BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**319 of 2023**
Date of complaint :	**27.01.2023**
Order pronounced on:	**15.05.2025**

1. Rajesh Khanna
2. Anubha Khanna

Both R/o: 44/7, Primrose, Vatika City, Sector-49, Gurugram-122018. **Complainants**

Versus

M/s Vatika Limited
Registered office: Vatika Triangle, 7th Floor, Sushant Lok, Phase 1, Gurugram – 122002. **Respondent**

CORAM:

Shri Vijay Kumar Goyal **Member**

APPEARANCE:

Shri Garvit Gupta, Advocate Complainants
Ms. Ankur Berry, 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 under the provisions of the Act or the Rules and regulations made thereunder or to the allottees as per the agreement for sale executed *inter se*.

A. Project and unit related details.

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

S. N.	Particulars	Details
1.	Name and location of the project	"The Seven Lamps" by Vatika India Next at Sector-82, 82A, 83, 84 & 85, Gurugram.
2.	Project area	11.925 acres
3.	Nature of Project	Group Housing Colony
4.	DTCP license no. and validity status	23 of 2011 dated 24.03.2011 Valid upto 23.03.2015
5.	Name of Licensee	M/s Shivganesh Buildtech Pvt. Ltd. (Formerly known as M/s Alden Developers Pvt. Ltd.)
6.	Rera registered/ not registered and validity status	**Un-Registered**
7.	Unit No.	1604, at 16th Floor, Tower – Truth, [Tower-T] (page 38 of complaint)
8.	Unit area admeasuring	2160 sq. ft. (Super Area) (page 38 of complaint)
9.	Allotment letter	19.08.2015 (page 38 of complaint)
10.	Date of buyer agreement	09.10.2015 (page 40 of complaint)
11.	Possession clause	**14. Schedule for Possession of the said apartment.** *"The developer based on its present plans and estimates and subject to all just exceptions, contemplates* ***to complete construction of the said building/ said apartment within a period of 4 (four) years from the date of execution of this***

		agreement *unless there shall be delay pr there shall be failure due to reasons mentioned in clauses 17, 18 & 42 or due to failure of allottee(s) to pay in time the price of the said apartment along with all other charges and sues in accordance with the schedule of payments given in annexure-III or as per the demands raised by the developer 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."* **(Emphases Supplied)**
12.	Due date of possession	**09.10.2019** (Calculated from the date of execution of buyer's agreement)
13.	Sale consideration	Rs.1,35,00,000/- (As per page 4 of BBA at page no. 43 of complaint)
14.	Amount paid by complainant	Rs.40,03,890/- (As per SOA dated 11.02.2016 at page no. 99 of complaint)
15.	Demand & Reminder letters	22.12.2015, 03.03.2016
16.	Intimation of possession	11.02.2016 (as per document provided with written submissions of complainant)
17.	Final Opportunity for Intimation of possession	13.04.2016
18.	Notice for Termination (due to non-payment of outstandings dues)	13.05.2016 (page 25 of reply)
19.	Termination-cum-refund letter	13.10.2016 (page 116 of complaint)
20.	Occupation certificate	**17.10.2017** (for Block - P, M, B & L, S & **T**, O, EWS, Community Centre Building, Convenient Shopping & Basement) (page 23 of reply)

B. Facts of the complaint:

3. The complainants have made the following submissions in the complaint: -

a. That the respondent offered for sale units in a group housing complex known as 'Vatika Seven Elements' developed by the respondent. That the complainants received a marketing call from the office of respondent in the month of March, 2013 and had also been attracted towards the aforesaid project on account of publicity given by the respondent through various means like various brochures, posters, advertisements etc. That the complainants have also made another booking in the other project of the respondent i.e., "Bellevue Residences" later renamed as "Vatika Signature-2" in the year 2009 on the basis of the representation and assurances made by the representatives of the respondent. The marketing staff of the respondent also assured timely delivery of the unit.

b. That the complainants, induced by the assurances and representations made by the respondent, decided to book a residential unit in the project of the respondent and made part-payment out of the total sale consideration on 04.04.2013. The complainants submitted an expression of interest for a residential apartment on 29.04.2013.

c. That the respondent on the basis of the application made by the complainants allotted unit no.904, Tower A4, in its project "Vatika Seven Elements" vide allotment letter dated 01.10.2013. That the respondent had issued the allotment offer letter to the complainants after almost 6 months from the date of booking.

d. That the complainants visited the project site in November, 2014 and were shocked to see that no construction activity was going on there and the work has been at standstill. Accordingly, a meeting was conducted between the complainants and the CRM team of the respondent wherein it was suggested by the representatives of the respondent that the complainants

submit a formal communication/email for transfer of the allotted unit in its other project i.e., "Vatika Seven Lamps". It was assured by the representatives of the respondent that the same would be a hassle-free process and that the entire amount of Rs.31,54,740/- as paid by the complainants for "Vatika Seven Elements" would be transferred as it was, without any deductions. Accordingly, on the suggestion made by the representatives of the respondent and the delay, the complainants sent an email on 30.10.2014 requesting for such migration.

e. That on 24.11.2014, the respondent sent an email to the complainants containing the payment plan and pricing of the unit for a 3 BHK unit in its project "Vatika Seven Lamps". However, despite the specific assurances of the respondent that it would not do any illegal deductions, that not only was the respondent proposing the transfer to the other project by illegally deducting Rs.2,30,850/- but also by charging for the said unit at a price which was higher than the then prevailing market price of the unit in the project "Vatika Seven Lamps". The complainants, vide their email dated 05.05.2015 made vocal their objections to the same and requested the respondent to charge for the said unit at the then prevailing market price or to refund the amount so that the same could be utilized for the purpose of purchasing a new unit in the "Vatika Seven Lamps" project.

f. That the respondent refused to take into consideration the genuine requests made by the complainants and further threatened the complainants to forfeit the previous amount paid towards the unit if the substitute allotment for a 3BHK in "Vatika Seven Lamps" was not accepted by the complainants after illegal deduction of Rs. 2,30,850/-. A breakdown of the illegal, unfair, unethical and completely one-sided deduction under

the heads of transfer charges and service tax was communicated by the respondent to the complainants vide its email dated 08.07.2015. Not only was it specifically assured that no such illegal deductions would take place, that nowhere in the agreed terms, it was decided that the respondent could charge transfer fees.

g. That accordingly, Rs.29,23,890/- stood transferred from Unit no.904 in Vatika Seven Elements to the new unit bearing no. 1604, Tower 'Truth' admeasuring 2160 sq. ft. in Vatika Seven Lamps which was allotted to the complainants by the respondent vide allotment letter dated 19.08.2015.

h. That the complainants had already parted with a considerable amount of the sale consideration, they were left with no other option but to accept the lopsided and one-sided terms of the apartment buyer's agreement. The complainants felt trapped and had no other option but to sign the dotted lines. Hence, the apartment buyer agreement dated 09.10.2015 was executed.

i. That the complainants, on the demand of the respondent made additional payments to the tune of Rs.10,80,000/- to the respondent towards the sale consideration of the unit in question from 25.10.2015 to 04.01.2016. Vide their email dated 14.02.2016, the complainants requested the respondent and its management for a special approval for 10% discount on the price that was offered.

j. That the respondent in order to create false evidence and despite being aware that mutual discussions were going on between the complainants and the respondent, kept on sending baseless reminders to the complainants. The complainants vide their emails dated 16.04.2016 and 17.05.2016 brought the same to the knowledge of the CRM team. It was

specifically requested by the complainants vide the said email not to take any coercive action including but not limited to levying of interest, holding charges and cancellation of the allotment.

k. That the management of the respondent intimated to the complainants that the 3BHK unit allotted to the complainants in seven lamps project has been allotted to a third party due to the fault of the CRM team and requested the complainants to instead opt for a 4BHK unit in the same project. It was assured that the entire amount including the earlier deducted amount would be adjusted in the new booking. On account of continuous delays and the unit being allotted to a third party, the complainants were left with no other option but to believe the said representations of the respondent. The complainants also received an email confirmation regarding the upgrade of their booking to 4 BHK on 21.04.2016. Accordingly, a booking application form for unit bearing no. was signed between the complainants and the respondent on 21.04.2016 and the complainants made an additional payment of Rs.2 lacs.

l. That the complainants continued their discussion with the sales and the CRM team for an amicable pricing for a 4BHK upgrade and the execution of the agreement who assured that they would get the management approval for the same very soon.

m. That despite specific assurances of the respondent that it would soon execute an agreement, it miserably failed to do so. The respondent failed to perform the most fundamental obligation of the allotment which was to actually execute the Agreement for Sale with the complainants, which in the present case was delayed for an extremely long period of time. Rather, the respondent with malafide motives and in complete violation of law sent a

termination letter dated 13.10.2016 of unit no.1604 i.e., 3BHK unit to the complainants and out of the total payment made, refunded Rs.9,90,753/-.

n. That immediately thereafter, the complainants contacted the management of the respondent company and sent an email dated 24.10.2016 to the respondent. It was informed by the complainants to the respondent that the termination letter dated 13.10.2016 was uncalled for and would not bind the complainants as the complainants had already upgraded the unit from 3BHK to 4BHK on the representations of the respondent itself. It was informed by the respondent that it would resolve the issue at the earliest and that the termination letter was issued inadvertently. It was also informed by the respondent to the complainants that the cheque issued may not be encased. Believing the representations to be true, the complainants did not encash the cheque which was issued by the respondent and also did not take any legal action against the unilateral cancellation of the respondent.

o. That several meetings were held in the office of the respondent who kept on giving assurances to the complainants about the withdrawal of the wrongly sent termination letter, adjustment of the amount paid to the 4BHK unit and for execution of the agreement with the complainants.

p. That on account of failure on the part of the respondent to abide with their repeated assurances and promises, the complainants, now tired of the malafide and delay tactics of the respondent, sent an email dated 22.01.2018 to the management of the respondent requesting the personal intervention of the chairman of the respondent in the matter and to allocate the 4BHK apartment to the complainants by adjusting the amount paid by the complainants. The complainants all this while were ready and willing to

honor their contractual obligations of making payment towards the remaining sale consideration towards the unit in question. It was also stated in the said email that in case, the scenario as promised by the respondent earlier and reiterated by the complainants in the said email was not acceptable to the respondent then in that case, the amount paid by the complainants be adjusted in the another booking i.e., Signature 2 Villa which was allotted to the complainants.

q. That the respondent went completely silent and for more than three years and failed to give any reply to the complainants. The telephonic calls of the complainants went unanswered and no appointment was given. The complainants for the last time sent an email dated 08.05.2021 seeking a proper reply from the respondent regarding the illegalities committed by it.

r. That the respondent vide its email dated 13.05.2021 offered the complainants to reinstate the cancelled unit and again offer for an upgrade to 4BHK. That the other unit of the complainants in the project 'Signature Villas 2' would be ready by Mid of 2023. The complainants were aggrieved as the very purpose of making the booking has been defeated. Due to the faults of the respondent, the complainants were deprived of roof over their head for so long and have suffered very badly. On account of complete failure of the respondent to abide by its obligations, complainants vide their email dated 14.05.2021 requested the respondent to update the account statement of Signature 2 villa by transferring Rs.42.33 lacs as already paid by the complainants.

s. That suddenly, the respondent deliberately, mischievously, fraudulently and with malafide motives cheated the complainants and sent a cancellation letter dated 08.12.2021 to the complainants with respect to the other unit

in Signature Villa 2 project. The said cancellation was wholly unilateral, arbitrary and was not in accordance with the terms of the allotment and without any sufficient cause and the complainants have already filed a complaint bearing number 1058 of 2022 with this Authority.

t. The respondent has been acting in contrary to law and has reduced the complainants at their mercy wherein and the complainants' questions have been left un-answered and the respondent is continuing with their illegal acts acting strictly in violation of the provisions of the RERA Act, 2016 and Haryana Rules, 2017. The respondent has violated several provisions of RERA 2016 and Haryana RERA Rules 2017 and is liable for the same.

u. That the respondent has violated several provisions of the RERA Act, 2016 and Haryana RERA Rules, 2017 and is liable for the same. That as per Section 18 of the RERA Act, 2016, the respondent/ promoter is liable to return the amount and to pay compensation to the complainants for delay and failure in handing over of such possession as per the terms and agreement of sale

v. That as per Section 12 of the RERA Act, 2016, the promoter/respondent is liable to return the entire investment along with interest to the complainants for giving incorrect, false statement.

w. That the above-mentioned acts of the respondents are also in violation of Section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016. That the complainants hereby make a submission before this Authority under Section 34(f) of RERA Act, 2016 to ensure compliance/obligations cast upon the promoter/ respondent as mentioned above.

x. The complainants have been forced to approach the Authority on account of contractual and financial defaults committed by the respondent towards the complainants.

y. That the respondent in utter disregard of its responsibilities has left the complainants in the lurch and the complainants have been forced to chase the respondent for seeking relief. Thus, the complainants have no other option but to seek justice from this Authority.

z. That the cause of action for the present complaint is recurring one on account of the failure of the respondent to perform its obligations within the agreed time frame. The cause of action again arose when the respondent illegally terminated the allotment in Seven Lamps Project, and when it failed to return the amount along with interest and finally about a week ago, when the respondent refused to refund the amount paid by the complainants along with compensation/damages and interest.

C. Relief sought by the complainants: -

4. The complainants have sought following relief(s): -

i. Direct the respondent to refund the amount of Rs.44,34,740/- along with interest from the date of payment till date.

ii. Pass an order imposing penalty on the builder on account of various defaults under RERA Act, 2016.

5. On the date of hearing, the authority explained to the respondent /promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

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

a. That the complainants have got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous

interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 09.10.2015. That the complainants are not "Allottees" but real estate investors who had booked the said unit in question as a speculative investment in order to earn rental income from its resale.

b. That the complainants being interested in the real estate development of the respondent under the name and style of "Vatika Seven Elements" tentatively applied for the allotment of the unit vide application form and were consequently allotted unit no. 904 in the Tower 4, vide the allotment letter dated 01.10.2013.

c. That the complainants on 30.10.2014, submitted a request to the respondent to migrate their booking in the project "Vatika Seven Elements" to "Vatika Seven Lamps".

d. That following the said request of the complainants, the respondent, having a very customer centric approach, upon the request of the complainants, migrated the booking of the unit from the project "Vatika Seven Elements" to "Vatika Seven Lamps" dated 24.07.2015. That a sum of Rs.29,23,890/- were transferred from the original booking of the complainants in the project "Vatika Seven Elements" to "Vatika Seven Lamps" after deduction of a sum of Rs.2,30,850/- as transfer charges. That after the said transfer, a new unit bearing no.1604, in tower "Truth" in the "Vatika Seven Lamps" admeasuring 2160 sq. ft. was allotted to the complainants vide allotment letter dated 19.08.2015 for a basic sale price of Rs.6,200/- sq. ft.

e. That the said migration, the respondents duly sent a copy of the builder buyer agreement to the complainant for its execution on 17.08.2015. However, the complainants have had malafide conduct from the very

beginning. They have been engaged in delaying tactics. That the complainants were required to execute the buyer's agreement, two copies of which were given to them, however, for reasons best known to the complainants, they delayed in the execution of the agreement. The respondent had time and again followed up with the complainants and it was after the last reminder dated 06.10.2015 that the buyer's agreement was executed between the parties on 09.10.2015.

f. That after the said execution of the builder buyer agreement, the respondents raised the invoice dated 07.10.2015 for the milestone "Within 3 months from the date of booking", for a sum of Rs.34,88,616/- due on 22.10.2015. However, the complainants miserably failed to make payments towards the said legal demand raised by the respondent.

g. That the respondent, again having a customer centric approach, sent reminder letter to the complainants again and again, however the complainants turned a blind eye towards the said reminders. That the complainants have gravely defaulted in timely remittance of instalments against their unit. That as per the agreement that time is of essence under clause 11 of the agreement. As is widely known and understood that the continuous flow of funds is pertinent to the real estate industry. That upon the failure of the complainants in making due payments as per the schedule agreed upon, it has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and further causes enormous business losses to the respondent. That upon delay being caused by the complainants on payment of different instalments, they were served with various payment reminders.

h. That the respondent, despite defaults on part of the complainants, earnestly fulfilled its obligation under the Buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. The default committed by various allottees and due to various factors beyond the control of the respondent are the factors responsible for delayed implementation of the project. The respondent cannot be penalised and held responsible for the default of its customers or due to force majeure circumstances.

i. That the respondent has complied with all of its obligations, not only with respect to the buyer's agreement with the complainants but also as per the concerned laws, rules and regulations thereunder and the local authorities. That despite innumerable hardships being faced by the respondent, the respondent completed the construction of the project and successfully received the occupation certificate dated 17.10.2017. That once an application for grant of occupation certificate is submitted to the concerned statutory authority to respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any influence in any manner whatsoever over the same. There is a delay of around 8 months caused due to the non-issuance of the occupation certificate by the statutory authority while calculating the period of delay. Therefore, the time period utilised by the concerned statutory authority for granting the occupation certificate is liable to be excluded from the time period utilised for implementation of the project.

j. That thereafter, only after obtaining the requisite permissions, the respondent legally sent the complainants the intimation of possession for the said unit on 11.02.2016 to clear all dues for a sum of Rs.1,01,41,023/-.

k. That in not making the due payments and taking possession, not only have the complainants violated the Agreement but also the Real Estate (Regulation and Development) Act, 2016, under which, the complainants were obligated to take possession of the unit within 2 months of the occupancy certificate, which the complainants miserably failed to do. Accordingly, the complainants stood in fundamental breach of the Agreement.

l. That upon the non-payment by the complainants, the complainants were considered under default under clause 20 (i), and upon the failure of the complainants to rectify their default, the respondent had the complete right to terminate the unit of the complainant in accordance with clause 20 of the said agreement.

m. That the complainants stood in the event of default since 07.10.2015for not making payment. Accordingly, the respondent had a right to terminate the unit as per the agreed terms and conditions under the agreement. That after having waited for almost 6 months, a final opportunity was given to the complainants to rectify their default through the notice of termination letter dated 13.05.2016, however, the complainants again willingly and voluntarily chose to not rectify the same, and consequently, the respondent terminated the unit by issuing the cancellation letter on 13.10.2016.

n. That accordingly, after cancellation of the unit, the respondent has a right to forfeit the earnest amount along with delayed interest and total tax against the unit. That, after the cancellation of the unit solely due to the fault

of the complainants, the respondent was entitled for a forfeiture of the non-refundable charges including earnest money, GST and delay interest, which accounted for Rs.31,03,136/-. The same was duly informed to the complainants and a cheque for refund for a sum of Rs.9,90,753/- was sent to the complainants.

o. That the right of the respondent to validly cancel the unit arises not only from the agreement but also from the model rera agreement which also recognizes the default of the allottee and the forfeiture of the interest on the delayed payments upon cancellation of the unit in case of default of the allottee.

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

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 by both parties:

9. The counsel for the complainants has filled written submissions on 26.04.2024 and the counsel for the respondent has filled written submissions on 07.05.2025 and no additional fact apart from the complaint and reply have been states in written submission.

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 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 laid down as under:

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

15. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases 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 maintainability of complaint on account of complainants being investor.

16. The respondent took a stand that the complainants are investor and not consumer and therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. However, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he 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 allotment letter, it is revealed that the complainants are buyer's, and they have paid a

considerable amount to the respondent-promoter towards purchase of 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;"*

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

H. Findings on the relief sought by the complainants.

H.I Direct the respondent to refund the amount of Rs.44,34,740/- along with interest from the date of payment till date.

H.II Pass an order imposing penalty on the builder on account of various defaults under RERA Act, 2016.

18. The above-mentioned relief 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. In the instant case, the unit was allotted to the complainants vide allotment letter dated 19.08.2015 and buyer's agreement executed between the complainants and the respondent on 09.10.2015 and in terms of clause 14

of the buyer's agreement, the due date of possession comes to 09.10.2019. The occupation certificate was received on 17.10.2017. However, the allotted unit was terminated by the respondent on 13.10.2016 on account of non-payment and a refund cheque of Rs.9,90,753/- was sent, which was not encashed by the complainants due to alleged illegal deductions made by the respondent and upon assurance by respondent either to reinstating the same booking or upgrade his booking from 3BHK to 4BHK. Therefore, the complainant filed the present complaint seeking withdrawal from the project and refund of paid-up amount along with interest.

20. Upon consideration of documents available on record and submissions made by both parties, the Authority observes that in the year 2013, the complainants booked a residential unit in the project "Vatika Seven Elements" of the respondent, pursuant to which the complainants were allotted a unit bearing no.904 Tower-A, having super area of 1630 sq. ft. vide allotment letter dated 01.10.2013 and an amount of Rs.31,54,740/- was paid towards the said unit. Thereafter, vide an email dated 30.10.2014, the complainants requested the respondent to transfer their booking from the project "Vatika Seven Elements" to another project namely "Vatika Seven Lamps". Upon considering the request of the complainants, the respondent vide e-mail dated 24.11.2014, informed the complainants of the deductions amounting to Rs.2,30,850/- to be made towards transfer charges and service tax thereon. Thereafter, on 24.07.2015, the respondent transferred an amount of Rs.29,23,890/- towards the sale consideration payable by the complainants for unit no.1604 Tower-Truth admeasuring 2160 sq. ft. in project "Vatika Seven Lamps" after deducting an amount of Rs.2,30,850/- on account of transfer

charges and service tax on transfer charges. Further on 09.10.2015, the complainants and the respondent entered into a buyer's agreement in respect of the unit no.1604 Tower Truth admeasuring 2160 sq. ft. in the project "Vatika Seven Lamps" and as per payment plan annexed with buyer's agreement dated 09.10.2015, the complainants were liable to pay 5% of BSP at the time of booking, 25% within 3 months of booking and the remaining 70% at the time of offer of possession. Further, a demand of Rs.34,88,616/- was raised by the respondent for the milestone payment 'within 3 months of date of booking' to be paid by 22.10.2015. Thereafter, the complainants made an additional payment of Rs.10,80,000/- to the respondent. Accordingly, the total amount paid by the complainants against the allotted unit comes to Rs.40,03,890/- only. Furthermore, on 11.02.2016, the respondent issued a letter for intimation for possession to the complainants followed by two reminders dated 03.03.2016 & 13.04.2016, respectively. Subsequently, on 13.05.2016, the respondent issued notice for termination of the allotment and on 13.10.2016 issued a termination-cum-refund letter along with a cheque of Rs.9,90,753/-, which was not encashed by the complainants upon the discussion and assurance by respondent either to reinstating the same booking or upgrade his booking from 3BHK to 4BHK.

21. In the present complaint, the complainants intends to withdraw from the project and are seeking refund as provided under the proviso of the Act. The respondent has submitted that the due date as per buyer's agreement is comes to 09.10.2019. However, the respondent has completed the construction of the project within the stipulated period and the occupation certificate with respect to the Tower - Truth (i.e., mentioned as Tower-T in

OC) in which unit of the complainants/allottees is situated has been granted by the competent authority only on 17.10.2017. The respondent has raised a plea in its reply that the complainants have sought the relief of refund by way of filing of the present complaint and never before and request for deduction of earnest money in terms of buyer's agreement.

22. Also, the Hon'ble Haryana Real Estate Appellate Tribunal, Chandigarh in Appeal no. ***H-REAT 255 of 2019 titled as Ravinder Pal Singh VS M/s Emaar MGF Land Ltd. & Anr.*** decided on 05.04.2021, observes in para 32 of order dated 05.04.2021, that in case if the appellant/ allottee still intends to withdraw from the project put of his own will, which will amount to the breach of the contract/ agreement on his part, in that case, he will be entitled for refund of the amount paid by him after forfeiting 10% of basic sale consideration, on account of earnest money & after deduction of the statutory dues already deposited with the government. The para 32 of the Judgement reproduced below:

> *32. However, nobody can be forced or compelled to purchase the house, but as the appellant himself is at default in making the payment as per the payment schedule and* ***if he still intends to withdraw from the project out of his own which will amount to the breach of the contract on his part, in that eventuality he will be entitled for refund of the amount paid by him after forfeiting 10% of the basic sale consideration, which will be considered to be the reasonable earnest money amount*** *and after deducting the statutory dues already deposited with the government.*

23. Therefore, in the light of the above judgement of the Hon'ble H-REAT, Chandigarh and considering the aforesaid reasons, the Authority is of the view that the refund can only be granted after certain deduction as prescribed under the Haryana Real Estate Regulatory Authority, Gurugram (Forfeiture of Earnest Money by the builder) Regulations, 11(5) of 2016.

24. It is contended by the respondent that as per clause 2 of the builder buyer's agreement dated 09.10.2015, they are liable to forfeit amount towards earnest money in case the allottee breached the terms and conditions of the buyer's agreement dated 09.10.2015 executed between both the parties. Clause 2 of the builder buyer's agreement dated 09.10.2015 is reproduced as under for ready reference.

> *"2. EARNEST MONEY*
> *The Allottee has entered into this Agreement on the condition that out of the amount(s) paid/ payable by him/ her for the said apartment and the reserved parking space allotted to him/ her, the developer shall treat 10% of the Total Consideration amount + brokerage if any paid by the developer in respect of the said apartment allotted herein, shall be treated as Earnest Money to ensure fulfilment, by the Allottee, of the terms and conditions as contained in the application and this Agreement. The allottee hereby agrees that the developer shall be entitle to forfeit out of the amounts paid/ payable by him/ her, the earnest money as aforementioned together with any interest paid, due or payable and other amount of non-refundable nature in the event of the failure of the allottee to perform his/ her obligation or fulfil all the terms and conditions set out in the application and/or this agreement...*

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

> ***"5. AMOUNT OF EARNEST MONEY***
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

26. So, keeping in view of the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, and the respondent/promoter can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/ promoter is directed to refund the amount of Rs.40,03,890/- received by it from the complainants after deducting 10% of the sale consideration and return the remaining amount along with interest on such balance amount 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 surrender i.e., 27.01.2023 (date of filing of the present complaint) till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

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 of Rs.40,03,890/- received by it against the allotted unit after deduction of 10% of the sale consideration as earnest money along with interest on such balance amount at the rate of 11.10% p.a. as prescribed under rule 15 of the Rules, 2017, from the date of surrender i.e., 27.01.2023 (date of filing of the present complaint) till its actual realization.

    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.

28. Complaints stand disposed of.

29. File be consigned to registry.

Dated: 15.05.2025

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