

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

Complaint no.	: 1570 of 2018
First date of hearing:	13.02.2019
Order Reserve On	: 07.12.2022
Order Pronounce On:	02.02.2023

Satish Gupta R/o: H. no. 16, O-Block, City-1, Gurgaon, Haryana	Complainant
Versus	
Ireo Grace Realtech Private Limited Registered Office: - C-4, 1 st Floor, Malviya Nagar, New Delhi-110017	Respondent

CORAM:	
Shri Ashok Sangwan	Member
Shri Sanjeev Arora	Member

APPEARANCE:	
Shri K.K Kohli	Advocate for the complainant
Shri M.K Dang	Advocate for the respondent

ORDER

- The present complaint dated 20.11.2018 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the 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 complainant, 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.	603, 6th floor, tower B4 (as per payment plan on page no. 52 of complaint)
7.	Unit measuring	1966.68 sq. ft. (as per payment plan on page

		no. 52 of complaint)
8.	Date of approval of building plan	23.07.2013 (annexure R-5 on page no. 47 of reply)
9.	Date of allotment	07.08.2013 (annexure R-2 on page no. 41 of reply)
10.	Date of environment clearance	12.12.2013 (annexure R-6 on page no. 55 of reply)
11.	Date of execution of builder buyer's agreement	21.04.2014 (page no. 28 of complaint)
12.	Date of fire scheme approval	27.11.2014 (annexure R-7 on page no. 66 of reply)
13.	Total consideration	Rs. 1,96,76,688/- [as per payment plan on page no. 52 of complaint]
14.	Total amount paid by the complainant	Rs. 1,93,88,432/- [as per statement of account dated 01.07.2019 annexed with offer of possession on page no. 76 of reply]
15.	Due date of delivery of possession	23.01.2017 (calculated from the date of approval of building plans) Note: Grace Period is not allowed.
16.	Possession clause	13. Possession and Holding Charges Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions

		<p>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.</p> <p>(Emphasis supplied)</p>
17.	Occupation certificate	31.05.2019 (A6 to A10, B1 to B4 and C3 to C7) (as per project details)
18.	Offer of possession	01.07.2019 [annexure R-11 on page no. 74 of



reply]

B. Facts of the complaint

The complainant has submitted as under:

3. That the complainant booked a residential flat in the project being developed by the respondent namely "The Corridors" at sector-67A, Gurugram.
4. That the representatives of respondent represented to the complainant that they are developing the above project through its 100% subsidiaries i.e., M/s Precision Realtors Pvt Ltd, M/s Blue Planet Infra Developers Pvt Ltd, M/s Madeira Conbuild Pvt Ltd and M/s Global Estate. The complainant was induced to book the above flat by showing brochures and various advertisement materials depicting that the project will be developed as a state-of-art project and shall be one of its kind. It was further stated that the project is a premium high-end multi-storey project being developed with the assistance of internationally renowned architects. It was also represented that all necessary sanctions and approvals had been obtained to complete the same within the promised period.
5. That the respondent/ promoter has a team marketing expert to lure the customers and induce them to purchase flats/ units its project by resorting to deceit and fraudulent representations and giving false one's own flats and accordingly after being influenced by the rosy picture put forth by the representatives of the respondent, the complainant got booked a flat with the respondent.
6. That the complainant was further induced to sign a pre-printed flat buyer's agreement ("FBA") dated 21.04.2014 by virtue of which the respondent allotted a unit bearing no. B-4, 603 on 6th floor in tower no. B, having super

area of 1966.68 Sq. Ft. to the complainant. The said flat buyer agreement is totally one sided which impose completely biased terms and conditions upon the complainant.

7. That the complainant has already paid a total sum of Rs 1,92,40,932/- towards the residential that in the project as and when demand was raised by the respondent. The balance payment was to be made at the time of offering of possession in terms of the FBA.
8. That in terms of the FBA, the respondent was to complete the project within a period of 42 months from the date of approval of building plans with a further grace period of six months. The flat buyer's agreement was executed on 21.04.2014 and till date the construction is not complete, which is resulting in extreme kind of mental distress, pain and agony to the complainant. That as per the information provided by the respondent, the building plans of the project were approved by the concerned authorities in April 2013.
9. That the complainant had taken a loan from AXIS Bank for purchasing the flat in question and is paying the regular instalments of the same and due to the delay in delivery of possession by the respondent, the complainant is burdened to pay the instalments from his pockets as the date of delivery have expired way long back and the construction of the project has still not been completed.
10. That respondent increased the floors in the project in a secretive manner without seeking the consent of the complainant for the same. It is stated that the enhancement of FAR is in total violation of representations made in the respondent' advertisement material displayed at site as well as on the internet.

11. That the unlawful act of increasing the FAR, the respondent referred to an obscure notice released by the respondent in non-descript newspaper(s) advertising the said change in plan. This unconscionable act is clear violation of the legal mandate whereby the developer is required to invite objections from allottees before seeking any revision in the original building plans. That the respondent has the complete contact details including phone numbers and email ID of the complainant where it has been doing regular communication, yet the respondent never communicated any intention or actions to revise the sanctioned building plans. The respondent has been sending various communications and demands, vide emails, but the respondent conveniently avoided to take approval of the complainant for the major changes in sanction plans, which has changed the fundamental nature of the project.

C. Relief sought by the complainant:

12. The complainant has sought following relief(s):
- (i) Direct the respondent to refund the sum of Rs. 1,92,40,932/- along with interest @ 18% per annum from the date when payments were made till realization of the amount in full.
 - (ii) Direct the respondent to pay a sum of Rs. 5,00,000/- to the complainant towards undue hardship and injury, both physical and mental caused due to the acts of omissions and commissions on the part of respondent.
 - (iii) Direct the respondent to pay a sum of Rs. 55,000/- to the complainant towards the cost of litigation.
13. 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:

14. 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.
15. That there is no cause of action to file the present complaint.
16. That the complainant has no locus standi to file the present complaint.
17. That the complainant is estopped from filing the present complaint by his own acts, omissions, admissions, acquiescence's, and laches.
18. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 35 of the buyer's agreement.
19. That the complainant has 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:
 20. That the complainant, after checking the veracity of the project namely, 'Corridor; sector 67-A, Gurugram applied for allotment of an apartment vide booking application form. The complainant agreed to be bound by the terms and conditions stipulated in the application for provisional registration of the residential apartment.
 21. That based on the application for booking, the respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainant apartment no. CD-



- B4-06-603 having tentative super area of 1966.68 sq. ft for a total sale consideration of Rs. 1,96,76,668/- and the buyer's agreement was executed on 21.04.2014.
22. That the respondent raised 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 some payments in time. However, the complainant defaulted in making timely payment towards the ninth payment demand. That the respondent had raised the ninth installment demand on 05.01.2016 for the net payable amount of Rs. 19,47,583.28. However, the complainant made the payment of the due amount only after a reminder dated 11.02.2016 was issued by the respondent.
 23. That the complainant has made the part-payment of Rs. 1,93,88,432/- out of the total sale consideration of Rs. 2,21,21,907/- and is bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, payable along with it.
 24. That 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.
25. 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. The respondent already completed the construction of the tower in which unit allotted to the complainant is located. The respondent has applied for grant of occupation certificate on 06.07.2017 and the same was granted to the respondent on 31.05.2019. Furthermore, the respondent has even offered the possession of the unit on 01.07.2019.
26. 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

27. 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

28. 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

29. 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.

30. 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.

31. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*" SCC Online SC 1044 decided on 11.11.2021 wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the

Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

32. Furthermore, the said view has been reiterated by the Division Bench of Hon'ble Punjab and Haryana High Court in "**Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021.**" The relevant paras of the above said judgment reads as under:

"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court, the Rules have to be in tandem with the substantive Act.

25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the

refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."

33. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of *M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*, and the Division Bench of Hon'ble Punjab and Haryana High Court in "*Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others. (supra)*", the authority has the jurisdiction to entertain a complaint seeking refund of the amount paid by allottee alongwith interest at the prescribed rate.

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.

34. 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.
35. 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."

36. 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."

37. 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

38. 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".

39. 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.
40. 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."

41. 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."

42. 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 regarding relief sought by the complainant.

(i) Direct the respondent to refund the sum of Rs. 1,92,40,932/- along with interest @ 18% per annum from the date when payments were made till realization of the amount in full.

43. 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. 1,96,76,688/-. The complainant was allotted the above-mentioned unit vide allotment letter dated 07.08.2013. Thereafter the apartment buyer agreement was executed between the parties on 21.04.2014.

44. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.



45. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The buyer's agreement lays down the terms that govern the sale of different kinds of properties like residential, commercials etc. between the buyer and the builder. It is in the interest of both the parties to have a well-drafted buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoter/developer to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoter/developer. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoter/developer or gave them the benefit of doubt because of the total absence of clarity over the matter.
46. 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.
47. 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.

48. 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.



49. The due date of possession as per agreement for sale as mentioned in the table above is 23.01.2017 and there is delay of 1 years 9 months 28 days on the date of filing of the complaint.
50. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after filing of application by the complainant for return of the amount received by the promoter on failure of promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. The complainant-allottee has already wished to withdraw from the project and the allottee has become entitled his right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as the promoter fails to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return the amount received by him from the allottee in respect of that unit with interest at the prescribed rate. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
51. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)** reiterated in case of **M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020** decided on 12.05.2022 it was observed as under:

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the

legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.

52. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.
53. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under section 71 read with section 31(1) of the Act of 2016.
54. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 1,93,88,432/- with interest at the rate of 10.60% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment

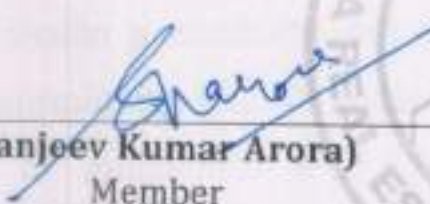
till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid


- (ii) **Direct the respondent to pay a sum of Rs. 5,00,000/- to the complainant towards undue hardship and injury, both physical and mental caused due to the acts of omissions and commissions on the part of respondent.**
- (iii) **Direct the respondent to pay a sum of Rs. 55,000/- to the complainant towards the cost of litigation.**
55. The complainant in the aforesaid relief is 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 complainant is 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 received by him from the complainant with interest at the rate of 10.60% as prescribed under rule 15 of the Haryana Real Estate (Regulation and

- Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
 - iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainant.
57. Complaint stands disposed of.
58. File be consigned to the registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 02.02.2022

HARERA
GURUGRAM