



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

Complaint no. : 1929 of 2018
First date of hearing: 25.04.2019
Date of decision : 31.08.2022

1. Sneha Dev
2. Samir Dev

Both R/O: B-129, Second Floor,
Malviya Nagar, New Delhi

Complainants

Versus

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

Respondent

CORAM:

Dr. K.K Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Nitin Yadav
Shri Rahul Thareja

Advocate for the complainants
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

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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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
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 Registered in 3 phases Vide 378 of 2017 dated 07.12.2017(Phase 1) Vide 377 of 2017 dated 07.12.2017 (Phase 2) Vide 379 of 2017 dated 07.12.2017 (Phase 3)
	Validity	30.06.2020 (for phase 1 and 2) 31.12.2023 (for phase 3)

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6.	Unit no.	104, 1 st Floor, D3 Tower (page no. 98 of complaint)
7.	Unit measuring	2213 sq. ft. (page no. 98 of complaint)
8.	Date of approval of building plan	23.07.2013 (annexure R-5 on page no. 37 of reply)
9.	Date of allotment	07.08.2013 (annexure R-1 on page no. 30 of reply)
10.	Date of environment clearance	12.12.2013 (annexure R-6 on page no. 41 of reply)
11.	Date of execution of builder buyer's agreement	11.06.2014 (page no. 95 of complaint)
12.	Date of fire scheme approval	27.11.2014 (annexure R-8 on page no. 48 of reply)
13.	Total consideration	Rs. 2,37,47,434/- (as per payment plan on page no. 131 of complaint)
14.	Total amount paid by the complainants	Rs. 1,02,13,829/- (as alleged by complainants)
15.	Due date of delivery of possession	23.01.2017 (calculated from the date of approval of building plans) Note: Grace Period is not allowed.
16.	Possession clause	13. Possession and Holding Charges Subject to force majeure, as defined herein and further subject to the Allottee

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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 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.



		(Emphasis supplied)
17.	Occupation certificate	Not obtained
18.	Offer of possession	Not offered

B. Facts of the complaint

The complainants have submitted that:

3. That the respondent painted an extremely rosy picture of the said project "The Corridor". The respondent promoter made several promises with regard to the project and timely delivery.
4. That the respondent further held out and represented that all necessary sanctions and approvals have been obtained by it for executing the said project and it would be completed within the promised timeframe.
5. That the respondent deliberately misled the complainants as the building plan for the said project was only sanctioned on 23.07.2013 which was subsequent to the application for allotment of the complainants dated 22.03.2013. The same was in violation of the statutory guidelines as the respondent was not allowed to invite bookings for the project before the grant of license. DTCP in their reply to an RTI application pertaining to the proposed project in question clearly stated that no promoter can invite booking without obtaining building plans approval.
6. That the complainants were enticed and induced by the respondent to book flat in the above project, based on aforesaid and other representations made by it. The complainants file up an application

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form dated 22.03.2013 which was in nature of a pre-printed form attached with terms & conditions and also made the necessary payment of booking amount of Rs.18,50,000/-. Even during the signing of the application form the respondent/promoter expressly stated that the project would be completed within the promised timeframe which was 60 months from the date of approval of building plans after including the grace period and "Extended delay period". The said time period taken by the builder for completion of project was unusually long and totally contrary to the market practices. However, despite the same the respondent/promoter miserably failed to construct the project.

7. That the respondent issued a letter of allotment dated 07.08.2013 confirming that an apartment being unit no. CD-D3-01-104, on the 1st floor of the tower D3 has been allotted to the complainants for a total sale consideration of Rs. 2,37,47,434/- inclusive of development charges and club membership charges.
8. That the complainants after issuance of allotment letter by the respondent/ promoter repeatedly requested it for execution of an apartment buyer agreement with balanced terms. However, it refused to amend or change any term of the pre-printed buyer's agreement. Furthermore, the respondent threatened the complainants and other innocent homebuyers to execute the buyer's agreement as otherwise the booking amount paid by them would be forfeited. The buyer's agreement was executed on 11.06.2014.
9. That the agreement also contains other clauses which are unacceptable without proper amendment in terms of the Model

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agreement provided in Haryana Real Estate (Regulation and Development) Rules, 2017. The complainants brought the aforesaid issues to the attention of the respondent, and also made objections to the same. However, during such discussions the respondent summarily rejected the bonafide request of complainants and stated that the agreement terms are non-negotiable and would remain as it is. The respondents further made demands for payments for instalments and threatened to forfeit the previous amount paid if further payment is not made.

10. That the complainants under the threat of forfeiture kept on making payments to the respondent/ promoter in terms with the demands raised. They had opted for construction linked payment plan and as per the said plan they paid the first instalment on 12.03.2013 and 15.03.2013, second instalment was paid on 23.05.2013, third instalment on 14.04.2014. The third instalment was subject to the respondent commencing excavation work. However, without there being any excavation at the site the respondent raised erroneous demand from the complainants and extracted money from them.
11. That the respondent/promoter raised an advance payment demand dated 10.07.2015 for the 4th instalment which was subject to casting of lower basement roof slab. They made advance payment against the fourth instalment on 17.07.2015 vide cheque on the assurance of the respondent that it would commence casting of lower basement roof slab in three months from the advance payment demand raised. The respondent did not begin with the casting of lower basement roof slab until March 2017 when the actual 4th payment demand was raised by it on 02.03.2017.

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12. That the complainants till date have made a total payment of Rs. 1,02,13,829/- against total sale consideration of Rs. 2,37,47,434/-. The respondent/promoter has failed to perform the most fundamental obligation of the agreement which was to handover the possession of the flat within the promised time frame, and extremely long. The respondent/promoter has apparently abandoned the tower in which the complainants were allotted the unit.
13. That the respondent as per clause 13.3, 13.4 and 13.5 of the apartment buyer agreement was under an obligation to handover the possession of the booked unit within maximum 60 months' time period (including "extended delay period"). However, till date the respondent has not even constructed 10% of the tower and there are no chances of the tower being constructed in near future. As per clause 13.5 and 10.7 of buyer's agreement the respondent on failure to handover possession is in any case was liable to refund the entire sale consideration along-with interest. But it has virtually abandoned the apartment of the complainants as more than 5 years have been passed since the date of booking and the respondent has not even begun constructing the apartment. As such the complainants are eligible for refund of their investment along-with interest as per clause 10.7 of the apartment buyer agreement. The website of respondent itself reflect that there has been no construction done since 2015 so far as tower of complainants is concerned. The pictures uploaded by the respondent on its website show that only basement of the cluster D has been constructed.
14. That the project has been inordinately delayed and thus the complainants are entitled for refund of their investment along-with



interest as provisions of Real Estate (Regulation and Development) Act, 2016.

C. Relief sought by the complainants:

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

(i) **Direct the respondent to refund Rs. 1,02,13,829/- along with interest @ 18% p.a. from the date of making payment to the complainants.**

(ii) **Direct the respondent to pay a sum of Rs. 50,000/- to the complainant towards the cost of litigation.**

16. 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: -

17. 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.

18. That there is no cause of action to file the present complaint.

19. That the complainants have no locus standi to file the present complaint.

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20. That the complainants are estopped from filing the present complaint by their own acts, omissions, admissions, acquiescence's, and laches.
21. That this Hon'ble Forum does not have the jurisdiction to try and decide the present complaint.
22. 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 buyer's agreement.
23. That the complainants have not approached this authority with clean hands and have intentionally suppressed and concealed the material facts in the present complaint. It 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:
24. That the complainants, after checking the veracity of the project namely, 'Corridor; sector 67-A, Gurugram applied for allotment of an apartment vide booking application form and agreed to be bound by the terms and conditions of the same.
25. That based on the application for booking, respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainant's apartment no. CD-D3-01-104 having tentative super area of 2213 sq. ft. The respondent had issued the payment demand letter dated 14.04.2013 for the net payable amount of Rs. 25,98,694/-. However, the due amount was paid by the complainants only after a reminder dated 14.05.2013 was sent to them.
26. That respondent had sent three copies of the apartment buyer's agreement to the complainants vide its letter dated 09.12.2013. The

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apartment buyer's agreement was executed between the parties on 11.06.2014. It is pertinent to mention herein that the Real Estate (Regulation and Development) Act, 2016 was not enacted at the time of execution of the apartment buyer's agreement and the provisions of the said act cannot be enforced retrospectively.

27. That from the aforesaid terms of the booking application form, it is evident that the time was to be computed from the date of receipt of all requisite approvals. Even otherwise the 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 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 was to be duly approved by the fire department before the start of any construction work at site. It is pertinent to mention herein that 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 was obtained on 04.03.2014. 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. It is

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submitted 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, would have expired only on 27.11.2019. However, as stated above, the due date is subject to the force majeure conditions which are beyond the reasonable control of the respondent.

28. That however, the State Environmental Assessment Authority, Haryana prohibited the respondent from undertaking any construction under the ROW ("Right of way") of the High Tension (HT) wire area for the tower in question. The said ROW of the said high tension wires only affected some portions of the project in question including the tower in question. The respondent was required to get these HT lines removed and relocate such HT Lines for the blocks/floors falling under such HT Lines. It is pertinent to mention to mention herein that the respondent had already started the construction of the other part of the project which was not affected by the High-Tension wire area.
29. That the whole-time directors of the concerned authority i.e HVPNL approved the conversion of 66 kV D/C Badshapur- Sector 56-Dundahera, Gurgaon Line crossing the land of the respondent from overhead line into underground XLPE Power Cable in new alignment as a deposit work of the associate company of the respondent and the same was approved vide memo dated Ch-155/DSO-434/Vol-II/CETS-589/Precision Realtors Pvt. Ltd dated 22.01.2014.

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30. That the approval of the conversion was intimated by HVPNL to the associate company of the respondent vide its letter dated 03.02.2014 and it was asked to pay an estimate of Rs. 40,29,300/- towards the same.
31. That despite best efforts and regular follow ups by the respondent, the overhead high-tension wires were shifted by the concerned government department only by February 2016. It is pertinent to mention herein that the respondent had vide its letter dated 04.08.2016 informed all the allottees including the complainants that the building plans earlier approved are to be revised only with respect to certain towers and had sought objections, if any, from the allottees, including the complainants. The letter dated 04.08.2016 explicitly mentioned that in case there is a failure to file any objections/suggestions for the revised building plan it shall be assumed that the complainants would have no objections/suggestions to the proposed Building Plan. No objections were ever received from the complainants with respect to the revised building plans and the concerned authority accordingly certified the conversion of the HT lines from overhead to underground.
32. That once the said pre-condition was fulfilled, the respondent approached the statutory Authority i.e. Director Town and Country Planning, Haryana, Chandigarh for permission to construct, consequent to the removal of the high tension wires, by the way of revised building plans. The revised building plan was approved by the competent authority for the concerned tower in question on 10.07.2017 after the removal of High Tension Wire.

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33. That the implementation of the project was hampered due to non-payment of instalments by allottees on time and several other issues also materially affected the construction and progress of the project.

- Inability to undertake the construction for approx. 7-8 months due to Central Government's notification with regard to demonetization : The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f from 9-10 November 2016 the day when the central government issued notification with regard to demonetization. During this period, the contractor could not make payments to the labour in cash and as majority of casual labour force engaged in construction activities in India do not have bank accounts and are paid in cash on a daily basis. During demonetization the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on the site of the magnitude of the project in question are Rs. 3-4 lakhs per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence the implementation of the project in question got delayed due on account of issues faced by contractor due to the said notification of central government.

There are also studies of Reserve Bank of India and independent studies undertaken by scholars of different

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institutes/universities and also newspaper reports of Reuters of the relevant period of 2016-17 on the impact of demonetization on real estate industry and construction labour.

Thus, in view of the above studies and reports, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should be deemed to be extended for 6 months on account of the above.

- Orders passed by National Green Tribunal: In last four successive years i.e., 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. The Hon'ble NGT has passed orders with regard to phasing out the 10-year-old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The Contractor of respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to that, there was a delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November- December 2016 and November- December 2017. The district administration issued the requisite directions in this regard. In view of the above, construction work remained badly affected for 6-12 months due to the above stated major events

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and conditions which were beyond the control of the respondent and the said period is also required to be added for calculating the delivery date of possession.

- Non-Payment of Instalments by Allottees: Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.
- Inclement weather conditions viz. Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavourable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions.
- Covid-19 Outbreak-: The outbreak of the deadly Covid 19 virus has resulted in significant delay in completion of the construction of the projects in India and the real estate industry in NCR region has suffered tremendously. The outbreak resulted in not only disruption of the supply chain of the necessary materials but also in shortage of the labour at the construction sites as several labourers have migrated to their respective hometowns. The Covid-19 outbreak which has been classified as 'pandemic' is an Act of God and the same

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is thus beyond the reasonable apprehension of the respondent.

34. 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

35. 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

36. 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

37. 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)

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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.

38. 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.
39. 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. 2021-2022(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

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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."

40. 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 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.

41. 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.
42. 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

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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."
43. 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.”

44. 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 complainants is in breach of agreement for non-invocation of arbitration

45. 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

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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".

46. 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,

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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.

47. 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 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."

48. 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."

49. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants

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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.

F.III Objections regarding force majeure

50. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainants is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction during 2015-2016-2017-2018, dispute with contractor, non-payment of instalment by allottees and demonetization. The plea of the respondent regarding various orders of the NGT and demonetisation advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Further, any contract and dispute between contractor and the builder cannot be considered as a ground for delayed completion of project as the allottee were not a party to any such contract. Also, there may be cases where allottees have not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus,



the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings regarding relief sought by the complainants.

(i) Direct the respondent to refund Rs. 1,02,13,829/- along with interest @ 18% p.a. from the date of making payment to the complainants.

51. The complainants booked a residential apartment in the project of the respondent named as "Corridors" situated at Sector-67-A, Gurugram, Haryana for a total sale consideration of Rs. 2,37,47,434/-. The allotment of the unit was made on 07.08.2013. Thereafter the builder buyer agreement was executed between the parties on 11.06.2014.
52. Keeping in view the fact that the allottee complainants wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein, the matter is covered under section 18(1) of the Act of 2016.
53. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The buyer's agreement lays down the terms that govern the sale of different kinds of properties like residential, commercials etc. between the buyer and the builder. It is in the interest of both the parties to have a well-drafted



buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoter/developer to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoter/developer. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoter/developer or gave them the benefit of doubt because of the total absence of clarity over the matter.

54. The respondent/ promoter has proposed to handover the possession of the subject apartment within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 180 days grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter.
55. Further, it is submitted by the respondent promoter that the due date of possession should be calculated from the date of fire scheme approval which was obtained on 27.11.2014, as it is the last of the statutory approvals which forms a part of the preconditions.
56. The authority has gone through the possession clause of the agreement in the present matter. On a bare reading of the said clause of the agreement reproduced above, it becomes clear that the



possession in the present case is linked to the “fulfilment of the preconditions” which are so vague and ambiguous in itself. Nowhere in the agreement, it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due date of possession is subjected to in the said possession clause. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the unit in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the “fulfilment of the preconditions” has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject unit. According to the established principles of law and natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and against the interests of the allottee must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of possession of the unit in question to the complainants. Accordingly, in the present matter the due date of possession is calculated from the date of approval of building plans i.e., 23.07.2013 which comes out to be 23.01.2017.

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57. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

“... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project.....”

58. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (c), 357*** reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others (Supra)*** it was observed as under:

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the

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proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.

59. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as they wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
60. This is without prejudice to any other remedy available to the allottee including compensation for which they may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
61. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 1,02,13,829/- 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 each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid.*

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(ii) Direct the respondent to pay a sum of Rs. 50,000/- to the complainants towards the cost of litigation.

62. The complainants in the aforesaid relief are 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 complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority: -


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

- i. The respondent/promoter is directed to refund the amount i.e., Rs. 1,02,13,829/- received by him to the complainants with interest at the rate of 10.00% as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the 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.
- iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainants.
64. Complaint stands disposed of.
65. File be consigned to the registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 31.08.2022

HARERA
GURUGRAM