



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

Complaint no. : 731 of 2021
First date of hearing: 16.04.2021
Date of decision : 10.05.2022

1. Seema Sangar
 2. Shreya Sangar
- Both RR/o: - 31, Rail Vihar, Sharda Niketan,
Pitampura, Delhi- 110034

Complainants

Versus

1. M/s Raheja Developers Limited.
Regd. office: -W4D- 204/5, Keshav Kunj,
Cariappa Marg, Western Avenue, Sainik Farms,
New-Delhi-110062
Also, at: - Raheja Mall, 3rd floor, Sector-47,
Sohna Road, Gurugram- 122001
2. PNB Housing Finance Limited.
Regd. Office: - 9th Floor, Antriksh Bhawan,
Kasturba Gandhi Marg, New Delhi- 110001

Respondents

CORAM:

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Sh. Shayon Chakarbarti (Advocate)
Sh. Rahul Bhardwaj (Advocate)
Sh. Venkat Rao (Advocate)

Complainants
Respondent no. 1
Respondent no. 2

ORDER

1. The present complaint dated 17.02.2021 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 provision of the Act or the rules and regulations made there under or to the allottees 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 complainants, 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 of the project	"Amaltaas Tower" (tower- B), in Raheja Vanya, Sector 99A, Gurugram.
2.	Registered area	2.21 acres
3.	Project area	12.48675 acres
4.	Nature of the project	Residential group housing project
5.	DTCP license no. and validity status	i. 64 of 2013 dated 20.07.2013 valid up to 19.07.2017 ii. 72 of 2014 dated 01.08.2014 valid up to 31.07.2019
6.	Name of licensee	Smt. Ajit Kaur D/o Pritpal singh and 2 others
7.	Date of approval building plans	02.01.2017 [as per information obtained by the web site of DTCP Haryana]
8.	RERA Registered/ not registered	Registered vide no. 18 of 2017 dated 06.07.2017
9.	RERA registration valid up to	5 Years from the date of revised Environment Clearance
10.	Unit no.	B-193, 19 th floor, Tower/block- B (Page no. 24 of complaint)



11.	Unit area admeasuring	1676.51 sq. ft. (Page no. 24 of complaint)
12.	Allotment letter	27.10.2017 [Page 3 of complaint]
13.	Date of execution of agreement to sell	27.10.2017 (Page no. 22 of the complaint)
14.	Date of execution of tripartite agreement	27.10.2017 [Page 54 of complaint]
15.	Possession clause	19 Possession of the Apartment 19.1 <i>The company agrees and understands the timely the delivery of the possession of the apartment is the essence of the agreement. The company based on the approved plans and specifications, assures to handover possession of the apartment in a period of 48 months minus/plus 6 (six) months variable grace period ("commitment Period") from the date of execution of the agreement for sale and receipt of unless there is delay or failure due to delay in government clearance or delay in Nocs & court injunction or war, flood, drought, fire, cyclone, earth quick, delay in providing necessary external infrastructure such as laying of sewer/water supply line, road, electrification etc. or inadequacy or any other calamity caused by nature affecting the regular development of the real estate project ("force majeure"). If, however, the completion of the project is delayed due to the force majeure conditions or any condition causing</i>

		<p><i>delay which is not under the direct control of company then the allottee agrees that the company shall be entitled to the extension of time for delivery of possession of the apartment, provided that such force majeure conditions are not of a nature which make it impossible for the agreement to sale to be implemented. The allottee agrees and confirms that, in the event it becomes impossible for the company to implement the project due force majeure conditions, then allotment shall stands terminated and the company shall refund to the allottee the entire amount received by the company from the allotment within 45 days from the date subject to provisions of balance availability in the escrow account. The allottee agrees that upon dispatch of the cheque or RTGS towards refund, he/she shall not have any rights, claims etc. against the company whatsoever.</i></p> <p>(Page 33 of the complaint).</p>
16.	Due date of possession	27.04.2022 [Note: - Grace period of 6 months allowed being unconditional and unqualified]
17.	Total sale consideration	Rs.1,56,65,760/- (As per customer ledger dated 01.06.2021 page no. 37 of reply)
		Rs.1,39,92,642/- (As per payment plan page 32 of the complaint)



18.	Amount paid by the complainants	Rs.35,42,777/- (As per customer ledger dated 01.06.2021 page no. 37 of reply)
19.	Occupation certificate	Not received
20.	Offer of possession	Not offered
21.	Surrender by allottee	08.09.2019 [Page no. 74 of the complaint]

B. Facts of the complaints

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

- I. That the complainant no. 1 is wife of late Mr. Sanjiv Sangar who was the first allottee of a unit bearing no. B-193, on 19th floor, in tower- B, in the project being Raheja Vanya, Sector- 99A, Gurugram Haryana, being developed by the respondent no. 1. The complainant no. 1 along with her son complainant no. 2, Mr. Shrey Sangar is co-allottee of the said unit.
- II. That in the year 2017, the complainant no. 1 and her deceased husband had come across certain advertisements about the project. Vide an application, the complainant no, 1's deceased husband had applied for booking a unit in the said project, with the complainant nos. 1 and 2 as co-applicants thereof. An amount of Rs.13,97,000/- was also paid to the respondent no. 1 i.e., builder in two instalment as booking amount which was duly acknowledged by the respondent/builder by way of receipts dated 22.08.2017 and 14.09.2017.

- III. That, consequent to the same the respondent/builder issued an allotment letter dated 27.10.2017 addressed to the complainant no. 1's deceased husband and the complainants about the allotment of the said unit, i.e., B-193, 19th floor, at tower-B, admeasuring approximately 1676.51 sq. ft. exclusively balcony areas admeasuring 160 sq. ft.
- IV. That, pursuant to the allotment, an agreement to sell/buyer's agreement dated 27.10.2017 was executed between respondent /builder and the complainant no. 1's deceased husband, the complainant no. 1, deceased husband, for a total price of Rs.1,39,92,642/- for the unit based on carpet area.
- V. That clause 1.2 of the agreement to sell also acknowledged that the buyers had as on date of execution of the said agreement, have already paid an amount Rs.13,97,000/-. Given the huge amount the buyer's had decided to take a loan from respondent no. 2, i.e., PNB Housing Finance Ltd. for financing the purchase of the said unit. Pursuant to the same 'Permission to Mortgage' was granted by the respondent/builder on 27.10.2017.
- VI. That, thereafter a tripartite agreement dated 27.10.2017 (subvention scheme) was executed between the respondents, and the buyers. The disbursed loan amount to the buyer's is to the tune of Rs.20,92,019/- out of sanctioned loan amount of Rs.1,17,11,000/-.



- VII. That the buyers continued to pay the loan taken from the respondent no. 2 and demands raised by respondent/builder towards the said unit in a timely manner. Till date the respondent /builder has received an amount of Rs.34,75,756/- along with interest 18% p.a. towards the said unit.
- VIII. That as fate would have it, due to grave misfortune complainant no. 1's husband Late Mr. Sanjiv Sangar met his untimely death and left for his final abode on 16.01.2019. The sad demise subjected the complainants to a great deal of hardship. That, thereafter also the complainant no. 1 continued to meet the obligations towards repayment of loan and demands of respondent/builder towards the said unit in a timely manner. However, her husband unfortunate and sudden demise and strain of being the sole bread winner for her family began putting a drain on complainant no. 1 limited new resources. Add to it the fact that two of her children were still pursuing their education and her liabilities as a widow were humongous.
- IX. That on 08.09.2019, complainant no. 1 wrote an email to respondent no. 1 duly intimating it of the sad demise of her husband, and the ensuing financial constraint on her resources. The complainant no. 1 formally requested for withdrawal of the allotment of the said unit due to the harsh circumstances at her end. However, till date, the respondent/builder has failed to

acknowledge the death of complainant no. 1's husband or to transfer the allotment in complainants' favour.

- X. That on 17.09.2019, the respondent/builder responded vide an email confirming that if the complainant no. 1 wants to opt for cancellation/withdrawal, the same can be processed further as per the terms and conditions or the BBA. It also added that the refund would be processed. *"Once the unit is allocated to other"*.
- XI. It is pertinent to mention at this stage that clause 19.5 enumerates the procedure to be followed in case an allottee opts for cancellation of the allotment.
- XII. That the said clause is blatantly illegal and unconscionable in as much as it necessitates substitution of the equivalent amount from the next purchaser and subject to provisions of balance in the escrow account. Such one-sided terms have been held to be untenable in a string of judicial pronouncements. It is humbly submitted that the said condition is an unfair obligation on the complainants with malicious intent of the respondent/builder. It falls within the purview of "unfair contract" and "unfair trade practice" and is liable to be struck down.
- XIII. That the complainant no. 1, vide an email dated 14.02.2020 formally wrote to the respondent no. 1 duly re-intimating about the demise of her husband and reiterating request for the substitution of herself and complainant no. 2 as first and second



allottee respectively. The respondent no. 1 vide an email dated 18.02.2020 intimated the complainant no. 1 that they would get back with details however till date they have failed to take any action in that in this regard.

- XIV. It is stated that the annexure A of the Haryana Real Estate (Regulation and Development) Rules, 2017 provides that in case, the allottee, wishes to seek withdrawal from the project, while the promoter is entitled to forfeit the booking amount and interest component in delayed payment, all remaining monies received shall necessarily be returned by the promoter to the allottee within 90 (Ninety) days of such cancellation. It is stated that admittedly, the Agreement to Sell dated 27.10.2017 provided that the complainants, in case of withdrawal from the project, would be entitled to refund of monies within 45 (Forty-Five) days of cancellation after substitution of the equivalent amount from the subsequent buyer and subject to provisions of balance in escrow account without affecting the on-going construction of the project. It is imperative to state that the respondent no. 1 has conveniently failed to bring to the attention of this authority, the provision for withdrawal by the allottee from the project, which further establishes that the respondent/promoter is grossly misrepresenting and misleading the complainants. Clause 7.5 of

annexure- A of the rules, 2017 is reproduced hereinbelow for the ready reference of this Authority:

7.5 Cancellation by Allottee - *The Allottee shall have the right to cancel/ withdraw his allotment in the Project as provided in the Act: Provided that where the allottee proposes to cancel/ withdraw from the project without forfeit the booking amount paid for the allotment an interest component on delayed payment (payable by the customer for breach of agreement and non-payment of any due payable to the promoter). The rate of interest payable by the allottee to the promoter shall be the State Bank of India highest marginal cost of lending rate plus two percent. The balance amount of money paid by the allottee shall be returned by the promoter to the allottee within ninety days of such cancellation".*

- XV. Thus, the respondent/promoter is liable to refund the requisite amount to the complainants or the respondent no. 2, as the case may be in consonance with the applicable law and by no stretch of imagination, the respondents deprive the complainants of their legitimate dues. Clause 19.5 of the said agreement as far as quantum of forfeiture and methodology of refund in case of withdrawal, i.e., only after resale is contrary to the intent set out in the Act of 2016 and the withholding of the monies by the respondent/promoter is clearly illegal and highly arbitrary. The intentional one-sided agreement format which the respondent /promoter has forced its customers to execute, in contrary to the Act of 2016 and the rules of 2017, is itself violative of law and misutilization by the respondent/promoter of its dominant position. It is stated that assuming for the sake of arguments that the money is to be refunded to the complainants in accordance



with the said agreement, in such an eventuality, assuming, the respondent/promoter is unable to sell the flat for a considerable period, the complainants shall be left at peril for an indefinite period, which shall not only cause grave prejudice to the complainants but shall also deprive the complainants of their legitimate dues.

- XVI. That in terms of clause 8 of the tripartite agreement, in case, the complainants fail to pay the balance amount representing the difference between in the loan sanctioned by the respondent no. 2 and the actual price of the said unit, the entire amount advanced by the respondent no. 2 would be refunded by the respondents. Therefore, it is evident that the complainants were well within their rights to cancel the allotment of the said unit and seek refund of monies in terms of the said agreement. It is noteworthy to state that the respondent no. 2 is liable to seek any money, if so advised, from the respondent /promoter, which shall be in conformity with the tripartite agreement.
- XVII. That the complainant no. 1 vide emails dated 19.03.2020, 30.03.2020 and 07.04.2020 duly sought a copy of the agreement in relation to the "subvention scheme" for her information, however, no affirmative response whatsoever was received from the respondent no. 1.

XVIII. That despite the right of the complainant no. 1 under the said agreement to sell and existing laws in this regard, the respondent /builder has till date failed to allotment of the said unit. The complainant no. 1 and the respondent/promoter has exchanged a string of emails in regard thereto, but the respondent/promoter has failed in its duty to comply with the request.

XIX. That upon the wrongful refusal of the respondent no. 1 to cancel the said allotment the complainants sent a legal notice dated 16.09.2020 to the respondent/promoter calling for:

- Providing agreement and details in relation to the subvention scheme for the loan account of complainants issued by respondent no. 2.
- Refund monies to the tune of Rs.13,97,000/- paid by the complainants to respondent no. 1 along with interest 18% pa. from the date of each payment until the date of receipt of all monies.
- Refund an amount of Rs.20,92,019/- to the respondent no. 2 in terms of the tripartite agreement dated 27.10.2017 along with interest 18% p.a.

XX. That on 17.06.2020, the complainant no. 1 had also written an email to respondent no. 2 requesting for a copy of the "subvention scheme" executed between buyers, respondents. The respondent no. 2 had responded vide email dated 19.06.2020 asking the complainant no. 1 to visit their branch for the same.

XXI. That in addition to other difficult circumstances the complainants are also incurring a heavy interest on the sanctioned loan amount by respondent no. 2 which has put an extreme burden on the



complainant no. 1 who as stated hereinabove is the sole earning member of the family.

- XXII. That illegal and erroneous refusal on the part of the respondent/builder seeks of malicious intent of the respondent/builder to cause wrongful loss to the complainants and in the process cause wrongful gain to itself. The intentional delay on the part of the respondent/builder to process the request and sudden change in stand to outright refuse the request of the complainants reflects the dishonest intent on the part of the respondent no. 1. The refusal to withdraw the allotment and refund the monies of the complainants tantamount to an unfair trade practice on the part of the respondent/builder.
- XXIII. The respondent/builder is liable to refund the amount paid by the complainants to the respondent/builder along with interest. The respondent/promoter is also liable to refund the heavy interest that the complainants have paid to the respondent no. 2 as repayment of loan.
- XXIV. That the cause of action to file the present complaint is a subsisting one which first accrued on 08.09.2019 when the respondent/builder wrote formally to the promoter to cancel the allotment. It further accrued every time the respondent/builder sought more time or continued to delay the refund process on one pretext or another.

XXV. That the complainants reserve their right to pursue appropriate concurrent remedies and otherwise against the respondent as may be available to him under various laws.

C. Relief sought by the complainants:

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

- I. Direct the respondent/promoter to cancel the allotment of the said unit of the complainants and refund the amount of Rs.13,97,000/- with interest @ State Bank of India highest marginal cost of lending rate plus two percent per annum thereupon.
 - II. Direct the respondent/promoter to refund the amount of Rs.20,92,019/- interest at the State Bank of India highest marginal cost of lending rate plus two percent per annum thereupon.
 - III. Direct the respondent/promoter to the complainants an amount of Rs.3,00,000/- on account of mental agony, suffered and harassment undergone by the complainants due to the acts and omissions of the respondent.
 - IV. Award litigations cost and favour of the complainants to the tune of Rs.2,00,000/- only as on date of filing of this complaint.
5. On the date of hearing, the authority explained to the respondents /promoters about the contravention 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 no. 1



6. The respondent no. 1 contested the complaint on the following grounds: -
- I. That the present complaint is based on vague, misconceived notions and baseless assumptions of the complainants and are, therefore, denied. That the complainants have not approached this authority with clean hands and have suppressed the true and material facts from this authority.
 - II. That the agreement as read and understood by the complainants are drafted on the basis of the format of the agreement as provided in the rules of 2017 and has been signed by the complainant after going through and agreeing with each and every clause of the agreement. That as per section 13 of the Act of 2016, the agreement needs to contain the details of the schedule of payments. Further, as per 19(6) of the Act the agreement needs to contain the details of the schedule of payments at the proper time as specified in the agreement and under section 13 of the Act. Further, as per section 19(7) of the Act, the allottee shall be liable to pay interest at the prescribed rate as is specified in the agreement for any delay in payment towards any amount or charges that are payable in terms of section 19(6), meaning hereby that the builder can levy interest upon the allottee for any delay in payments made by the allottee as per the schedule of payments in the agreement.

- III. That the respondent has filed the reply as per provisions of the Act of 2016.
- IV. 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 45 of the agreement to sell.
- V. 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 by it 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: -
- That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as 'Raheja Atlantis', 'Raheja Atharva', 'Raheja Shilas' and 'Raheja Vedanta' and in most of these projects a large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.



- Raheja Vanya in one of the Greenest Group Housing projects of Gurugram, and is bordering continuous green belt, (Gurugram and Delhi Master Plans). The project is spread over 12.48 acres. It consists of 3 towers of ground plus 19th floors and 1 tower of ground plus 34 floors. Vanya is a stimulating fusion of eclectic thinking, structural dynamism and international parameters. The magnificent edifice owes its conceptualization to Aedas Singapore, the world renowned architectural and design powerhouse.
- That the complainant, after checking the veracity of the project namely, "Raheja Vanya" sector- 99A, Gurugram had applied for allotment of an apartment vide its booking application form. The complainant agreed to bound by the terms and conditions of the agreement. The complainant was aware from the very inspection and had acknowledged in clause 19.5 of the agreement to sell dated 27.10.2017.

D.II. Reply by the respondent no. 2

7. The respondent no. 2 has contested the complaint on the following grounds: -

- I. That the PNB Housing Private Limited is one of the largest housing finance company duly registered with the National Housing Bank and is law abiding listed public company, primarily

engaged in the business of rendering home loan/finance facility, predominantly against the security of immovable properties.

- II. That this authority does not have the jurisdiction to entertain the present complaint against the respondent no. 2 as section 31 of the Act mandates filing of complaint for any violation or contravention of the provisions of the Act or rules and regulations made thereunder only against any Promoter, Allottee or Real Estate Agent and the respondent no. 2 does not fall under any of those categories and consequently is incapable of committing any violation or contravention of the provisions of the Act as the provisions contain duties and obligations only of the three entities mentioned above viz. , promoters, allottees and real estate agents.
- III. That the promoter M/s Raheja Developers Limited (respondent no. 1) in respect of the apartment/unit described in the project "Raheja Vanya" situated at sector- 99A, Gurugram Haryana for failure on the part of the promoter to acknowledge the death of the complainant's husband and to cancel the allotment of the unit. The complainant had prayed for refund of an amount of Rs.13,97,000/- paid at the time of booking the unit and disbursed loan amount of Rs.20,92,019/- paid to the promoter/developer.
- IV. That the complainants have grievances with the promoter related to the allotment and cancellation of the unit and the complainants



have neither sought any relief from the respondent no. 2 nor are there any grievance against the financial institute. It is therefore submitted that the respondent no. 2 cannot be made a party to the present case, and it is also pertinent to note that no relief has been sought from the respondent no. 2.

- V. That the complainants have opted for and booked a unit in the project themselves. As the complainants was falling short of finance for purchase of the unit, the complainants approached the financial institute seeking extension of a loan facility, which, after necessary assessment, was duly sanctioned for an amount of Rs.1,17,11,000/-.
- VI. That, at the time of purchase of the property by the complainants, the respondent no.1 was granting an interest subvention on the loan availed whereunder the complainants would receive the *pre-EMI* from the builder/promoter until possession of the unit was delivered. The complainants by their own volition opted for the Subvention Scheme being offered by the respondent no.1. It is further submitted that the complainants have duly read all the terms and conditions of the subvention scheme and agreed to the same and thereby the promoter and the complainants approached the respondent no. 2, in furtherance to which the tripartite agreement was entered into, however, subject to terms and conditions of the loan agreement.

- VII. That it is relevant to point out that the complainants with their own free consent had approached the respondent no. 2 to avail the loan facility in order to get financial assistance to purchase the unit/apartment in the said project. Further, a mere perusal of the loan agreement read with the tri partite agreement, makes it evident that it is the duty of the borrowers/complainants to pay the EMIs to the respective loan amount and the ultimate liability to pay the entire outstanding amount was always envisaged to be that of the borrowers/complainants.
- VIII. That the complainants were fully aware of the terms and conditions at the time of executing the tripartite agreement and was also aware of the fact that the respondent no. 2 is just providing financial assistance and nothing more to the complainant. It is further submitted that the grievances related to refund of booking amount and related issues are subject matter between the promoter and the complainants.
- IX. That it is pertinent to mention that the respondent no. 2 is a financial institution and had advanced a loan facility to the complainant for purchase of a unit/apartment after being approached by the complainant for the mentioned intention and on the representation made by the complainant that the builder/promotor (*respondent no.1*) is of their choice and that they have satisfied themselves with regard to integrity and



- capability of the builder for quality construction and the builder's ability and efficiency in timely completion and delivery of the project.
- X. That further, at the time of executing the tri-partite agreement, the complainants represented, and such representation being a continuing representation since the execution of the tripartite agreement, that their obligation to repay the loan shall be distinct and independent obligation more particularly independent of any issues/concern/dispute of whatsoever nature between the complainants and promoter. The complainants even undertook that subsequent to the disbursements as requested by them, there would be no repayment default for any reason whatsoever including but not limited to any concern/issues by and between the borrowers and the builder/developer.
- XI. That the complainants are bound by the terms and conditions of the loan agreement read with the most important terms and conditions executed with the respondent no. 2 and the tri-partite agreement dated 27.10.2017 entered into between the complainants and the respondents.
- XII. That there exists no cause of action against the respondent no. 2 as the complaint has arisen from builder buyer agreement and is primarily regarding the cancellation/surrender of the allotted unit. Therefore, there exists no cause of action against the

respondent no. 2 and has been impleaded unnecessarily. Furthermore, it is apparent that all the allegations levelled by the complainants and their entire grievance is exclusively against the promoter, who have utterly failed to fulfil their obligations towards cancellation of the unit within the stipulated time. A perusal of the aforementioned builder buyer agreement clears the fact that the respondent no. 2 is incapable of committing any violation or contravention of the provisions of the said agreement or the provisions of the Act as the respondent no. 2 is nowhere responsible for the cancellation and refund of the amount.

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 on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

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

E.1 Territorial jurisdiction

9. 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

10. 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.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by 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 complainants at a later stage.
12. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters*

and Developers Private Limited Vs State of U.P. and Ors.” and followed in case of Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 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”

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

F. Findings on the objections raised by the respondent/promoter

F.I. Objection regarding complainants is in breach of agreement for non-invocation of arbitration

14. The respondent/promoter had raised an objection for not invoking arbitration proceedings as per the provisions of agreement to sell which contains provisions regarding initiation of arbitration proceedings in

case of breach of agreement. The clause 45 has been incorporated w.r.t arbitration in the buyer's agreement: -

45. Dispute Resolution

"All or any disputes arising out or touching upon in relation to the terms of this Application/Agreement to Sell/ Conveyance Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereof for the time being in force. The arbitration proceedings shall be held at the office of the seller in New Delhi by a sole arbitrator who shall be appointed by mutual consent of the parties. If there is no consensus on appointment of the Arbitrator, the matter will be referred to the concerned court for the same. In case of any proceeding, reference etc. touching upon the arbitrator subject including any award, the territorial jurisdiction of the Courts shall be Gurgaon as well as of Punjab and Haryana High Court at Chandigarh.

15. 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 the same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

16. 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 complainants and builders 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."

17. 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."

18. 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 her 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.

G. Findings on the relief sought by the complainant

- G. I** Direct the respondent/promoter to cancel the allotment of the said unit of the complainants and refund the amount of Rs.13,97,000/- with interest @ State Bank of India highest marginal cost of lending rate plus two percent per annum thereupon.
- G. II** Direct the respondent/promoter to refund the amount of Rs.20,92,019/- interest at the State Bank of India highest marginal cost of lending rate plus two percent per annum thereupon.
19. In the present matter, the allottee no. 1 namely late Sh. Sanjiv Sanger has expired on 16.01.2019. The copy of death certificate issued by the North Delhi Municipal Corporation dated 29.01.2019 has been annexed with the paper book (page 73 of complaint). Thereafter, the complainant no. 1, continued to meet obligation towards repayment of loan and demands for respondent no. 1 i.e., promoter/developer towards the said unit in a timely manner. The complainant no. 1 being the sole bread winner for her family began putting a drain on complainant no. 1 limited resources. Being the mother of two sons, who

are still pursuing their education, her liabilities as a widow are humongous.

20. The complainant no. 1 wrote an email to the respondent no. 1 on 08.09.2019, and even requested withdrawal of the allotment of the said unit due to the harsh circumstances at her end. On 17.09.2019, the respondent no. 1 responded vide an email confirming that if the complainant no. 1 wants to opt for cancellation/withdrawal, the same can be process further as per the terms and condition of the BBA. It also added that the refund will be processed "... once the unit is allotted to other."
21. Further, as per Clause 19.5 of the agreement to sell dated 27.10.2017, talks about cancellation by allottee. The relevant part of the clause is reproduced as under:
- "Provided that where the allottee proposes to cancel /withdraw from the project without any fault of company herein is entitled to forfeit the Application Fee towards Earnest Money, Govt, dues and taxes default interest and other dealer commission paid for the allotment. The balance amount of money, if any, paid by the allottee shall be return by the Company to the allottee within 45 days of such cancellation after substitution of the equitant amount from the next purchaser and subject to provisions of balance in escrow account without affecting the ongoing constructions of the project execution including its current liabilities."*
22. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(1), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 19.1 of the agreement to sell executed between the

parties on 27.10.2017, the possession of the subject apartment was to be delivered within 48 months plus 6 months grace period i.e., 27.04.2022. The authority further observes that in the present matter, the complainant no. 1 wrote an email to the respondent/promoter on 08.09.2019, and even requested withdrawal of the allotment of the said unit due to the harsh circumstances at her end. On 17.09.2019, the respondent/promoter responded vide an email confirming/agreed that if the complainant no. 1 wants to opt for cancellation/withdrawal, the same can be process further as per the terms and condition of the BBA. It also added that the refund will be processed "*... once the unit is allotted to other*"

23. Accordingly, the authority hereby directs the respondent/promoter to cancel the unit and return the amount after forfeiting earnest money of 10% of sale consideration of unit along with interest @9.40% per annum (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid.*

G.III Direct the respondent/promoter to the complainants an amount of Rs.3,00,000/- on account of mental agony, suffered and harassment undergone by the complainants due to the acts and omissions of the respondent.

G. IV Award litigations cost and favour of the complainants to the tune of Rs.2,00,000/- only as on date of filing of this complaint.

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

H. 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/promoter is directed to refund the amount after forfeiting earnest money of 10% of sale consideration of unit along with interest @9.40% per annum as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.

- ii. The respondent is further directed that the outstanding loan paid by the bank be refunded to the financial institution.
 - iii. The balance amount with the respondent/builder after paying the financial institution be refunded to the complainants along with interest at the prescribed rates.
 - iv. 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.
26. Complaint stands disposed of.
27. File be consigned to registry.

V.K. Goyal
(Vijay Kumar Goyal)
Member

[Signature]
(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 10.05.2022

HARERA
GURUGRAM