

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

Complaint no.	4526 of 2019
Date of filing complaint	19.09.2019
First date of hearing	07.11.2019
Date of decision	05.09.2022

Lt. Col Sushil Rana R/O: D-104, Sispal Vihar (AWHO), Sector 49, Gurugram, Haryana-122018	Complainant
Versus	
M/s. Ireo Grace Realtech Pvt. Ltd. Regd. office: 304, Kanchan House, Karampura Commercial Complex, New Delhi-	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Harshit Batra and proxy counsel Ms. Tanya (Advocates)	Complainant
Sh. M.K. Dang (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the

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

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name 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.	Unit no.	302,3 rd Floor, A5 Tower (page no. 32 of complaint)



8.	Unit area admeasuring	1966.61 sq. ft. (page no. 32 of complaint)
9.	Date of approval of building plan	23.07.2013 (annexure R-22 on page no. 72 of reply)
10.	Date of allotment	12.08.2013 (annexure R-2 on page no. 49 of reply)
11.	Date of environment clearance	12.12.2013 (annexure R-23 on page no. 80 of reply)
12.	Date of builder buyer agreement	09.05.2014 (annexure C-4 on page no. 31 of complaint)
13.	Date of fire scheme approval	27.11.2014 (annexure R-24 on page no. 91 of reply)
14.	Reminders for payment	14.03.2014, 13.04.2014, 13.06.2016, 06.07.2016, 01.08.2016, 23.08.2016, 13.09.2016, 04.10.2016, 07.11.2016, 30.11.2016, 26.12.2016, 18.01.2017
15.	Possession clause	13.3 Possession and Holding Charges Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having 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 fulfillment 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)
16.	Due date of possession	23.01.2017 (calculated from the date of approval of building plans i.e., 23.07.2013 as the possession clause in the agreement is vague and arbitrary as previously held by the Authority in a number of cases) Note: Grace Period is not allowed.
17.	Cancellation letter	18.08.2017 (annexure R-25 on page no. 92 of reply)
18.	Total sale consideration	Rs. 2,24,95,918/- [as per payment plan on page no. 25 of complaint]
19.	Amount paid by the complainant	Rs.97,91,881/- [as per receipts of payment on page no. 68 of complaint]
20.	Occupation certificate	27.01.2022 (as per project details)
21.	Offer of possession	Not offered

B. Facts of the complaint:

- That the respondent under the guise of being a reputed builder and developer has systematic, organized tools and techniques to cheat and defraud the unsuspecting, innocent and gullible public at large and its modus operandi is to advertise its projects widely and thereafter induce the innocent people to invest in their projects, as at the first blush the schemes offered by the respondent seem to be very attractive and thus

every advertisement made on behalf of respondent, is just like a nail in the coffin of the customers and the complainant is no exception to that who fell prey to one of the misleading advertisement of company and is bearing the brunt of its fraudulent activities.

4. That the agent of the opposite party approached the complainant and informed their upcoming project which is residential complex located in Sector 67A, Gurugram. That the allotment offer letter has been issued by the respondent dated 12 August 2013 for the residential apartment no. CD-AS-03-302 in group housing project "The Corridors".
5. That at the time of booking, complainant paid an amount of Rs. 20,08,735/- dated 17.06.2013 to the respondents through RTGS: SBINH13168307101, NEFT: SBINH13168190691 dated 17.06.2013.
6. That the flat which was allotted to the complainant measuring 1966.61 sq. ft. bearing number AS-302 located in "The Corridor", Sector 67 A. Gurugram. That at the time of booking, the basic sale price of the flat which was allotted to the complainant was Rs. 10,500. The total sale consideration which was to be paid by the complainant towards the allotment was Rs. 2,24,95,918.67. The said payment which was to be made in accordance with the payment plan. That the respondent issued agreement dated 09.05.2014 where in the complainant and respondents had mutually signed the builder buyer agreement. The respondent also sent the copy of the Builder buyer agreement which was duly executed between the parties.
7. That thereafter the complainant made following payments as and when demanded by the respondents.

Receipt No	Date	Amount
------------	------	--------



14211705	17.06.2013	19,36,915/-
14211706	17.06.2013	71,820/-
14211836	16.08.2013	8,735/-
14211837	16.08.2013	10,00,000/-
15211249	05.05.2014	8,18,160/-
15211250	05.05.2014	10,00,000/-
15211252	05.05.2014	10,00,000/-
15211707	31.05.2014	69,046/-
1400000008	04.04.2015	28,87,205/-
TOTAL		97,91,881/-

8. That complainant paid Rs. 69,046/- for the transferring of the name from respondents to the complainant as per the requirement under Form 26 QB.
9. That till date, the complainant had already paid a total sum of Rs 97,91,881/- (Ninety-Seven Lakh Ninety-One Thousand Eight Hundred Eighty-One only) on different dates as demand was raised by the respondent company, and it is also not out of point to mention here that

though the complainant followed the discipline in paying the demand/payment raised by the respondent company, but respondent has been totally failed in all fronts /and has done the breach of faith /promise.

10. That on 06.06.2015, complainant came to know about the ongoing dispute between the residents and the respondent company which includes the entire project of the respondent company named M/s IREO Grace Realtech Pvt. Ltd. and project name The Corridors, Sec 67A, Gurgaon, Haryana and there is no likelihood of construction on the said site in near future.
11. That on 10.06.2014, Complainant approached the office of respondent company and had meetings with various executives/directors to know about the fate of their legitimate money, but the directors of respondent company did not have any concrete reply.
12. That the respondent has clearly breached the clause no. 13.3 (page no 22) of apartment buyers agreement dated 09.05.2014 executed between both the parties by not delivering the possession of the project in 42 months. Clause 13.3 of the agreement reads as

"Subject to Force Majeure, as define herein and further subject to the allottee having complied with all it's obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this agreement including but not limited to timely payment of all dues and charges including the total sale consideration, registration charges, stamp duty and other charges and also subject to the allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said apartment to the allottee within a period of 42 (Forty Two) months from the date of approval of the building plan and/or fulfillment of the preconditions imposed thereunder ("Commitment Period"). The Allottee further agrees and

understands that the company shall additionally entitled to a period of 180 days ("Grace Period"), after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company"

13. That the intention of respondent company was fraudulent and dishonest since inception and whenever the complainant try to approach the office of respondent company and had meetings with various executives/directors to know about the fate of their legitimate money, the directors of developer company do not have any concrete reply and only evasive replies and assurances have been offered to complainant who have put his hard earned money at the stake of respondent company and it seems that the directors of respondent company have scant regard for the plights of the customers of respondent company and this lopsided attitude of respondent company clearly speaks of its malafide intentions to grab, cheat and forfeit the hard earned legitimate money of complainant.
14. That the complainant had a specific purpose for purchasing the said residential town house and this inordinate/infinite delay in the construction of said residential town house has prejudiced the complainant to a great extent and their financial interest have been seriously jeopardized.
15. That the complainant reminded and had a word with directors of respondent company several times but no replies has been received till date from the respondent company and to know about the fate of their legitimate money but the executives of the developer company did not give any concrete reply. That the respondent threatened the complainant when complainant approached them and it still subsisting continuing.

16. That the cause of action to prefer the present suit arose when the complainant got the information regarding the refund of payment by respondent, it again arose when the respondent threatened the complainant and it still subsisting continuing and subsequently legal notice.

C. Relief sought by the complainant:

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

- i) Direct the respondent company to refund the amount paid by the complainant along with interest at the prescribed rate from the date of receipt of each instalment of payment till the date of refund.
- ii) To direct the respondent to refrain from charging maintenance charges from the complainant.
- iii) Direct the respondent to pay Rs. 10,00,000/- as compensation for mental harassment and Rs. 50,000/- as legal expenses to the complainant.

D. Reply by respondent:

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

18. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The apartment buyer's agreement was executed between the parties to the complaint prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

19. That the complaint is not maintainable for the reason that the booking application form contains an Arbitration Clause which refers to the dispute resolution mechanism to be adopted by the parties in the event



of any dispute i.e. Clause 54 of Schedule-1 of the Booking Application Form, which is reproduced for the ready reference of this Hon'ble Forum-

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

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

- i. That the complainant, after checking the veracity of the project namely, 'The Corridors', Sector 67-A, Gurgaon had applied for allotment of an apartment by filling the booking application form. The complainant agreed to be bound by the terms and conditions of the booking application form.

- ii. That based on the application for booking, the respondent vide its allotment offer letter dated 12.08.2013 allotted to the complainant apartment no. CD-A5-03-302 having tentative super area of 1966.61 sq. ft. for a total sale consideration of Rs. 2,24,95,918.68. Vide letter dated 31.01.2014, the respondent sent 3 copies of the apartment buyer's agreement to the complainant. However, the same was executed by the complainant only on 05.05.2014 after a reminder dated 14.03.2014 was issued by the respondent.
- iii. That the complainants made certain payment towards the instalment demands on time and as per the terms of the allotment. However, they started committing defaults. Vide payment request dated 18.03.2014, the respondent had raised the demand of third instalment for net payable amount of Rs.28,87,205.55. However, the complainant remitted the due amount only after a reminder dated 13.04.2014 was issued by the respondent.
- iv. That vide payment request dated 16.05.2016, the respondent had raised the demand of fifth instalment for net payable amount of Rs. 25,75,611.66. The complainant failed to remit the demanded amount despite reminders dated 13.06.2016 and 06.07.2016 and the due amount was adjusted in the next instalment demand as arrears.
- v. That vide payment request dated 27.06.2016, the respondent had raised the demand of sixth instalment for net payable amount of Rs. 51,56,550.15. However, the complainant again failed to pay the due instalment amount despite issuance of reminders dated 01.08.2016 and 23.08.2016 by the respondent.

- vi. That vide payment request dated 16.08.2016, the respondent had raised the demand of seventh instalment for net payable amount of Rs. 73,24,375.53 followed by reminders dated 13.09.2016 and 04.10.2016. However same was never paid by the complainant.
- vii. That vide payment request dated 12.10.2016, the respondent had raised the demand of eighth instalment for net payable amount of Rs. 3,48,451.092 followed by reminders dated 07.11.2016 and 30.11.2016. However, the complainant again failed to pay the due instalment amount and the due amount was adjusted in the next instalment demand as Arrears.
- viii. That again vide payment request dated 29.11.2016, the respondent had raised the demand of ninth instalment for net payable amount of Rs.1,14,42,009.33 followed by reminders dated 26.12.2016 and 18.01.2017. Yet again, the complainant defaulted in abiding by his contractual obligations and the respondent was constrained to issue a final notice dated 16.02.2017 to the complainant.
- ix. That the possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the Buyer's Agreement. It is submitted that Clause 43 of the Schedule - I of the Booking Application Form states that '*...subject to the allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said apartment to the allottee within a period of 42 months from the date of approval of the Building Plans and/or fulfillment of the preconditions imposed thereunder (Commitment Period). The allottee further agrees and understands that the company shall be additionally be entitled to a period of 180 days*

(Grace Period)...".. Furthermore, the complainant had further agreed for an extended delay period of 12 months from the date of expiry of the grace period as per clause 44 of schedule 1 of the booking application form.

- x. That from the aforesaid terms of the buyer's agreement, it is evident that the time was to be computed from the date of receipt of all requisite approvals. Even otherwise construction can't be raised in the absence of the necessary approvals. It is pertinent to mention here that it has been specified in Sub- clause (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.
- xi. That it is 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, was to expire only on 27.11.2019. Furthermore, the revised date of offering the possession as submitted before the Hon'ble RERA Authority at the time of registration of the project is 30.06.2020.

- xii. That it is pertinent to mention here that timely payment of instalments 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, his calculations went wrong on account of slump in the real estate market and the complainant did not possess sufficient funds to honour his commitments. There was no readiness or readiness to make the payment of the due instalments amount. 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 along with other charges was forfeited vide cancellation letter dated 18.08.2017 in accordance with clause 21 read with clause 7.4 of the apartment buyer's agreement.
- xiii. That it is submitted that despite the non-fulfilment of the contractual obligations by the complainant, the respondent has not only completed the construction of the tower in which the unit allotted to the complainant was located but has also applied for the grant of the occupation certificate vide application dated 10.09.2019.

21. All other averments were denied in toto.

22. Copies of all 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 submissions made by the parties.

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

24. 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

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

26. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be

decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondents:

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

27. 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.
28. 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."

29. 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."

30. 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

31. 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".

32. 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.
33. 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."

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."

34. 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."

35. 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. Entitlement of complainant for refund:

- G.1 Direct the respondent company to refund the amount paid by the complainant along with interest at the prescribed rate from the date of receipt of each instalment of payment till the date of refund**

36. The complainant has booked the residential apartment in the project named as 'The Corridors' situated at sector 67 A for a total sale consideration of Rs. 1,92,17,760/-. The complainant was allotted the above-mentioned unit vide allotment letter dated 12.08.2013. Thereafter the apartment buyer agreement was executed between the parties on 09.05.2014.

37. As per the payment plan respondent started raising payments from the complainant. The complainant in total has made a payment of Rs. 97,91,881/-. The respondent vide letter dated 16.05.2016 raised the demand towards fifth instalment and due to non-payment from the complainant, it sent reminders on 13.06.2016 and 06.07.2016 and thereafter various instalments for payments were raised but the complainant failed to pay the same. Thereafter the respondent cancelled the allotment of the unit. 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.
38. 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."

39. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the deposited amount i.e., Rs. 97,91,881/- after deducting 10% of the basic sale price of the unit within a period of 90 days from the date of this order along with interest @ 10.00% p.a. on the refundable amount from the date of cancellation i.e., 18.08.2017 till the date of its payment.

F.II. Direct the respondent to refrain from charging maintenance charges from the complainant.

40. In view of the findings in the relief above, this relief becomes redundant.

F.III. Direct the respondent to pay Rs. 50,000/- as legal expenses and Rs. 10,00,000/- for mental agony and harassment to the complainant

41. The complainant in the aforesaid head is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by

the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the Authority:

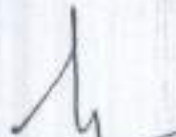
42. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent is directed to refund the deposited amount i.e., Rs. 97,91,881/- after deducting 10% of the basic sale price of the unit within a period of 90 days from the date of this order along with interest @ 10.00% 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.

43. Complaint stands disposed of.

44. File be consigned to the registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.09.2022