

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

Complaint no.	3923 of 2019
Date of filing complaint	04.09.2019
First date of hearing	15.10.2019
Date of decision	31.08.2022

Renu Kawatra <b>R/o:</b> 402, Sovereign-3, Vatika City, Sector 49, Gurugram-122018	<b>Complainant</b>
Versus	
M/s Ireo Grace Realtech Pvt. Ltd. <b>Regd. office:</b> C-4, First Floor, Malviya Nagar, New Delhi-110017.	<b>Respondent</b>

**CORAM:**

Dr. KK Khandelwal **Chairman**

Shri Vijay Kumar Goyal **Member**

**APPEARANCE:**

Sh. Riju Mani (Advocate) **Complainant**

Sh. Rahul Thareja (Advocate) **Respondent**

**ORDER**

1. The present complaint 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 29 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 allottee as per the agreement for sale executed inter se.

### A. Unit and project 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 and delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name of the project	"The Corridors (phase 2)" situated at Sector-67A, Gurgaon.
2.	Project area	Group Housing Colony
3.	Nature of the project	13.152 acres
4.	DTCP license no. and validity status	05 of 2013 dated 21.02.2013 valid up to 20.02.2021
5.	Name of licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
6.	RERA Registered/ not registered	377 of 2017 dated 07.12.2017 valid up to 30.06.2020
7.	Date of Application form for booking	22.03.2013 (Page 37 of the complaint)
7.	Allotment Letter	07.08.2013 (Page 37 of the complaint)
8.	Unit no.	404, 4 <sup>th</sup> floor, Tower B8 (Page 37 of the Complaint)
9.	Unit area admeasuring	1937.53 sq. ft. (super area) (Page 23 of the Complaint)
10.	Date of execution of Apartment Buyer's Agreement	Not executed
11.	Possession clause (taken from BBA of same project annexed in another file)	<b>13.3 Possession and Holding Charges</b> The company proposes to offer <b>the possession of the said residence unit to the allottee within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions Imposed thereunder (Commitment Period).</b> The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to

		allow for unforeseen delays beyond the reasonable control of the Company. <b>(Emphasis supplied)</b>
11.	Date of approval of building plan	23.07.2013 (as per details provided by planning department)
12.	Due date of possession	23.01.2017 (Calculated from date of approval of building plan i.e., 23.07.2013)
13.	Total sale consideration	Rs. 2,08,22,519.17/- (Page 40 of the complaint)
14.	Amount paid by the complainants	Rs. 39,18,273/- (Page 17 of CRA)
15.	Demand/Reminder Letters	18.03.2014, 13.04.2014, 04.05.2014, 21.10.2014
16.	Cancellation Letter	13.11.2014 (Page 91 of complaint)
17.	Occupation certificate /Completion certificate	Not obtained
18.	Offer of Possession	Not offered

### B. Facts of the complaint:

- That the respondent company made several representations of its project to the complainant, alluring her to book an apartment in its project "The Corridors" situated in Sector 67A, Gurgaon, Haryana. That the complainant approached the respondent company for booking of an Apartment in the project, and was assured of a reasonable basic sale price for the same, at the rate of Rs. 8,700/- per Sq. Ft or Rs.8,750/- per sq. ft. It was further made certain that no additions will be made to the said basic sale price.
- That the complainant on 28.02.2013, only after approving the rate of basic sale price confirmed by the respondent company, proceeded with her application for booking an apartment in the project. That the complainant also paid a booking amount of Rs. 18,50,000/- (Rupees Eighteen Lacs Fifty Thousand only) vide cheque bearing no. 21749.

5. That a demand of Rs. 25,98,694/- was raised by the respondent company on 06.05.2013. The said demand was for a considerable amount when no allotment had even made in the favour of the complainant. That perturbed by the same, the complainant called the respondent company to inquire and verify the said demand. To the shock of the complainant, the respondent company admitted that there had been some error in the said demand and the amount was revised to Rs. 20,68,273/-, it is to be noted that no explanation was offered to the complainant regarding the error. That such an act of the respondent is a clear manifestation of their dishonest intentions to deceive the complainant.
6. That the complainant being an innocent consumer, proceeded with the allotment, and made the payment for the said demand by two cheques bearing no. 029681 and 62011 for Rs. 5,00,000/- and 15,68,275/- respectively. That the total amount paid by the complainant even before the allotment was thus, Rs. 39,18,275/- (Rupees Thirty Nine Lacs Eighteen Thousand Two Hundred and Seventy Five only).
7. It was submitted that no further communication was received by the complainant after the booking and the payment, nor the complainant was ever called to initiate the process of allotment. That after around 6 months from the date of booking of the apartment, an allotment offer letter dated 07.08.2013 was served to the complainant and a unit bearing No. CD-B8-04-404 was allotted to the complainant, without her consent or approval.
8. That a construction linked payment plan was also served to the complainant which had not been shown to her at any time prior to the said allotment. That as per the payment plan, the basic sale price of the unit/apartment was given as Rs. 9,750/- per sq. ft. in contravention to the agreed amount of Rs. 8,700/- per Sq. Ft. That the total consideration of the unit as per the new rate was Rs.

2,08,22,519.19/- (Rupees Two Crore Eight Lakh Twenty Two Thousand Five Hundred and Nineteen only).

9. That a copy of the apartment buyer agreement was served on the complainant on 13.12.2013 and the same was to be signed and returned by the complainant within 30 days. That the said agreement contained various unilateral and arbitral clauses and the complainant only had the option to sign the same to proceed with the allotment. For instance, an exorbitant interest of 18% was levied on the complainant in case of delayed payment but the Respondent was only liable to pay only Rs. 7.50/- per sq. ft. in case of delayed possession That soon after a letter was served on the complainant dated 24.12.2013 asking her to ignore the said agreement as there was an error in the same. That the complainant was assured that a fresh agreement would be provided to her soon.
10. That a notice for payment of third instalment was served on the complainant on 18.03.2014 by which the respondent demanded an amount of Rs. 25,00,850/- for excavation work. That the complainant inquired about the said amount about the basic sale price which had been increased abruptly in contravention to the promised rate. That the respondent admitted with the said increase and strangely lowered the price to only Rs. 9,400/- without offering any explanation.
11. That the complainant was yet again served with a letter dated 22.03.2014 vide which she was assured that a fresh copy of the agreements would be dispatched to her shortly. However, it is pertinent to note that no such agreements were ever served on the complainant and the respondent was only serving the frivolous letters giving false assurances to the complainant.
12. That shocked by the unfair and unreasonable acts of the respondent, the complainant visited the project site on 30.05.2014 (2 months after the

demand) to inspect and verify the demand being put forth by the respondent. That to her utter shock the respondent noticed that no excavation work was in progress and only 10 ft. of the earth had been dug up to give the impression of on-going work when no actual work was in progress. In fact, the tower B, where the unit of the complainant was located was idle and no work/excavation was going on there. That the complainant also intimated the miserable state of things to the respondent vide their numerous mails, but to his amazement the respondent came up with unreasonable explanations to only justify the demand being put forth by them. That the respondent company tried to further deceive the complainant by telling her that the construction linked payment plan was in view and accordance of the whole project and not a specific tower. That such an explanation by the respondent is only an admission that the demand was arbitrary as no work was actually being done on the tower of the complainant.

13. The complainant again visited the project site on 10.06.2014, accompanied by officials from the team of the respondent. That no excavation/ work was done on the project site and the tower of the complainant was lying in an abandoned state. That the complainant again wrote an e-mail to the respondent on 10.06.2014 regarding the same. It is submitted that the respondent were adamant on the demand and only forced the complainant to pay the unjustified money even when the project was on a standstill.
14. That the respondent had retained the money of the complainant and was not making any progress on the actual site of the project nor did offer any agreement for execution. That the complainant was left with no other option but to resort to some external help in order to recover her money illegally retained by the respondent. That the complainant thus lodged a criminal



complaint dated 31.10.2014 against the respondent with the Police Station, Sadar, Gurgaon.

15. That as a reaction to the police complaint filed against them, the respondent sent the complainant, a cancellation notice dated 13.11.2014 by which her allotment in the project had been cancelled and the sum of Rs. 39,18,275/- (Rupees Thirty Nine Lacs Eighteen Thousand Two Hundred and Seventy Five only) paid by her was forfeited by the respondent company.

16. Further, to alleviate the matter, respondent submitted an offer for restoration of cancellation dated 15.04.2015 before the investigating officer. that the said letter is nothing but only a manifestation of the malafide intentions of the respondent. Relevant excerpt of the letter has been produced below:

*"...Further, as a goodwill gesture your cancellation is being offered to be restored (@Rs. 8,750/- per sq. ft. BSP exclusive of car parking....."*

17. That the said act of the Respondent was no "goodwill gesture as the Respondent has only repeated the previous scenario. It is submitted that the BSP rate was still the same and had not been reduced. That the rate of Rs. 8,750/- per sq. ft. was explicitly exclusive of the car parking as had been mentioned by the respondent in the letter. That the letter shows that the respondent had not altered any price but had only misled the Police into believing that they had restored the BSP to the rate as had been initially promised to the complainant.

18. That the complainant did not agree for the restoration as the project was already way behind schedule and block D, which was the main attraction of the project, had also been abandoned. Further, the respondent through the offer of restoration had again tried to mislead the complainant. That the complainant had no reason to continue with the allotment as there was no

trust left between the parties and thus, the complainant refused to restore the allotment and asked for the refund of their money. That no communication was made by the complainant after the said restoration letter nor the money of the complainant was ever returned to her. That the complainant tried to contact the respondent several time but to no avail as the respondent ignored her queries on one or the other pretext.

19. That the complainant has no faith on the respondent and in spite of paying a sum of Rs. 39,18,275/- (Rupees Thirty Nine Lacs Eighteen Thousand Two Hundred and Seventy Five only) no agreement has till date been executed between the parties. Thus, the complainant now seeks the interference of the hon'ble authority to give appropriate directions.

**C. Relief sought by the complainants:**

20. The complainants have sought following relief(s):

- i. Direct the respondents to refund a sum of Rs. 39,18,275/- paid by the complainant along with interest at prescribed rate from the date of payment till the date of refund.

**D. Reply by respondents:**

The respondents by way of written reply made following submissions:

21. It was submitted that the complainants are real estate investors in the given project and that their calculations went wrong and hence, they didn't fulfil the contractual obligations. It was further submitted that the present complaint is not maintainable for the reason that the booking application form contains an arbitration clause in clause 54 of Schedule-I, which is reproduced as under:





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

22. It was submitted that the complainant, after checking the veracity of the project namely, 'The Corridors', Sector 67-A, Gurgaon had applied for allotment of an apartment by filling the application for provisional registration of residential apartment and the booking application form and agreed to be bound by the terms and conditions of the application for provisional registration of residential apartment and booking application form. It is pertinent to mention herein that the complainant undertook vide clause 'd' of the application for provisional registration of residential apartment to execute all documents/agreements and to accept all the terms and conditions contained therein and to pay all charges as applicable therein.
23. That the respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainant apartment no. CD-B8-04-404 having tentative super area of 1937.53 sq.ft. Vide letter dated 22.03.2014, the respondent requested the complainant to

return the 3 copies of the agreement sent to her on 13.12.2013 on account of certain formatting deficiency. However, the complainant failed to return the copies of the previous Agreement and send the signed copies of the new agreement despite several reminders and follow-ups by the respondent.

24. That vide payment request dated 18.03.2014, the respondent had raised the demand towards third instalment demand for net payable amount of Rs. 25,00,850.01. However, despite reminders dated 13.04.2014 and 04.05.2014, the complainant failed to remit the due amount.
25. That vide final notice dated 21.10.2014, the complainant was requested to remit the due amount and was informed that in the event of her failure to do so, the unit allotted to the applicant would be terminated in accordance with the agreed terms and conditions of the Booking Application Form.
26. That as per the terms of booking application form, the due date is to be computed from the date of receipt of all requisite approvals. Even otherwise construction can't be raised in the absence of the necessary approvals. It is pertinent to mention here that it has been specified in Sub- clause (iv) of clause 17 of the approval of building plan dated 23.07.2013 of the said project that the clearance issued by the Ministry of Environment and Forest, Government of India must be obtained before starting the construction of the project. It was submitted that the environment clearance for construction of the said project was granted on 12.12.2013. Furthermore, in clause 39 of part-a of the environment clearance dated 12.12.2013 it was stated that fire safety plan was to be duly approved by the fire department before the start of any construction work at site. That the last of the statutory approvals which forms a part of the pre-conditions was the fire scheme

approval which was obtained on 27.11.2014 and that the time period for offering the possession, according to the agreed terms of the buyer's agreement, will expire only on 27.11.2019.

27. That it is pertinent to mention here that timely payment of installments within the agreed time schedule was the essence of allotment. On account of non-fulfillment of the contractual obligations by the complainant despite several opportunities extended by the respondent, the allotment of the complainant was cancelled and the earnest money was forfeited vide cancellation letter dated 13.11.2014 in accordance with clause 9 read with clause 11 of the booking application form. However, on the request of the complainant, the respondent being a customer oriented company has offered for the restoration of the allotment of the unit, subject to certain conditions and the same was intimated to the complainant vide the letter dated 15.04.2015. It was also intimated that no penal charges/interest will be levied for such restoration.
28. It was submitted that the respondent has already completed the construction of the tower in which the unit allotted to the complainant is located and has applied for the grant of the Occupation Certificate on 18.09.2019
29. All other averments were denied in toto.
30. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

**E. Jurisdiction of the authority:**

31. The plea of the respondents regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

### **E. I Territorial jurisdiction**

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

### **E. II Subject matter jurisdiction**

33. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

#### ***Section 11(4)(a)***

*Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

#### **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.*

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

35. 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. 2020-2021 (1) RCR (c) 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** 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."*

36. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases 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 respondents:**

**F.I Objections regarding the complainants being investors:**

37. It is pleaded on behalf of respondents that complainants are investors and not consumers. So, they are not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondents is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are buyers and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

*"Z(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold(whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."*



38. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainants are allottees as the subject unit allotted to them by the respondents/promoters. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as **M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being an investor are not entitled to protection of this Act also stands rejected.

**F.II Objection regarding complaint not being maintainable due to presence of arbitration clause in the Agreement between the parties:**

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

*"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole*

*Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".*

40. 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.

41. Further, in **Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017**, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and

builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

*"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-*

*"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*

*It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act....*

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

42. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as **M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided

in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

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

43. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.

**G. Entitlement of the complainants for refund:**

**G.I Direct the respondents to refund a sum of Rs. 39,18,275/- paid by the complainant along with interest at prescribed rate from the date of payment till the date of refund.**

44. The complainant submitted that he booked a flat in the project named as "The Corridors Phase 2" by submitting an application form dated 22.03.2013. On 07.08.2013 an allotment letter was issued for the given unit. However no BBA was executed between the parties. Meanwhile the allotment of the unit was cancelled vide letter dated 13.11.2014.
45. As per the payment plan the respondent started raising payments from the complainant. The complainant in total has made a payment of Rs. 39,18,273/-. That vide payment request dated 18.03.2014, the respondent had raised the demand towards third instalment demand for net payable amount of Rs. 25,00,850.01/-. However, despite reminders dated 13.04.2014 and 04.05.2014, the complainant failed to remit the due amount. That vide final notice dated 21.10.2014, the complainant was requested to remit the due amount and was informed that in the event of her failure to do so, the unit allotted to the applicant would be terminated in accordance with the agreed terms and conditions of the booking application form and thereafter vide Cancellation Letter dated 13.11.2014, the unit was cancelled.
46. The authority is of the view that cancellation is as per the terms and conditions of agreement and the same is held to be valid. However, while cancelling the allotment of the respondent forfeited the total paid up amount by way of earnest money, interest on delayed payment, brokerage and applicable taxes. The cancellation of unit was made by the respondent after the Act, of 2016 came into force. So, the respondent was not justified in forfeiting the whole of the paid amount and at the most could have deducted 10% of the basic sale price of the unit and not more than that. Even the



Hon'ble Apex court of land in case of **Maula Bux Vs. Union of India, (1970) 1 SCR 928** and **Sirdar K.B Ram Chandra Raj Urs. Vs. Sarah C. Urs, (2015) 4 SCC 136**, held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of Section-74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damage. The deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

#### **5. AMOUNT OF EARNEST MONEY**

*Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

47. Keeping in view the aforesaid legal provisions, the authority hereby directs the promoter to return the deposited amount i.e., Rs. 39,18,273/- after forfeiture of 10% of total sale consideration with interest at the rate of 10.00% (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 cancellation i.e., 13.11.2014 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017.



**H. Directions of the Authority:**

48. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i. The respondent-promoter is directed to refund the paid-up amount to the complainant after deducting 10% of the sale consideration of the subject unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2013 along with interest @ 10.00% p.a. on the refundable amount, from the date of cancellation i.e., 13.11.2014 till the date of realization of amount.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

47. Complaint stands disposed off.

48. File be consigned to the registry.

  
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

  
(Dr. KK Khandelwal)

Chairman

**Dated: 31.08.2022**