

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

Complaint no.	:	1428 of 2021
Date of filing complaint	:	09.03.2021
First date of hearing	:	19.04.2021
Date of decision	:	20.01.2023

	Dr. Deepika Thakral D/o Sh. OP Thakral R/o: H.no. 106, Sector- 4, Gurugram	Complainant
	Versus	
1.	Alpha G Corp Regd. office: T-2, 3rd floor, Manish Corner Plaza, Sector- 11, Dwarka New Delhi, West Delhi - 110075	Respondents
2.	Mangnum International Trading Company Private Limited Regd. office: 48/12, Commercial Centre, Malcha Marg, Chanakyapuri, New Delhi - 110021	

CORAM:

Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member

APPEARANCE:

Complainant-in-person with Sh. Sunil Kumar (Advocate)	Complainant
Ms. Ridhima Gupta (AR of the respondent-company)	Respondents

ORDER

- 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 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section

11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under 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.n.	Particulars	Details
1.	Name of the project	Gurgaon One, Sector 84, Village Sihi, Gurugram, Haryana
2.	Project type	Group housing project
3.	DTPC License no.	61 of 2009 dated 28.10.2009
	Validity Status	27.10.2019
	Licensed area	12.515 acres
	Name of licensee	Magnum International Trading Company Private Limited
4.	HARERA Registration	Not registered
5.	Allotment of unit	Not provided on record
6.	Unit no.	D-002, Tower- D (As per page no. 36 of complaint)
7.	Unit area admeasuring	1427 sq. ft. (super area) (As per page no. 36 of complaint)

8.	Date of apartment buyer's buyer agreement	27.05.2011 (As per page no. 33 of complaint) Executed between original allottee & respondent
9.	Endorsement dated	02.02.2012 (As per page no. 32 of complaint)
10.	Possession clause	<p>As per as per Clause 12.1</p> <p><i>The construction of the Apartment is proposed to be completed by the Owners/Company within 36 (thirty six) months (plus 6 months grace period) from the date of start of ground floor roof slab of the particular tower (building) in which the booking is made, subject to timely payment by the Allottee(s) of sale price, stamp duty and other charges due and payable according to the Payment Plan applicable to him/her/them and/or as demanded by the Owners/Company, and subject to force majeure provisions</i></p> <p>(Page no. 88 of complaint)</p>
11.	Date of start of ground floor roof slab	03.12.2012 (As per demand letter annexed on page no. 67 on complainant for start of ground floor roof slab)
12.	Due date of possession	03.06.2016 (Calculated from date of start of ground floor roof slab i.e.; 03.12.2012) Grace period of 6 months is allowed
13.	Payment plan	Construction linked payment plan

		(As per page no. 31 of complaint)
14.	Sale consideration	Rs. 57,91,050/- (TSC) Rs. 46,09,219/-(BSP) (As per payment plan on page no. 31 of complaint)
15.	Amount paid by the complainant	Rs. 54,85,530/- (As alleged by the complainant on page no. 02 of CRA)
16.	Amount pending	Rs. 6,91,382/- (Amount received- Rs. 47,94,148/- till 30 th Oct 2017) (As alleged by the complainant on page no. 03 of CRA)
17.	Occupation certificate	09.10.2017 (As per page no. 96-97 of reply)
18.	Completion certificate	13.12.2019 (As per site of DTCP)
19.	Offer of possession	13.10.2017 (As per page no. 80 of complaint)
20.	Request for withdrawal stating that the offer of possession is not acceptable to the complainant on account that that the unit is not as per the specification provided to the complainant.	27.10.2017 (As per page no. 87 & 97 of complaint)

B. Facts of the complaint

3. That one Sh. Indrajit Maitra booked a unit in the project of the respondent namely "Gurgaon One" (hereinafter, the "project") situated at Sector-84, Gurugram, Haryana, for total cost of Rs. 46,09,210/-. Since the booking was made under construction linked payment plan, hence the payment was to be made on the basis of schedule of construction, provided by the respondent.
4. That on 27.05.2011, Sh. Indrajit Maitra entered into an apartment buyer's agreement and was allotted unit no. D-002, in Tower No. D admeasuring 132.57 sq. mtrs. (1427 sq. ft), along-with car parking space in the said project. Subsequently, the complainant entered into an agreement to sell dated 27.01.2012 with Sh. Indrajit Maitra, with regard to the subject unit and the same was endorsed in her favour by virtue of the handover of endorsement letter dated 08.02.2012.
5. That the allotment letter dated 20.04.2011, apartment buyer agreement dated 27.05.2011 and receipts no. 211, 900 and 2240 dated 16.02.2011, 11.07.2011 and 03.11.2011 respectively, were endorsed and transferred in favour of the complainant by the respondent.
6. That pursuant to the endorsement, the complainant made the balance payments as per the payment schedule and as per the demand letters issued by the respondent without any delay. The payments made by her were duly acknowledged by it vide receipts no. 3858, 4851, 4852, 4853, 5632, 6526, 7572, 8612, 8613, 9715, 11162, 12921, 13710 and 13709 dated 03.12.2012, 21.05.2013, 21.05.2013, 21.05.2013, 21.11.2013, 07.03.2014, 21.07.2014, 26.11.2014, 26.11.2014, 23.03.2015, 23.02.2016,

15.11.2016, 22.12.2016 and 22.12.2016 respectively. Till date, the complainant has made total payment of Rs 54,85,530/- from her own sources.

7. That as per clause 12.1 of the buyer's agreement dated 27.05.2011, the respondent categorically stated that the construction of the said apartment was to be completed within 36 months plus 6 months of grace period from the date of start of ground floor roof slab of the particular tower in which the booking was made and the same comes to 03.06.2016 along with grace period of 6 months. The construction of ground floor slab of the tower D was started on 03.12.2012 as per the receipt no. 3858 dated 03.12.2015.
8. That as per the terms and conditions of the buyer's agreement, the possession of the apartment was to be offered only after the grant of completion/occupation certificate from the competent authority. However, the occupation certificate was obtained by the respondent almost after delay of 22 months on 09.10.2017 after the date stipulated in the buyer agreement.
9. That there was a failure to hand over the possession of the allotted unit within the fixed period and the possession was offered by the respondent after much delay vide offer of possession dated 13.10.2017 demanding a payment of Rs. 11,29,281/-. In the said letter for offer of possession, it was admitted by the respondent for the delay in completion of the project for which compensation has also been calculated by it. The respondent while calculation the compensation amount for delay, has excluded the period of

- 4 months on account of force majeure conditions, without providing any explanation. Thus, the respondent has delayed the completion of project and possession of the apartment by more than 1 and a half-year.
10. That in the offer of possession dated 13.10.2017, it informed the complainant about the increase in the saleable area of apartment in question by 7.5% and also regarding the escalation charge of an amount of Rs. 315870/-.
 11. That the respondent breached the fundamental terms of the contract by inordinately delaying in delivery of the possession. Be that as it may, the project is not nearing completion and the complainant has lost faith in respondent who has taken her and other home buyers for a ride by not completing the project
 12. That thereafter, the complainant through her GPA holder, vide letter dated 21.10.2017, duly received by the respondent on 23.10.2017, requested it to provide details and explanation for the force majeure for which the delay in handing over the possession was caused; the escalation charges were demanded for increase in the saleable area and plans on basis of which the demands were raised by the respondent.
 13. That the respondent vide letter dated 25.10.2017 provided some of the documents including sanction plans and occupation certificate dated 09.10.2017 demanded by complainant. The explanation provided by the respondent was vague for the demand raised by it. The respondent also sent an email dated 25.10.2017 to the complainant.

14. That the complainant vide letter dated 27.10.2017 to the respondent raised his objection regarding the utility room been agreed in agreement dated 27.05.2011, despite the fact that the store has been approved by it from the Director General Town and Country Planning on 15.02.2011, which was having outside entry and no connection from the main house, a concern of safety for which she paid the preferential location charges (PLC) in lakh for ground floor unit as per clause 1.7.
15. That at the time of purchasing of the said flat, the respondent has showed a sample flat to the complainant and in which the entry of utility room was given from inside the apartment. When she asked about sanctioned map, then the respondent has handed over in which the entry of the room was from outside and whereas in the brochure, it was shown as utility room and in sanctioned plan it was shown as store/waiting alcove. Then it committed through its management team that it has applied for the revised plan and would definitely get the permission for the revised sanctioned map as per sample flat/agreed as per brochure annexed to apartment buyers' agreement dated: 27.05.2011. So, the complainant agreed and believing the assurances of the respondent's management, she continued making the payments.
16. That in the month of October 2017, when respondent demanded payment against the apartment, then the same issue again arose and it clearly denied to get the revised sanctioned map as per the sample flat/ agreed terms and also refused to give utility room. The complainant felt cheated

and then she asked about refund of the amount along with interest and compensation vide letter dated 21.10.2017.

17. That the complainant also sent a letter dated 30.10.2017 to the respondent regarding increase of saleable area and escalation cost and also demanded refund of the amount. In the said letter GPA Holder has raised the issue regarding there being no increase in the saleable area as per the Occupation Certificate dated 09.10.2017. As per the occupation certificate dated 09.10.2017 provided by the respondent reveals the area of the premises has in fact been reduced. As per the sanction plan provided by the respondent vide letter dated 25.10.2017 for Tower E and not for Tower D in which the subject unit is located. It is pertinent to mention that if the sanction plan for Tower D is same as for Tower E, in that case the area of the apartment reduces even further.
18. That respondent sent a letter dated 30.10.2017 to the complainant for termination of the apartment buyer agreement dated 27.05.2011 and a refund of Rs. 47,94,148/- vide cheque no. 005244 dated 30.10.2017 drawn on HDFC Bank, Safdarjung Branch, New Delhi. The said refund was made by the respondent after deducting Rs. 6,91,382/-, without any fault of the complainant. In the said letter, it also admitted in offering the possession treating the room as a utility room in terms of the approvals granted. It was also mentioned in that letter that the offer for possession was in consistent to the commitment as per the buyer agreement.
19. That a letter dated 19.01.2018 was sent by the complainant to the respondent no. 2 regarding the acceptance of the refunded amount as a

part payment towards the total amount due and payable by it as compensation and not as a final acceptance or settlement.

20. That thereafter, legal notice was sent to the respondent by the complainant regarding illegal deductions and refund of the remaining paid-up amount but with no positive results. So, she seeks refund of her balance investment deducted by the respondent for an amount of Rs. 6,91,382/- along with interest from the date of payment vide receipt no. 211 dated 16 Feb 2011 i.e., 16.02.2011 till the date the amount is refunded besides interest on the paid-up amount from the date of each payment and compensation.

C. Relief sought by the complainant:

21. The complainant has sought following relief(s):
- i. Direct to the respondent to return the balance amount of Rs. 6,91,382 received by it, to the complainant along with interest at the prescribed rate.
 - ii. Direct the respondent to pay litigation cost of Rs. 1,00,000/-.
22. 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 no. 1

23. The answering respondent being agent of principal- respondent submitted by way of written reply as under:

- i. That the complaint filed by the complainant is not maintainable before this forum as the same is filed after receipt of completion certificate on 13.12.2019.
- ii. That the complainant is a subsequent allottee and who stepped into the shoe of original allottee. There was an apartment buyer's agreement executed between the parties on 27.05.2011 setting out the terms and conditions of allotment, dimensions of the unit, its area, the sale price, the payment schedule and the due date of possession. The complainant came into picture only on 02.02.2012 when an endorsement on the buyer's agreement was made in her favour by the respondent.
- iii. That as per the agreement executed with regard to the allotted unit, there is an arbitration clause and so this authority has no jurisdiction to proceed with the complaint.
- iv. That after the possession of the allotted unit was offered to the complainant vide letter dated 13.10.2017, she made a request for withdrawal from the project vide letter dated 27.10.2017, leading to its acceptance and refund of Rs. 47,49,148/- on 30.10.2017. The same was accepted by her without any protest and now the complaint seeking refund of the remaining amount is not maintainable on the ground of estoppel.
- v. That the unit in question was allotted to Sh. Indrajit Maitra for a total sale consideration of Rs. 54,85,530/- leading to execution of buyer's agreement dated 27.05.2011. Though some payment was made by the original allottee, but he got the allotment endorsed in favour of the complainant vide endorsement dated 02.02.2012.

- vi. It was denied that there was delay in completion of the project and offer of possession of the allotted unit to the complainant. In fact, due to various circumstances beyond the control of respondent, it could not complete the construction. After completion of the construction and receipt of occupation certificate on 09.10.2017, the respondent offered [possession of the allotted unit to the complainant. But instead of accepting the offer of possession and paying the amount due, she requested for withdrawal from the project.
- vii. It was denied that the construction of the allotted unit was not made as per the sanctioned plans or there was nay delay in its completion. In fact, as per terms and conditions of the buyer's agreement, the builder was entitled to have some minor alterations in the building plan. Even that fact was also explained to the complainant in various communications. But instead of coming forward to take possession, she opted to withdraw from the project and sought refund of the paid-up amount.
- viii. That considering the request of the complainant dated 27.10.2017, the respondent accepted the same vide letter dated 30.10.2017 and refunded her Rs. 47,94,148/- after forfeiture of earnest money to the tune of Rs. 6,91,382/- and the same was accepted by her as evident from letter dated 19.01.2018 received through her attorney. Thus, now she is not left with any right or interest in the allotted unit or the money paid towards the same.
- ix. It was denied that the respondent-builder was not entitled to deduct and forfeit the amount of earnest money from the amount deposited against the allotted unit. When the allotted unit was fir for occupation and its possession was offered to the complainant, she sought refund of the

paid-up amount by taking lame excuses and even accepted the amount sent by the respondent. So now she has no cause of action against the respondent and the complaint filed in this regard is not maintainable. Moreover, from time to time the complainant was informed about the issues raised from time to time. So now at a belated stage she cannot knock the doors of the authority and seek refund of the remaining amount along with interest, and which is barred by the limitation.

- x. All other arguments made in the complaint were denied in toto.
- xi. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Even the written submissions submitted by the complainant have also been perused. Hence, the complaint can be decided based on those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

The authority observed that it 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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 allottee 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 of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
27. 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** and followed in ***M/s Sana Realtors Private Limited & others V/s Union of India & others SLP (Civil) No. 13005 of 2020*** decided on **12.05.2022** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory

authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest 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."

28. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases referred above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the amount paid.

F. Findings on objection raised by the respondent

F.1 Objection regarding complainants is in breach of agreement for non-invocation of arbitration.

29. The respondents has raised an objection that the complainants has not invoked arbitration proceedings as per the provisions of apartment buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

"Clause 31. JURISDICTION & DISPUTE RESOLUTION

This Agreement shall be governed by and construed and enforced in accordance with the laws of India and the Courts at Gurgaon shall have jurisdiction to entertain any and/or all proceedings under this Agreement. The Allottee(s) agree(s) that in the event of any dispute or differences arising out or touching upon or in relation to the terms of this Agreement, including the interpretation and validity of the terms thereof

and/or respective rights and obligations of the Allottee(s) and the Owners/Company, the same shall be referred to a sole arbitrator to be appointed by the Owners/Company whose decision shall be final and binding upon the parties. It is understood that no other person or authority shall have the power to appoint the arbitrator. The arbitration proceedings shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 and/ or any statutory amendments/modifications thereof for the time being in force. The seat of arbitration shall be in New Delhi and the language of the arbitration proceedings shall be English

....."

30. The respondents contended that as per the terms & conditions of the buyer's agreement duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism. 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. 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 builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

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

31. While considering the issue of maintainability of a complaint before a consumer forum/commission in the face 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 complainants 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."

32. 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 their right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and Act of 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.

G. Findings on the relief sought by the complainant

G.I Direct the respondent to return the balance amount of Rs. 6,91,382/- received by it, to the complainant along with interest at the prescribed rate.

33. Some of the admitted facts of the case are that the predecessor-in-interest of the complainant was allotted the unit in question for a total sale

consideration of Rs. 57,91,050/-. It led to execution of a buyer's agreement between them on 27.05.2011. The allotted unit was endorsed in favour of the complainant by the respondent on 02.02.2012 on the basis of nomination letter dated 27.01.2012. The complainant started making payments against the allotted unit and admittedly paid a sum of Rs. 54,85,530/-. The due date for completion of the project and offer of possession of the allotted unit as per buyer's agreement was fixed as 03.06.2016 which was not adhered to by the respondent by one reason or the other. After completion of the project, it received occupation certificate on 09.10.2017 and offered possession of the allotted unit vide letter dated 13.10.2017 along with requisite payments. It is pleaded by the complainant that since the unit was not constructed as per the sanctioned building plan, so she was left with no alternative but to withdraw from the project by writing letter dated 27.10.2017 and seeking refund of the paid-up amount. The request made in this regard by her was accepted by the respondent vide its letter dated 30.10.2017 and who after deducting the earnest money of Rs. 6,91,382/- send her an account payee cheque of Rs. 47,94,148/- and the same was accepted by her as evident from letter dated 19.01.2018 but with certain reservations, keeping her right open with regard to the remaining amount besides compensation. The version of respondent-builder is otherwise and who took a plea that after accepting the amount after deduction, the complainant was left with no right or interest in the unit. Thus, her claim in this regard is liable to be rejected.

34. As per buyer's agreement executed between the predecessor-in-interest of the complainant namely Sh. Indrajit Maitra and the respondents on 27.05.2011 with regard to the allotted unit, the due date for completion of the project and offer of possession was fixed as 03.06.2016. There are specific recitals in that document with regard to plans, designs and specifications with regard to the allotted unit in clause "F" and reiterated in clause "10.1" and accompanied by a plan of the unit wherein the opening of the utility room/store was shown from the outside instead of the inner portion of the subject unit. That document was signed by the original allottee and the respondent-builder. The complainant came into the picture only on 02.02.2012 and the respondent-builder besides endorsing letter of allotment dated 20.04.2011 also acknowledged buyer's agreement dated 27.05.2011 and receipts bearing no. 211, 900 and 2240 dated 16.02.2011, 11.07.2011 and 30.11.2011 respectively. After endorsement of the allotted unit in favour of the complainant, she admittedly continued to make remaining payments and did not raise any objection except the letter dated 27.10.2017 after receipt of offer of possession dated 13.10.2017.
35. The respondent-builder failed to complete the same within the stipulated period. It received occupation certificate of the project only on 09.10.2017 and offered the possession of the allotted unit to the complainant vide letter dated 13.10.2017. Thus, there is nothing on the record except the letter dated 27.10.2017, to show any communication sent by the complainant to the respondent with regard to change in the building plan

of the unit and increase in its area. Though it is the version of the complainant after offer of possession dated 13.10.2017, she visited the project and found the entry of utility room from outside the allotted unit and whereas the same was proposed to be from the inner side of the unit itself. Even that fact was also mentioned by her in the communication dated 27.10.2017 sent to the respondent through her attorney. If that was the position, then she should not have accepted the paid-up amount minus the earnest money sent by the respondent through an account-payee cheque. But she accepted that amount though reserving her right to claim the remaining amount with compensation. The version of the respondent is otherwise and who took a plea that the structure of the allotted unit was made as per sanctioned plan and as agreed upon between the parties as per clauses F & 10.1 of the buyer's agreement dated 27.05.2011. So now she has no claim whatsoever with regard to the remaining amount.

36. The authority has considered the rival submissions made by both the parties.
37. After the expiry of due date for completion of project and before offer of possession of the allotted unit, the complainant never exercised her right to withdraw from the project and seek refund of the paid-up amount. When after receipt of occupation certificate of the project vide letter dated 09.10.2017, she was offered possession of the allotted unit, she sought to withdraw from the project and sought refund of the paid-up amount besides interest and compensation. Before proceeding further, a reference

in this regard may be made to the provisions of Section 18(1) of Act of 2016 which provides as follows: -

"Section 18: - Return of amount and compensation

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case 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 that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

38. A perusal of letter dated 30.10.2017, sent by the respondent to the complainant in response to her letter dated 27.10.2017 shows that her request for refund of the paid-up amount was accepted but only after deduction of earnest money. Admittedly, she received that amount by way of an account payee cheque as evident from letter dated 19.01.2018 received through her attorney. Though there were some reservations with regard to that amount but the same were kept open. If the complainant was aggrieved against that action of respondent, then she should not have waited for more than three years to approach the authority for the relief with regard to the remaining amount. Secondly, by way of letter dated

27.10.2017, she refused to accept the offer of possession sent by the respondent vide letter dated 13.10.2017 and sought refund of the paid-up amount. If she was not satisfied with the response of the respondent qua the payment of the amount, she could have refused to accept the same and press for full refund besides interest on the paid-up amount. But to the contrary, she accepted that amount and approached the authority for the remaining amount deducted by the respondent by way of earnest money. So, the refusal of complainant to accept offer of possession of the allotted unit and seeking refund of the paid-up amount vide letter dated 27.10.2017 would be treated as withdrawal from the project after receipt of its occupation certificate and offer of possession dated 09.10.2017 and 13.10.2017 respectively. Thus, the act of respondent in retaining the amount of earnest money cannot be said to be illegal in any manner. Though as per statement of account attached with the letter dated 30.10.2017, the total sale consideration of the unit is mentioned as Rs. 57,91,050/- and after deducting its 10%, the amount of Rs. 47,84,184/- was sent through an account payee cheque but as per schedule of payment (page 31 of complaint), the total sale consideration of the unit is mentioned as Rs. 57,91,050/- but inclusive of IFMS amount of Rs. 1,07,025/- and which comes to Rs. 56,84,025/-. So, after the Act of 2016 came into operation, the builder was not entitled to forfeit the amount paid at the time of booking as Rs. 6,91,382 but only Rs. 4,60,921/- i.e., 10% of the basic sale consideration of Rs. 46,09,219/-. Even the Hon'ble Apex court took the same view while dealing with such type in cases of *Maula Bux Vs Union of*

India (1970)1SCR298 & Dardar KB Ramchandra Raj Urs Vs Sarah C Urs (2015)4SCC136. The same view was followed by *NCDRC, New Delhi in consumer case no. 2766 of 2017 titled as Jayant Singal & anr. vs M/s M3M India Limited* decided on 26.07.2022. The Government of Haryana also framed regulations in this regard known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which is providing as under-

"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. Thus, keeping in view the factual as well as legal position detailed above, the respondent-builder was not justified in retaining more than 10% of the sale consideration after accepting surrender of the allotted unit from the complainant and returning the remaining amount. Since she has already refunded the amount of Rs. 47,94,148/- vide account payee cheque after retaining the earnest money of Rs. 6,91,382/-, so the respondent is directed to retain only Rs. 4,60,921/- and return the remaining amount with interest at the prescribed rate i.e., @ 10.60 % p.a. on the refundable

amount, from the date of surrender i.e., 27.10.2017 till the date of actual realization of payment.

40. The respondent is directed to refund the amount deducted over and above 10% of the basic sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 within 90 days from the date of this order along with an interest @ 10.60 % p.a. on the refundable amount, from the date of surrender i.e., 27.10.2017 till the date of realization of payment.

G.II Direct the respondent to pay cost of litigation of Rs. 1,00,000/-.

41. The complainant is seeking relief w.r.t compensation in the aforesaid relief, 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. (SLP(Civil) No(s). 3711-3715 OF 2021)*, held that an allottee are 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 may approach the adjudicating officer for seeking the relief of compensation

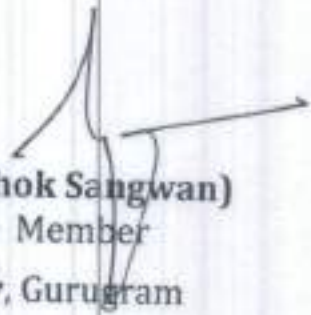
H. Directions of the authority

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

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

- i. The respondents are directed to refund the amount deducted over and above 10% of the basic sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018; along with an interest @ 10.60 % p.a. on the refundable amount, from the date of surrender i.e., 27.10.2017 till the date of realization of 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 registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.01.2023