the complainant has opted for construction linked payment plan and he has paid a sum of Rs.18,58,825/- against sale consideration of Rs.92,94,133/- of the unit allotted to him. As per the payment plan opted by the complainant, he was required to make payment 35% of the total sale consideration before the start of construction but till date only 20% of the amount has been paid by him.

17. Now when the complainant approached the Authority to seek refund, it is observed that under clause 1.16 of the agreement to sale, the respondent-builder is entitled to forfeit the 10% of the total sale consideration. The relevant portion of the clause is reproduced herein below:

"Provided that if the allottee defaults/delays in payment towards any amount which is payable, the allottee shall be liable to pay interest for the delayed period to RBPL, at the interest rate as prescribed in the Rule 15 of Rules computed on and from the due date. "Earnest Money" will be 10% (Ten Percent) of the total sale consideration."

18. That the above mentioned clause provides that the promoter is entitled to forfeit the booking amount/earnest money paid for the allotment and interest component on delayed payment (payable by the allottee for breach of this agreement and non-payment. It is unjust condition that exploits the allottee and can be termed as one sided. The clause on the face of it does not give equal bargaining power to the allottee.

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

is a 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."

20. 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/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainant i.e., Rs.18,58,825/- after deducting 10% of the sale consideration and also the amount already paid to the complainant and return the remaining amount along with interest at the rate of 11.10% (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 cancellation i.e., 27.11.2011 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.II Direct the respondent no. 1 to pay the pre-handover to the complainant for April, 2019.



G.III Direct the respondent no. 1 to cancel the allotment of the unit in question and pay pre-handover amount to the complainant from August, 2021 till the date of cancellation of allotment.

G.IV Direct the respondent no. 1 to not penalize the complainant with interest on any payment after March, 2019. And in the alternative, if this Hon'ble Authority comes to the conclusion that the complainant is liable to pay interest on delayed payments then respondent no. 1 may very kindly be directed to adjust the same from the unpaid pre-handover amount due and payable to the complainant till the date of cancellation of allotment of the unit in question.

21. The complainant is seeking refund of the paid-up amount along with the interest. As the Authority is allowing the refund of the paid-up amount along with interest as mentioned in para 22, all above sought reliefs by the complainant becomes redundant.

G.V Direct the respondent no. 1 to pay an amount of Rs.1,00,000/- as litigation expenses incurred by the complainant.

22. The complainant is seeking relief w.r.t compensation in the aforesaid relief, **Hon'ble Supreme Court of India in civil appeal titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. Supra** held that an allottee is entitled to claim compensation 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 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.

G.VI Penalize the respondent no. 1 for contravention of the provisions of the Act as well as for cheating and defrauding the intending allottee including the complainant.

23. The complainant has not clearly identified the violations of the Act, 2016, and its rules by the respondent. Neither it is mentioned in the facts of the complaint nor pressed before the Authority during the proceedings of the

day. Without specific details about the alleged violations, there is no basis for the relief sought. Thus, no direction to this effect.

H. Directions of the Authority:

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

- i) The respondent/promoter is directed to refund the amount i.e., **Rs.18,58,825/-** received by him from the complainant after deduction of 10% of sale consideration of Rs.92,94,133/- as earnest money and amount already refunded/pre-handover amount paid to the complainant-allottee along with interest at the rate of 11.10% p.a. on such balance amount as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of cancellation i.e., 27.11.2021 till the actual date of refund of the amount.
- ii) A period of 90 days is given to the respondent-builder to comply with the directions given in this order and failing which legal consequences would follow.

25. Complaint stands disposed of.

26. File be consigned to the registry.


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.09.2024