

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

**Complaint no:** 4047 of 2023  
**Date of Filing:** 04.09.2023  
**Date of First Hearing:** 13.12.2023  
**Date of decision:** 11.12.2024

1. Mr. Nirmalendu Banerjee
2. Mrs. Banashree Banerjee
3. Mr. Nikhil Banerjee

**All R/o :** Flat no. 6, Sector- A, Pocket- C, Vasant Kunj, New Delhi- 110070

**Complainants**

Versus

M/s VSR Infratech Private Limited  
**Registered address:** A-24, Hill View Apartments, Vasant Vihar, New Delhi- 110057  
**Office address:** Plot No. 14, Ground Floor, Sector-44, Industrial Area, Gurugram-122003

**Respondent**

**CORAM:**

Shri Ashok Sangwan

**Member**

**Appearance:**

Mr. Samarth Kapoor (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:

Sr. No.	Particulars	Details
1.	Name of the project	"68 Avenue", Sector- 68, Gurugram
2.	Project area	3.23 acres
3.	Nature of the project	Commercial Colony
4.	DTCP license no. and validity status	4 of 2012 dated 23.01.2012 Valid upto 22.01.2020
5.	Name of licensee	Yad Ram and two others
6.	RERA Registered/ not registered	Registered 119 of 2017 dated 28.08.2017 Valid upto 30.06.2018
7.	<b>Firstly allotted unit</b> along with other details	<b>"114 Avenue"</b> Unit no. 6B-07 <b>Allotment letter</b> dated 08.12.2011 (Page no. 13 to 16 of complaint) <b>BBA</b> dated 12.10.2012 <b>BSP-</b> Rs.50,37,774/-
8.	Request letter issued by complainant for surrender and transfer of amount from the project "114 Avenue" to another project "68 Avenue"	28.11.2017 (Page no. 40 of complaint)
9.	<b>Secondly allotted unit</b> along with other details	<b>"68 Avenue", Tower B</b> Unit no. SH3-01 AND SH3-02 <b>MOU</b> dated 15.12.2017 (Page no. 49 of complaint) <b>BBA</b> dated 30.12.2017 (Page 63 of complaint) <b>BSP-</b> Rs.69,16,450/- plus Rs.7 lacs for 2 parking spaces
10.	<b>Currently allocated unit</b> along with other details	<b>"68 Avenue", Tower A</b> Unit no. SA-6-54 and SA-6-55 <b>Allotment letter</b> dated 05.06.2020 (Page 53 of reply)



		<p>MOU dated 10.06.2020 (Page 205 of complaint)</p> <p>TSC- Rs.1,51,66,500/-</p>
11.	Lease clause of MOU Dated 10.06.2020	<p><b><u>“Article 2</u></b> <b><u>Post Possession- Lease of Unit</u></b></p> <p>2.1 Notwithstanding anything contained herein below, this paragraph relates to the Leasing of Unit post the Possession.</p> <p>2.2 That upon the completion of the Complex and upon receipt of the Sale Consideration and dues as demanded, the Developer shall issue offer of possession to the Allottee subject to reservation of a lease back right with the Developer on such terms and conditions including the initial Lock in Period as may be determined by the Developer. The Developer reserves all the right to club the units, create blocks, demarcate or re-demarcate the Units including the here-mentioned Unit for the purpose of leasing the unit or to appoint operator/lessee to manage them.”</p> <p>(Page 212 of complaint)</p>
12.	Lease rental clause of MOU Dated 10.06.2020	<p><b><u>“Article 3</u></b> <b><u>3. Lease Rental</u></b></p> <p><b><u>3.1 Post-Possession Lease Rental:</u></b> The Allottee shall be in receipt of Lease Rental @ Rs. 83.33 (Rupees Eighty Three and Thirty Three Paise Only) per sq. ft. per month beginning from 01.03.2020, subject to receipt of complete Possession charges by the Developer.”</p> <p>(Page 213 of complaint)</p>
13.	Amount paid by the complainants	<p>Rs.1,74,01,288/- (as confirmed by both the parties during the proceedings dated 11.12.2024)</p>
14.	Fit-out Possession Letter	<p>01.01.2019</p> <p>“We are pleased to inform you that the building of 68 Avenue, tower Building- B at Sector- 68, Gurgaon (HR) is ready for possession and you can start the process for fit outs. You are advised to take the possession within 30 days by making the following payments mentioned in Annexure 1.”</p> <p>(Page no. 89 of complaint)</p>
15.	Occupation certificate	<p>02.08.2019 (Page 51 of reply)</p>



16.	Assured returns paid by the respondent to the complainant	Rs.7,27,274/- (As alleged by both the parties)
17.	Notice by respondent to complainant informing about leasing out of unit	23.02.2021- Leased out SA3-9 and SA3-10 to Sarovar Portico (Page no. 196 of complaint)
18.	Request by complainant to respondent for refund	Legal notice dated 01.07.2023- Refund Rs.1,74,78,059/- along with interest (Page 315 of complaint)
19.	Lease deed	15.09.2023- Leased to Nextay Hotels and Resorts through BNM Hotels and Residencies Pvt. Ltd. (Page no. 55 of reply)
20.	LC report with respect to project "68 Avenue"	09.03.2023 (Page no. 73 of reply)

**B. Facts of the complaint:**

4. The complainants have made the following submissions by way of filing the present complaint as well as by way of rejoinder dated 01.05.2024: -
- a. That the respondent did not provide the commercial units allotted to the complainants in either of the projects developed by the respondent, i.e., in "114 Avenue" and in "68 Avenue" for which respondent promised to handover the possession and execute a conveyance within a stipulated time period.
  - b. That, the complainants issued a legal notice dated 01.07.2023, claiming immediate refund from the respondent of Rs.1,74,78,059 along with interest at the rate of 18% p.a. from the date when the letter of possession was first issued to the complainants along with the amount in terms of assured returns as agreed vide MOU dated 15.12.2017 and lease rental amount as agreed vide MOU dated 10.06.2020.
  - c. That, as per Section 18 of the Real Estate (Regulation and Development) Act, 2016, the remedy is available for the buyers when possession is delayed on the part of the promoter. In the present set of facts, the respondent failed to deliver the physical possession the commercial units so allotted to the complainants in either of the projects of the respondent as allotted from time

to time by the respondent vide executing different instruments. Further, as per Section 18 of the RERA Act, 2016, the complainants have the remedy of terminating the agreement and seeking a refund with the interest.

- d. That the complainants have approached this Authority to seek relief as the respondent, despite giving assurance to the complainants pertaining to transferring the commercial units first allotted to the complainants in the project "114 Avenue", vide MOU dated 15.12.2017 in tower-B of the project "68 Avenue" and finally in tower-A of the project "68 Avenue" as per clause 31 of the buyer's agreement dated 30.12.2017 executed between the parties. The respondent was obligated to complete the construction within 36 months from the signing of the agreement or within 36 months from the date of start of construction of the said building whichever is later, but the respondent failed to deliver the said premises on time. The buyer's agreement dated 30.12.2017 executed for the commercial units in tower-B of "68 Avenue" was registered in the year 2017 and construction was in progress in the year 2017 itself, therefore the 3-year period will be computed from the date of execution of the agreement dated 30.12.2017.
- e. That, as per clause 6.3 of the MOU dated 15.12.2017, the respondent was obligated to execute the buyer's agreement in favor of the complainants when all the dues and payments will be settled. That, as the buyer's agreement has already been executed by the respondent, it conclusively means, that the complainants have already cleared all the dues towards the units SH03-01 & SH3-02 booked and allotted to the complainants in tower-B of project "68 Avenue".
- f. That, the complainants has received only an amount of Rs. 7,27,274/- towards the obligation of the respondent to pay the assured returns as per clause 3 of the MOU dated 15.12.2017 which was not at par with the obligations of the respondent. The complainants have received the assured returns from the

year 2018 and after receiving eight such returns from the respondent, neither any further returns were provided by the respondent nor was any communication received by the complainants to this effect.

- g. That a demand cum possession letter dated 01.01.2019 was issued in favor of the complainants for the commercial units allotted in tower-B of "68 Avenue" and the complainants were asked to take the possession within 30 days and to pay an additional amount, however, no such possession was ever transferred to the complainants despite the complainants deposited the additional amount as stipulated in the letter dated 01.01.2019.
- h. That as the complainants asked for registration of the commercial units and documents to be handed over the complainants, vide email dated 14.03.2019, the respondent sent a worksheet to the complainants as per which it was shown that the complainants had cleared the earlier outstanding amounts and are in arrears of fresh outstanding amount which was not asked earlier amounting to Rs. 5,04,747/-. Further, vide an email dated 20.06.2019, the respondent again sought an amount of Rs. 13,58,034.80/- from the complainants as the floor space of the allotted units was increased to 1200 sq. ft. from 1036 sq. ft.
- i. That firstly, the complainants got to know that the commercial unit so allotted in project "114 Avenue" was expected to be much delayed due to non-receipt of scheduled payments from other clients, and hence, the funds got transferred from the project "114 Avenue" to project "68 Avenue" but at the time of office visit after getting the allotment of the commercial units in tower-B of project "68 Avenue", the complainants got to know that not even 66% of the project has been completed and as an alternative, the complainants were offered service apartment in tower-A of Project "68 Avenue" which was fully ready and being let out to a third party.

- j. That pursuant to the complainants were offered a service apartments, namely, SA6 - 54 and 55 in tower-A of project "68 Avenue" measuring about 1300 sq. ft. vide an email dated 02.03.2020 at the rate of Rs. 12,500 per sq. ft. amounting to the total of Rs. 1,62,50,000/- for which the complainants were asked to deposit an additional amount of Rs. 54,000/- apart from the amount already deposited for allotment of commercial units, first in the project "114 Avenue" and then in tower-B of the project "68 Avenue". Also vide the same email dated 02.03.2020, the respondent sent their offer and in the additional amount to be paid, the amount pertaining the registration charges were also included and it was promised by the respondent that the immediate registration will be done in the name of the complainants after clearing the additional amount.
- k. That based on the same offer and promise made by the respondent, the complainants deposited the additional amount of Rs. 54,00,000/- and accordingly the complainants sent a letter dated 06.03.2020 vide which the complainants enclosed their three cheques to make the payment for Rs. 54,00,000/-.
- l. That vide letter dated 05.06.2020, the respondent confirmed the allotment of the service apartments booked by the complainants and conditions and additional payment to be made for the same. Vide a notice issued on 23.02.2021, respondent informed the complainants that the service apartments allotted to the complainants have been leased out to one entity, named, Sarovar Portico and demanded another additional payment of Rs. 12,50,000/- on or before 25.02.2021 by stating the reason that there was an increase in total area of the service apartments by 100 sq. ft. The respondent promised the complainants that the registration of the service apartments will be done by 02.03.2021, however, no such action was taken till date.

- m. That after such allotment of the service apartments by the respondent, no document, either the MOU or the buyer's agreement was executed in the name of the complainants. The respondent on 06.10.2022, executed a back-dated MOU between the complainants and the respondent dated 10.06.2020, however, the buyer's agreement and the conveyance deed remained unexecuted.
- n. That, the MOU dated 10.06.2020, indicates that commercial units/ service apartments no. SA6 – 54 and 55 located in tower – A in the project "68 Avenue" allotted to the complainants, however, till date the respondent did not execute the buyer's agreement as per which the units allotted were located in tower – B of the project "68 Avenue" which remains unchanged even after execution of the said MOU dated 10.06.2020. This is in complete contradiction of the terms of the MOU, vide clause 6.3, as per which the respondent was obligated to execute buyer's agreement after the settlement of the account which was duly taken care of by the complainants. The relevant clause of the MOU dated 10.06.2020 is reproduced herein below for ease of reference:

***"6.3 Space Buyer's Agreement: The developer shall execute the Space Buyer's Agreement in favour of the Allottee in respect of the Premises only upon settlement if all the accounts with the Allottee and all the dues being duly paid to the Developer as per this MOU. It is agreed by both the parties herein that both the parties shall be bound by the terms of this MOU and the Space Buyer's Agreement. The provisions shall be subject to the Space Buyer's Agreement to be executed between the Allottee and the Developer, as per the format provided by the Developer."***

- o. That, as per Clause 6.11 of the MOU dated 10.06.2020, the complainants cannot earn any income from the said commercial units purchased even after spending and investing their hard-earned money into such projects/development plans. Further, from the official website of the Haryana RERA – Gurugram, it can be verified that certain proceedings are going on against the respondent for both of its projects.



- p. That till the date of transfer of the allotment of the commercial units from tower – B of project “68 Avenue” to tower – A of project “68 Avenue”, there was no provision of water, electricity, sanitation and other amenities in tower – B project, which was never mentioned by the respondent in their various communications sent to the complainants.
- q. That, again on 03.06.2023, during another visit of the complainants to the office of the respondent, they were given few other alternatives in new VSR “Project 85” and when the complainants insisted for having the commercial units as allotted vide MOU dated 10.06.2020. But to the utmost surprise of the complainants, the respondent informed that the same units as allotted to the complainants vide MOU dated 10.06.2020 were no longer available.
- r. That, to make good of the loss caused to the complainants, the respondent offered another space/ commercial units in the same project, namely SA3 9 and 10 for which, the respondent asked for an additional amount of Rs. 15,00,000/- was asked to be deposited by the complainants. The complainants insisted to settle the amount with the lease rental amount pending as per Article 3 and stated above in the complaint vide MOU dated 10.06.2020, however, the respondent refused any settlement outrightly.
- s. That, after trying every recourse, the complainants herein are filing the present complaint seeking relief for refund of the amount deposited by the complainants for allotment of the commercial units in either of the projects developed by the respondent along with interest rate as applicable in terms of the Act of 2016 and Rules of 2017.

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

5. The complainants have sought following relief(s)

- I. Direct the respondent to refund Rs.1,74,78,059/- paid by the complainants towards the allotment of the commercial unit in the different projects developed by the respondent as per different MOUs executed from time to time between the complainants and the respondent.

- II. Direct interest at the rate of 18% per annum from the date of receipt of Rs.1,74,78,059/- by the respondent from the complainants till actual realization of entire refund of the said amount.
- III. Direct the respondent to pay a lease rental amount as per Article 3 of the MOU dated 10.06.2020 at the rate of Rs.83.33/- per sq. ft. per month from beginning from 01.03.2020 amounting to Rs.44,41,489/-. (Computed till August 2023)
- IV. Direct the respondent to pay litigation costs amounting to Rs.1,00,000/- to the complainants.
6. 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.**

7. The respondent contested the complaint on the following grounds vide its reply dated 27.3.2024: -
  - a. That the complainants after conducting their own due diligence applied for booking of a unit in 114 Avenue vide application form. In due consideration of the commitment to make timely payments the respondent was allotted unit bearing no. 6B-07. The buyer's agreement for unit no.6B-07 was entered into between the parties on 12.10.2012. The complainants opted for the construction linked payment plan. The cost of the unit bearing no. 6B-07 was Rs.50,37,774.00/- plus IFMS, VAT , surcharge, service tax etc. The respondent raised the demands as per the payment plan opted by the complainants on the achievement of relevant construction milestone. Thereafter, the complainants in the year 2017 approached the respondent and requested them to shift the booking from 114 Avenue to 68 Avenue. The respondent being a customer oriented company acceded to the request of the complainants and transferred the amount without any deductions from 114 Avenue to 68 Avenue post completion of necessary formalities.
  - b. That the construction of the project 68 Avenue was near completion and the complainants after visiting the site and satisfying themselves with all aspects of the project, on their own free will applied for booking of two units in tower

- B of the project 68 Avenue vide application form. The respondent allotted shop bearing nos. SH 3-01 and SH3-02 at a sale consideration of Rs. 69,16,450/- plus taxes, duties and levies. The complainants opted for investment return plan. Accordingly, MOU dated 15.12.2017 was entered into between the parties.
- c. Further, the payment of the payment of assured return was subject to force majeure clause as provided under clause 6.1 of the MOU. Accordingly, the respondent paid an amount of Rs. 5,59,025/- towards assured return to the complainants. It is submitted that the assured return was stopped at that point of force majeure conditions. . The buyer's agreement for units was entered into between the parties on 30.12.2017 and sale consideration of unit bearing nos. SA6-54 and SA-6-55 was Rs. 1,51,66,500/- plus other charges.
- d. That the due date of possession for SH3-01 and SH3-02 comes out to 30.12.2020. There was no delay in completion of the project. The occupation certificate for tower A and tower B was applied on 28.07.2017 and 28.03.2018 respectively. The complainants vide letter dated 28.11.2017 were requested to take possession of the shops in tower B and start the fit outs. After visiting the project and after being satisfied with the units the complainants paid the above-mentioned demand. The occupation certificate for 68 Avenue was granted by the competent authorities on 15.01.2019 and 02.08.2019, much before the due date i.e. 30.12.2020.
- e. Thereafter the complainants requested that their booking be shifted to tower A. Post discussion with the complainants, the respondent agreed to cancel the previous booking in tower B of 68 Avenue and shift the funds towards the units in tower A. Accordingly, the complainants were allotted unit bearing nos. SA6-54 and SA6-55 in tower A of 68 Avenue vide allotment letter dated 05.06.2020. The parties entered into an MOU dated 10.06.2020 for unit

bearing nos. SA6-54 and SA6-55 at a sale consideration of Rs. 1,51,66,500/- plus other charges.

- f. That despite repeated requests the complainants were not coming forward to get the conveyance deed registered nor they came forward to execute the buyer's agreement. The complainants till date have paid an amount of Rs. 1,74,01,288/- towards the serviced apartments. Vide letter dated 15.09.2023, the complainants were duly informed that the service apartments in question are being leased to M/s. BNM Hotels and Residences Pvt. Ltd. for a period of 15 years.
- g. That this Authority does not have the jurisdiction to deal with the relief of assured return and the enforcement of MOU entered into between the parties on the same date with regard to assured return before and after offer of possession is a matter of civil nature, only to be dealt by a civil court/consumer court, as the case may be.
- h. 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.

- i. That delay has also been caused as the OC could not be issued since there was an 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..."*

- j. 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.
8. 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**

9. The respondent has filed the written submission on 18.09.2024, and made the following submissions: -
- a. That the OC for the project was granted by the competent authorities on 15.01.2019 and 02.08.2019. The construction of the project is complete in all respects and same is evident from report of LC as submitted in matter titled as "Azad Dabas vs. VSR Infratech Pvt. Ltd." The complainants were well aware that the serviced apartments were to be leased out to the lessee on very long term basis. Thus, the complainants were only entitled to symbolic possession of the serviced apartments, Since the project is in habitable condition and

functional, therefore the complainants are not entitled to any relief, whatsoever. Further, without prejudice to the above, if the Authority allows relief of refund of amount deposited then the same shall be allowed only after deduction of earnest money being 10% of the sales consideration, assured returns paid, statutory dues and 0.5% brokerage.

- b. That as far as assured return is concerned the same was not paid due to force majeure circumstances i.e., Covid 19 pandemic and the enactment of BUDS Act, 2019. The complainants were very aware that the said service apartments were to be leased out to a prospective lessee. The complainants thus had waived their right to seek physical possession of the unit.
- c. That the serviced apartment had been leased out to Sarovar Portico and further the complainants were informed about the increase in area to 100 sq. ft. and the total area of the serviced apartment was 1312 sq. ft. The complainants were requested to deposit an amount of Rs.12,50,000/- so that the registry can be done. The complainants, however, did not come forward to get the conveyance deed registered.
- d. That the complainants are relying on the buyer's agreement for tower B which was cancelled/annulled on the specific request of the complainants. Further, clause 6.3 of the MOU dated 10.06.2020 clearly stipulates that the complainants shall be bound by the terms of the MOU. Post cancellation of units in tower B of 68 Avenue, the complainants are neither the allottees of the same nor have any right, title or interest on the same.

#### **F. 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.

##### **F. I Territorial jurisdiction**

11. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by the 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**

12. 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.*

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. (Supra) and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been held 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 case mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

**G. Findings on the objections raised by the respondent**

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

16. 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 Authority in **CR/8001/2022** titled as "**Gaurav Kaushik and anr. Vs. Vatika Ltd.**" has already held that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and the Act of 2019 does not create a bar for payment of assured returns even after coming into operation as the payments made in this regard are protected as per Section 2(4)(l)(iii) of the BUDS Act of 2019.



Therefore, the plea advanced in this regard is devoid of merits as the complainants wish to withdraw from the project after receipt of occupation certificate by the respondent 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.**

17. This objection raised by the respondent does not address the specific relief sought by the complainants. Therefore, the respondent's claim about force majeure events does not align to the complainant's request for refund as the complainant wish to withdraw from the project after receipt of occupation certificate by the respondent and therefore, not relevant to the instant complaint.

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

**H.I Direct the respondent to refund Rs.1,74,78,059/- paid by the complainants towards the allotment of the commercial unit in the different projects developed by the respondent as per different MOUs executed from time to time between the complainants and the respondent.**

**H.II Direct interest at the rate of 18% per annum from the date of receipt of Rs.1,74,78,059/- by the respondent from the complainants till actual realization of entire refund of the said amount.**

18. The above-mentioned reliefs sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and the same being interconnected.
19. The factual matrix of the case reveals that the complainants applied for booking of a unit in the project "114 Avenue" and were allotted unit bearing no. 6B-07 vide allotment letter dated 08.12.2011. The buyer's agreement for unit no. 6B-07 was entered into between the parties on 12.10.2012. The sale consideration of the unit was Rs.50,37,774.00/-. Thereafter, vide letter dated 28.11.2017, the complainants approached the respondent and requested them to shift their booking towards another project of the respondent namely

“68 Avenue.” The respondent acceded to the request of the complainants and allotted two serviced apartments bearing no. SH3-01 and SH3-02 in tower B vide MOU dated 15.12.2017 which provided for lease of premises and payment of assured return to the complainants at the rate of Rs. 60.50/- per sq. ft. per month till the offer of possession of the said units. The sale consideration of these serviced apartments was Rs.69,16,450/-. A buyer’s agreement dated 30.12.2017 was also executed between the parties. Accordingly, the amount of Rs.7,27,274/- has been paid by the respondent to the complainants on account of assured returns.

20. Further, the complainants herein intend to withdraw from the project and are seeking a 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**

*Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”*

**(Emphasis supplied)**

21. The Authority observes that right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or 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. If the allottee has not exercised the

right to withdraw from the project after the due date of possession is over till the occupation certificate was obtained by the respondent-promoter, it impliedly means that the allottee tacitly wished to continue with the project. The promoter has already invested in the project to complete it and occupation certificate w.r.t. the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottees interest for the money he has paid to the promoter is protected accordingly and the same was upheld by in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs. State of U.P. and Ors. (supra)*** reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022.*** observed as under: -

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

22. However, in case the allottee wishes to withdraw from the project, the promoter is liable on demand to return the amount received by it with interest at the prescribed rate if it fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that the allottee has to make

intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready then he impliedly agreed to continue with the project i.e. he do<sup>es</sup> not intend to withdraw from the project and this proviso to Section 18(1) automatically comes into operation and the allottees shall be paid interest at the prescribed rate for every month of delay by the promoter.

23. In the instant case, the occupation certificate for tower-A was received on 02.08.2019. However, the complainant has surrendered the unit by filing the present complaint on 04.09.2023 i.e., after receipt of occupation certificate. Therefore, in this case, refund can only be granted after certain deductions. Though, it is contended on behalf of respondents that they are liable to forfeit amount towards earnest money, statutory taxes, brokerage etc. However, the Authority is of view that the respondents cannot not retain more than 10% of the sale consideration and is bound to return the remaining. Even the Hon'ble Apex court of the land in cases of *Maula Bux Vs. Union of India (1973) 1 SCR 928*, *Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136*, and followed by the National Consumer Dispute Redressal Commission, New Delhi in *consumer case no. 2766/2017 titled as Jayant Singhal and Anr. Vs. M/s M3M India Ltd. decided on 26.07.2022* took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder and as such, there is hardly any actual damage. So, it was held that 10% of the sale price is reasonable amount to be forfeited in the name of earnest money. Thus, keeping in view the principles laid down by the Hon'ble Apex court in the above mentioned two cases, the rules with regard to forfeiture of earnest

money were framed by the authority known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, providing as under:

**"5. AMOUNT OF EARNEST MONEY**

*Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment /plot /building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

24. Thus, keeping in view the aforesaid legal provisions and the facts detailed above, the respondents-promoter is directed to refund the amount paid by the complainants after deducting 10% of the sale consideration being earnest money along with an interest @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 on the refundable amount, from the date of surrender/withdrawal i.e., 01.07.2023 till actual refund of the amount after adjusting the amount/pre-handover amount paid by respondents, if any within the timelines provided in Rule 16 of the Haryana Rules, 2017 ibid.

**H.III Direct the respondent to pay a lease rental amount as per Article 3 of the MOU dated 10.06.2020 at the rate of Rs.83.33/- per sq. ft. per month from beginning from 01.03.2020 amounting to Rs.44,41,489/-. (Computed till August 2023)**

25. The complainants have filed the present complaint seeking refund of the entire paid-up amount. Hereby, the above sought relief regarding payment of lease rental itself becomes redundant as no further liability remains towards

the promoter to fulfil the obligations agreed as per the MOU entered between the parties.

**H.IV Direct the respondent to pay litigation costs amounting to Rs.1,00,000/- to the complainants.**

26. 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 and legal expenses.

**I. Directions of the authority**

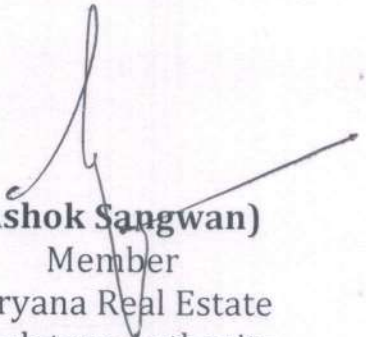
27. Hence, the authority hereby passes this order and issues the following directions under Section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under Section 34(f):

- i. The respondent/ promoter is directed to refund the paid-up amount after deduction of 10% of the sale consideration as earnest money along with interest at the rate of 11.10% 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., 01.07.2023 till its realization.
- ii. The amount of assured return of Rs.7,27,274/- 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.

28. Complaint stands disposed of.

29. File be consigned to registry.

**Dated: 11.12.2024**

  
**(Ashok Sangwan)**  
Member  
Haryana Real Estate  
Regulatory Authority,  
Gurugram



**HARERA**  
**GURUGRAM**