BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1704 of 2019/532 of 2021
First date of hearing: 17.09.2019
Date of decision : 10.08.2022

Geeta Choudhary
W/o: Amit Choudhary
Address: F-322, Royal Cosa, Sushant Lok-II, Sector-57, Gurugram — **Complainant**

Versus

M/S Ireo Grace Realtech Pvt. Ltd.
Regd. Office at: C-4, 1st Floor, Malviya Nagar, New Delhi-110017 — **Respondent**

CORAM:
Shri KK Khandelwal — **Chairman**
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:
Shri Sanjeev Sharma — Advocate for the complainant
Shri M.K Dang — Advocates for the respondent

ORDER

1. The present complaint dated 24.04.2019 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 there under to the allottees 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. N.	Particulars	Details
1.	Name and location of the project	"The Corridors" at sector 67A, Gurgaon, Haryana
2.	Nature of the project	Group Housing Colony
3.	Project area	37.5125 acres
4.	DTCP license no.	05 of 2013 dated 21.02.2013 valid upto 20.02.2021
5.	Name of licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
6.	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 status	30.06.2020 (for phase 1 and 2) 31.12.2023 (for phase 3)
7.	Apartment no.	403, 4th floor, tower A4 (annexure C-6 on page no. 51 of complaint)
8.	Unit area admeasuring	1726.91 sq. ft.

		(annexure C-6 on page no. 51 of complaint)
9.	Date of approval of building plans	23.07.2013 (annexure R-29 on page no. 95 of reply)
10.	Date of allotment	07.08.2013 (annexure C-3 on page no. 36 of complaint)
11.	Date of environment clearance	12.12.2013 (annexure R-30 on page no. 103 of reply)
12.	Date of builder buyer agreement	16.10.2014 (annexure C-6 on page no. 48 of complaint)
13.	Date of fire scheme approval	27.11.2014 (annexure R-31 on page no. 118 of reply)
14.	Reminders for payment	For Fourth Instalment: 29.03.2015, 23.04.2015 For Fifth Instalment: 29.06.2016, 22.07.2016 For Sixth Instalment: 12.08.2016, 16.09.2016 For Seventh Instalment: 16.09.2016, 07.10.2016 For Eight Instalment: 15.11.2016, 07.12.2016 For Ninth Instalment: 16.01.2017, 07.02.2017 26.04.2017(Final notice)
15.	Due date 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 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.	Date of cancellation letter	**18.08.2017** [annexure R-32 on page no. 119 of reply]
18.	Total sale consideration	Rs. 1,73,08,261/- [as per payment plan on page no. 84 of complaint]
19.	Amount paid by the complainant	Rs. 63,88,945/- [as per cancellation letter on page no. 85 of complaint]
20.	Occupation certificate	Not obtained
21.	Offer of possession	Not offered

B. Facts of the complaint

3. That at the time of execution of application form, respondent collected initial amount of Rs. 20,00,000/- at the basic sale price of Rs. 8750/- per sq. ft.

4. That thereafter as per 2nd demand raised by the respondent, the complainant paid another sum of Rs. 13,46,912/- through cheque.

5. That the complainant was shocked to see the offer of allotment in which the respondent has increased the basic sale price to 9400 per sq. ft. without any notice.

6. That complainant when enquired in regard to increase of Rs. 650/- per sq. ft. in the basic sale price and demand of other charges as above mentioned; then it was assured by the respondent no.1 that increased price shall be taken-back including other charges and persuaded the complainant to pay the next/third instalment to avoid any late payment charges and/or forfeiture of money and promised that the adjustment shall be made before issuance of next/fourth instalment's due date.

7. That complainant had also booked another unit in the same project vide flat No. CD-B4-03-304 and had already paid a substantial amount of Rs.33,46,486/- in which there was also one-sided increase in basic sale price; hence, the complainant apprehended for any further untoward/illegal act at the hands of respondent are requested it to surrender the allotment of said/second unit and to adjust the amount paid i.e.

Rs.33,46,486/- towards the present unit which is now the subject matter of the present complaint.

8. The respondent under fraudulent intentions first of all illegally deducted the delayed payment interest of Rs.1,53,433- and thereafter Rs.1,51,020/- out of the balance amount of Rs.31,93,053/- was first adjusted as delayed payment interest accrued for the retained unit; as a result, only an amount of Rs.30,42,033/- got adjusted against the retained/present unit. Thus, in total Rs.63,88,945/- were treated as paid-up amount by the complainant which even otherwise is more than the 3rd payment instalment of which originally was raised for a sum of Rs.19,97,183/-.

9. That when complainant received another/new apartment buyer agreement along with payment plan for getting it signed by the complainant; several other issues which were contrary, one sided & unethical adversely affecting the interest and charges as falsely claimed were neither being resolved in the said apartment buyer agreement, nor the original basic sale price was reduced to its original amount of Rs. 8,750/- per sq. ft. rather respondent kept intact the illegal and unjustifiable demands in spite of repeated resistance by the complainant, who was further threatened that the unit would be cancelled and would also forfeit the money paid.

10. That complainant in spite of paying the surplus amount against the 3 instalment; requested the respondent to refund her hard-

earned money but, respondent not only illegally forfeited 20% of the total cost of unit; also deducted/adjusted towards delayed payment interest of Rs.20,28,380/-; furtherance to that Rs.4,86,989/- as brokerage and Rs.10,66,538/- as applicable taxes has also been falsely levied and cancelled the unit vide letter dtd.18.8.2017.

C. Relief sought by the complainant:

11. The complainant has sought the following relief:

- Direct the respondent/builder to refund a sum of Rs. 63,88,945/- which had been paid by the complainant.

D. Reply by the respondent.

12. 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 complainant and the respondent prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be enforced retrospectively.

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

14. That the complainant has no locus standi to file the present complaint.

15. That the complainant is estopped from filing the present complaint by her own acts, conduct, omissions, admissions, acquiescence and laches.

16. That this Hon'ble Forum does not have the jurisdiction to try and decide the present complaint.

17. That the complaint is not maintainable as the matter is referable to arbitration as per The Arbitration and Conciliation Act, 1996 in view of the fact that buyer's 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.

18. That the complainant, after checking the veracity of the project namely, 'Corridor; Sector 67A, Gurugram had applied for allotment of an apartment vide her booking application form. the complainant agreed to be bound by the terms and conditions of the booking application form agreed upon by her.

19. That based on the said application, the respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainant apartment no. CD-A4-04-403 having tentative super area of 1726.91 sq.ft for a total sale consideration of Rs. 1,73,08,261.56. Vide letter dated 31.03.2014, the respondent sent 3 copies of the apartment buyer's agreement to the complainant. It is submitted that the complainant signed and executed the apartment buyer's agreement only on 16.10.2014 after reminders dated 28.05.2014 and 17.07.2014 were issued by the respondent.

20. That the respondent kept on raising payment demands from the complainant in accordance with the mutually agreed terms and

conditions of the allotment as well as of the payment plan and the complainant made the payment of the part-amount of the total sale consideration. That vide payment request dated 18.03.2014, respondent had raised the demand for third installment of net payable amount of Rs. 19,97,183.77 followed by reminders dated 13.4.2014 and 04.05.2014 and final notice dated 29.05.2014.

21. That vide letter dated 08.09.2014, the complainant, on account of paucity of funds, requested the respondent through her broker to merge the unit no. CD-B4-03-304 which was already allotted by the respondent in the name of the complainant with the unit of the complainant. . The respondent being a customer-oriented company acceded to the request of the complainant vide letter dated 10.10.2014 and intimated to her that after deducting the delayed interest accrued towards the units no. CD-A4-04-403 and CD-B4-03-304, the amount of Rs. 3193053/- was adjusted towards unit no. CD-A4-04-403 and a memo to the same effect with respect to the amount transferred towards the balance sale consideration of the unit in question was issued by the respondent to the complainant vide memo dated 14.11.2014.

22. That vide payment request dated 03.03.2015, respondent had raised the demand for fourth installment of net payable amount of Rs. 9,32,272.16 followed by reminders dated 29.3.2105 and 23.04.2015. However, the complainant again failed to pay the due installment amount. Again, vide payment request dated

2.06.2016, respondent had raised the demand for fifth installment of net payable amount of Rs. 26,28,615/- followed by reminders dated 29.6.2016 and 22.07.2016. Yet again, the complainant defaulted in abiding by her contractual obligations.

23. That the respondent had raised the payment request for sixth installment dated 18.07.2016 for net payable amount of Rs. 43,24,959.69 followed by reminders dated 12.08.2016 and 06.09.2016. However same was never paid by the complainant. The respondent had raised the payment request for seventh installment dated 23.08.2016 for net payable amount of Rs. 61,65,053,69 followed by reminders dated 16.09.2016 and 07.10.2016. Vide Payment request dated 18.10.2016, respondent had raised the demand for eighth installment of net payable amount of Rs. 78,61,396.92 followed by reminders dated 15.11.2016 and 07.12.2016. Again, vide payment request dated 19.12.2016, respondent had raised the demand for ninth installment of net payable amount of Rs. 96,11,847.69 followed by reminders dated 16.01.2017 and 07.02.2017 and final notice dated 26.04.2017. Yet again, the complainant defaulted in abiding by her contractual obligations.

24. That the time was to be computed from the date of receipt of all requisite approvals. Even otherwise the construction could be raised in the absence of the necessary approvals. That 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. That 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 her contractual obligations and the occurrence of the force majeure events. The complainant is trying to re-write the agreed terms and conditions of the agreement. It is submitted that even as per the terms and conditions of the agreement, no defaults or illegalities have been committed by respondent with respect to offering the possession of the unit to the complainant and she has made false averments in order to unnecessarily harass and pressurize the respondent to submit to her unreasonable demands.

25. That it is pertinent to mention here 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. 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, her calculations went wrong on account of slump in the real estate market and the complainant did not possess sufficient funds to honour her commitments. The complainant was never ready and willing to abide by her contractual obligations and she also did not have the requisite funds to honour her commitments.

26. That on account of non-fulfilment of the contractual obligations by the complainant despite several opportunities extended by the respondent, the allotment of the complainant was cancelled and the earnest money deposited by the complainant along with other charges were forfeited vide cancellation letter dated 18.08.2017 in accordance with clause 21 read with clause 21.3 of the apartment buyer's agreement and the complainant is now left with no right, claim, lien or interest whatsoever in respect of the said booking/allotment. Despite failure of the complainant to adhere to her contractual obligations of making payments and executing the apartment buyer's agreement, the respondent has completed the construction of the tower in which the unit allotted to the complainant was located and has even applied for the grant of the occupation certificate on 10.09.2019.

27. That although the unit of the complainant has already been terminated on account of continuous defaults on the part of the complainant herself, it is pertinent to mention herein that the implementation of the said project was hampered due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of the respondent, and which have affected the materially affected the construction and progress of the project. Some of the force majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under :

28. 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 payment 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 a 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.

29. There are also studies of Reserve Bank of India and independent studies undertaken by scholars of different institutes/universities and also newspaper reports of Reuters of the relevant period of 2016-17 on the said issue of 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 deemed to be extended for 6 months on account of the above.

30. 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. Also 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 the respondent could not undertake construction for 3-4 months in compliance of the orders of

Hon'ble National Green Tribunal. Due to following, 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.

31. In view of the above, construction work remained very badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of respondent no.1 and the said period is also required to be added for calculating the delivery date of possession.

32. 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.

33. 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.

34. That Divisional Commissioner, Gurgaon directed District Town Planner, Gurgaon to stop construction at site and for nearly two months the implementation was kept in abeyance. Despite all these circumstances mentioned above respondent worked hard and tirelessly and was able to complete the construction of the apartment allotted to the complainant.

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

E. Jurisdiction of authority

36. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

37. 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

38. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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.*

39. 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.

40. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the residence purchase agreement was executed between the complainant and the respondent prior to the enactment of the

Act and the provision of the said Act cannot be applied retrospectively.

41. The authority is of the view 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. The Act nowhere provides, nor can be so construed, that all previous agreements will 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 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."*

42. Further, 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."*

43. 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

44. 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".

45. 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.

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

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

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
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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.*
>
> ...
>
> *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."*

47. 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."*

48. 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 on the relief sought by the complainant.

- **Direct the respondent to refund a sum of Rs. 63,88,945/- which had been paid by the complainant towards the allotted unit.**

49. That the complainant booked a residential apartment in the project of the respondent named as "corridors" situated at sector 67-A, Gurgaon, Haryana for a total sale consideration of Rs. 1,73,08,261/-. The allotment of the unit was made on 07.08.2013 and the complainant was allotted the above-mentioned unit. Thereafter the apartment buyer agreement was executed between the parties on 16.10.2014.

50. 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 residentials, 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.

51. 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.

52. Further, in the present case, 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.

53. 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 complainant. 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.

54. As per the payment plan respondent started raising payments from the complainant. The complainant in total has made a payment of Rs. 63,88,945/- The respondent vide letter dated 03.03.2015 raised the demand towards fourth instalment and due to non-payment from the complainant he sent reminders on 29.03.2015, 23.04.2015 and thereafter various instalments for payments were raised but the complainant failed to pay the instalments. The final notice against such demands was sent on 26.04.2017. Thereafter the respondent cancelled the allotment of the unit vide letter dated 18.08.2017(annexure R-2). The authority is of the view that cancellation is as per the terms and conditions of agreement and the same is held to be valid. However, while cancelling the allotment of the respondent forfeited the total paid up amount by way of earnest money, interest on delayed payment, brokerage and applicable taxes. The cancellation of unit was made by the respondent after the Act, of 2016 came into force. So, the respondent was not justified in forfeiting the whole of the paid amount and at the most could have deducted 10% of the basic sale price of the unit and not more than that. Even the Hon'ble Apex court of land in case of **Maula Bux Vs. Union of India, (1970) 1 SCR 928** and **Sirdar K.B Ram Chandra Raj Urs. Vs. Sarah C. Urs, (2015) 4 SCC 136,** held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is In the nature of penalty,

then provisions of Section-74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damage. The deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

> *"5. AMOUNT OF EARNEST MONEY*
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

55. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the deposited amount i.e., Rs. 63,88,945/- 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 @ 9.80% p.a. on the refundable amount from the date of cancellation i.e., 18.08.2017 till the date of its payment.

H. Directions of the authority

56. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure

compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondent /promoter is directed to refund the deposited amount of Rs. 63,88,945/- after deducting 10% of the basic sale price of the unit along with interest @ 9.80% p.a. on the refundable amount from the date of cancellation i.e., 18.08.2017 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.

57. Complaint stands disposed of.

58. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 10.08.2022