

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

Complaint no.	5899 of 2023
Date of filing complaint	04.01.2024
First date of hearing	10.04.2024
Date of decision	13.11.2024

1. Satish Chandra Gupta
2. Sudha Gupta

Resident of: House no. 37A, Gautam Nagar, New Delhi-
110049

Complainants

Versus

Vatika Limited

Regd. office: A002, INXT City Centre, Ground Floor,
Block- A, Sector- 83, Vatika India Next, Gurugram-
122012

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Shri Pawan Verma (Advocate)

Complainants

Shri Dhruv Dutt Sharma (Advocate)

Respondent

ORDER

1. The present complaint has been filed by the complainants/allottee(s) 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 provisions 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 complainants, the date of proposed handing over of the possession, and the delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name and location of the project	"Vatika Express City Plots", which is part of integrated township "Vatika India Next 2 Plots", Sector- 88B, Gurugram
2.	Nature of the project	Residential Plot
3.	RERA Registered/Not Registered	Registered 271 of 2017 dated 09.10.2017 valid upto 08.10.2022
4.	DTCP License no. and validity status	94 of 2013 dated 31.10.2013 valid upto 30.10.2019
5.	Name of licensee	Malvina Developers Pvt. Ltd. And 20 others
6.	Allotment Letter	16.01.2014 (Page no. 48 of complaint)
7.	Date of execution of buyer's agreement	04.12.2014 (Page no. 48 of complaint)
8.	Unit no.	Plot no. 14, Street no. G-14, Block G (As per BBA at page 69 of complaint)
9.	Unit area admeasuring	301.39 sq. yards (As per BBA at page 69 of complaint)
10.	Possession Clause	"9. SCHEDULE FOR POSSESSION OF THE SAID RESIDENTIAL PLOT- The Company based on its present plans and estimates and subject to all just exceptions, force majeure and delays due to reasons beyond the control of the Company contemplates to complete development of the said Residential Plot within a period of 48 (Forty Eight) months from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in other Clauses herein or due to failure of Allottee(s) to pay in time the price of the said Residential Plot along with all other charges and dues in accordance with the Schedule of Payments given in Annexure-

		<i>It or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any of the terms or conditions of this Agreement."</i> (Emphasis Supplied) (As mentioned in BBA at page no. 74 of complaint)
11.	Due date of possession	04.12.2018 (Calculated to be 48 months from the date of execution of BBA)
12.	Total sale consideration	Rs. 2,18,32,660/- (SOA dated 14.02.2024 at page no. 83 of reply)
13.	Amount paid by the complainants	Rs. 84,38,921/- (SOA dated 14.02.2024 at page no. 83 of reply)
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered
16.	Refund request letter sent by complainant and duly approved by respondent	11.05.2023 (Page no. 48 of complaint)

B. Facts of the complaint:

3. The complainant has made the following submissions:

- a) That the complainant no. 1 is about 66 years old and his wife complainant no. 2 is about 64 years old. Both are citizens of India however, they are presently residing at 1525, White Birch Terrace, Apartment No. 213, Fremont, California 94536, USA. As the complainants are unable to come to India for filing the present complaint, they have appointed complainant no.1's real brother Mr. Parmod Kumar Gupta as their lawful Attorney (the Authorised Representative), authorizing him to sign, file and prosecute the present complaint against the respondent.
- b) That during the year 2013, complainants were looking for a residential plot in Gurugram and they came across lucrative advertisements published by the respondent, wherein the respondent represented that a high-end plotted colony is developed by them in Sector 88-A, 88-B, Gurugram.
- c) That on 30.11.2013, the complainants visited the respondent's office, where the respondent's staff handed over to them the advertising literature/

brochure/pamphlets of the respondent's upcoming plotted colony project in Sector-88A and 88B, Gurugram, Haryana. Being influenced by the lucrative promises and representations made by the respondent's staff and their advertising literature brochure/pamphlets about their project, and believing all their representations to be true, the complainants booked plot no.14, Block G, with proposed area of 300 sq. yards in the respondent's project named "Vatika Express City" situated at Sector 88B, Gurugram by signing a printed Expression of Interest and handing over a cheque bearing no. 000039 worth Rs.11,00,000/- drawn on Standard Chartered Bank. The respondent acknowledged the receipt of the said payment vide its receipt dated 11.12.2013 which was sent to the complainants enclosed with the respondent's covering letter dated 20.12.2013.

- d) That the respondent allotted the said plot to the complainants by sending a formal allotment letter dated 16.01.2014. Further, vide letter dated 29.10.2014, the respondent sent the two copies of the builder buyer agreement to the complainants for signing thereof. Both the copies were already duly stamped and signed by the authorized representative of the respondents on each page. The complainants signed both the copies of the BBA and sent one copy thereof to the respondent on 04.12.2014.
- e) That as per clause 9 of the BBA, the possession of the plot was promised to be delivered within 48 months of execution of BBA, i.e., by 04.12.2018. The basic sale price as shown in the BBA was Rs.2,10,97,300/-, which was payable as per the following payment plan annexed with the BBA:

At the time of Booking	5% of BSP
Within 2 months from the date of Booking	10% of BSP
Within 4 months from the date of Booking	10% of BSP
Within 6 months from the date of Booking	15% of BSP

On offer of Possession	60% of BSP + 100% of PLC + EDC/IDC + IFMS + STP charges + Electric Meter Charges + Gas Pipeline Charges
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Thus, 40% of BSP was payable within first six months of booking and the balance was payable on offer of possession of the plot.

- f) That as detailed above by 03-12-2014, the complainants had paid a sum of Rs.84,38,921/-, which is 40% of the BSP. As per the payment plan specified in the BBA, the balance amount was payable on the offer of possession. A tabulated account of the various payments made by the complainants to the respondent is as under:

Sr. No.	Date	Amount	Remarks
1.	11.12.2013	11,00,000	
2.	07.02.2014	20,18,500	
3.	14.04.2014	31,500	TDS against sr. no.1 and 2
4.	14.04.2014	20,79,000	
5.	20.05.2014	21,000	TDS against sr. no.4
6.	16.06.2014	31,18,500	
7.	31.07.2014	31,500	TDS against sr. no.6
8.	20.11.2014	18,631	Payments on account of increase in
9.	26.11.2014	19,900	Plot area
10.	31.12.2014	390	TDS against sr. no.8 and 9
11.	Total	84,38,921	

- g) That upon the 'Act' having come in force in the year 2016, the project was registered in RERA as an ongoing project vide registration no. 271 of 2017 dated 09.10.2017, whereby the date of delivery of possession was declared as 08.10.2022. However, the despite the expiry of 8 years of announcing the project, the respondent took no steps for development of the project, and therefore, the project lapsed on 08.10.2022 on the RERA website as per RERA Rules. Subsequently, the said date of delivery of possession was extended on the RERA website to 08.07.2023. However, the said date has already expired, and the project is still shown as "lapsed" on the website of Haryana RERA, as date of completion of the project already elapsed twice.
- h) That despite the fact that the project had lapsed on account of respondent's having abandoned the project and that complainants had already paid more

than 40% of the BSP and the balance was payable only at the stage of delivery of possession, the respondent was audacious enough to send to the complainants a malicious demand letter dated 02.12.2022, posing as final opportunity, threatening cancellation of complainants' booking and forfeiture of complainants' money, and demanding Rs.1,24,92,728.96/- to avoid cancellation with immediate effect. The complainants replied to the said letter vide his letter dated 01.03.2023 sent through speed post and courier, wherein they mentioned that the balance payment was payable only at the stage of possession. The complainants further requested the respondent to update about the status of the project and also provide, inter-alia, the copy of the RERA completion approval and occupancy certificate, if the respondent claimed the plot was ready for possession.

- i) That on 07.03.2023, the complainant no. 1 visited respondent's office and project site and was highly disappointed at the deserted and abandoned state of the project land. Therefore, he sent an email dated 11.03.2023 to the respondent requesting them to inform him about the current status of the project and to provide the expected time for delivery of possession, the latest layout plan, approvals, and respondent's communication with RERA regarding the status and proposed completion of the project.
- j) That despite passage of about 5 months of complainants having sent the abovementioned e-mail dated 11.03.2023, the respondent neither replied to the said email nor took any step in the direction of the development of the project. Therefore, the complainants were constrained to send a legal notice dated 05.08.2023 to the respondent, through speed post and courier, calling upon the respondent to provide actual on record current status of the project and take steps to renew/extend the registration under RERA, within a period of 15 days from receipt of the notice. However, despite having received the said notice, the respondent did not care to respond to the same.

- k) That further, the respondent sent a pre-termination notice dated 14.11.2023 to the complainants demanding the entire sale consideration of the plot within a period of seven days and threatened to terminate the booking as a consequence of non-payment thereof.
- l) That it was also noticed that the respondent had booked complainants' plot in their project named 'Vatika Express City', and referred to the said name in all their communications, except in their last two communications, i.e. demand notice dated 02.12.2022 and termination notice dated 14.11.2023, wherein the respondent referred the project as 'Vatika India Next 2', instead of 'Vatika Express City'. The respondent sent no communication to the complainants regarding the change of the name of the project or shifting of complainants' plot to any other project. Further, on searching about respondent's projects on the HRERA website, it was revealed that none of the said two projects was active. 'Vatika Express City' has already been lapsed and 'Vatika India Next 2' has not even been registered yet. It was further revealed that the respondent had withdrawn their application for registration of their project 'Vatika India Next 2' before RERA authorities vide order dated 13.03.2023 passed by HRERA Authority. Thus, the respondent sent the said pre-termination notice dated 14.11.2023 knowing fully well that the balance payment was payable by the complainants only on offer of possession, which was never offered, as the project is nowhere near completion and the same has been abandoned by the respondent; and that 'Vatika Express City' has already been lapsed and 'Vatika India Next 2' has not even been registered yet.
- m) That the respondent's conduct in failure to deliver the possession as per the terms of the agreement, taking no steps to develop the project, further demanding the money which is not payable by the complainants as per the agreement, threatening to cancel the booking and forfeiture of complainants' money, demanding the payment despite the project having

been lapsed, demanding the payment under the name of another project which has not been registered yet and failing to provide any information with respect to the project despite repeated reminders, not only violates various provisions of the Act, including but not limited to Section 11, 18, 19(1) to (3), but also amounts to 'deficiency of service' and 'Unfair Practices' under the scope of the penal provisions of Section 7 of RERA, which render the promoters of the respondent liable for punishment under Section 61 of the Act and revocation of the project.

- n) That the complainants are senior citizens and had invested their lifetime savings on the booking of the said plot with the hope that they will build their retirement home on the said plot to lead their retired life peacefully. The complainants have also suffered grave and severe financial loss and hardship during last 9 years as they have been cutting on their essential expenses to save money to make the payment for the said Plot. In light of the aforesaid facts and circumstances, the respondent is also liable to compensate the complainants for the financial loss suffered as well as the mental harassment and agony that the complainants have undergone at the behest of the respondent.
- o) That the respondent has been demanding the balance payment knowing fully well that the project has already been lapsed. The respondent has also been demanding the balance payment under the name of another project under which the respondent never applied for the booking. Thus, the promoters of the respondent have acted dishonestly and thereby caused wrongful loss to the complainants and wrongful gain to the respondent. Accordingly, the promoters have also committed the offence of cheating and have rendered them liable to be punished under Section 420 IPC.
- p) That the complainants were constrained to send a legal notice dated 23.11.2023, whereby they not only replied to respondent's letter dated 14.11.2023, but also cancelled/terminated the booking of the said plot with

immediate effect and demanded the refund of the entire payment of Rs. 84,38,921/- paid by the complainants to the respondent along with interest @ 18% p.a. from the date of the respective payments till the date of actual realization thereof, within a period of 7 days of receipt of the said legal notice. However, the respondent neither replied to the said legal notice nor refunded any money to the complainants.

C. Relief sought by the complainants:

4. The complainants have sought the following relief(s):
 - i. Direct the respondent to refund the entire amount paid by the complainants to the respondent along with interest at the prescribed rate from the date of each payment made by the complainants to the respondent, till the date of actual realization of the entire amount along with interest.
 - ii. Direct the respondent to pay Rs.1,50,000/- on account of litigation expenses.
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) 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 vide its reply dated 27.03.2024:
 - a) That from the conjoint reading of Rule 8 and Rule 15 Form and Annexure 'A' of the Haryana RERA Rules, 2017, it is evident that the 'Agreement for Sale', for the purposes of 2016 Act as well as 2017 Haryana Rules, is the one as laid down in Annexure 'A', which is required to be executed inter se the promoter and the allottee.
 - b) That it is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of 2016 Act and 2017 Haryana Rules, has been executed between respondent and the complainants. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is the builder

buyer agreement, executed much prior to coming into force of 2017 Haryana Rules.

- c) That adjudication of the complaint for refund, as provided under Sections 12, 14, 18 and 19 of 2016 Act, if any, must be in reference to the agreement for sale executed in terms of 2016 Act and 2017 Haryana Rules and no other agreement. Thus, no relief as claimed can be granted to the complainants.
- d) That it has been categorically agreed between the parties that subject to the complainants having complied with all the terms and conditions of the buyer's agreement and not being in default under any of the provisions of the said agreement and having complied with all provisions, formalities, documentation etc., the developer contemplates to complete construction of the said residential plot within a period of 48 months from the date of execution of the agreement, unless there shall be delay due to force majeure events and failure of allottee(s) to pay in time the price of the said unit in terms of clause 9 of the agreement. Further, it had been agreed and accepted that in case the delay is due to the reasons beyond control of the company, developer shall be automatically entitled to extension of time for delivery of possession. Further the company may also suspend the project for such period as it may consider expedient in terms of clause 12 of the buyer's agreement.
- e) That in the present case, there has been a delay due to various reasons which were beyond the control of the respondent and the same are enumerated below: -
- a. Unexpected introduction of a new National Highway being NH 352 W (herein "NH 352 W") proposed to run through the project of the respondent. Initially HUDA has to develop the major sector roads for the connectivity of the projects on the licensed land. But no development for the connectivity and movement across the sectors, for ingress or egress

was done by HUDA for long time. Later on, due to the change in the master plan for the development of Gurugram, the Haryana Government has decided to make an alternate highway passing through between sector 87 and sector 88 and further Haryana Government had transferred the land falling in sector 87, 88 and others sectors to GMDA for constructing new highway 352 W. Thereafter in a process of developing the said highway 352 W, the land was uplifted by 4 to 5 metres. The respondent has already laid down its facilities before such upliftment and is constrained to uplift the project land and re-align the facilities. Thereafter GMDA handed over the possession of the land properties/land falling in NH 352 W to NHAI for construction and development of NH 352 W.

- b. The GMDA vide its letter dated 08.09.2020 handed over the possession of said properties for construction and development of NH 352 W to the National Highway Authority of India (NHAI). This is showing that still the construction of NH 352 W is under process resulting in unwanted delay in completion of project.
- c. Further, initially, when HUDA had acquired the sector road and started its construction, an area by 4 to 5 metres was uplifted. Before start of the acquisition and construction process, respondent no. 1 had already laid down the services according to the earlier sector road levels, however due to upliftment caused by HUDA in NH 352 W the company has been constrained to raise and uplift the same within the project, which not only result in deferment of construction of project but also attract costing to the respondent.
- d. The Hon'ble National Green Tribunal (NGT)/Environment Pollution Control Authority (EPCA) issued directives and measures to counter the deterioration in Air Quality in the Delhi-NCR region, especially during the winter months. Among these measures were the bans imposed on

- construction activities for a total period of 70 days between November 2016 to December 2019.
- e. Declaration of Gurgaon as a Notified Area for purpose of Groundwater and restrictions imposed by the state government on its extraction for construction purposes.
- f. The Government of India imposed lockdown in India in March 2020 to curb the spread of the Covid-19 pandemic. This severely impacted the Respondent as the Respondent was constrained to shut down all construction activities for the sake of workers' safety, most of the labour workforce migrated back to their villages and home states, leaving the Respondent in a state where there is still a struggle to mobilize adequate number of workers to start and complete the construction of the Project due to lack of manpower.
- f) Further, it had been also agreed and accepted that in case the delay is due to the force majeure then the developer shall not be held responsible for delay in delivery of the possession in terms of the clause 35 of the buyer's agreement.
- g) That the complainants have also failed to make payments in time in accordance with the terms and conditions as well as payment plan annexed with the buyer's agreement and as such the complaint is liable to be rejected. It is submitted that out of the sale consideration of Rs. 2,18,32,660/-, the amount actually paid by the complainants is Rs. 84,38,921/- i.e. around 39% of the total sale consideration of the unit. There was an outstanding amount of Rs. 1,33,93,739/- (including interest) payable by the complainants as on 14.02.2024 as per the payment plan opted by the complainants.
- h) That respondent has already offered possession of the unit to complainants vide letter dated 13.09.2022 and 02.12.2022, however, the complainants have till date failed to make the payment of outstanding dues. On 14.11.2023 the respondent again called upon the complainants vide letter ✓

dated 14.11.2023 with an opportunity to make the payment within 07 days failing which the unit of the complainants shall stand cancelled, however, the complainants did not bother to make the payment. The complainants after defaulting in complying with the terms and conditions of the buyer's agreement, now wants to shift the burden on the part of the respondent whereas the respondent has suffered financially.

7. Copies of all the relevant documents have been filed and placed on 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. Jurisdiction of the authority:

8. 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

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be the entire Gurugram District for all purposes with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

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

Section 11(4)(a)

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

Section 34-Functions of the Authority:

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

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (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 laid down as under:

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

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

F. Findings on the objections raised by the respondent:

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

14. The respondent has raised an objection that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017** which provides as under:

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

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

15. Further, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

16. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F.II Objections regarding force majeure.

17. It is contended on behalf of the respondent/builder that due to various circumstances such as various orders passed by NGT, Hon'ble Supreme court, introduction of new highway being NH-352W, transferring the land acquired for it by HUDA to GMDA, it could not speed up the construction of the project, resulting in its delay, then handing over to NHAI, re-routing of high tension lines passing through the land of the project, etc. But all the

pleas advanced in this regard are devoid of merit. The passing of various orders to control pollution in the NCR region during the month of November is an annual feature and the respondent should have taken the same into consideration before fixing the due date. Secondly, the various orders passed by other authorities were not all of a sudden. Also, as far as the plea with regard to handing over the construction work to NHAI is concerned, neither any specific pleading has been advanced by the respondent during the course of proceedings nor any documentary evidence has been placed on record to substantiate the same. The contention made by the respondent seems to have been made in routine and are therefore, rejected.

18. The due date of possession in the present case is 04.12.2018, so, any situation or circumstances which could have an effect on the due date should have been considered before fixing a due date. Moreover, the circumstances detailed earlier did not arise at all and could have been taken into account while completing the project and benefit of indefinite period in this regard cannot be given to the respondent/builder.

F.III Objection regarding delay in completion of construction of project due to outbreak of Covid-19.

19. The Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020* dated 29.05.2020 has observed as under:

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

20. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by ✓

04.12.2018. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period cannot be excluded while calculating the delay in handing over possession.

G. Findings on relief sought by the complainants.

G.I Direct the respondent to refund the entire amount paid by the complainants to the respondent along with interest at the prescribed rate from the date of each payment made by the complainants to the respondent, till the date of actual realization of the entire amount along with interest.

21. 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"

22. Clause 9 of the buyer's agreement provides for handing over of possession and is reproduced below:

"9. SCHEDULE FOR POSSESSION OF THE SAID RESIDENTIAL PLOT-

The Company based on its present plans and estimates and subject to all just exceptions, force majeure and delays due to reasons beyond the control of the Company contemplates to complete development of the said Residential Plot within a period of 48 (Forty Eight) months from

the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in other Clauses herein or due to failure of Allottee(s) to pay in time the price of the said Residential Plot along with all other charges and dues in accordance with the Schedule of Payments given in Annexure-II or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any of the terms or conditions of this Agreement.”

(Emphasis Supplied)

23. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottees that even a single default by the allottees in making payment as per the plan may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such a clause in the agreement to sell by the promoter is just to evade the liability towards the timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such a mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

24. Due date of handing over possession and admissibility of grace period:

As per clause 9 of the agreement to sell, the possession of the allotted plot was supposed to be offered within a stipulated timeframe of 48 months from the date of execution of the agreement. The buyer's agreement was

executed between the parties on 04.12.2014. Thus, the due date for handing over of possession comes out to be 04.12.2018.

25. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by him in respect of the subject unit with interest at prescribed rate as provided under Rule 15 of the Rules, 2017. 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.

26. The legislature in its wisdom in the subordinate legislation under the provision of Rule 15 of the Rules, 2017, ibid 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.
27. 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., 13.11.2024 is **9.10%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%**.
28. On consideration of the documents available on record as well as submissions made by the parties, the authority is satisfied that the respondent is in contravention of the Section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement.
29. Keeping in view the fact that the complainants/allottee wishes to withdraw from the project and is demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the

terms of agreement for sale or duly completed by the date specified therein.

The matter is covered under Section 18(1) of the Act of 2016.

30. The due date of possession was 04.12.2018 and even after a passage of more than 5 years till date neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to it.
31. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

"... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

32. 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. it was observed:

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."

33. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale under Section 11(4)(a). The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.

34. Accordingly, the non-compliance of the mandate contained in Section 11(4)(a) read with Section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @11.10% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each deposit till its realization within the timelines provided in Rule 16 of the Haryana Rules, 2017, *ibid*.

G.II Direct the respondent to pay Rs. 1,50,000/- on account of litigation expenses.

35. The complainants are seeking the above-mentioned relief w.r.t. compensation. The Hon'ble Supreme Court of India in *Civil Appeal nos. 6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Ltd. V/s State of UP & Ors.* has held that an allottee is entitled to claim

compensation and 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 and litigation expense shall be adjudged by the adjudicating officer having due regards 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.

H. Directions issued by the Authority:

36. Hence, the Authority hereby passes this order and issues the following directions under Section 37 of the Act to ensure compliance with obligations cast upon the promoter 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 entire amount received by it from the complainants 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 each payment till the actual date of refund of the deposited amount within the timelines provided in Rule 16 of the Haryana Rules, 2017.
- II. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

37. Complaint stands disposed of.

38. File be consigned to the Registry.

Dated: 13.11.2024

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