BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 5678 of 2019
Date of decision : 05.05.2022

1. Mrs. Manorma Chauhan
2. Ms. Rashmi Mehta
3. Ms. Namrata Jaggi

Address:- E/052, Raheja Atlantis, Sector-31, Gurgaon Haryana, 122001 **Complainants**

Versus

M3M India Pvt. Ltd.
Registered address: - Paras Twin Tower B, 6th floor, Golf Couse Road, Sector-54, Gurugram-122002 **Respondent**

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

APPEARANCE:
Shri Siddhart Sharma Advocate for the complainants
Ms. Shriya Takkar Advocate for the respondent

ORDER

1. The present complaint dated 26.02.20121 has been filed by the complainants 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 complainants, 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 4 of the promoter information
6.	Rera registration	N.A
7.	OC received on	25.07.2017 (Page 145 of the reply)
8.	Unit no.	MGE-2 TW-05/11A, level-11, tower-05
9.	Unit area	3655 sq. ft.

10.	Date of allotment	18.12.2010
11.	Date of builder buyer agreement	14.03.2011 (Page 86 of the complaint)
12.	Possession clause	**14 Possession of the apartment** **14.1 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). should the possession of the apartment be not given within the time specified above the allottee agree to provide the company with an extension of six month from the expiry of the original period for handing over the same.* ***(Emphasis supplied)***
13.	Due date of possession	28.12.2015 (Due date of the possession is calculated from the date of mud slab i.e., 28.12.2012)
14.	Total sale consideration	Rs. 3,92,730,42/- (As per the schedule of the payment on page 116 of the reply
15.	Amount paid by the respondent	Rs.99,78,150/-

		(As per statement of account, page 86 of the complaint)
16.	Notice of offer of possession	18.12.2017 [Page 84 of complainants]
17.	Delay in handing over of possession till the date of offer of possession	1 year 11 months and 20 days
18.	1. First pre- cancellation letter issued on	10.05.2018
	2. Intimation of termination	29.05.2018 (Page 153 of reply)
19.	Grace period utilization	Not allowed

B. Facts of the complaint

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

i. That on 04.12.2010, the complainants no. 2 along with her mother Smt. Manorama Chauhan (complainants no. 1), Smt. Namrita Jaggi (complainants no. 3) along with late Mr. Rajiv Mehta (husband of complainants no. 2) and Mr. Dharmenda Chauhan (brother of complainants) visited the property of the respondent. That the complainants no. 1 and 3 along with Mr. Rajiv Mehta booked a flat in the said project and made a payment of Rs. 33,30,000/- that after certain difference between complainants no. 1 and 3 with Mr. Rajiv Mehta, the complainants decided not to book a flat in the said project and decided to make a stop payment of the cheque bearing no. 023958 of Rs. 33,30,000/- and the same was duly

acknowledged by Ms. Pallavi Shah, sales executive of the respondent.

ii. That on 10.12.2010, the complainants visited the said project and met Ms. Pallavi Shah and asked her to book another flat under the name of the complainants and paid earnest amount of Rs. 33,30,000/- considering the fact that the amount paid on 04.12.2010 has been stopped and the booking form filled under the name of Mr. Rajiv Mehta along with complainants no. 1 and 3 has been cancelled. That on 14.12.2010, the complainants received an acknowledgment receipt confirming the payment of Rs. 33,30,000/- in the said project.

iii. That the respondent sent a welcome letter dated 18.12.2010 to the complainants. That the respondents on 18.12.2010 sent a provisional allotment letter for the apartment no. MGE-2 TW-05/11 a, in the said project M3M GOLF ESTATE, FAIRWAY EAST, Sector-65, Gurgaon measuring 339.68 Sq. mt. for total base price of Rs. 3,32,60,500/-. That the complainants paid a further sum of Rs. 33,22,100/- on 8.01.2011 and the same was duly received and acknowledged by the respondents vide receipt no. 1590. That the respondent sent a letter dated 05.02.2011 sending the BBA to the complainants along with schedule of payment for the allotted apartment booked by the complainants in the said project. That the respondent sent a letter dated 21.02.2011 requesting the complainants to make payment of Rs. 33,26,050/-. That the BBA was executed between the complainants and respondent wherein it was mentioned that the respondent would hand over the

possession of the said apartment to the complainants within 36 months as per clause 14.1 of the BBA 14. That the complainants received a reminder letter dated 17.03.2011 requesting the complainants to make further payment of Rs. 33,26,050/- failing which the respondent would penalize the complainants and also attract delayed interest charge at 24% per annum. That the respondent sent another letter dated 18.03.2011 requesting the complainants to pay the service tax of Rs. 1,71,292/- for the payments made by the complainants on 14.12.2010 and 28.01.2011. That the complainants received another reminder letter dated 28.03.2011 requesting the complainants to make further payment of Rs. 33,26,050/- failing which the respondent would penalize the complainants and also attract delayed interest charge at 24% per annum.

iv. That the respondent sent a letter to the complainants acknowledging that the second copy of the BBA has been duly executed for apartment no. MGE-2 TW- 05/11 a. That due to grave error committed by the respondent, the complainants had to suffer majorly mentally and financially as Late Mr. Rajiv Mehta, husband of complainants no. 2 started to receive communication w.r.t. the cancelled booking from the respondents, despite the fact that the initial booking dated 04.12.2015 was cancelled by the complainants no. 1 and 3. That due to this error committed by the respondents, multiple litigations were invited by the respondents and Late Mr. Rajiv Mehta filed criminal complainants and civil suits against the complainants herein and respondent for cancellation of the apartment which actually was never booked by

Late Mr. Rajiv Mehta and that by them and no penalty would be pressed on them, as it was fault of the respondent and not of the complainants. That despite the assurances and promises made by respondent that no penalty or extra charges would be demanded, the respondent raised fresh demands from the complainants seeking heavy penalty, whereas it was due to delay and negligence of the respondent and unwanted litigation against the complainants.

V. That the respondent sent another reminder letter dated 06.04.2016 demanding Rs.2,69,96,027/-for the allotment of the apartment which was booked in 2010. That almost after 7 years the respondent sent a letter offering possession of the said apartment sent a pre- cancellation notice to the complainants. The complainants was further threatened cancellation of the said apartment if the complainants fail to pay a sum of Rs. 5.88.34.027/-. That the respondent sent an intimation of termination letter to the complainants for the said apartment in the project and without mentioning that an amount of Rs. 99,78,150/- already received by them.

C. Relief sought by the complainants

4. The complainants are seeking the following relief:

   i. Refund the entire amount along with interest.

   ii. The respondent guilty of indulging into unfair practices to provided services to th complainants and award a compensation of Rs.10,00,000/- along with interest.

D. Reply filed by the respondent-promoter

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

   i. That the complaint filed by the complainants is baseless, vexatious and is not tenable in the eyes of law and therefore the complaint deserves to be dismissed at the very threshold. That the present complaint is not maintainable as this hon'ble adjudicating officer has no jurisdiction to entertain the present complaint. That the complainants have failed to make out a case under section 12,14,18 and 19 of the RERA Act 2016 and thus the complaint is liable to be dismissed at the very threshold.

   ii. The complaint relating to cancellation of allotment by a promoter, is specifically reserved for consideration by the hon'ble authority under Section 11(5) of the RERA Act. That Section 11(5) is reproduced herein below for the ready reference:

> *"11(5) The promoter may cancel the allotment only in terms of the agreement for sale:*
>
> *Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause."*

   iii. The respondent sent an apartment buyers agreement to the complainants vide letter dated 05.02.2011 for execution at their end. The apartment buyer's agreement was executed between the parties on 14.03.2011. That the complainants were well aware about their duty under the agreement to make timely payments. That despite being aware that they are duty bound to make timely

payments, the complainants herein defaulted in making payments and the respondent was to issue reminder letters dated 17.03.2011, 14.11.2012, 07.12.2012, 25.06.2013, 08.11.2013, 22.02.2014, 21.07.2014, and 06.04.2016 to the complainants herein. That clause 11.1 of the apartment buyers agreement clearly states that the allottee was under the obligation to make timely payment of every instalment. for ready reference of this hon'ble authority that relevant clause is reproduced herein below:

> *"11.1 Time is the essence with respect to the Allottee(s) obligation/s to make timely payments towards the price of the said Apartment in accordance with the Schedule of Payments as given in Annex "A" along with other payments, such as, applicable stamp duty, registration fee, interest free maintenance security deposit and other charges, deposits, as stipulated under this Agreement to be paid on or before the due date or as and when demanded by the Company as the case may be and also to perform or observe all the other obligations of the Allottee(s) under this Agreement."*

iv. That without prejudice to the submission as made above , it is humbly submitted that in the intervening period 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 respondent 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 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 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 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna Riverbed. These orders infect inter-alia continued till the year 2018. Similar orders 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 material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity as detailed aforesaid 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. The time taken by the respondent to develop the project is the usual time taken to develop such a project of such a large scale.

v. Occupancy certificate for the complex being 'M3M golf estate fairway east' was granted by the competent authority after due

verification and inspection on 25.07.2017. Upon the completion of the apartment and consequent receipt of occupancy certificate, possession of the apartment was offered to the complainants vide notice of offer of possession dated 18.12.2017 and the same is a matter of record. That thereafter the complainants were requested to come forward to take over the possession of the unit in question and clear all the dues and formalities in respect of the said unit. however, the complainants failed to come forward to take the possession of the unit and clear their outstanding dues even after various reminders and communications. Therefore, the respondent was constrained to issue a pre-cancellation letter dated 10.05.2018 to the complainants. even after the issuance of the pre-cancellation letter, the complainant did not come forward to take the possession of the apartment and clear their dues and hence, the respondent issued a termination letter dated 29.05.2018 to the complainants thereby cancelling the allotment of the apartment in question in accordance with the apartment buyer's agreement executed between the parties on 14.03.2011.

vi. It is stated that the complainant had of their own free will opted for a construction linked payment plan and were thus time and again aware of the actual stages of construction as the demands were raised by the respondent only after the relevant construction milestones were achieved. it is however, stated that the despite the complainants having chronically defaulted in making timely payments and breaching their contractual obligations, the respondent diligently pursued and constructed the project in accordance with the agreed terms of the said agreement i.e. the

apartment buyer's agreement. it is submitted that the timeline for possession is a part of apartment buyer agreement executed between the parties and it is very clear from the terms therein that the timeline for possession was not concrete and was subject to certain contingencies and just and fair exceptions including timely payments by the allottees. It is matter of record that the respondents have been chronic defaulters in making payments and several reminders have been sent to the respondents.

vii. That the complainants have till date paid an amount of Rs. 99,78,150/- out of the total sale consideration of Rs. 4,11,50,498/-. Thus, the total loss calculated comes to rs.3,44,95,812/- which includes earnest money deduction @15% to the tune of Rs. 61,14,927/-, taxes to the tune of Rs. 17,98,906/- and further sum of Rs. 2,65,81,979/- was the interest payable by the complainants for the delayed payments. Thus, the complainants are not entitled to get any reliefs as sought for from this hon'ble authority. Failure on the part of the complainants to perform their contractual obligations disentitles them from any relief. that the apartment buyer's agreement was entered into between the parties on 14.03.2011 and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. the said agreement was duly signed by the complainants after properly understanding each and every clause contained in the agreement. The complainants was neither forced nor influenced by the respondent to sign the said agreement. It was the complainants who after understanding the clauses signed the said agreement in her complete senses.

viii. That it is trite law that the terms of the 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 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.

ix. 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. It is submitted that the respondent has incurred various losses/damages on account of the breach of the terms of the allotment and agreement by the complainants, which the complainants is liable to pay as per the terms of the agreement. It is submitted that a specific clause for referring disputes to arbitration is included in the said agreement vide clause 56 of the agreement which is extracted hereunder:

> *"56.1- "56.1 That all or any disputes 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 settled through the process of 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 and shall be referred to the sole arbitration of the person appointed by the Company, whose decision shall be final and binding on the Parties hereto. The venue of the Arbitration proceedings shall be at any place specified by the Company in Gurgaon. The language of the arbitration proceedings shall be English. The provisions related to the Arbitration as mentioned herein this clause shall supersede any or all the other arbitration agreements/clauses between the Parties."*

Hence, both the parties are contractually bound by the above condition. In view of clause 56.1 of the agreement, the captioned complaint is barred.

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 agreement to sell entered into between the two side on 14.03.2011 contains a clause 56.1 relating to dispute resolution between the parties. The clause reads as under: -

> *"56.1 That all or any disputes 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 settled through the process of 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 and shall be referred to the sole arbitration of the person appointed by the Company, whose decision shall be final and binding on the Parties hereto. The venue of the Arbitration proceedings shall be at any place specified by the Company in Gurgaon. The language of the arbitration proceedings shall be English. The provisions related to the Arbitration as mentioned herein this clause shall supersede any or all the other arbitration agreements/clauses between the Parties."*

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 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 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 complainants are well within their rights 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 complainants:**

i. Refund the entire amount along with interest.

ii. The respondent guilty of indulging into unfair practices to provided services to the complainants and award a compensation of Rs.10,00,000/- along with interest.

19. In the present complaint, the complainants intend to withdraw from the project and is seeking return of the amount paid by them 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 complainants as per the statement of account paid an amount of Rs. 99,78,150/- out of the total amount of Rs. 3,92,73,042/-. The complainants 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 29.05.2018. Now the question before the authority is whether this cancellation is valid?

21. As per clause 11.1 of the agreement, the allottee was liable to pay the Installment as per payment plan opted by the complainants. Clause 11.1 of the agreement is reproduced under for ready reference:

> *Clause 11.1 Time is the essence with respect to the Allottee(s) obligation/s to make timely payments towards the price of the said Apartment in accordance with the Schedule of Payments as given in Annex "A" along with other payments, such as, applicable stamp duty, registration fee, interest free maintenance security deposit and other charges, deposits, as stipulated under this Agreement to be paid on or before the due date or as and when demanded by the Company as the case may be and also to perform or observe all the other obligations of the Allottee(s) under this Agreement.*

22. The respondent had issue various reminders, pre-cancellation letter and last and final opportunity letter to the complainants. That the OC for the unit of the complainants was granted on 25.07.2017 that upon receipt of the OC the respondent issued the notice of possession dated 18.12.2017. The respondent was obtained OC from the competent authority thereafter issuing offer of possession letter dated 18.12.2017 it is a valid offer of possession in the eyes of law. The respondent cancelled the unit of the complainants 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., 05.05.2022 is 7.40%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.40%.

25. The respondent guilty of indulging into unfair practices to provide services to th complainants and award a compensation of Rs.10,00,000/- along with interest. The complainant in the aforesaid reliefs is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as **M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP &Ors. (Civil appeal nos. 6745-6749 of 2021, 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 complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the authority

26. 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. Keeping in view the aforesaid legal provisions, 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 complainants 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., 29.05.2018, accordingly the interest at the prescribed rate i.e., 9.40% is

allowed on the balance amount from the date of termination to date of actual refund.

27. Complaint stands disposed of.

28. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.05.2022