BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**4805 of 2019**
Date of filing complaint	**28.10.2019**
First date of hearing	**07.01.2020**
Date of decision	**06.10.2022**

	Col Jodh Singh Dhillon **R/O**: C/o Capt. Gurvinder Singh, 18/2, IInd Floor, Prem Nagar, Janakpuri, New Delhi-110058	**Complainant**
	Versus	
	M/s. Ireo Pvt. Ltd. **Regd. office:** SF-05, Ireo Camous Archview Drive, Ireo City, Golf Course Extension Road, Gurugram-122101	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Complainant in Person	Complainant
Sh. M.K. Dang (Advocate)	Respondent

ORDER

1. The present complaint 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 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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	"Skyon", Sector 60, Gurgaon
2.	Project area	18.10 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	192 of 2008 dated 22.11.2008
5.	Name of licensee	M/s High Responsible Realtors Pvt. Ltd. and M/s Five River Buildcon Pvt. Ltd.
6.	RERA Registered/ not registered	367 OF 2017 DATED 24.11.2017
7.	RERA registration valid up to	21.11.2018
8.	Allotment Letter	29.01.2013 (Annexure 1 at page 18 of complaint)
9.	Unit no.	E0609, 6th Floor, E tower (As per BBA on annexure P-4 of complaint)

10.	Unit area admeasuring (super area)	2023 sq. ft. (As per BBA on annexure P-4 of complaint)
11.	Date of execution of Buyer's Agreement	02.05.2013
12.	Possession clause	**13.3 Possession and Holding Charges** 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 defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said Rental Pool Serviced Apartment to the Allottee within a period of **42 months from the date of approval of the Building Plans and/or fulfillment of the preconditions imposed there under ("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.
13.	Environmental Clearance	31.07.2012 (Taken from similar file of same project)
14.	Approval of building plans	27.09.2011 (Taken from similar file of same project)
15.	Fire Scheme Approval	25.09.2013

		(Taken from similar file of same project)
16.	Due date of possession	27.03.2015 (Calculated as 42 months from date of approval of building plan as per various judgments of the Authority)
17.	Total sale consideration	Rs. 2,35,82,800/- (BSP) (As per page 14 of BBA at annexure P-4)
18.	Amount paid by the complainants	Rs. 75,59,776/- (Details of payment at annexure P-2)
19.	Demand/Reminder Letters	25.04.2013, 21.05.2013, 11.06.2013, 02.07.2013, 30.10.2013, 21.11.2013, 17.12.2013, 07.01.2014, 28.01.2014, 08.01.2014, 03.02.2014, 24.02.2014, 06.02.2014, 04.03.2014, 25.03.2014, 15.04.2014, 22.01.2015, 17.02.2015, 10.03.2015, 28.08.2015, 27.11.2015, 23.12.2015, 19.01.2016, 11.02.2016, 25.02.2016, 11.04.2016
20.	Cancellation Letter	03.11.2016 (Annexure R37 at page 100 of reply)
21.	Occupation certificate /Completion certificate	26.08.2016 (As per DTCP website)
22.	Offer of Possession	08.09.2016 (Annexure R34 at page 94 of reply)

B. Facts of the complaint:

3. In the year 2013, the complainant being desirous of owning a residential apartment decided to book a unit in the project of the respondent. Thus, an application for booking was signed by the complainant on 25.01.2013. In lieu of the application, an allotment offer letter was received by the

complainant dated 29.01.2013 offering a unit bearing no. SY-E-06-09, sixth floor, Tower E.

4. The respondent thereafter raised demand for second instalment on reaching the milestone, "within 45 days of booking", demanding Rs. 24,16,800.70/- from the complainant. It is pertinent to mention that no BBA was executed between the parties till now.
5. Thereafter, a BBA was executed inter se the parties on 02.05.2013. As per clause 13.3 of the agreement the respondent was supposed to deliver the possession of the said Rental Pool Serviced Apartment to the Allottee within a period of **42 months from the date of approval of the Building Plans and/or fulfillment of the preconditions imposed there under ("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. However, the same has yet not been delivered by the respondent.
6. Despite non-completion of project, the respondent kept on demanding payment from time to time and the same was paid by the complainant. The complainant has till now paid Rs 75,59,776/- (Rupees Seventy Five Lakh Fifty Nine Thousand And Seven Hundred And Seventy Six Only) on various dates.
7. That the respondent vide letters dated 30.10.2013 raised further demand of Rs. 52,21,186.76/- on milestone, "casting of 2nd floor roof slab". Thereafter, on 21.11.2013, the respondent again raised demand against milestone, 'casting of 4th floor roof slab' amounting to Rs. 77,15,655.78/-.
9. That the complainant visited the office of the respondent and requested to see the property for which he had paid huge amount of money. However,

the senior officials of the company refused to show the property and stated if he wishes to see the property, he must inform seven days prior to his visit. He asked them to give him date to show him the property after seven days but no information was given to him as to when he can visit to see the property and instead was thrown out with the help of the security staff.

9. That a notice was again received from the respondents demanding the payments. That the complainant replied to the notice of the respondent where in attention of the respondent was drawn as regards letter of petitioner's dated 27.03.2016 and assurance given to show the property bought by the petitioner. The petitioner also informed the respondents that due to coming into force of The Real Estate (Regulation and Development) Act 2016, the agreement between the petitioner and respondent has become null and void hence a new agreement must be signed between the parties but no response was ever received.
10. That the complainant visited Ireo office again on 02.09.2019 and he was told by the staff of respondent that agreement with the petitioner and his wife has been terminated and refused to give any further information. The complainant sent a registered notice to the respondent which was returned unserved.
11. In view of your aforesaid conduct, the complainant has lost his faith in respondent's project and would like to withdraw from the project. Thus, our plea before this Hon'ble Authority is that the complainant has earned the said amount with due hard work and from his sweat and blood, thus the invested money is very much important to the complainants. The complainant left with no other option has approached the Authority for justice.

C. Relief sought by the complainant:

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

i) Direct the respondent company to refund the amount paid by the complainant along with interest at the prescribed rate from the date of receipt of each instalment of payment till the date of refund.

ii) To hold the agreement between the parties as null and void for not conforming to the Act of 2016.

D. Reply by respondent:

The respondent by way of written reply has made following submissions:

13. 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 to the complaint 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.

14. That the complaint is not maintainable for the reason that the booking application form 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 54 of schedule-1 of the booking application form, which is reproduced for the ready reference of this Hon'ble forum-

"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".

15. That the complainant has not approached this Hon'ble Forum with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by him 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:

A. That the complainant, after checking the veracity of the project namely, 'Ireo Skyon', Sector 60, Gurgaon had applied for allotment of an apartment by filling the booking application form dated 25.01.2013. The complainant agreed to be bound by the terms and conditions of the booking application form.

B. That based on the said application, the respondent vide its allotment offer letter dated 29.01.2013 allotted to the complainant apartment no. SY-E-06-09 having tentative super area of 2033 sq. ft. for a total sale consideration of Rs 2,51,45,039/-. Vide letter dated 01.04.2013, the respondent sent 3 copies of apartment buyer's agreement to the complainant and the same was executed by her on 02.05.2013.

C. That the complainant made certain payment towards the instalment demands on time and as per the terms of the allotment. However,

she started committed defaults from fourth instalment demand onwards. Vide payment request dated 25.04.2013, the respondent had raised the demand of fourth instalment for net payable amount of Rs. 53,44,948.40/-. However, the complainant remitted the due amount only after reminders dated 21.05.2013, 11.06.2013 and final notice dated 02.07.2013 was issued by the respondent.

D. That vide payment request dated 30.10.2013, the respondent had raised the demand of fifth instalment for net payable amount of Rs. 52,21,138.76/-. However, the complainant failed to pay the due instalment amount and the due amount was adjusted in the next instalment demand as arrears.

E. That again vide payment request dated 21.11.2013, the respondent had raised the demand of sixth instalment for net payable amount of Rs. 77,15,655.78/- followed by reminders dated 17.12.2013 and 07.01.2014 and final notice dated 28.01.2014. Yet again, the complainant defaulted in abiding by his contractual obligations and the due amount was again adjusted in the next instalment demand as arrears.

F. That vide payment request 08.01.2014, the respondent had raised the demand of seventh instalment for net payable amount of Rs. 1,01,61,380.80/- followed by reminders dated 03.02.2014 and 24.02.2014. However, the same was never paid by the complainant.

G. That vide payment request dated 06.02.2014, the respondent had raised the demand of eighth instalment for net payable amount of Rs. 1,26,07,105.82/- followed by reminders dated 04.03.2014 and 25.03.2014. However, the complainant again failed to pay the due instalment amount.

H. That again vide payment request dated 22.01.2015, the respondent had raised the demand of ninth instalment for net payable amount of Rs. 1,50,52,830.84/- followed by reminders dated 17.02.2015 and 10.03.2015. The respondent vide its letter dated 28.08.2015 intimated to the complainant about the outstanding interest which has been accrued on account of non-payment of the instalment dues by the complainant. Yet again, the complainant defaulted in abiding by her contractual obligations.

I. That the respondent yet again vide its letter dated 27.11.2015, the respondent had raised the demand of tenth installment for net payable amount of Rs. 1,62,83,263.59/- followed by reminders dated 23.12.2015 and 19.01.2016 and final notice dated 11.02.2016. Yet again, the complainant defaulted in abiding by the contractual obligations.

J. That the respondent yet again vide its letter dated 25.02.2016 intimated to the complainant to remit the outstanding payments of the instalment demands as well as the delayed interest which has been accrued as per the terms of the booking application form and the apartment buyer's agreement. An opportunity was given by the respondent to the complainant vide its notice dated 11.04.2016 wherein it was informed to the complaint that as per the terms of the apartment buyer's agreement, the complainant is bound to make the payment towards the due amount.

K. That the possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the apartment buyer's agreement. It was submitted that clause 13.3

of the buyer's agreement and clause 40 of the schedule - I of the booking application form states that

...subject to the force majeure conditions and the allottee having complied with all 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 the Building Plans and/or fulfilment of the preconditions imposed thereunder (Commitment Period). The allottee further agrees and understands that the company shall be additionally be entitled to a period of 180 days (Grace Period)...".

It is pertinent to mention here that as per clause 13.5 of the apartment buyer's agreement and clause 41 of the schedule - I of the booking application form further 'extended delay period' of 12 months from the end of grace period is provided.

L. That from the aforesaid terms of the buyer's agreement, it is evident that the time was 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 (v) of clause 17 of the memo of approval of building plan dated 27.09.2011 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 31.07.2012. Furthermore, in clause (xxii) of part-A of the environment clearance dated 31.07.2012 it was stated that fire safety plan duly was to be duly obtained before the start of any construction work at site. It is submitted that the fire scheme approval was granted on 25.09.2013 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 25.09.2013. Therefore, 60 months from 25.09.2013 (including the 180 days grace period and extended delay period) would have expired on 25.09.2018. However, the same was subject to the complainant complying with her contractual obligations and the occurrence of the force majeure events.

M. That the respondent being a customer oriented developer completed the construction of the tower in which the unit allotted to the complainant was located, much before the lapse of the due date of possession. The respondent has even been granted the occupation certificate by the concerned authorities on 26.08.2016. Furthermore, the respondent had even offered the possession of the unit to the complainant vide notice of possession dated 08.09.2016. The complainant is bound to complete the documentation formalities and make payment towards the remaining due amount. In fact holding charges are payable by the complainant. It is pertinent to mention herein that the complainant has not remitted the due amount despite reminder dated 24.10.2016. The complainant has even failed to make payment towards the advance electricity charges which were demanded by the respondent vide letter dated 07.10.2016.

N. That on account of continuous defaults committed by the complainant, the respondent issued notice of termination dated 03.11.2016 intimating and offering the complainant with a final and last opportunity to remit the due payment. However, the complainant till date has failed to make the payment of the due

amount. It was submitted that the complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that his calculations have gone wrong on account of severe slump in the real estate market and the complainant now wants to unnecessarily harass, pressurize and blackmail the respondent on highly flimsy and baseless grounds. Such malafide tactics of the complainant cannot be allowed to succeed.

16. All other averments were denied in toto.

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

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

19. 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

20. 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.

21. 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.

F. Findings on the objections raised by the respondents:

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.

22. 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.

23. 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."

24. 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."*

25. 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

26. 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".*

27. 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.

28. 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:-*
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> > *"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."*
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> *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.*
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> ...
>
> *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."

29. 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."*

30. 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

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 complainant for refund:

G.I Direct the respondent company to refund the amount paid by the complainant along with interest at the prescribed rate from the date of receipt of each instalment of payment till the date of refund

31. In the instant case, the complainant booked a unit in respondent's project and was allotted the same vide letter dated 29.01.2013. A BBA was also executed between the parties on 02.05.2013 and according to the clause of BBA, the due date of possession comes out to be 27.03.2015. However, the complainant has till now paid only Rs. 75,59,776/- out of basic sale consideration of Rs. 2,35,82,800/-. It is pertinent to note that the respondent had even offered possession of the unit to the complainant, however the same is valid as the same was done after occupation certificate was obtained by the respondent. Thus, **the offer of possession of the unit is valid** (Inadvertently mentioned as invalid offer of possession in proceedings dated 06.10.2022 and the same stands corrected by this order).

32. The respondent sent various demand as well as reminder letters dated 25.04.2013, 21.05.2013, 11.06.2013, 02.07.2013, 30.10.2013, 21.11.2013, 17.12.2013, 07.01.2014, 28.01.2014, 08.01.2014,

33. In view of the same, the respondent cancelled the unit of the complainant vide letter dated 03.11.2016. 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 cancellation of any allotted unit by the respondent builder must be as per the provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram providing deduction of 10% of sale consideration as earnest money and sending the remaining amount to the allottee immediately. So, 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."

34. Keeping in view the above-mentioned facts and since the allottee requested for cancellation of the allotment on 03.11.2016 and even withdrew from the project by filing the complaint, so the respondent was bound to act upon the same. The Authority hereby directs the promoter to return the paid up amount after forfeiture of 10% of 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., 03.11.2016 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017.

G.II Direct the respondent to declare the BBA as void for not being in conformity with the Act of 2016.

35. The above-mentioned relief sought by the complainant was not pressed during the arguments. The authority is of the view that the complainant does not intend to pursue the above-mentioned relief sought. Hence, the authority has not raised any findings w.r.t. to the above-mentioned relief.

H. Directions of the Authority:

36. Hence, the authority hereby passes this order and issue the following directions under section37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondent is directed to return the paid up amount after forfeiture of 10% of 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., 03.11.2016 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017.

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.

37. Complaint stands disposed of.

38. File be consigned to the registry.

(Sanjeev Kumar Arora) Member

(Ashok Sangwan) Member

(Vijay Kumar Goyal) Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.10.2022