BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 212 of 2020
Date of decision : 13.07.2022

Mohit Global service Pvt. Ltd.
Address:- 2nd floor, B-3, Sector-3, Noida, U.P-201301 **Complainant**

Versus

M3M India Pvt. Ltd.
Registered address: Paras Twin Towers, Tower-B, 6th Floor, Golf course road, Sector-54, Gurugram-122002 **Respondent**

CORAM:
Dr. K.K Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri V.D. Costa Advocate for the complainant
Ms. Shriya Takkar Advocate for the respondent

ORDER

1. The present complaint dated 23.01.2020 has been filed by the complainant under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale 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 complainant, 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	M3M Golf Estate, sector 65
2.	Land area	63 acres
3.	Nature of the project	Group housing colony
4	DTCP License no.	234 of 2007 dated 16.10.2007 valid upto 15.10.2024 52 of 2009 dated 28.09.2009 valid upto 27.08.2024 35 of 2010 dated 06.05.2010 valid upto 05.05.2025
5.	Building Plan approved on	09.01.2015 Page 6 of the promoter information
6.	Rera registration	N.A
7.	OC received on	25.07.2017 (Page 6 of the promoter information)
8.	Unit no.	MGP PS-01/07B, level-07, tower-Polo suit- 1
9.	Unit area	3980 sq. ft.
10.	Date of allotment	01.10.2011 [Page 58 of the reply]

11.	Date of builder buyer agreement	29.03.2013 (Page 18 of the complaint)
12.	Addendum to the buyer's agreement	10.07.2014 (Page 140 of the reply)
13.	Possession clause	**16 Possession of the apartment** 16.1 The company *based upon its present plans and estimates, and subject to all just exceptions, proposes to hand over possession the said apartment within a period of* ***thirty-six 36 months from the date of commencement of construction*** *which shall mean the date of lying of the first cement concrete/mud slab of the tower in which shall be duly communicated to the allotee(s)* ***or the date of execution of this agreement whichever is later.*** *Should the possession of the apartment be not given within the time specified above the allottee agree to an extension of 180 days after expiry of the committed period.* ***(Emphasis supplied)***
14.	Due date of possession	29.03.2016 (The date of first cement concreate was laid on 23.03.2013 and date of execution of agreement i.e., 29.03.2013 so, the due date of the possession is calculated from the date of execution of agreement i.e., 29.03.2013 which is later then the first mud slab)

15.	Total sale consideration	Rs. 5,03,36,580/- (As per payment plan, page 60 of the complaint)
16.	Amount paid by the complainant	Rs.1,00,00,000/- (As per statement of account, page 72 of complaint)
17.	Notice of offer of possession	18.09.2017 [Page 69 of the complaint]
18.	Delay in handing over of possession till the date of offer of possession	1 year 5 months and 20 days
19.	1.First pre- cancellation letter issued on	02.01.2019
	2.Intimation of termination	28.01.2019 (Page 155 of reply)
20.	Grace period utilization	Not allowed

B. Facts of the complaint

3. The complainant made the following submissions in the complaint:

   i. That the complainant had booked M3M Polo Suits in the month of July 2011 for unit no. MGP as PS-1/07 b, unit area 3980 sq. ft. in M3M Golf estate by paying the booking amount of Rs. 40,00,000 and registration no. issued by the respondent was 1078 and customer code as 1332. That the complainant gave subsequent payments of Rs. 40,00,000/- on 19.07.2011, Rs. 10,00,000 on 17.12.2011 and 50,00,000 on 28.04.2012. Hence, the complainant given total Rs. 1,00,00,000/- to the respondent.

ii. That the complainant issued a provisional letter on 01.10.2011 mentioning the total breakup of the cost of the apartment which was Rs. 5,01,57,480/- plus service tax which was 15,76,221/- i.e. total amount of Rs. 5,17,33,701/-. Whereas stamp duty, electric meter connection charges additionally are payable on possession.

iii. That the respondent had executed apartment buyer's agreement after delay of one year and was executed on 29.03.2013. The terms in the agreement are unilateral and were forced upon the complainant to sign. There was no option with the complainant as substantial payment was already made.

iv. That after gap of more than 5 year, the complainant received a letter offering the possession of the apartment dt.18.09.2017 mentioning that the super area has been increased and the cost revised due to revised area and other charges thereto also etc. Thereby increased the total cost of the apartment tune of Rs. 8,09,09,924/- against the original amount of Rs. 5,17,33,701/- which was neither acceptable nor payable. That the complainant sent reply vide its letter dt. 10.11.2017 mentioning that terms regarding change in super area cannot be acceptable, additional demand in respect thereof is not acceptable, refund of invested money along with interest due to more delay in possession.

V. That the complainant has not received the reply of our letter dt.10.11.2017. It is submitted that due to slow/ delay speed of construction on behalf of the respondent, the complainant expresses to cancel the agreement and allotment vide its letter dt. August 2015 and 10.11.2017. That in view of the delay in giving the possession of the unit, the complainant is not interested in taking the possession and thereby requested the builder to refund

the invested amount of Rs. one crore along with 18% interest. The builder has refused to give the refund and intimated the complainant by express its desire to not to pay the invested amount and take the possession by 31st July 2019, otherwise invested amount of Rs. one crore will be forfeited and offer the same to any other prospective buyer. It is submitted that the forfeiture of the total amount paid by me i.e. 1,00,00,000/- is wrong, arbitrary and thereby not maintainable in law. The forfeiture was never agreed by the complainant.

vi. That the complainant received e-mail dt. 24.07.2019 from M3M regarding forfeiture of the amount for apartment and release of the unit for further sale in the market and there will be no right or lien on the unit. Further, it is mentioned therein that in the event of cancellation, earnest money shall be forfeited. That as per supreme court Judgment in the matter of ***Pioneer Urban Land & infrastructure Ltd. Vs. Govidan Raghwan vide order dt. 02.04.2019,*** it is stated that "Contractual terms of the Agreement are ex-facie one sided, unfair and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice. Thereby, allotted is entitled to refund trade practices. Thereby, allotted is entitled to refund of the amount paid with reasonable interest to refund of the amount paid with reasonable interest thereon from the date of payment till the date of refund." Hence, supreme court judgment which clearly stated that builder cannot force delay possession on buyer and if buyer is not interested then builder has to refund the advance paid by the buyer along with interest to date to the buyer.

4. **The complainant is seeking the following relief:**

   i. Refund the entire amount along with interest.

D. Reply filed by the respondent

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

   i. That the complainant has neither any cause of action nor any *locus standi* to maintain the present complaint against the respondent, especially when the complainant has defaulted in making payments and now is seeking the complete amendment/ modification/re-writing of the terms and conditions of the agreement/understanding between the parties. This is evident from the averments as well as the prayers sought in the complaint. It is submitted that the complaint filed by the complainant is baseless, vexatious and is not tenable in the eyes of law therefore the complaint deserves to be dismissed at the threshold.

   ii. It is further submitted that the hon'ble authority has no powers to deal with the cases where the cancellation of the unit has been done on account of default. the present complaint does not fall within the ambit section 12, 14, 18 and 19 of the Rera act and thus this hon'ble authority has no jurisdiction to decide the present complaint. it is submitted that reliefs sought vide the present complaint can only be granted under the section 11(5) of the act and thus can only be decided by the hon'ble authority, however it is clarified that there is no cause of action made out in the present case.

iii. That the respondent company started raising the demands as per the construction linked plan, however, the complainant started defaulting in making the payments. That there were repeated reminders sent to the complainant for not making the payments and also there were follow ups with the complainant calling upon it to clear the outstanding dues. Thus in the present case, the complainant had not adhered to the terms of the contract and has committed a breach of the agreement and the addendum agreement, the respondent is entitled to deduct the financial charges which were non- refundable in addition to the earnest money as categorically defined under the addendum agreement. That the respondent is also entitled to enforce its rights on account of breach of the agreement and the addendum agreement by the complainant, for which the respondent reserves its rights to claim damages in appropriate proceedings.

iv. The construction and development of the complex was completed well within time and the respondent applied to the competent authority for the grant of occupancy certificate on 23.12.2016, after complying with all the requisite formalities. That after due inspection and verification of each and every aspect, the occupancy certificate was duly granted by the competent authority on 25.07.2017. That the time taken by the competent authorities in processing the said application for grant of the occupation certificate, the possession could only be offered to the complainant in the month of September 2017, i.e. after the receipt of the occupancy certificate. that the period of 7 months in receiving the occupancy certificate should be considered as force majeure and/or beyond the control of the respondent, for which

the respondent cannot be accounted for and be held responsible. The building in which the apartment in question is situated was complete in all respects in December 2016 itself. That considering the above facts and circumstances, the possession of the apartment was offered well within time to the complainant. That upon the completion of the construction of the apartment in question and consequent receipt of the occupancy certificate, the possession of the apartment was offered to the complainant vide notice of offer of possession dated 18.09.2017 and the same is a matter of record.

v. That the complainant failed to take the possession of the said apartment since September, 2017 and for no just and valid reason was holding back its contractual obligations and in fact defaulted in the due and timely performance of its contractual obligations. That it is pertinent to mention here that it was upon the request of the complainant company of its inability to pay, the payment plan was changed and amended, and the complainant was given the liberty under the addendum agreement to make the payment at the time of possession, i.e. the payment plan stood amended to deferred payment plan. however, the construction of building and the apartment in question was completed by respondent on its own cost and expense on the pretext that the complainant will be duly fulfil its obligation cast upon in terms of apartment buyer's agreement dated 29.03.2013 and addendum agreement dated 10.07.2014 at the appropriate time. That on contrary the complainant failed to do abide by the terms, as a consequence thereof the respondent was constrained to cancel / terminate the allotment of the apartment.

vi. That is submitted that the complainant, as on date of cancellation, had made a payment of Rs.1,00,00,000/- approx. to the respondent against the total dues of Rs. 11,52,39,353.76/- which includes the interest on delayed payments. That the respondent was constrained to cancel the apartment on account of non-payment of the demands raised by the respondent. It is submitted that it is the respondent company which has suffered financial losses for no fault of theirs, and by way of the instant complaint the complainant is seeking to take advantage of his own faults and wrongs. As per the terms and conditions of the apartment buyer's agreement (executed between parties on 29.03.2013), the possession of the apartment was agreed to be handed over within a period of thirty six (36) months plus 180 days grace period, from the date of commencement of construction, which means the date of laying of the first plain cement concrete/ mud-mat slab of the tower, or the date of execution of the apartment buyer's agreement, whichever is later.

vii. It is submitted that the construction of the project was affected on account of unforeseen circumstances beyond the control of the answering respondent. in the year 2012, on the directions of the hon'ble supreme court of India, the mining activities of minor minerals (which includes sand) was regulated. The hon'ble supreme court directed framing of modern mineral concession rules. Reference in this regard may be had to the judgment of ***"Deepak Kumar v. State of Haryana, (2012) 4 SCC 629"***. The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of

the said project became scarce. Further, the developer was faced with certain other force majeure events including but not limited to non-availability of raw material due to various orders of hon'ble Punjab & Haryana high court and the national green tribunal thereby regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. It is pertinent to state that the hon'ble National Green Tribunal, in several cases related to Punjab and Haryana, had stayed mining operations, including in O.A No. 171/2013, wherein vide order dated 2.11.2015, the mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna Riverbed. These orders inter-alia continued till the year 2018. Similar orders/directions staying the mining operations were also passed by the Hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh as well. The stopping of mining activity not only made procurement of essential material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity as detailed above continued, despite which all efforts were made, and materials were procured at 3-4 times the rate and the construction continued without shifting any extra burden to the customer. accordance with the approved plans and relevant laws and that the apartment was in a habitable and liveable condition.

viii. In the present complaint, the reliefs claimed are in the nature of recovery as the earnest money and non-refundable amounts have been forfeited in the year 2019, after issuance of the intimation of

termination letter, and as per the terms and conditions of agreement/understanding between the parties. it is submitted that the complainant is now claiming refund of that amount along with interest. it is submitted that such prayers are beyond the jurisdiction of the hon'ble adjudicating officer, as the complainant in the guise of the present complaint cannot claim for recovery of amount along with interest and, therefore, the present complaint, merits outright dismissal.

ix. That it is trite law that the terms of an agreement are binding between the parties. The hon'ble supreme court in the case of **"Bharti Knitting Co. vs. DHL Worldwide Courier (1996) 4 SCC 704"** observed that a person who signs a document containing contractual terms is normally bound by them even though he has not read them, and even though he is ignorant of their precise legal effect. It is seen that when a person signs a document which contains certain contractual terms, then normally parties are bound by such contract; it is for the party to establish exception in a suit. When a party to the contract disputes the binding nature of the singed document, it is for him or her to prove the terms in the contract or circumstances in which he or she came to sign the documents. That the hon'ble supreme court in the case of **"Bihar State Electricity Board, Patna and Ors. Vs. Green Rubber Industries and Ors, AIR (1990) SC 699"** held that the contract, which frequently contains many conditions, is presented for acceptance and is not open to discussion. It is settled law that a person who signs a document which contains contractual terms is normally bound by them even though he has not read them, even though he is ignorant of the precise legal effect.

x. That it is pertinent to mention here that timely payments by the complainant are the essence of the apartment buyer's agreement executed between the parties. That as per clause 8.1 of the apartment buyer's agreement it is the obligation of the complainant to make timely payment of every instalment due. That in event of default on the part of the complainant to make timely payments, the respondent company may as per clause 8.2 cancel the agreement and forfeit the earnest money. The clause 8.1 and clause 8.2 of the apartment buyer's agreement are reproduced herein under:

> *"**8.1.** The obligation to make timely payment of every instalment of the Total Consideration in accordance with the Payment Plan along with payment of other charges such as applicable stamp duty, registration fees, IFMS, and other charges, any deposits, as stipulated under this Agreement or that may otherwise be payable on or before the due date or as and when demanded by the Company, as the case may be, and also to discharge all other obligations under this agreement shall be the essence of this agreement."*
>
> *"**8.2.** In the event of failure of the Allottee to perform the obligations or to fulfil the terms and conditions as set out in the application and this Agreement, including but not limited to the occurrence of any event of default as described herein, the Company may cancel this Agreement and forfeit the Earnest money and any other amount including any commission/brokerage/margin paid or payable by the Company to a Channel partner in case the booking is made by the Allottee through a Channel Partner (unless a credit note/ no objection certificate (NOC) from such Channel Partner forgoing its right to claim such brokerage/ commission/ margin is submitted) and thereafter, refund the balance amount, if any, without interest in the manner describes hereunder:-*
>
> *In case any breach is committed by the Allottee, the Company shall serve a notice calling upon the Allottee to rectify such breach within the time mentioned in such*

notice provided that the time mentioned shall not be less than fifteen (15) days.

In case such breach is not rectified within the time period stipulated or is continuing or is otherwise repeated, then this Agreement may be cancelled by the Company at its sole option by serving a written notice ('Notice of Termination') to the Allottee of the same."

That a perusal of the above stated clauses clearly shows that the intimation of termination dated 28.01.2019 is in accordance with the apartment buyer's agreement and as well as the addendum agreement. That the complainant defaulted in making timely payments and despite of several reminders, dues were not cleared and hence the respondent had to issue a notice of termination. That the respondent company has not acted beyond the scope of the apartment buyer's agreement and the addendum agreement. The relationship of the complainant and the respondent is defined and decided by the apartment buyer's agreement executed between both parties. It is submitted that a specific clause for referring disputes to arbitration is included in the said agreement vide clause 49 of the agreement which is extracted hereunder;

"49- Any dispute connected or arising out of this Agreement or touching upon or in relation to terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the Applicant and/or Company shall be settled amicably by mutual discussion. In case the parties are unable to settle their disputes within 15 days, the same shall be settled though Arbitration ....."

Hence, both the parties are contractually bound by the above condition. in view of clause 49 of the addendum agreement, the captioned complaint is barred. The complainant ought to have resorted to arbitration instead of having approached this hon'ble

authority with the captioned complaint. It is respectfully submitted that in light of the arbitration clause in the agreement and the addendum agreement, this hon'ble authority does not have the jurisdiction to adjudicate upon the instant complaint and ought to dismiss the same. The complaint is liable to be dismissed on this ground alone.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

> ***Section 11***
>
> .....
>
> *(4) The promoter shall-*
>
> *(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.

9. 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

10. 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." SCC Online SC 1044 decided on 11.11.2021*** 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."

11. Furthermore, the said view has been reiterated by the Division Bench of Hon'ble Punjab and Haryana High Court in ***"Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021***. The relevant paras of the above said judgment reads as under:

"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court, the Rules have to be in tandem with the substantive Act.

25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)***, and the Division Bench of Hon'ble Punjab and Haryana High Court in

"***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others. (supra)***, 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 agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement

13. The addendum agreement to sell entered into between the two side on 10.07.2014 contains a clause 49 relating to dispute resolution between the parties. The clause reads as under: -

> *49.1 Any dispute connected or arising out of this agreement or touching upon or in relation to the terms of this agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties hereto shall be resolved through the process of arbitration. The arbitration proceedings shall be governed by the provisions of the arbitration and conciliation act 1996 or any stator amendments/modifications to be appointed by the company, whose decision shall be final and binding upon the parties hereto. .....*

14. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court,

particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

15. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreement between the complainant and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a*

large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainant and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

16. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

17. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is

well within the right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

18. **Relief sought by the complainant:**

i. Refund the entire amount along with interest.

19. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by him in respect of subject apartment along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference:

> *"**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)*

20. On consideration of the documents available on record and submission by both the parties, the authority is of the view that the allottee has failed to abide by the terms of agreement by not making the payments in timely manner as per the payment plan opted by him, the complainant as per the statement of account paid an amount of Rs. 1,00,00,000/- out of the total amount of Rs. 5,03,36,580/-. The complainant failed to pay the remaining amount as per the schedule of payment and which led to issuance of notice of termination by the respondent on 28.01.2019. Now the question before the authority is whether this cancellation is valid?

21. As per clause 8 of the agreement, the allottee was liable to pay the Installment as per payment plan opted by the complainant. Clause 8 of the agreement is reproduced under for ready reference:

> *Clause 8.1 The obligation to make timely payment of every Installment of the total consideration in accordance with the payment plan along with payment of other charges such as applicable stamp duty, registration fee, IFMS and other charges deposits as stipulated under this agreement or that may otherwise be payable on or before the due date or as and when demand by the company as the case may be, and also to discharged all others obligation under this agreement shall be the essence of this agreement.*

22. The respondent had issue various reminders pre-cancellation letter and last and final opportunity letter to the complainant. The OC for the unit of the complainant was granted on 25.07.2017 and upon receipt of the OC the respondent issued the notice of possession dated 18.09.2017. The respondent was obtained OC from the competent authority thereafter issuing offer of possession letter dated 18.09.2017 it is a valid offer of possession in the eyes of law. The

respondent cancelled the unit of the complainant with adequate notices. Thus, the cancellation of unit is valid.

23. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

> *"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. The rule 15 of the rules has determined the prescribed rate of interest and it provides that 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%. 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., 13.07.2022 is 7.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.70%.

G. Directions of the authority

25. 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 is directed to refund the balance amount of the unit by deducting the earnest money which shall not exceed the 10% of the sale consideration of the said unit as per statement of account and shall return the balance amount to the complainant within a period of 90 days from the date of this order. The refund should have been made on the date of termination i.e., 28.01.2019. Accordingly, the interest at the prescribed rate i.e., 9.70% is allowed on the balance amount from the date of termination to date of actual refund .

26. Complaint stands disposed of.

27. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.07.2022