# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

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| **Complaint no.** | **:** | **1728 of 2018** |
| **First date of hearing:** | | **07.11.2019** |
| **Date of decision** | **:** | **24.08.2022** |

**Sai Webtel Technologies Pvt. Ltd.**
**Address:** AG-1, 57/B, Vikas Puri,
New Delhi-110018 **Complainant**

Versus

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

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

**APPEARANCE:**
Shri Venket Rao Advocate for the complainant
Shri Pankaj Chandola
Shri M.K Dang Advocate for the respondent

## ORDER

1. The present complaint dated 26.11.2018 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that

the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se.

## A. Unit and project related details

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

| S. No. | Heads | Information |
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| 1. | Project name and location | "The Corridors" at sector 67A, Gurgaon, Haryana |
| 2. | Licensed area | 37.5125 acres |
| 3. | Nature of the project | Group Housing Colony |
| 4. | DTCP license no. | 05 of 2013 dated 21.02.2013 |
| | License valid up to | 20.02.2021 |
| | Licensee | M/s Precision Realtors Pvt. Ltd. and 5 others |
| 5. | RERA registered/not registered | **Registered**<br>Registered in 3 phases<br>**Vide 378 of 2017 dated 07.12.2017(Phase 1)**<br>Vide 377 of 2017 dated 07.12.2017 (Phase 2)<br>Vide 379 of 2017 dated 07.12.2017 (Phase 3) |
| | Validity | 30.06.2020 (for phase 1 and 2) |

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| | | 31.12.2023 (for phase 3) |
| 6. | Unit no. | 503, 5th Floor, A7 Tower<br>(annexure 17 on page no. 139 of complaint) |
| 7. | Unit measuring | 1920.22 sq. ft.<br>(annexure 17 on page no. 139 of complaint) |
| 8. | Date of approval of building plan | 23.07.2013<br>(annexure R-31 on page no. 95 of reply) |
| 9. | Date of allotment | 07.08.2013<br>(annexure R-2 on page no. 58 of reply) |
| 10. | Request for cancellation | 10.10.2013<br>(annexure P-11 on page no. 113 of complaint) |
| 11. | Date of environment clearance | 12.12.2013<br>(annexure R-32 on page no. 99 of reply) |
| 12. | Date of execution of builder buyer's agreement | 28.03.2014<br>(annexure 17 on page no. 136 of complaint) |
| 13. | Date of fire scheme approval | 27.11.2014<br>(annexure R-33 on page no. 105 of reply) |
| 14. | Reminders for payment | **For Sixth Instalment:**<br>07.01.2016, 10.02.2016<br>**For Seventh Instalment:**<br>07.01.2016, 10.02.2016<br>**For Eight Instalment:**<br>29.02.2016, 23.03.2016<br>**For Ninth Instalment:**<br>28.03.2016, 19.04.2016<br>**For Tenth Instalment:**<br>04.10.2016, 27.10.2016 |

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| | | **For Eleventh Instalment:** 04.04.2017, 26.04.2017<br>**Final Notice:** 19.05.2017 |
| 15. | Cancellation letter | **05.07.2017**<br>(annexure R-28 on page no. 87 of complaint) |
| 16. | Total consideration | Rs. 1,92,17,760/-<br>(as per payment plan on page no. 172 of complaint) |
| 17. | Total amount paid by the complainant | Rs.90, 80,588/-<br>(as per statement of amount paid annexed with cancellation letter) |
| 18. | Due date of delivery of possession | **23.01.2017**<br>(calculated from the date of approval of building plans)<br>Note: Grace Period is not allowed. |
| 19. | Possession clause | **13. Possession and Holding Charges**<br>Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, registration chares, stamp duty and other charges and also subject to the allottee |

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| | | having complied with all the formalities or documentation as prescribed by the company, the company proposes to offer the possession of the said apartment to the allottee **within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder**(Commitment Period). The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the Company.<br>**(Emphasis supplied)** |
| 20. | Occupation certificate | 31.05.2019<br>(annexure R-30 on page no. 93 of reply) |
| 21. | Offer of possession | Not offered but cancelled |

## B. Facts of the complaint

The complainant has submitted as under:

3. That the complainant is a bonafide buyer of a flat in Ireo Corridors, Sector 67A, Gurugram. That the project is under-construction and registered with the authority under vide interim registration nos. as per HRERA Website: 377 of 2017, 378 of 2017, 379 of 2018. The complainant is aggrieved by the violation and contravention of the provisions of the Act, 2016 and the Rules, 2017 by the respondent which is a developer company involved in the business of real estate whereby it constructs and sell apartments, plots in townships and commercial spaces in malls to buyers. The respondent has committed gross delay in delivery of the plot.
4. That the complainant is a private limited company incorporated under the Companies Act (as subsisting) and booked a 3 BHK + study under its name for the purpose of giving residence to the director of the company. The said unit had an area of 1920 sq. ft. and the total sale consideration amounted to Rs.1,92,17,760/- by way of allotment letter dated 07.08.2013 and the complainant was allotted CD-A7-05-503 in the said project.
5. That after making a payment of Rs.37,21,564/- of the total sale consideration of Rs.1,92,17760/-, the complainant through one of its directors vide his communication dated 08.10.2013 i.e., approximately after 8 months from paying the booking amount, sought cancelation of the allotment with full refund. This request was not acceded to by the respondent/promoter. The respondent vide its reply dated 15.10.2013 took extremely unreasonable stand and inter-alia stated that if the complainant wish to withdraw the booking it would have to forfeit 20% of the earnest money.

6. That the respondent acted in complete disregard of applicable laws. Firstly, the project was advertised (pre-launch) prior to grant of license from the Directorate of Town and Country Planning (Haryana). Secondly, the respondent solicited monies from the complainant as on 07.02.2013 towards booking amount at a time when the above license had not been granted. Thirdly, it sought to claim forfeiture, which is in the form of penalty, giving a complete go-by to the fact that it had at its end sought monies and commenced construction activities without first securing all necessary approvals.
7. That the respondent all along had represented that it has proper title to the land. However, it has since been revealed that the board resolution authorizing the signatory to sign the sale deed is of time prior to incorporation of the respondent. This is fatal error and goes to root of the sale deed and the representation made to the complainant in the apartment buyer's agreement.
8. That the building plan which was approved on 23.07.2013 was sought to be revised on 25.07.2016 and public notice was issued on 04.08.2016, without providing particulars about the nature of changes/revisions sought to be incorporated. This too was in direct contravention of the terms of grant of the first building plan.
9. That the complainant at the time did not know these crucial and pertinent facts and the extent of misrepresentation made by the respondents. It was clearly prejudiced by the rejection of the request for cancellation on 15.10.2013 and had to per force continue making payments through own funds and bank loan while

simultaneously seeking cancellation of the unit in terms of its communications which are part of the record.

10. That the complainant on account of the unreasonable rejection of cancellation by the respondent had to incur carrying cost i.e., compound interest in view of the home loan that it had got sanctioned. However, instead of appreciating all the difficulties of the complainant and the very basic and fundamental principle well settled in law it has a inherent right to seek cancellation in case of default which operates independent of the grossly one side and unfair terms of the apartment buyers agreement, the respondent vide its letter dated 15.10.2013 first sought forfeiture at 20% of the earnest money and thereafter, it in a malafide and unjust manner sought to serve a final notice dated 19.05.2017 seeking payment and thereafter on 05.07.2017 sought to cancel the allotment while effectively usurping all the money paid by the complainant amounting to Rs. 90,80,588/-. The respondent vide its cancellation letter dated 05.07.2017 to the complainant informed it of the fact that the allotment of the said flat stood cancelled and that the respondent was proceeding to deduct an amount of Rs.70,78,159/- [Rs.37,85,945 (earnest money)+Rs.1758157/- (interest on delayed payment)+ Rs.541502/-(brokerage)+Rs.992555/- (Tax)] from Rs.90,80,588/-.

11. That any amount refundable would be payable only after resale of the said apartment. The letter was marked to ICICI Bank also. However, ICICI bank in-turn stated that it has not received the cancellation letter. It may be noted that the adjustment so carried out is contrary to all principles of fairness and equity. It is on the

face of it contrary to the representation made by the respondent in its letter dated 28.03.2014 to ICICI Bank. The respondent could not have carried out any such unilateral cancellation and/or proceeded to make such illegal adjustments.

12. These actions cannot be sustained or stand the scrutiny considering that there was firstly no occasion for the respondent to reject the request of cancellation with full refund made by the complainant on 08.10.2013 and secondly in light of the revelations regarding the project not having secured necessary approvals which have come to light more recently and therefore for this reason also in the absence of necessary approvals the entire premise on which the respondent sought to raise demand of payment for construction and carried out construction activity also falls. Pertinently, even as per the terms of the apartment buyer's agreement, the project is nowhere near completion. This is evident from the photographs placed by the complainant in support of this complaint. Even the timeline stipulated in the apartment buyer's agreement for handing over possession of the units to allottees has also long expired.

13. That section 18 of the Act mandates a promoter to return the amount received in respect of a plot with interest at the prescribed rate. The Act and Rules mandates payment of interest at the same rate as charged by the developer. In the alternative, rule 15 of the rules prescribe the payment of interest at State Bank of India highest marginal cost of lending rate plus two percent.

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

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

(i) Direct the respondent to refund an amount of Rs. 90, 80,588/- with interest.

15. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

**D. Reply by the respondent.**

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

16. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The apartment buyer's agreement was executed between the parties prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.
17. That there is no cause of action to file the present complaint.
18. That the complainant has no locus standi to file the present complaint.
19. That the complainant is estopped from filing the present complaint by its own acts, omissions, admissions, acquiescence's, and laches.
20. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 35 of the buyers agreement.

21. That the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the complaint. The complaint has been filed maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:

22. That the complainant, after checking the veracity of the project namely, 'The Corridors', Sector 67-A, Gurgaon had applied for allotment of an apartment vide its booking application form.

23. That based on the application for booking, respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainant apartment no. CD-A7-05-503 having tentative super area of 1920.22 sq.ft for a total sale consideration of Rs. 1,92,17,760.34. Vide letter dated 12.03.2014, respondent sent 3 copies of the apartment buyer's agreement to the complainant and the same was executed by it on 28.03.2014.

24. That the complainant made certain payment towards the installment demands on time and as per the terms of the allotment. However, it started committing defaults from fourth installment demand onwards. Vide payment request dated 27.01.2015, respondent had raised the demand of fourth installment for net payable amount of Rs.21,98,439.88. However, the complainant remitted the amount only after reminders dated 22.02.2015 and 24.03.2015 were sent by respondent.

25. That vide payment request dated 02.11.2015, respondent had raised the demand of sixth installment for net payable amount of Rs. 9,40,981.54 followed by reminders dated 07.01.2016 and

10.02.2016. However, the complainant again failed to pay the due installment amount.

26. That vide payment request dated 01.12.2015, respondent had raised the demand of seventh installment for net payable amount of Rs. 20,25,869.30 followed by reminders dated 07.01.2016 and 10.02.2016. However same was never paid by the complainant.

27. That vide payment request dated 03.02.2016, respondent had raised the demand of eighth installment for net payable amount of Rs. 34,38,512.74 followed by reminders dated 29.02.2016 and 23.03.2016. However, the complainant again failed to pay the due installment amount.

28. That again vide payment request dated 01.03.2016, respondent had raised the demand of ninth installment for net payable amount of Rs.48,51,156.19 followed by reminders dated 28.03.2016 and 19.04.2016 . Yet again, the complainant defaulted in abiding by its contractual obligations.

29. That vide payment request dated 07.09.2016, respondent had raised the demand of tenth installment for net payable amount of Rs. 62,65,830.33 followed by reminders dated 04.10.2016 and 27.10.2016. However same was never paid by the complainant.

30. That vide payment request dated 08.03.2017, respondent had raised the demand of eleventh installment for net payable amount of Rs. 77,40,667.07 followed by reminders dated 04.04.2017 and 26.04.2017 followed by final notice dated 19.05.2017. However yet again, the complainant failed to make the necessary payments.

31. That according to agreed clauses of the booking application form and the apartment buyer's agreement, timely payment of

installments within the agreed time schedule was the essence of allotment. However, on account of non-fulfilment of the contractual obligations by the complainant despite several opportunities extended by respondent, the allotment of the complainant was cancelled and the earnest money deposited by the complainant along with other charges was forfeited vide cancellation letter dated 05.07.2017 in accordance with clause 21 read with clause 21.3 of the apartment buyer's agreement Thus, the complainant is now left with no right, claim, lien or interest whatsoever in respect of the said booking/allotment. The respondent has even obtained the occupation certificate on 31.05.2019.

32. That as per possession clause 13.3 of the agreement the time of handing over of possession was to be computed from the date of receipt of all requisite approvals. Even otherwise the construction could not be raised in the absence of the necessary approvals. It has been specified in sub- clause (iv) of clause 17 of the memo of approval of building plan dated 23.07.2013 of the said project that the clearance issued by the Ministry of Environment and Forest, Government of India has to be obtained before starting the construction of the project. It is submitted that the environment clearance for construction of the said project was granted on 12.12.2013. Furthermore, in clause 39 of part-A of the environment clearance dated 12.12.2013 it was stated that fire safety plan duly was to be duly approved by the fire department before the start of any construction work at site. Further as per clause 35 of the environment clearance certificate dated

12.12.2013, the project was to obtain permission of mines & geology department for excavation of soil before the start of construction. The requisite permission from the department of mines & geology department has been obtained on 04.03.2014. The fire scheme approval was granted on 27.11.2014 and the time period for calculating the date for offering the possession, according to the agreed terms of the buyer's agreement, would have commenced only on 27.11.2014. Therefore, 60 months from 27.11.2014 (including the 180 days grace period and extended delay period) would have expired on 27.11.2019. However, the same was subject to the complainant complying with contractual obligations and the occurrence of the force majeure events.

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

## E. Jurisdiction of the authority

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

### E. I Territorial jurisdiction

35. 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**

36. 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.*

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

**F. Findings on the objections raised by the respondent.**

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

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

39. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and would be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 and which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under*

*Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...*

*122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

40. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

*"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

41. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the

plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

**F.II Objection regarding complainant is in breach of agreement for non-invocation of arbitration**

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

> ***"35. Dispute Resolution by Arbitration***
> *"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".*

43. 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.

44. 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 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 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."*

45. 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."*

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

**G. Findings regarding relief sought by the complainant.**

(i) Direct the respondent to refund an amount of Rs. 90, 80,588/- with interest.

47. The complainant has booked the residential apartment in the project named as 'The Corridors' situated at sector 67 A for a total sale consideration of Rs. 1,92,17,760/-. It was allotted the above-mentioned unit vide allotment letter dated 07.08.2013. Thereafter the apartment buyer agreement was executed between the parties on 28.03.2014.

48. As per the payment plan the respondent started raising payments from the complainant. The complainant in total has made a payment of Rs. 90,80,588/- . The respondent vide letter dated 02.11.2015 raised the demand towards sixth instalment and due to non-payment from the complainant it sent reminder on 07.01.2016 and 10.02.2016 and thereafter various instalments for payments were raised but the complainant failed to pay the same. Further the respondent sent final notice dated 19.05.2017. Thereafter the respondent cancelled the allotment the unit vide letter dated 05.07.2017. The authority is of the view that cancellation is as per the terms and conditions of agreement and the same is held to be valid. However, while cancelling the allotment of the respondent forfeited the total paid up amount by way of earnest money, interest on delayed payment, brokerage and applicable taxes. The cancellation of unit was made by the respondent after the Act, of 2016 came into force. So, it 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 cases 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. Even keeping in view those principle in mind, the authority framed a regulation in the year 2018 and 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."*

49. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the deposited amount i.e., Rs. 90,80,588/- after deducting 10% of the basic sale price of the unit within a period of 90 days from the date of this order along with interest @ 10% p.a. on the refundable amount from the date of cancellation i.e., 05.07.2017 till the date of its payment.

**(ii) Cost of litigation.**

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

**H. Directions of the authority: -**

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

i. The respondent/promoter is directed to refund to the complainant the amount i.e., Rs. 90,80,588/- after deducting 10% of the basic sale price of the unit along with interest @ 10% p.a. on the refundable amount from the date of cancellation i.e., 05.07.2017 till the date of its payment.

ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

52. Complaint stands disposed of.

53. File be consigned to the registry.

**(Vijay Kumar Goyal)**
Member

**(Dr. K.K. Khandelwal)**
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
**Dated: 24.08.2022**