BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1578 of 2019
1177 of 2020
First date of hearing: 05.09.2019
Date of decision : 10.08.2022

1. Rahul Agarwal
2. Vishal Gupta
R/O: E-4/16, Krishna Nagar,
Delhi-110051 **Complainants**

Versus

Ireo Grace Realtech Private Limited
Registered Office: - C-4, 1st Floor,
Malviya Nagar, New Delhi-110017 **Respondent**

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

APPEARANCE:
Shri Rahul Agarwal Advocate for the complainants
Shri M.K Dang Advocate for the respondent

ORDER

1. The present complaint dated 11.04.2019 has been filed by the complainants/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of

section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the 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)
6.	Unit no.	903,9th Floor, B5 Tower (page no. 67 of complaint)
7.	Unit measuring	1321.15 sq. ft. (page no. 67 of complaint)
8.	Date of approval of building plan	23.07.2013 [annexure R-22 on page no. 98 of reply]
9.	Date of allotment	07.08.2013 (annexure R-2 on page no. 72 of reply)
10.	Date of environment clearance	12.12.2013 [annexure R-23 on page no. 106 of reply]
11.	Date of execution of builder buyer's agreement	12.05.2014 (page no. 64 of complaint)
12.	Date of fire scheme approval	27.11.2014 [annexure R-24 on page no. 117 of reply]
13.	Reminders for payment	**For Fourth Instalment:** 21.08.2015, 10.02.2016 **For Fifth Instalment:**04.05.2016, 26.05.2016 **For Sixth Instalment:** 06.07.2016, 01.08.2016 **For Seventh Instalment:** 06.09.2016, 28.09.2016

		For Eight Instalment: 07.11.2016, 30.11.2016 **For Ninth Instalment:** 28.12.2016, 16.02.2016
14.	Date of cancellation letter	**05.01.2017** (page no. 158 of complaint)
15.	Total consideration	Rs. 1,30,35,970/- [as per payment plan on page no. 100 of complaint]
16.	Total amount paid by the complainants	Rs. 40,06,266/- [as alleged by complainants]
17.	Due date of delivery of possession	**23.01.2017** (calculated from the date of approval of building plans) Note: Grace Period is not allowed.
18.	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)**

19.	Occupation certificate	27.01.2022 [as per project details]
20.	Offer of possession	Not offered

B. Facts of the complaint

The complainants have submitted as under:

3. That the complainants were offered a unit @ Rs. 8750/- including basic sale price and other charges such as EDC, IDC, PLC and parking charges. That based on the assurances made by the respondent, they booked a unit.

4. That after accepting the booking amount of Rs. 12,50,000/- in January 2013 respondent issued two receipts dated 13.03.2013, wherein unit no. CD-B5-09-903 was allotted arbitrarily without any consultation. That at the time of signing the application form, the complainants were asked to leave the relevant columns blank stating that the said columns would be filled at a later stage and booking form was only formality and all terms and condition will be finalized at the time of signing of agreement. The complaints believing upon the version of official/ authorized agents of the respondent signed the application form. Thereafter demand for second installment vide payment request letter dated 14th April 13 for a sum of Rs.12,56,032/-, was raised by the respondent before signing of flat buyer agreement. The complainants made the payment of Rs. 12,56,032/-.

5. That the sanctioned building plans for the project were issued on 23.07.2013, which is subsequent to the date of the booking made by the complainants. The respondent accepted 2 installments from the complainants before approval of building plan. The problem started when the "allotment offer letter" was issued by the respondent to the complainants in which the basic sale price was reflected @ Rs. 9200/- per sq. ft along with other ancillary charges which were not agreed or were part of sale consideration at the time of booking of flat. The complainants pointed out this fact to the respondent whereupon they were assured that the basic sale price for them would be @ Rs. 8750/- per sq. ft. and the enhanced basic sale price and other charges were for the new customers only but not for the complainants and same would be rectified in the apartment buyer agreement with the necessary corrections in other charges.

6. That thereafter respondent demanded payment for third installment of Rs. 14,85,190/- on 18.03.2014 on account of "commencement of excavation" even before execution of flat buyer agreement. The complainants made payment of Rs. 14,85,190 dated 09.04.2014. Thus, they made payment of Rs.40,06,266/- before execution of flat buyer agreement which was duly acknowledged by the respondent.

7. The complainants received the flat buyer's agreement for the purpose of signing, but they were shocked to see that the basic

sale price in the builder buyer agreement was again @Rs. 9200/- per sq. ft. not only that it was also mentioned that the development charges @ Rs. 327.91/- per sq. ft. of the super area would be charged in addition to the basic sale price. The complainants were also slapped with the club membership charges amounting to Rs. 2,50,000/- . It was stated by them that the documents were printed in bulk and new allotment rate finds printed even in the documents sent to the complainants, who had purchased prior in time and the enhanced rate would not apply to the complainants. It was assured to the complainants that since they had purchased the apartments from the respondent before the revision of the BSP, therefore, the BSP would remain same as initially agreed

8. That believing on their assurances to be true, the complainants, signed apartment buyer agreements on 12.05.2014, at Gurugram.

9. As per clause 13.3 of the buyer's agreement dated 12.05.2014 the respondent was required to handover the possession of the apartment within 42 months from the date of approval of building plans.

10. That after the execution of the apartment buyer agreements as stated above, the respondent continued demanding installments as per increased BSP @ Rs.9200/- which was the totally illegal and unlawful. The unilateral enhancement was strongly objected by the complainants along with other

allottees, who had also booked the apartments with the respondent @ BSP Rs.8750/- per sq. ft. They further threatened the complainants to cancel their allotment and to forfeit the entire money paid by the complainants in case they do not make further payments as per the enhanced rates to the respondent.

11. That a criminal complaint was filed against the respondent and its officials by the complainants along with other allottees i.e., FIR bearing no. 561 dated 20.12.2014 U/s 406, 420 of IPC registered at PS Sushant Lok, Gurugram. That during the investigation carried out by police, one of the directors of the respondent admitted to the police that the flats were originally booked @ BSP Rs. 8750/- per sq. ft. but rates were increased by Rs.450/- on account of car parking. There is no reference of charges of car parking.

12. That fed up with the continued misleading promises, the complainants through complainant no. 1 filed a complaint before the Hon'ble National Consumer Dispute Redressal forum along with the other allottees against the respondent in the said compliant; the complainants and other buyers reserved the right to seek appropriate remedy before an appropriate forum in respect of other allegations made in the said complaint.

13. That national consumer dispute redressal forum directed the respondent not to cancel the allotments of the complainants,

even if they chose not to pay the demand of installments raised by the respondent.

14. The complaint so filed by the complainants was ultimately dismissed as withdrawn with liberty to file fresh complaint U/s 12(1) (c) of the Consumer Protection Act in conformity with the decision of the three members bench of the Hon'ble National Commission in CC no. 97 of 2016 in the Case titled 'Ambirish Kumar Shukla & Ors. V/s Ferrous Infrastructure Pvt. Ltd.'. That after the withdrawal of the case the complainants have not filed any case before any case before any consumer forum till date.

15. That, the complainants through complainant no. 2 filed a Civil Suit No. 179/2016 dated 07.12.2016 in the court of Ld. Civil Judge (Senior Division), Gurugram along with the other complainants for the reliefs of declaration, permanent and mandatory injunction.

16. That during the pendency of the suit an interim order dated 22.12.2016 was passed by the Ld. Civil Court directing the complainants to deposit the amount @ Rs. 8750/- per sq. ft. within 7 days and it was also mentioned that if they complainants fail to make the payment within 7 days then the opposite party are at liberty to cancel their respective allotments. The complainants received the copy of order on 07.01.2017 due to closure of courts on account of winter vacations. However, the respondent cancelled the allotment of

complainants vide letter dated 05.01.2017 without any prior communication/intimation.

17. That not only was the said cancellation wrongly made but also cancelled in an unfair manner without paying any refund of the monies to the complainants. The question of any compensation for the physical and mental agony and harassment and monetary losses and costs of litigation that the complainants were subjected to because of the default of the respondent was not considered.

C. Relief sought by the complainants:

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

(i) Direct the respondent to return the amount of Rs. 40,06,266/- against the booking of the apartment.

(ii) Direct the respondent to grant litigation cost of Rs. 2,50,000/-.

19. 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: -

20. 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.
21. That there is no cause of action to file the present complaint.
22. That the complainants have no locus standi to file the present complaint.
23. That the complainants are estopped from filing the present complaint by his own acts, omissions, admissions, acquiescence's, and laches.
24. That this authority does not have the jurisdiction to try and decide the present complaint.
25. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 35 of the buyers agreement.
26. That the complainants have not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:

27. 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 dated 22.03.2013. The complainants agreed to be bound by the terms and conditions stipulated in the application for provisional registration of the residential apartment.

28. That based on the application for booking, the respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainants apartment no. CD-B5-09-903 having tentative super area of 1321.15 sq.ft for a total sale consideration of Rs. 1,30,35,970/- and the buyers agreement was executed on 12.05.2014.

29. That the complainants made certain payment towards the installment demands on time and as per the terms of the allotment. However, they started committed defaults from fourth installment demand onwards. Vide payment request dated 05.06.2015, the respondent had raised the demand of fourth installment for net payable amount of Rs. 14,92,210/- However, the complainants failed to pay the due amount only after reminders dated 21.08.2015 and 10.02.2016.

30. That vide payment request dated 04.04.2016, the respondent had raised the demand of fifth installment for net payable amount of Rs. 27,60,540/-followed by reminders dated 04.05.2016 and 26.05.2016. However, the complainants failed to pay the due instalment amount.

31. That vide payment request dated 07.06.2016, the respondent had raised the demand of sixth installment for net payable amount of Rs. 40,30,694/- followed by a reminder dated 06.07.2016 and 01.08.2016. However, the complainants again failed to pay the due installment amount.

32. That again vide payment request dated 08.08.2016, the respondent had raised the demand of seventh installment for net payable amount of Rs. 54,44,598/- followed by a reminder dated 06.09.2016 and 28.09.2016. However, the same was never paid by the complainants.

33. That vide payment request 12.10.2016, the respondent had raised the demand of eighth installment for net payable amount of Rs. 67,14,751.82 followed by reminders dated 07.11.2016 and 30.11.2016. However, the complainants again failed to pay the instalment amount.

34. That vide payment request dated 01.12.2016, the respondent had raised the demand of ninth installment for net payable amount of Rs. 79,84,905.62 followed by reminder dated 28.12.2016. Yet again complainants defaulted in abiding by their contractual obligations.

35. That on account of non-fulfilment of the contractual obligations by the complainants despite several opportunities extended by the respondent, the allotment of the complainants was cancelled and the earnest money deposited by the complainants along with other charges were forfeited vide

cancellation letter dated 05.01.2017 in accordance with clause 21 read with clause 21.3 of the apartment buyer's agreement.

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

37. 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 only on 27.11.2019. There could not have been any delay till 27.11.2019. The time period for offering the

possession of the unit had not yet elapsed at the time of cancellation of the allotment by the respondent.

38. 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

39. 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

40. 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

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

Section 11(4)(a)

> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*

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.*

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

F. Findings on the objections raised by the 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.

43. 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.

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

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...

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

45. 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 <u>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</u>. 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."

46. 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 are in breach of agreement for non-invocation of arbitration

47. 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".

48. 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.

49. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the*

matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

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

50. 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."

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

G. Findings regarding relief sought by the complainants.

(i) Direct the respondent to return the amount of Rs. 40,06,266/- against the booking of the apartment.

52. The complainants have booked the residential apartment in the project named as 'The Corridors' situated at sector 67 A for a total sale consideration of Rs. 1,30,35,970/. The complainants were allotted the above-mentioned unit vide allotment letter dated 07.08.2013. Thereafter the apartment

buyer agreement was executed between the parties on 12.05.2014.

53. As per the payment plan respondent started raising payments from the complainants. The complainants in total has made a payment of Rs. 40,06,266/- . The respondent vide letter dated 05.06.2015 raised the demand towards fourth instalment and due to nonpayment from the complainants it sent reminder on 21.08.2015 and 10.02.2016 and thereafter various instalments for payments were raised but the complainants failed to pay the same. Thereafter the respondent cancelled the allotment of the unit vide letter dated 05.01.2017. The authority is of the view that cancellation is as per the terms and conditions of agreement and the same is held to be valid. However, while cancelling the allotment of the respondent forfeited the total paid up amount by way of earnest money, interest on delayed payment, brokerage and applicable taxes. The cancellation of unit was made by the respondent after the Act, of 2016 came into force. So, 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."*

54. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the deposited amount i.e., Rs. 40,06,266/- 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., 05.01.2017 till the date of its payment.

(ii) Direct the respondent to grant litigation cost of Rs. 2,50,000/-.

55. 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: -

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

i. The respondent/promoter is directed to refund the amount i.e., Rs. 40,06,266/- 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., 05.01.2017 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 the registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 10.08.2022