

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

Complaint no. : 1630 of 2019
1195 of 2020
First date of hearing: 05.09.2019
Date of decision : 10.08.2022

Dr. Mukhtar Ali Akbar
R/O: H.no. 10/29, Old Campus,
CCS Haryana agricultural University,
Hisar, Haryana-125004

Complainant

Versus

Ireo Grace Realtech Private Limited
Registered Office: - 304, Kanchan House,
Karampura, Commercial Complex,
New Delhi-110015

Respondent

CORAM:
Dr. K.K Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri M.K Dang

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 06.05.2019 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of



section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, 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. No.	Heads	Information
1.	Project name and location	"The Corridors" at sector 67A, Gurgaon, Haryana
2.	Licensed area	37.5125 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no.	05 of 2013 dated 21.02.2013
	License valid up to	20.02.2021
	Licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
5.	RERA registered/not registered	Registered Registered in 3 phases Vide 378 of 2017 dated 07.12.2017(Phase 1) Vide 377 of 2017 dated 07.12.2017 (Phase 2)



		Vide 379 of 2017 dated 07.12.2017 (Phase 3)
	Validity	30.06.2020 (for phase 1 and 2) 31.12.2023 (for phase 3)
6.	Unit no.	1103,11th Floor, C6 Tower (page no. 66 of complaint)
7.	Unit measuring	1475.86 sq. ft. (page no. 66 of complaint)
8.	Date of approval of building plan	23.07.2013 [as per project details]
9.	Date of allotment	12.08.2013 (annexure R-2 on page no. 71 of reply)
10.	Date of environment clearance	12.12.2013 [as per project details]
11.	Date of execution of builder buyer's agreement	28.04.2014 (page no. 63 of complaint)
12.	Date of fire scheme approval	27.11.2014 [as per project details]
13.	Reminders for payment	For Third Instalment: 13.04.2014, 04.05.2014 For Fourth Instalment: 22.02.2015, 24.03.2015 For Fifth Instalment: 09.07.2015 For Sixth Instalment: 28.08.2015 For Seventh Instalment: 28.09.2015, 10.02.2016 For Eight Instalment: 07.01.2016, 16.02.2016



		For Ninth Instalment: 07.01.2016, 16.02.2016 For Tenth Instalment: 07.12.2016, 30.12.2016
14.	Date of cancellation letter	05.01.2017 (annexure R-25 on page no. 97 of reply)
15.	Total consideration	Rs. 1,45,33,240/- [as per payment plan on page no. 99 of complaint]
16.	Total amount paid by the complainant	Rs. 44,75,361/- [as alleged by complainant]
17.	Due date of delivery of possession	23.01.2017 (calculated from the date of approval of building plans) Note: Grace Period is not allowed.
18.	Possession clause	13. Possession and Holding Charges Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, registration chares, stamp duty and other charges and also subject to the allottee



		having complied with all the formalities or documentation as prescribed by the company, the company proposes to offer the possession of the said apartment to the allottee within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder (Commitment Period). The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the Company. (Emphasis supplied)
19.	Occupation certificate	27.01.2022 (as per project details)
20.	Offer of possession	Not offered

B. Facts of the complaint

The complainant has submitted that:



3. That the respondent builder approached the complainant for booking of the apartment in the project namely "The Corridors" situated at sector-67 A, Gurugram.
4. That the complainant offered a flat of 2 BHK @ Rs. 8750/- basic sale price including EDC, IDC, PLC, parking charges and other charges.
5. That the complainant agreed to buy an apartment, the respondent issued the application form and demanded an amount of Rs. 12,00,000/- which is duly paid by him.
6. That the respondent further issued a second instalment letter dated 17.04.2013 for Rs. 15,99,513/- which contained Rs. 1,99,756/- towards unexplained arrears, Rs. 13,57,800/- towards instalment and Rs. 41,956/- towards service tax.
7. The respondent informed the complainant that the price has been increased from Rs. 8750/- per sq. ft. to price of Rs. 9200 per sq. ft. from earlier agreed price of Rs. 8750 per sq. ft. and also the size of the flat has been increased.
8. That due to such behaviour the complainant requested the refund of his money, and the respondent replied that in case the complainant wished to opt out then the booking amount of Rs. 12,00,000/- would be forfeited. In order to not give up on his unit the complainant paid instalments.
9. That on 12.08.2013 the respondent offered the allotment of the apartment. That after few months on 13.04.2014 the respondent sent a reminder letter demanding third instalment of Rs. 16,75,848/- which was duly paid by complainant.



10. That around 11.04.2014 the respondent sent three copies of buyer's agreement to complainant for signing the same. That without letting booking amount get forfeited the complainant agreed to terms and conditions and the same was executed on 28.04.2014.
11. However, the respondent had also concealed the facts about the 90 m access road and sold the apartment to the complainant without disclosing true facts. As per the buyer's agreement the entry was shown from the 90-meter road. As per actual status on the site there is no such access road available to the project neither any land has been acquired.
12. That the complainant after being fed up with lethargic and indifferent attitude of the parties filed a case before this hon'ble commission on 23.03.2015, however during the pendency of the case the landmark judgement of **Ambrish Kumar Shukla & Ors. Vs. Ferrous Infrastructure Pvt. Ltd.** was pronounced and hence vide order dated 18.10.2016 the said complaint was dismissed as withdrawn with the liberty to file under section 12(1) (c), of the consumer protection act, 1986.
13. That opposite party demanded fourth instalment and other instalments of total amount of Rs. 97,28,873/-.
14. Thereafter the complainant along with 8 other buyers also filed a suit for declaration with consequential relief of permanent injunction titled "**Rajan Gupta and Ors vs. M/s IREO Grace Realtech Pvt Ltd & Ors.**" bearing CS No. 179/2016 before the Ld. Gurgaon district court praying to pass a decree of declaration in



favour of complainant and other buyers and against the opposite parties declaring the site shown by the opposite parties in their sale brochure earmarked for laying 90 mtr wide road only and to reinstate the said 90mtr road along with a decree of permanent injunction restraining the opposite party from cancelling allotment or alienating the apartment in the name of any other person and directing the opposite parties not to force the complainant and other buyers to make pending payments on account of demands raised at enhanced rate before access is given to the project through the 90 mtr road and also directing the opposite parties not to charge any interest/ penalty till the dispute is resolved amongst a few other prayers.

15. However, the ld. trial court passed interim order on 22.12.2016 in terms of statement given on behalf of respondents that if the allottees deposit instalments @Rs.8750/- per sq. ft. within 7 days, the respondents would not cancel the allotment as interim arrangement.
16. The copy of order was delivered to complainant on 07.01.2017 as hon'ble courts were closed for winter vacation. The opposite parties cancelled the allotment of the apartment thought its letter dated 05.01.2017 i.e. before expiry of seven days as per well settled legal proposition and without any intimation to the complainant. The opposite party also conveyed that it had forfeited the entire amount paid by the complainant i.e. Rs.44,75,361/- .

C. Relief sought by the complainant:



17. The complainant has sought following relief(s):

(i) Direct the respondent to return the total amount paid to them amounting to Rs. 44,75,361/- along with interest calculated @ 18% from the date of booking the apartment till the date of realization.

(ii) Direct the respondent to grant litigation cost of Rs. 1,00,000/-

18. 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.

The respondent has contested the complaint on the following grounds: -

19. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The apartment buyer's agreement was executed between the parties prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.
20. That there is no cause of action to file the present complaint.
21. That the complainant has no locus standi to file the present complaint.

22. That the complainant is estopped from filing the present complaint by his own acts, omissions, admissions, acquiescence's, and laches.
23. That this authority does not have the jurisdiction to try and decide the present complaint.
24. That the respondent has filed the present reply within the period of limitation as per the provisions of Real Estate (Regulation and Development) Act, 2016.
25. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 36 of the residence purchase agreement.
26. That the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:
 27. That the complainant, after checking the veracity of the project namely, 'Corridor; sector 67-A, Gurugram applied for allotment of an apartment vide booking application form dated 25.03.2013. The complainant agreed to be bound by the terms and conditions



stipulated in the application for provisional registration of the residential apartment.

28. That based on the application for booking, the respondent vide its allotment offer letter dated 12.08.2013 allotted to the complainant apartment no. CD-C6-11-1103 having tentative super area of 1475.86 sq.ft for a total sale consideration of Rs. 1,45,33,240 and the buyers agreement was executed on 28.04.2014.
29. That the complainant made certain payment towards the installment demands on time and as per the terms of the allotment. However, he started committed defaults from third installment demand onwards. Vide Payment Request dated 18.03.2014, the respondent had raised the demand of third installment for net payable amount of Rs. 16,75,848.32 However, the complainant remitted the due amount only after reminders dated 13.04.2014 and 04.05.2014.
30. That vide Payment Request dated 27.01.2015, the respondent had raised the demand of fourth installment for net payable amount of Rs. 16,59,085.46/-. However, the complainant failed to pay the due amount despite reminders dated 22.02.2015 and 24.03.2015.
31. That vide Payment request dated 05.06.2016, the respondent had raised the demand of fifth installment for net payable amount of Rs.



30,73,903.43 followed by a reminder dated 09.07.2015. However, the complainant again failed to pay the due installment amount.

32. That again vide payment request dated 01.07.2015, the respondent had raised the demand of sixth installment for net payable amount of Rs. 44,88,722.43 followed by a reminder dated 28.08.2015. Yet again, the complainant defaulted in abiding by his contractual obligations.
33. That vide Payment Request 02.09.2015, the respondent had raised the demand of seventh installment for net payable amount of Rs. 60,45,467.23 followed by reminders dated 28.09.2015 and 10.02.2016. However, the same was never paid by the complainant.
34. That vide payment request dated 06.10.2015, the respondent had raised the demand of eighth installment for net payable amount of Rs. 74,60,859.43 followed by reminders dated 07.01.2016 and 16.02.2016. However, the complainant again failed to pay the due installment amount.
35. That again vide payment request dated 10.11.2015, the respondent had raised the demand of ninth installment for net payable amount of Rs.88,75,677.63 followed by reminders dated 07.01.2016 and 16.02.2016. Yet again, the complainant defaulted in abiding by his contractual obligations.



36. That again vide payment request dated 10.11.2016, the respondent had raised the demand of tenth installment for net payable amount of Rs.97,28,873.90 followed by reminders dated 07.12.2016 and 30.12.2016. Yet again, the complainant defaulted in abiding by his contractual obligations.
37. As per possession clause 13.3 of the agreement the time of handing over of possession was to be computed from the date of receipt of all requisite approvals. Even otherwise the construction could not be raised in the absence of the necessary approvals. It has been specified in sub- clause (iv) of clause 17 of the memo of approval of building plan dated 23.07.2013 of the said project that the clearance issued by the Ministry of Environment and Forest, Government of India has to be obtained before starting the construction of the project. It is submitted that the environment clearance for construction of the said project was granted on 12.12.2013. Furthermore, in clause 39 of part-A of the environment clearance dated 12.12.2013 it was stated that fire safety plan duly was to be duly approved by the fire department before the start of any construction work at site. That as per clause 35 of the environment clearance certificate dated 12.12.2013, the project was to obtain permission of mines & geology department for excavation of soil before the start of construction. The requisite permission from the department of mines & geology department has been obtained on 04.03.2014. That the fire scheme approval was granted on 27.11.2014 and the time period for calculating the



date for offering the possession, according to the agreed terms of the buyer's agreement, would have commenced only on 27.11.2014. Therefore, 60 months from 27.11.2014 (including the 180 days grace period and extended delay period) would have expired on 27.11.2019. However, the same was subject to the complainant complying with her contractual obligations and the occurrence of the force majeure events.

38. That according to agreed clauses of the booking application form and the apartment buyer's agreement, timely payment of installments within the agreed time schedule was the essence of allotment.
39. That on account of non-fulfilment of the contractual obligations by the complainant despite several opportunities extended by the respondent, the allotment of the complainant was cancelled and the earnest money deposited by the complainant along with other charges was forfeited vide cancellation letter dated 05.01.2017 in accordance with clause 21 read with clause 21.3 of the apartment buyer's agreement and the complainant is now left with no right, claim, lien or interest whatsoever in respect of the said booking/allotment.
40. That the complainant is a habitual litigator who has filed several baseless, false cases against the respondent company on untenable grounds and most of them have already been dismissed by the competent authorities. That a similar suit was filed by the complainant against the respondent and the respondent had filed an application for rejection of the plaint and the Hon'ble Civil Judge



(Junior Division), Gurugram on the basis of averments raised by the parties accepted the application filed by the respondent and dismissed the suit vide order dated 31.10.2017. That the complainant had also filed an appeal against the said order and the same was rightly dismissed vide order dated 05.05.2018. The present complaint is barred by res-judicata. The malafide tactics adopted by the complainant cannot be allowed to succeed and the present complaint is liable to be dismissed with heavy costs payable to the respondent.

41. That the implementation of the project was hampered due to non-payment of instalments by allottees on time and several other issues also materially affected the construction and progress of the project.
- Inability to undertake the construction for approx. 7-8 months due to Central Government's notification with regard to demonetization : The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f from 9-10 November 2016 the day when the central government issued notification with regard to demonetization. During this period, the contractor could not make payments to the labour in cash and as majority of casual labour force engaged in construction activities in India do not have bank accounts and are paid in cash on a daily basis. During demonetization the cash withdrawal limit



for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on the site of the magnitude of the project in question are Rs. 3-4 lakhs per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence the implementation of the project in question got delayed due on account of issues faced by contractor due to the said notification of central government.

There are also studies of Reserve Bank of India and independent studies undertaken by scholars of different institutes/universities and also newspaper reports of Reuters of the relevant period of 2016-17 on the impact of demonetization on real estate industry and construction labour.

Thus, in view of the above studies and reports, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should be deemed to be extended for 6 months on account of the above.

- Orders passed by National Green Tribunal: In last four successive years i.e., 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. The Hon'ble NGT has passed orders with regard to phasing out the 10-year-old



diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The Contractor of Respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to that, there was a delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November- December 2016 and November- December 2017. The district administration issued the requisite directions in this regard. In view of the above, construction work remained badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondent and the said period is also required to be added for calculating the delivery date of possession.

- Non-Payment of Instalments by Allottees: Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.
- Inclement weather conditions viz. Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavourable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various

institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions.

42. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

43. The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

45. Section 11(4)(a) of the Act, 2016 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)(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;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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.

46. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondents.

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

47. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.



48. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and would 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. The Act nowhere provides, nor can be so construed, that all previous agreements would 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 and 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."

49. Also, 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."

50. 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 Objection regarding complainant is in breach of agreement for non-invocation of arbitration

51. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute and the same is reproduced below for the ready reference:

"35. Dispute Resolution by Arbitration

"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".

52. 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.

53. 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 agreements 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 Appellate 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 Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

54. 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 para 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."

55. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within 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. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.

G. Findings regarding relief sought by the complainant.

- (i) Direct the respondent to return the total amount paid to them amounting to Rs. 44,75,361/- along with interest



calculated @ 18% from the date of booking the apartment till the date of realization.

56. The complainant has booked the residential apartment in the project named as 'The Corridors' situated at sector 67 A for a total sale consideration of Rs. 1,45,33,240/-. The complainant was allotted the above-mentioned unit vide allotment letter dated 12.08.2013. Thereafter the apartment buyer agreement was executed between the parties on 28.04.2014.
57. As per the payment plan the respondent started raising payments from the complainant. The complainant in total has made a payment of Rs. 44,75,361/- . The respondent vide letter dated 18.03.2014 raised the demand towards third instalment and due to nonpayment from the complainant it sent reminder on 13.04.2014 and 04.05.2014. Thereafter various instalments for payments were raised but the complainant failed to pay the same. Thereafter the respondent cancelled the allotment of the unit vide letter dated 05.01.2017. The authority is of the view that cancellation is as per the terms and conditions of agreement and the same is held to be valid. However, while cancelling the allotment of the respondent forfeited the total paid up amount by way of earnest money, interest on delayed payment, brokerage and applicable taxes. The cancellation of unit was made by the respondent after the Act, of 2016 came into force. So, the respondent was not justified in forfeiting the whole of the paid amount and at the most could have deducted 10% of the basic sale price of the unit and not more than that. Even the Hon'ble Apex



court of land in case 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**, 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 damage. The deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which 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."

58. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the deposited amount i.e., Rs. 44,75,361/- after deducting 10% of the basic sale price of the unit within a period of 90 days from the date of this order along with interest @ 9.80% p.a.



on the refundable amount from the date of cancellation i.e., 05.01.2017 till the date of its payment.

(ii) Direct the respondent to grant litigation cost of Rs. 1,00,000/-

59. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as **M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.** (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority: -

60. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the authority under sec 34(f) of the Act:-

- i. The respondent/promoter is directed to refund the amount i.e., Rs. 44,75,361/- after deducting 10% of the basic sale price of the unit along with interest @ 9.80% p.a. on the

refundable amount from the date of cancellation i.e., 05.01.2017 till the date of its payment.

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.

(iii) Complaint stands disposed of.

(iv) File be consigned to the registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 10.08.2022

HARERA
GURUGRAM