BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4159 of 2021
Date of decision : 05.05.2022

Joyline Exports India Pvt. Ltd.
Address:- 805, Aggarwal Millennium Tower-1, Netaji Subhash Place, Pitampura, New Delhi-110034 **Complainant**

Versus

1. M3M India Pvt. Ltd.
Registered address: Unit no. SB/5L/Office/008, M3M Urbana, Sector-67, Gurugram Manesar Urbana Complex Gurugram
2. Martial Buildcon Pvt. Ltd.
Address: - Paras Twin Tower B, 6th floor, Golf Couse Road, Sector-54, Gurugram-122002 **Respondents**

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

APPEARANCE:
Shri Garv Malhotra Advocate for the complainant
Ms. Shriya Takkar Advocate for the respondents

ORDER

1. The present complaint dated 22.10.2021 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. Project and unit related details

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

Sr. No.	Particulars	Details
1.	Name of the project	M3M Urbana, sector 67
2.	Land area	8.2125 acres
3.	Nature of the project	Commercial complex
4	DTCP License no.	100 of 2010 dated 26.11.2010 valid upto 25.11.2022 101 of 2010 dated 26.11.2010 valid upto 25.11.2022 11 of 2011 dated 28.01.2011 valid upto 27.01.2023
5.	Building Plan approved on	03.08.2016 revised on dated 30.11.2017 as per website of DTCP
6.	Rera registration	35 of 2019 dated 18.06.2019 valid upto 31.12.2021
7.	OC received on	03.07.2020 (Page 127 of the reply)
8.	Unit no.	SB/SA/9L/04, 9th level

9.	Unit area	797.41 sq. ft.
10.	Date of allotment	01.09.2014 (Page 17 of the complaint)
11.	Date of builder buyer agreement	25.06.2015 (Page 26 of the complaint)
12.	Possession clause	**16. Possession of the unit** **16.1 The company** *based upon its present plans and estimates, and subject to all just exceptions, proposes to hand over possession the unit within a period of* ***thirty-six (36) months from the date of execution of this agreement ("Committed Period").*** *Should the possession of the unit not be given within the committed period, the allottee agrees to an extension of one hundred and eighty (180) days (Grace Period) after expiry of the commitment period.....* ***(Emphasis supplied)***
13.	Due date of possession	25.06.2018 (Due date of the possession is calculated from the date of execution of this agreement)
14.	Total sale consideration	Rs. 85,96,901/- (As per payment plan page 67 of the complaint)
15.	Amount paid by the complainant	Rs. 31,49,500/- (As per statement of account, page 82 of the complaint)
16.	Notice of offer of	08.07.2020

	possession	[Page 81 of complainant]
17.	Delay in handing over of possession till the date of offer of possession	2 years 13 days
18.	1. First pre- cancellation letter issued on	10.08.2015
	2. Last and final opportunity letter issued on	12.02.2019 (Page 108 of reply)
	3. Pre-cancellation notice	17.01.2019 (Page 110 of reply)
	4. Pre-cancellation notice issued on	12.08.2020 (Page 136 of reply)
	5. Last and final opportunity notice issued on	01.09.2020 (Page 137 of reply)
	6. Intimation of termination	16.10.2020 (Page 138 of reply)
19.	Grace period utilization	Not allowed

B. Facts of the complaint

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

i. That the respondent no.1 is developer/promoter, and the respondent no.2 is the conforming party and absolute owner of the freehold land. That the complainant company namely M/s Joyline Exports Pvt. Ltd. is being duly represented by its Mr. Sudarshan Kumar Lath who is the director of the aforesaid

company and is duly authorized to institute, file, sign and prosecute any suit, application, complaints etc., on behalf of the aforesaid company. That on 01.09.2014, the complainant received a provisional allotment letter of a service apartment no. SB/SA/9L/04 called " M3M Urbana-One-Key Resiments" in the above-mentioned serviced apartment project by paying an amount of Rs. 5 Lakhs only vide cheque number 414081 dated 30.07.2014 drawn on IndusInd Bank which was duly acknowledged by the respondent vide receipt no. 28014 dated 01.08.2014. The payment plan was a construction and time linked plan, in the project of M3M Urbana-One-Key Resiments. The total consideration of the unit was Rs. 85,96,903/- including BSP, PLC, IFMS, EDC, IDC etc. That from 01.08.2014 till date, the complainant further made a payment of Rs. 5,00,000/- vide cheque bearing no. 414081 dated 30.07.2014 which was duly acknowledged by the respondent vide receipt no. 28014 dated 01.08.2014 Rs. 1,98,000/- vide cheque bearing no. 414091 dated 12.02.2016 which was duly acknowledged by the respondent vide receipt no. 43779 dated 15.02.2016 Rs. 9,47,000/- dated 16.02.2016 Rs. 1,98,000/- vide cheque bearing no. 414043 dated 25.03.2016 each drawn on IndusInd Bank Rs 1,98,000/-vide cheque bearing no.414095 dated 25.04.2016 Rs1,98,000/- vide cheque no.414098 dated 28.05.2016 Rs.1,98,000/-vide cheque no.414102 dated 25.06.2016 Rs. 1,98,000/ vide cheque no.414110 dated 14.08.2016 Rs.2,47,500/- vide cheque no.414112 dated 27.02.2017 Rs.2,47,500/-vide cheque no.414114 dated 28.03.2017.

ii. That on 08.01.2015 & 17.02.2015 the respondent sends the payment request letters within 180 days of booking and reminders respectively demanding Rs. 21,95,683/- to which the complainant requested the respondent to sign and execute the builder buyer agreement (hereinafter referred as "BBA"). Thereafter, the agent and the representative of the respondent stated that the BBA would be executed soon and no delay interest on payments would be imposed the complainant. That on 25.06.2015 is executed at Gurugram, Haryana. That on 10.08.2015 the respondent unilaterally and without any rhyme or reason sent an arbitrary and malafide pre-cancellation notice of serviced apartment buyer agreement despite assuring the complainant that no delay penalty or interest will be levied. That on 04.06.2016 a payment request letter was sent by the respondent demanding of Rs. 26,83,662/-in addition with service tax, Swachh Bharat cess and Krishi kalian Cess @4.5%/-15 % which is arbitrary, malafide, illegal. Moreover, the construction was at its initial phases, but the respondent arbitrarily mentioned in subject line "on completion of structure" whereas on this date the construction had not even begun.

iii. That the respondent vide pre -cancellation notice dated 17.01.2019 gave another arbitrary, malafide, illegal notice to the complainant. That the notice was vehemently opposed by the complainant as the respondents through agents and representatives had agreed to not levy any delay interest but still the respondents illegally and malafide demanded interest of Rs.18,66,807/-. Moreover, no payment was due as the construction milestone was not

completed which is "on completion of structure". Despites the issuance of a threatening pre cancellation notice sent one and half year ago on 08.07.2020 the respondent sent a notice of possession for service apartment. That on 12.08.2020 the respondent sent another pre-cancellation notice on 12.08.2020 to the complainant demanding again Rs.18,02,173/- as interest without any calculation or justification for the same. On 01.09.2020 the respondent sent the notice of last and final opportunity and finally on 16.10.2020 the respondent sent the notice of intimation of termination and notified that the respondent forfeited the total amount paid by the complainant.

iv. That the aforementioned acts of the respondent builder were just a mere pressure tactic and a well thought out strategy by respondent to illegally demand and extort more money from the complainant and to illegally forfeit all the money paid till date. This unfair trade practice resorted to by the builder was to threaten the honest complainant in order to dupe his hard-earned money. That the respondent just to harass the complainant, grabbed his hard-earned money. The complainant has tried every possible way to take refund the entire consideration amount paid to the respondents. But the respondents are bad intention to grab the hard-earned money of the complainant by giving vague excuses. The act and conduct of the respondents has caused a lot of physical harassment, mental agony and huge financial loss to the complainant. After repeated reminders the respondents assured that they will handover of possession soon. Yet no such offer has been made till now. Moreover, the respondents

represented and assured that they would hand over the possession very soon. Moreover, in the present project the respondents have charged the complainant on super built up area whereas as per the new act the basic sale price is liable to be paid on the carpet area only. This is a clear and blatant violation of the provision's rules and object of the Act. Also, the respondents have arbitrarily and wrongly charged extra money for car parking which is against the law of the land.

C. Relief sought by the complainant-allottee

4. The complainant-allottee is seeking the following relief:

   i. Refund the entire amount deposited on the pro rate basis with intertest for every month of delay at the rate of interest from the actual date of deposit of each payment till date of realization.

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 complainant 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 present complaint pertains to refund of the amount along with interest for a grievance under section 18, 31, 19(4) of the real estate (regulation & development) act, 2016 (hereinafter referred to as the "said act").

ii. That the allotment of the property in question was cancelled by the respondents vide letter dated 16.10.2020 as the complainants failed to make payments despite sending repeated reminders. 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. That after making independent enquiries and only after being fully satisfied about the project the complainant approached the respondent Company for booking of a commercial unit in 'M3M Urbana- One Key Resiments', being part of M3M Urbana, containing commercial units for retail, office use and service apartments with suitable infrastructure facilities being developed in a planned and phased manner over a period of time referred to as the "commercial complex". That thereafter the respondents company provisionally allotted the unit bearing No. "SB/SA/9L/04" in favour of the complainant vide provisional allotment letter dated 01.09.2014. The complainant as per its own decision and after fully understanding its obligations opted for the possession linked payment plan. The two copies of the buyer's agreement were dispatched to the complainant vide for execution at their end. That the complainant failed to remit the outstanding

dues on time and also failed to execute the buyer's agreement, constrained by which the respondent's issued reminders dated 17.02.2015 and 10.04.2015 to the complainants. The buyer's agreement was executed between the parties on 25.06.2015. That the buyer's agreement duly covers all the liabilities and rights of both the parties. That the respondents company raised demands as per the terms of the agreed payment plan and in terms of the buyer's agreement. However, the complainants failed to make the timely payments of the said demands despite the complainant's commitment to strictly adhere to the payment plan. That the complainants failed to fulfil the contractual obligation of making timely payment which was the essence of the buyer's agreement even after the issuance of various reminders and pre-cancellation.

iv. That the complainant is a chronic defaulter and has defaulted in making timely payments at various occasions. That the respondents have issued reminder dated 18.12.2018, pre-cancellation letter dated 17.01.2019 and last and final opportunity letter dated 12.02.2019 to the complainant. That the present construction and development of the present segment/phase was completed within the agreed time limit and the respondents applied to the competent authority for the grant of occupancy certificate on 12.05.2017 after complying with all the requisite formalities. That despite this Order, the OC was still not released by the Department of Town and Country Planning. It needs to be highlighted here that the respondents suffered a state of complete helplessness at the hands of the statutory authorities, who despite the construction having been completed in all

respects, without any shortcoming whatsoever in the construction, failed to grant the occupation certificate in compliance of their statutory duties. The said fact that there were no shortcomings/infirmity in the application for grant of the OC is apparent from the OC dated 03.07.2020, released for tower 7 and 8. That this delay of the competent authorities in granting the OC cannot be attributed in considering the delay in delivering the possession of the flat, since on the day the answering respondents applied for OC, the unit was complete in all respects.

v. That the government of Haryana has accorded approval to consider the period i.e. 01.11.2017 to 11.05.2020 as "Zero Period" vide its order dated 03.03.2021. wherein owning to the litigation pending before the Hon'ble Supreme Court of India in C.A. No. 8977 of 2014, developers/colonizers were restrained from carrying out any development works in their respective licensed colonies including such colonies which are required to be completed as per section 7B of Haryana Development and Regulation of Urban Areas Act, 1975 and the approvals were withheld by the Department within the said period in view of the legal opinion and has granted relaxation for the said period.

vi. The government gave following relaxations for the period i.e., 01.11.2017 to 11.05.2020:

a. To waive off the interest on license renewal fee for the above-mentioned period. To grant benefit of the time from 01.11.2017 to 11.05.2020 with regard to the validity of the license and calculation of renewal period in case of special category of

projects as per the provisions of section 7B (2) of Act No. 8 of 1975. To waive off the interest/penal interest on external development charges/infrastructure development charges dues for the above said period. Accordingly, the director (town and country planning Haryana Chandigarh) vide order dated 03.03.2021 has directed the office to examine all such cases affected wherein permission/approvals were withheld earlier by the department by considering relaxations and benefits as per the approvals of the government.

vii. The above order substantiates the fact that the delay in grant of occupation certificate was not attributable to the respondent. That the delay in grant of the occupation certificate by the competent authority was beyond the control of the respondents company and the same is squarely covered under clause 16.4 of the buyer's agreement. It needs to be highlighted here that the respondents suffered a state of complete helplessness at the hands of the statutory authorities, who despite the construction having been completed in all respects, without any shortcoming whatsoever in the construction, failed to grant the occupation certificate in compliance of their statutory duties. That immediately after the receipt of the occupation certificate on 03.07.2020, the respondents company sent the offer of possession dated 08.07.2020 to the complainant herein.

viii. That despite possession being offered to the complainant on 08.07.2020, the complainant did not come forward to clear their dues and take possession, due to which the respondents were constrained to issue pre-cancellation notice dated 12.08.2020. That the respondents as a goodwill gesture offered the complainant, a last and

final opportunity to correct the breach of the terms of the buyer's agreement, vide last and final opportunity letter dated 01.09.2020. That on account of the willful breach of the terms of the allotment and buyers' agreement by failing to clear the outstanding dues despite repeated requests, the respondents were constrained to terminate the allotment of the unit vide termination letter dated 16.10.2020. It is submitted that the complainant has till date made a payment of Rs. 31,49,500/- as raised by the respondents in accordance with the payment plan and the terms of the buyer's agreement.

ix. That the buyer's agreement was entered into between the parties and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. The said agreement was duly signed by complainants after properly understanding each and every clause contained in the agreement. complainant was neither forced nor influenced by the opposite parties to sign the said agreement. It was complainant who after understanding the clauses signed the said agreement in his complete senses.

x. Obligation to make timely payment of every instalment of the total consideration in accordance with the payment plan along with payment of other charges such as applicable stamp duty, registration fee, IFMS, and other charges, any deposits, as stipulated under this agreement or that may otherwise be payable on or before the due date or as and when demanded by the company, as the case may be, and also to discharge all other obligations under this agreement shall be the essence of this agreement.

xi. 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.

xii. 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. That in accordance with clause 16.1 of the buyer's agreement (executed between parties on 25.06.2015) possession of the Unit was agreed to be handed over within a period of 36 months from the date of execution of the buyer's agreement, whichever is later plus 180 days grace period. Clause 16.1 of the buyer's agreement is extracted hereunder:

> *"16.1 The Company, based upon its present plans and estimates, and subject to all exceptions, proposes to*

> *handover possession of the Commercial Unit within a period of Thirty Six (36) months from the date of execution of the this Agreement (Commitment Period). Should the possession of the Commercial Unit not be given within the time specified above, the allottee(s) agree/s to provide the Company with an extension of 180 days ("Grace Period") after the expiry of the Commitment Period. In case of failure of the Allottee to make timely payments of any of the instalments as per the payment plan, along with other charges and dues as applicable or otherwise payable in accordance with the Payment Plan or as per the demands raised by the Company from time to time in this respect, despite acceptance of delayed payment along with interest or any failure on the part of the Allottee to abide by the terms and conditions of this Agreement, the time periods mentioned in this clause shall not be binding upon the Company with respect to the handing over the possession of the Unit.*

The buyer's agreement was executed between the parties on 25.06.2015 and the due date of possession comes out to be 25.12.2018. The construction of the project was affected on account of unforeseen circumstances beyond the control of the respondent. In the year, 2012 on the directions of the hon'ble supreme court of India, the mining activities of minor minerals 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 respondents were 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. 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 respondents to develop the project is the usual time taken to develop a project of such a large scale. Despite force majeure conditions the respondents have completed the construction of the project within the agreed time limit and occupancy permission from the competent authority was duly applied for on 12.05.2017. That it is stated that the grant of occupation certificates, permissions and approvals were withheld by the department of town and country planning for various projects in Sectors 58-63 and 65-68 of GMUC, including that of the respondent.

That aggrieved by this action of the department, a civil writ petition bearing No. **CWP No. 29239 of 2018 titled as: Martial Buildcon Pvt. Ltd. vs. State of Haryana and Ors. and CWP No.6801 of 2019** titled as: **Varinder Pal Singh and others versus State of Haryana and Others** were filed seeking directions for the grant of the occupation certificate with respect to the application dated 12.05.2017. That the hon'ble high court of Punjab and Haryana was pleased to pass an order dated 29th May 2019 directing the department to grant the occupation certificate preferably within 6 weeks from the receipt of the certified copy of the order. However, despite such an order the department failed to grant the occupation certificate, for no fault of the respondent. It is further submitted that thereafter the department after having sought the opinion of the advocate general, Haryana, allowed and released the permissions and approvals which were previously withheld as admitted by them in the office order dated 3rd March 2021 ('Office Order'). That thus the occupation certificate for the unit of the complainant was granted by the department on 03.07.2020. Further the parties have agreed in clause 16.6 that in the event of delay for reason other than 'force majeure', the allottee shall be entitled to compensation of equal to simple interest @ 9% per annum on the amounts paid by the allottee, which shall be adjusted at the time of handing over of possession/execution of conveyance deed subject to the allottee not being in default under any of the terms of the agreement. Thus, the delay compensation, if any, to be remitted/credited to the complainant can only be until the date on which the application for the occupation certificate was applied for.

That the complainant in the present case defaulted in making timely payments and thus are not entitled to any relief whatsoever.

xiii. That the complainant is not a consumer and an end user since they had booked the service apartment in question purely for commercial purpose as a speculative investor and to make profits and gains. The complainant was interested in leasing out his unit which is clear from its email dated 6th July 2020. Further, the complainant has invested in many projects of different companies which prove that the complainant is not a consumer but only an investor. Thus, it is clear that the complainant has invested in the unit in question for commercial gains, i.e., to earn income by way of rent and/or re-sale of the property at an appreciated value and to earn premium thereon. Since the investment has been made for the aforesaid purpose, it is for commercial purpose and as such the complainant are not a consumer/end user. The complaint is liable to be dismissed on this ground alone. Under these circumstances, it is all the more necessary for the complainant, on whom the burden lies, to show how the complainant are a consumer.

xiv. That despite the offer of possession having been offered on 08.07.2020, the complainant did not come forward to take the possession, due to which the respondents issued Pre-cancellation notice and last and final opportunity dated 12.08.2020 and 01.09.2020 respectively. That the respondents were constrained to cancel the unit on account of non-payment of the demands as raised by the respondent. It is submitted that the respondents have incurred various losses/damages on account of the breach of the terms of the allotment and agreement by the complainant, which the complainant 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 48 of the agreement which is extracted hereunder:

> *"48.1- Any dispute connected or arising out of this Agreement or touching upon or in relation to terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties hereto shall be resolved through the process of arbitration....."*

Hence, both the parties are contractually bound by the above condition. In view of clause 48.1 of the agreement, the captioned complaint is barred.

E. Jurisdiction of the authority

5. 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

6. 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

7. 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.*

8. 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.

9. 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."*

10. 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."*

11. 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 exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

12. As far as contention of the respondents with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondents had applied for grant of occupation certificate on 12.05.2017 and thereafter the occupation

certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 03.07.2020 that an incomplete application for grant of OC was applied on 12.05.2017 as fire NOC from the competent authority was granted only on 02.07.2018 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 18.01.2018. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 26.03.2018 and 27.03.2018 respectively. As such, the application submitted on 12.05.2017 was incomplete and an incomplete application is no application in the eyes of law.

13. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. Therefore, in view of the deficiency in the said application dated

12.05.2017 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

F.II objection regarding agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement

14. The agreement to sell entered into between the two side on 25.06.2015 contains a clause 47 relating to dispute resolution between the parties. The clause reads as under: -

> *47.1 Any dispute connected or arising out of this agreement or touching upon or in relation to the terms of this agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties hereto shall be resolved through the process of arbitration. The arbitration proceedings shall be governed by the provisions of the arbitration and conciliation act 1996 or any stator amendments/modifications to be appointed by the company, whose decision shall be final and binding upon the parties hereto. .....*

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 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 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 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 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.

19. **Relief sought by the complainant:** Refund the entire amount deposited on the pro rate basis with intertest for every month of delay at the rate of interest from the actual date of deposit of each payment till date of realization.

20. In the present complaint, the complainant 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)*

21. On consideration of the documents available on record and submission by both the parties, the authority is of the view that the allottee has failed to abide by the terms of agreement by not making the payments in timely manner as per the payment plan opted by him, the complainant as per the statement of account paid an amount of Rs. 31,49,500/- out of the total amount of Rs. 85,96,901/-. The complainant failed to pay the remaining amount as per the schedule of payment and which led to issuance of notice of termination by the respondents on 16.10.2020. Now the question before the authority is whether this cancellation is valid?

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

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

the case may be, and also to discharged all others obligation under this agreement shall be the essence of this agreement.

23. The respondents had issue various reminders dated 18.12.2018, pre-cancellation letter dated 17.01.2019 and last and final opportunity letter dated 12.02.2019 to the complainant. That the OC for the unit of the complainnat was granted on 03.07.2020 and upon receipt of the OC the respondents issued the notice of possession dated 08.07.2020. The respondents obtained OC from the competent authority and thereafter issued offer of possession letter dated 08.07.2020. It is a valid offer of possession in the eyes of law. The respondents cancelled the unit of the complainant with adequate notices. Thus, the cancellation of unit is valid.

24. 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."

25. 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%.

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 respondents are directed to refund the balance amount of the unit by deducting the earnest money which shall not exceed the 10% of the sale consideration of the said unit as per statement of account and shall return the balance amount to the complainant within a period of 90 days from the date of this order. The refund should have been made on the date of termination i.e., 16.10.2020, 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