BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**533 of 2021 & 1705 of 2019**
Date of filing complaint	**24.04.2019**
First date of hearing	**07.11.2019**
Date of decision	**06.10.2022**

	1.Nitin Aggarwal **R/o:** Flat no. 504, Chandra CGHS, Plot GH-64, Sector-55, Gurugram, Haryana-122011 2. Anil Kumar **R/o:** Flat no. 303, Shri Kirti Apartments, Plot no. 64, Chandra Society Ltd., Sector-55, Gurugram , Haryana-122011	**Complainants**
	Versus	
	M/s Ireo Grace Realtech Pvt. Ltd. **R/o:** C-4, Malviya Nagar (1st floor), New Delhi-110017	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Shri Deepak Pushlani Advocate	Complainants
Shri M.K. Dang Advocate	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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 allottees 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 complainants, 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 (phase 1)" situated at Sector-67A, Gurgaon.
2.	Nature of the project	Group Housing Colony
3.	Project area	13.25 acres as per registration certificate.
4.	DTCP license no.	05 of 2013 valid up to 20.02.2021
5.	Name of licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
6.	RERA Registered/ not registered	378 of 2017 dated 07.12.2017 valid up to 30.06.2020
7.	Developer-Promoter	M/s Ireo Grace Realtech Pvt. Ltd.
8.	Allotment Letter	07.08.2013 (Page 32 at annexure C3 of the complaint)
9.	Unit no.	503, 5th Floor, Tower B2 (Page 45 at annexure C4 of the complaint)
10.	Unit area admeasuring (super area)	1726.69 sq. ft.

		(Page 45 at annexure C4 of the complaint)
11.	Date of approval of building plan	23.07.2013 (Page 77 at annexure R28 of the complaint)
12.	Date of apartment buyer agreement	02.06.2014 (As per BBA on Page 42 of complaint)
13.	Possession clause	**13.3 Possession and Holding Charges** The company proposes to offer **the possession of the said residence unit to the allottee within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder (Commitment Period).** The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the Company. **(Emphasis supplied)**
14.	Due date of possession	23.01.2017 (Calculated from the date of approval of building plan i.e., 23.07.2013) **Note:** Grace Period is not allowed.
15.	Total sale consideration	Rs. 1,73,06,088/- (As per payment plan given in annexure R-2 on page 51 of reply)
16.	Amount paid by the complainants	Rs. 1,38,11,544/- (As per statement of account dated 13.06.2019 on page no. 96 of reply and annexure R-34)
17.	Surrender Letter	30.09.2018 (Annexure C-8 at page 86 of complaint)
18.	Occupation certificate	31.05.2019

		(Annexure R32 at page 91 of reply)
19.	Offer of possession	Offered on 13.06.2019 (Page 94 at annexure R34 of reply)

B. Facts of the complaint:

3. That the respondent invited applications from public for the allotment of flats for their aforementioned upcoming project/housing complex, assuring that all necessary approvals/ pre-clearances in regard to the project and construction had been obtained from Directorate Town & Country Planning, Haryana and from other concerned civic authorities and also projected 90-meter approachable road to the project in lay-out plans/brochures. Accordingly, the complainants jointly booked a 3 BHK unit/flat in the aforesaid group housing project.
4. That at the time of execution of application form, respondent collected the initial Earnest money/amount of Rs.17,00,000/- (Rs. Seventeen Lacs only) from the complainants on dated. 06.03.2013 vide payment acknowledgment issued on dated 13.04.2013. The complainants at the time of signing the application form agreed at a rate of Rs. 8.750/- per sq. ft. (inclusive of car parking's) as a net basic sale price. The complainants were, but, told to leave some columns blank at page no.7 wherein basic sale price (BSP) was agreed @ Rs. 8,750/- per sq. ft.
5. The complainants thereafter as per the IInd demand raised (within 45 days from the day of booking) paid another sum of Rs. 16,46,486/-(Rs. Sixteen lacs forty six thousand four hundred eighty six only) against which payment acknowledgment was issued by the respondent.
6. That complainants were stunned and surprised to note the moment they received the "Offer of Allotment" letter dated 07.08.2013 with a payment plan attached thereto wherein net basic sale price had been changed/increased to Rs.9,400/- per sq. ft. without any notice, knowledge and consent of the complainants, also falsely raised

Rs.2,50,000/- towards club membership charges, which were not agreed or were a part of the sale consideration price at the time of booking of unit/flat.

7. That complainants when enquired regarding increase of Rs. 650/- per sq. ft. in the basic sale price and demand of other charges as above mentioned then it was assured by the respondent that increased price shall be taken-back including other charges and persuaded the complainants to pay the next/third instalment to avoid any late payment charges and/or forfeiture of money and promised that the adjustment shall be made before issuance of next/fourth instalment's due date. The respondent further assured that they are in a process of being finalizing the apartment buyer agreement and necessary reductions in other charges & in the basic sale price shall be done at their end. Consequently, the complainants also paid the third instalment.
8. That when complainants received apartment buyer agreement along with payment plan for signing. There were several issues which were contrary, one sided & unethical adversely affecting their interest. Even the basic sale price was not reduced to its original amount of Rs. 8,750/- per sq. ft. rather respondents kept intact the illegal and unjustifiable demands despite repeated resistance by the complainants. They were further threatened that the unit shall be cancelled, and the money paid shall be forfeited if the apartment buyer's agreement is not signed. The complainants were persistently forced to sign the apartment buyer agreement and under constrained and forced circumstances complainants signed upon the dotted lines. Thus, the complainants entered into an agreement with the respondent on 02.06.2014.
9. That complainants finding no other way to avoid forfeiture paid the subsequent payment instalments under protest and as per the advice of respondent opted flexibility in existing payment plan by choosing the

payment plan with relaxed milestone vide letter dated 21.5.2015 issued by the respondent, wherein 10th payment demand was split into three instalments. They, after paying the 10th payment demand in May/June, 2016 had remitted in total a sum of Rs.1,38,11,544/- (Rs. One Crore thirty-eight lacs eleven thousand five hundred forty four only) qua the unit and enquired about the construction work at the site, the respondent in response thereto vaguely replied not specifying the work progress pertaining to the B-2 tower but, admittedly the construction work was not in accordance to the payment plan. Thereafter still, 10-B/11th payment demand was raised vide letter dated 06.10.2016 (the same to be payable by 20.10.2016) which was not in accordance with the pace of construction being carried out at the site.

10. Thereafter respondent had also raised the 12th payment demand during the period when the project is already under a delayed zone w.e.f. dtd.23.1.2017.
11. That complainant's apprehension found true when the possession had not been handed over to the complainants within stipulated period of 42 months from the day of grant of building plan approval, which had already been expired on dtd.23.1.2017 stopped making any further payment.
12. Thereafter, the complainants on 30.9.2018 requested the respondent to return their hard-earned money on account of delay and other unfair trade practices adopted by the respondent.
13. That respondent at the time of booking advertised the project with a 90-meter motorable access road approaching to the project and assured that a link road of 90 meter wide, flanked by an 18-meter-wide green belt, further flanked by a 24-meter-wide service road as a approach to the project as also shown in site-plan/brochures at page no. 38 & 39 of the apartment buyer agreement. Therefore, it is submitted that no 90-meter

road and/or 18-meter road and/or 24-meter service road towards the present group project as also shown in the lay-out plans exists at the site/project. Thus, non-existence of 90-meter-wide road had rendered the project with imperfection, which had been undertaken to be performed, now making agreement executed amongst complainant imperfect suffers from material defects also leading to deficiency in services.

14. The complainants having no other option approached the Authority for seeking refund of the paid-up amount.

C. Relief sought by the complainants:

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

i. Direct the respondent to refund the entire amount along with prescribed rate of interest.

D. Reply by respondent:

The respondents by way of written reply made following submissions:

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

17. That the complaint is not maintainable as per the Arbitration and Conciliation Act, 1996 since buyer's agreement, contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 35 of the buyer's agreement, and the same 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".

18. That the complainants have not approached this Hon'ble Forum with clean hands and have intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by them 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:

A. That the complainants, after checking the veracity of the project namely, 'The Corridors', Sector 67A, Gurugram had applied for allotment of an apartment vide their booking application form. The complainants agreed to be bound by the terms and conditions of the booking application form.

B. That based on the said application, the respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainants apartment no. CD-B2-05-503 having tentative super area of 1726.69 sq. ft. for a total sale consideration of Rs. 1,73,06088.41. Vide letter dated 22.03.2014, the respondent sent 3 copies of the apartment buyer's agreement to the complainants. It was submitted that the

complainants signed and executed the apartment buyer's agreement on 2.6.2014

C. That the respondent kept on raising payment demands from the complainants in accordance with the mutually agreed terms and conditions of the allotment as well as of the payment plan and the complainants made the payment of the part-amount of the total sale consideration till certain installments and then started committing defaults. It is pertinent to mention that vide payment request dated 14.04.2013, respondent had raised the demand for second installment of net payable amount of Rs. 16,46,486/- followed by reminder dated 14.05.2013. However, the complainants failed to remit the whole amount and the due amount was adjusted in the next installment demand as arrears. Vide payment request dated 18.03.2014, respondent had raised the demand for third installment of net payable amount of Rs. 19,96,928.96 followed by reminders dated 13.04.2014, 04.05.2014 and 29.10.2014 respectively. However, the complainants again failed to pay the due installment amount. Again, vide payment request dated 27.01.2015, respondent had raised the demand for fourth installment of net payable amount of Rs. 19,84,990.47 followed by reminders dated 28.02.2015 and 24.03.2015. Yet again, the complainants defaulted in abiding by their contractual obligations.

D. That the respondent had raised the payment request for sixth installment dated 22.07.2015 for net payable amount of Rs. 16,76,248.80. However, the whole amount was never paid by the complainants. The remaining due amount was adjusted in the next installment as arrears. Vide payment request dated 17.08.2015, respondent had raised the demand for seventh installment of net payable amount of Rs.9,96,585.16 followed by a reminder dated

28.09.2015 and 12.11.2015. Yet again, the complainants defaulted in abiding by their contractual obligations.

E. That the respondent had raised the payment request for eighth installment dated 09.09.2015 for net payable amount of Rs. 22,56,571.70. However, the complainants failed to remit the due amount yet again despite reminders dated 07.10.2015 and 12.11.2015 being issued by the respondent. Again, vide payment request dated 06.10.2015, the respondent raised the demand for ninth installment of net payable amount of Rs. 32,25,015.74. However, the complainants made the payment of the due amount only after a reminder dated 05.11.2015 was raised by the respondent. Vide Payment request dated 11.04.2016, respondent had raised the demand for tenth installment of net payable amount of Rs. 11,95,285.71. However, the complainants paid the due amount only after a reminder dated 10.05.2016 was issued by the respondent.

F. That the respondent raised the payment request for eleventh installment dated 06.10.2016 for net payable amount of Rs. 12,67,379.82 followed by reminders dated 02.11.2016 and 24.11.2016. However, the complainants again defaulted in adhering to their contractual obligations. Copies of the payment request dated 06.10.2016 and reminders dated 02.11.2016 and 24.11.2016. Again, vide payment request dated 04.04.2017, respondent had raised the demand for twelfth installment of net payable amount of Rs. 30,17,608.58. However, the complainants have till date failed to remit the due amount despite reminders dated 08.05.2017 and 30.05.2017.

G. That the possession of the unit was supposed to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement. It is submitted that clause 13.3 of the buyer's agreement and clause 43 of the schedule – I of the booking application

form states that *'...subject to the force majeure conditions and 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)...'.* It is pertinent to mention here that as per clause 13.5 of the apartment buyer's agreement and clause 44 of the schedule – I of the booking application form further 'extended delay period' of 12 months from the end of grace period is provided.

H. 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 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. It was submitted 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) shall expire only on 27.11.2019. However, the same is subject to the occurrence of the force majeure conditions. It was submitted that despite the complainants being continuous defaulters from the very inception, the respondent has completed the construction of the tower in which the unit allotted to the complainants is located. Furthermore, the respondent being a customer-oriented company applied for the grant of occupation certificate on 06.07.2017 and the same has already been offered the occupation certificate on 31.05.2019. It was submitted that the respondent has prior to the lapse of the due date of possession already offered the possession vide notice of possession dated 13.06.2019. The complainants are bound to complete the documentation formalities and make payment towards the remaining due amount. In fact, holding charges are payable by the complainants.

I. Although the respondent has offered the possession of the apartment prior to the elapse of the due date of handing over of the possession, it is pertinent to mention herein that the implementation of the said project was hampered due to non-payment of instalments by the allottees on time and also due to the events and conditions which were beyond the control of the respondent, and which have materially affected the construction and progress of the project. Some of the force majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under :

   i. **Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to Demonetization**

   ii. **Orders Passed by National Green Tribunal**

iii. **Non-Payment of Instalments by Allottees**

iv. **Inclement Weather Conditions viz. Gurugram**

J. That section 51 of the Indian Contract Act, 1872 provides that promisor is not bound to perform, unless reciprocal promisee is ready and willing to perform. Section 52 of the Indian Contract Act, 1872 provides for Order of performance of reciprocal promises wherein it is stated that the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order. In the instant case, the complainants have failed to perform its obligation under the contract for timely payment of instalments. However, the respondent still fulfilled its obligations. No claim is maintainable by the complainants against the respondent.

K. That in fact the complainants are real estate investors who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that the complainants' calculations went wrong on account of severe slump in the real estate market and the complainants now wants to somehow get out of the concluded contract on highly flimsy and baseless grounds. Such malafide tactics of the complainants cannot be allowed to succeed.

19. All other averments made in the complaint were denied in toto.

20. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and written submissions made by the parties and who reiterated their earlier version as set up in the pleadings.

E. Jurisdiction of the authority:

21. The plea of the respondents regarding lack of jurisdiction of Authority is rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

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.

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

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

F. Findings on the objections raised by the 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.

22. 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.

23. 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."*

24. 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."*

25. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance

with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

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

26. 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:

> ***"34. 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".*

27. 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.

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

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

Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

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

29. 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."

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

F.III Objections regarding force majuere

31. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainants are situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction during 2015-2016-2017-2018, dispute with contractor, non-payment of instalment by allottees and demonetization. The plea of the respondent regarding various orders of the NGT and demonetisation and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Further, any contract and dispute between contractor and the builder cannot be considered as a ground for delayed completion of project as the allottee was not a party to any such contract. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter respondent cannot be given any leniency

on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F.IV. Objections regarding the complainants being investors:

32. It is pleaded on behalf of respondents that complainants are investors and not consumers. So, they are not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondents is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are buyers and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

"Z(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold(whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."

33. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainants are allottees as the subject unit allotted to them by the respondents/promoters. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as **M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being an investor are not entitled to protection of this Act also stands rejected.

G. Entitlement of the complainants for refund:

G.I Direct the respondents to refund the amount deposited by the complainants along with interest at the prescribed rate.

34. That the complainants booked a unit in the project of the respondent namely, "Corridors (phase-1)" and was allotted a unit bearing no. 503, 5th floor, tower B2 vide allotment letter 07.08.2013. Thereafter, a BBA was executed between the parties on 02.06.2014.

35. The respondent promoter vide clause 13.3 of the buyer's agreement executed inter se parties, had 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 delay beyond the control of the company i.e., the respondents/promoters. It was contended on behalf of the respondent that the due date for delivery

of possession of the allotted unit should be calculated from the date of fire safety approval i.e., 27.11.2014 as it was the last pre-condition that was fulfilled.

36. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment 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 promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

37. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in

compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment not as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

38. The respondent promoters have 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 respondents/promoters.

39. Further, in the present case, it was submitted by the respondent promoters that the due date of possession should be calculated from the date of fire safety approval which was obtained on 27.11.2014, as it is the last of the statutory approvals which forms a part of the preconditions. The authority in the present case observed that, the respondents have not kept the reasonable balance between his own rights and the rights of the complainants/allottees. The respondents have acted in a pre-determined and preordained manner. The respondents have acted in a highly discriminatory and arbitrary manner. The unit in question was

allotted to the complainants on 07.08.2013. The date of approval of building plan was 23.07.2013. It will lead to a logical conclusion that the respondents would have certainly started the construction of the project. On a bare reading of the clause 13.3 of the agreement reproduced above, it becomes clear that the possession in the present case is linked to the "fulfilment of the preconditions which is 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 flat in question and the promoters are 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 apartment. According to the established principles of law and the principles of 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 totally against the interests of allottees 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 complainants.

40. Here, the authority is diverging from its earlier view i.e., earlier the authority was calculating/assessing the due date of possession from date approval of firefighting scheme (as it the last of the statutory approval

which forms a part of the pre conditions) i.e., 27.11.2014 and the same was also considered/observed by the Hon'ble Supreme Court in Civil Appeal no. 5785 of 2019 titled as ***'IREO Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.'*** by observing as under:

> *"With the respect to the same project, an apartment buyer filed a complaint under Section 31 of the Real Estate (Regulation & Development) Act, 2016 (RERA Act) read with rule 28 of the Haryana Real Estate (Regulation & Development) rules, 2017 before the Haryana Real Estate Regulatory Authority, Gurugram (RERA). In this case, the authority vide order dated 12.03.2019 held that since the environment clearance for the project contained a pre-condition for obtaining fire safety plan duly approved by the fire department before the starting construction, the due date of possession would be required to be computed from the date of fire approval granted on 27.11.2014, which would come to 27.11.2018. Since the developer had failed to fulfil the obligation under Section 11(4)(a) of this Act, the developer was liable under proviso to Section 18 to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant, upto the dote when the possession was offered. However, keeping in view the status of the project, and the interest of other allottees, the authority was of the view that refund cannot be allowed at this stage.*

41. On a bare reading of the said clause of the agreement reproduced above, it becomes clear that the possession in the present case linked to the "fulfilment of the preconditions which is so vague and ambiguous in itself. Nowhere in the agreement it has been defined the 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 t flat in question and the promoters are aiming to extend this time peri indefinitely on one eventuality or the other. Moreover, the said clause is 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 apartment. According to the established principles of law and the principal of natural justice when a certain glaring illegality or irregularity

comes to the notice of the adjudicator, the adjudicator can take cognizance of the same a adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and totally against the interests of the allottees 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 complainants. Accordingly, in the present matter the due date of possession is calculated from the date approval of building plan i.e., 23.07.2013 which comes out to be 23.01.2017.

42. It is pertinent to highlight that the complainants had requested the respondent to refund the paid-up amount vide letter dated 30.09.2018 i.e., after the due date of possession had expired. The respondent meanwhile obtained the occupation certificate and offered possession of the unit vide letter dated 13.06.2019. It is thus clear that the complainants wishes to withdraw from the project and had even communicated his desire to do so to the respondent, so it was the duty of the respondent to act upon it. Keeping in view the fact that the allottee complainants 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.

43. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainants are 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.

44. 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*** wherein it was observed that:

> *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*

45. 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.

46. 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.

47. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 1,38,11,544/- with interest at the rate of 10.35% (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

H. Directions of the Authority:

50. 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 promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016.

i. The respondent/promoters are directed to refund the amount i.e., Rs. 1,38,11,544/- received by them from the complainants/allottee along with interest at the rate of 10.35% p.a. 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. The respondent/promoters are directed not to create third party rights over the allotted unit till the payment of the amount received from the complainants is paid. If any negotiations for sale of that unit are made, then the receivables from that unit would be paid to the complainants and the remainder if any is liable to be retained by them.

iii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.

51. Complaint stands disposed of.

52. File be consigned to the registry.

Sanjeev Kumar Arora
Member

Ashok Sangwan
Member

Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.10.2022