

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

Complaint no.	:	1085 of 2022
First date of hearing:		26.08.2022
Order Reserve On	:	29.11.2022
Order Pronounce On:		08.02.2023

Hanita Kaushal R/o: 65, Asopalav Bunglow, Behind ZyduS Hospital, Thaltej, Ahmedabad, Gujarat-380059	Complainant
Versus	
M/s Ireo Private Limited Office at : - Ireo Campus, Archview Drive, Ireo City, Golf Course Extension Road, Gurugram-122101, Haryana	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Arora	Member

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

ORDER

1. The present complaint dated 11.03.2022 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter

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

A. Unit and project related details

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

S. No.	Heads	Information
1.	Project name and location	"Skyon", Sector 60, Gurgaon, Haryana
2.	Licensed area	18.10 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no.	192 of 2008 dated 22.11.2008
	Licensee	M/s High Responsible Realtors Pvt. Ltd. and M/s Five River Buildcon Pvt. Ltd.
5.	RERA registered/not registered	Registered 367 of 2017 dated 24.11.2017
	Validity	21.11.2018
6.	Unit no.	C0111, 1st Floor, Tower-C (annexure II on page no. 25 of complaint)
7.	Unit measuring	1365 sq. ft. (annexure II on page no. 25 of complaint)
8.	Date of approval of building plan	27.09.2011 (annexure R-27 on page no. 63 of reply)



9.	Date of environment clearance	31.07.2012 (annexure R 28 on page no. 69 of reply)
10.	Date of allotment	04.03.2013 (annexure I on page no. 14 of complaint)
11.	Date of execution of builder buyer's agreement	31.05.2013 (annexure II on page no. 22 of complaint)
12.	Date of fire scheme approval	25.09.2013 (annexure R-29 on page no. 77 of reply)
13.	Reminders for payment	For Fifth Instalment: 29.10.2013, 19.11.2013, Final notice: 10.12.2013 For Sixth Instalment: 27.01.2014, 16.02.2014, Final notice: 09.03.2014 For Seventh Instalment: 30.04.2014, 21.05.2014 For Eight Instalment: 30.07.2014, 20.08.2014 For Ninth Instalment: 17.02.2015, 10.03.2015, 28.08.2015, Final notice: 23.02.2016, Letter: 25.02.2016, 11.04.2016.
14.	Date of cancellation letter	03.11.2016 (annexure R-35 on page no. 88 of reply)
15.	Total consideration	Rs. 2,25,02,392/- (as per statement of account dated 06.09.2016 annexed on page no. 84 of complaint)
16.	Total amount paid by the complainant	Rs. 75,40,350/- (as per statement of account

		dated 06.09.2016 annexed on page no. 84 of complaint) Rs. 80,10,444/- (as alleged by complainant)
17.	Due date of delivery of possession	27.03.2015 (Calculated as 42 months from date of approval of building plan) Note: Grace Period is not allowed.
18.	Possession clause	13. Possession and Holding Charges Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, registration chares, stamp duty and other charges and also subject to the allottee having complied with all the formalities or documentation as prescribed by the company, the company proposes to offer the possession of the said apartment to the allottee within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed

		thereunder (Commitment Period). The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the Company. (Emphasis supplied)
19.	Occupation certificate	26.08.2016 (annexure R-32 on page 81 of reply)
20.	Offer of possession	06.09.2016 (annexure R-33 on page no. 83 of reply)

B. Facts of the complaint

The complainant has submitted as under:

3. That the complainant/ allottee is a widow (w/o late Col. Sanjiv Kaushal). The complainant's husband Late Col. Sanjiv Kaushal joined Indian Army on 17.06.1983 and completed 32 years of service with utmost determination, dedication, discipline and highest integrity. Out of 32 years, he served 16 years in the sensitive areas of Jammu & Kashmir like Baramulla, Poonch, Leh - Ladakh etc. prioritising his nation and service over his family.
4. That complainant and her late husband booked a unit in the skyon project based on feedback and assurances given by the officials/employees of respondent.

5. That the respondent allotted an apartment i.e., unit no. C-0111 admeasuring 1365 sq. ft at the rate of Rs 11,600/sq. ft. under Skyon Project situated at sector 60, Gurugram, Haryana in favour of the complainant and her late husband Col. Sanjiv Kaushal as buyer/allotee vide allotment offer letter dated 04.03.2013.
6. That apartment buyer's agreement was executed between complainant, her late husband and respondent on 31.05.2013 for a total sale consideration of Rs 1,58,34,000/-.
7. That the complainant made more than 50% of the payment within 6-7 months from the date of allotment letter i.e., 04.03.2013 for the said property i.e., of Rs. 80,10,444/-.
8. That in early 2014, complainant and her late husband heard unsettling news about the respondent from their friends. It was reported widely in the media as well including headlines "*Ireo is going bankrupt, not wise for the homebuyers to invest money with Ireo*". The complainant's husband started discussing with the respondent's representatives telephonically to find out ways and methods for the refund of money already paid.
9. That the respondent sent final notice dated 11.04.2016 to the complainant's husband email address and intentionally did not serve the actual physical copy to the complainant and her late husband.
10. That despite not serving the physically copy of final notice dated 11.04.2016 to the complainant, respondent sends "*notice of possession*" dated 06.09.2016 to the complainant's husband again over his email id.
11. That the complainant's husband (Col. Sanjiv Kaushal) died due to Covid-19 and left for heavenly abode on 13.05.2021.
12. That after the demise of her husband, complainant wrote two mails to the respondent on 21.09.2021 and 29.10.2021 for the refund of the already

paid which is Rs 80,10,444/- along with the interest from last 8 years in order to settle down in life and meet expenses of herself and her children. One of the emails dated 29.10.2021 was duly received and signed along with stamp on 08.11.2021.

13. That the complainant sent legal notices to the respondent through speed post as well as on respondent's email id on 11.11.2021.

C. Relief sought by the complainant:

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

- (i) Direct the respondent to refund the said total amount of Rs. 80,10,444/- along with interest of 18% pa from the date of respective payments till actual realization of complete amount i.e., 8 years.
- (ii) Direct the respondent to compensate the complainant for Rs 3,00,000/- for the damages towards mental agony & harassment caused by respondent.
- (iii) Direct the respondent to pay the cost towards the legal notice of Rs 30,000/- served by the complainant.

15. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

The respondent has contested the complaint on the following grounds: -

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 parties prior to the enactment of the Real Estate (Regulation

and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

17. That there is no cause of action to file the present complaint.
18. That the complainant has no locus standi to file the present complaint.
19. That the complainant is estopped from filing the present complaint by his own acts, omissions, admissions, acquiescence's, and laches.
20. The present complaint is barred by limitation.
21. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 35 of the buyer's agreement.
22. That the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:
23. That the complainant, after checking the veracity of the project namely, 'Ireo Skyon; Sector 60, Gurugram applied for allotment of an apartment vide booking application form dated 01.03.2013. The complainant and her husband agreed to be bound by the terms and conditions of the booking application form.
24. That based on the application for booking, the respondent vide its allotment offer letter dated 04.03.2013 allotted to the complainant and her husband apartment no. C0111 having tentative super area of 1365 sq. ft for a total sale consideration of Rs. 1,70,21,501/- and the buyers agreement was executed on 31.05.2013.

25. That the respondent raised payment demands from the complainant and her husband in accordance with the agreed terms and conditions of the allotment as well as of the payment plan and they defaulted in making payments. Vide payment demand dated 30.05.2013, the respondent had raised the fourth payment demand. However, the due amount was credited only after reminders dated 25.06.2013 and 16.07.2013 were sent by the respondent.
26. That vide payment request letter dated 03.10.2013, the respondent raised the fifth installment demand for the net payable amount of Rs. 12,25,014.71. However, the complainant and her husband failed to remit the due amount despite reminders dated 29.10.2013 and 19.11.2013 and final notice dated 10.12.2013 and the amount was accordingly adjusted in the next payment demand as Arrears.
27. That vide payment request letter dated 31.12.2013, the respondent raised the sixth installment demand for the net payable amount of Rs. 29,71,112.62. However, the complainant and her husband failed to remit the due amount despite reminders dated 27.01.2014, 16.02.2014 and final notice dated 09.03.2014 and thus the complainant and her husband were in continuous defaults of their contractual obligations.
28. That the respondent had sent the payment demand dated 04.04.2014 to the complainant and her husband towards seventh installment demand for the net payable amount of Rs. 45,88,593/-. Yet again, they defaulted in making payment towards the demanded amount despite reminders dated 30.04.2014 and 21.05.2014 and the due amount was adjusted in the next installment demand as arrears.
29. That the respondent had sent the payment demand dated 04.07.2014 to the complainant and her husband towards eighth installment demand for

the net payable amount of Rs. 62,06,074/-. Yet again, they defaulted in making payment towards the demanded amount despite reminders dated 30.07.2014 and 20.08.2014 and the due amount was adjusted in the next installment demand as arrears.

30. That the respondent had sent the payment demand dated 22.01.2015 to the complainant and her husband towards ninth installment demand for the net payable amount of Rs. 78,23,554.96. Yet again, the complainant and her husband defaulted in making payment towards the demanded amount despite reminders dated 17.02.2015 and 10.03.2015, letter dated 28.08.2015, final notice dated 23.02.2016, letter dated 25.02.2016 and notice dated 11.04.2016.
31. That as per possession clause 13.3 of the agreement the time was to be computed from the date of receipt of all the requisite approvals. Even otherwise, construction cannot be raised in the absence of the necessary approvals. It is pertinent to mention herein that it has been specified under sub-clause (v) of the clause 17 of the memo of the approval of the building plan dated 27.09.2011 of the said project that clearance issued by the Ministry of Environments and Forest, Government of India has to be obtained before starting the construction of the project. It is submitted that the environment clearance for the construction of the said project was granted on 31.07.2012. Furthermore, in clause (XXII) of part A of the environment clearance dated 31.07.2012, it was stated that fire safety plan was to be duly obtained before the start of any construction work at site. The fire scheme approval was granted on 25.09.2013 and the time period for calculating the date for offering the possession according to the agreed terms of the agreement would have commenced only on 25.09.2013. Therefore, 60 months from 25.09.2013 (including 180 days

- grace period and extended delayed period) would have expired only on 25.09.2018.
32. That the respondent completed the construction of the tower in which the unit allotted to the complainant and her husband is located and applied for the grant of occupation certificate on 29.09.2015. The occupation certificate was granted by the concerned authorities on 24.08.2016. Furthermore, the respondent offered the possession of the unit to the complainant and her husband vide notice of possession dated 06.09.2016 and intimated to them to remit the due amount and complete the documentation formalities by 06.10.2016. However, the complainant and her husband failed to do the needful despite reminder dated 24.10.2016.
33. That on account of non-fulfilment of the contractual obligations by the complainant and her husband despite several opportunities extended by the respondent, the respondent was constrained to terminate the allotment and accordingly, the earnest money deposited by them along with other charges were forfeited vide notice of termination dated 03.11.2016 in accordance with clause 21 read with clause 21.3 of the agreement and the complainant is now left with no rights, claim, lien or interest whatsoever in respect of the said booking/ allotment.
34. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

35. The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected.

The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

36. 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

37. 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.

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

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

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

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

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

"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The

Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

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

25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."

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

F. Findings on the objections raised by the respondent.

F.1 Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

42. 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.



43. 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."*

44. 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."

45. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

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

46. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the

event of any dispute and the same is reproduced below for the ready reference:

"35. Dispute Resolution by Arbitration

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

47. 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.

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

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

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

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate 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."

49. 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."

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

G. Findings regarding relief sought by the complainant.

(i) Direct the respondent to refund the said total amount of Rs. 80,10,444/- along with interest of 18% pa from the date of respective payments till actual realization of complete amount i.e., 8 years.

51. The complainant-allottees booked a residential apartment in the project of the respondent named as "skyon" situated at sector 60, Gurgaon, Haryana for a total sale consideration of Rs. 2,25,02,392/-. The allotment of the unit was made on 04.03.2013. Thereafter the builder buyer agreement was executed between the parties on 31.05.2013.
52. As per the payment plan the respondent started raising payments from the complainant and her husband but they defaulted to make the payments. The complainant-allottees in total has made a payment of Rs. 80,10,444/-. The respondent vide letter dated 03.10.2013 raised the demand towards fifth instalment and due to non-payment from the complainant and her husband it sent reminder on 29.10.2013 and 19.11.2013 and thereafter various instalments for payments were raised but the complainant and her husband failed to pay the same. Further the respondent sent final notice dated 23.02.2016, 25.02.2016, 11.04.2016. The occupation certificate of the tower where the allotted unit is situated has been received on 26.08.2016 and subsequently offer for possession was also made by the respondent on 06.09.2016. Thereafter the respondent cancelled the allotment the unit vide letter dated 03.11.2016.
53. The complainant has pleaded, that she and her husband booked the unit in the project of respondent and in 2014 they heard a news that the promoter is going bankrupt, so they stop making further payments.
54. The respondent-builder took a plea that after the cancellation of allotted unit on 03.11.2016, the complainant filed the present complainants on 11.03.2022 i.e., after more than 5 years and thus, is barred by the



limitation. The authority observes that the case of the complainant is not against the cancellation letter issued way back as on 03.11.2016 as the same cannot be agitated as complaint was filed after more than 5 years well beyond the limitation period. But the promoter was required to refund the balance amount as per applicable cancellation clause of the builder buyer agreement. The balance amount has not been refunded which is a subsisting obligation of the promoter as per the builder buyer agreement. The respondent-builder must have refunded the balance amount after making reduction of the charges as mentioned in the buyer's agreement. On failure of the promoter to refund the amount the authority is of considered opinion that the promoter should have refund the balance amount after deducting 10% of the sale consideration and taxes which are not adjustable and have been borne by the promoter and brokerage charges as admissible as per law.

55. The Hon'ble Apex Court of land in cases of *Maula Bux Vs. Union of India, (1970) 1 SCR 928* and *Sirdar K.B. Ram Chandra Raj Urs Vs. Sarah C. Urs, (2016) 4 SCC 136*, held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provision of the section 74 of the Contract Act, 1872 are attracted and the party so forfeiting must prove actual damage.
56. Even keeping in view, the principle laid down by the Hon'ble Apex Court of the land, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, framed regulation 11 provided as under-

"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"

57. In view of aforesaid circumstances, the respondent is directed to refund the paid-up amount after deducting 10% of the sale consideration of the unit being earnest money along with statutory dues within 90 days along with an interest @ 10.60% p.a. on the refundable amount, from the date of cancellation i.e., 03.11.2016 till the date of its payment.
- (ii) Direct the respondent to compensate the complainant for Rs 3,00,000/- for the damages towards mental agony & harassment caused by respondent.
- (iii) Direct the respondent to pay the cost towards the legal notice of Rs 30,000/- served by the complainant.
58. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as **M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.** (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is



advised to approach the adjudicating officer for seeking the relief of compensation.


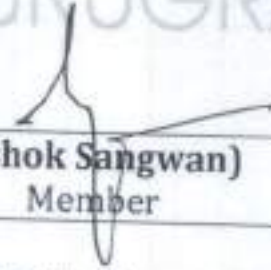

H. Directions of the authority: -

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

- i. The respondent is directed to refund the amount of Rs. 75,40,350/- after deducting 10% of the 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 and statutory dues along with an interest @10.60 % p.a. on the refundable amount, from the date of cancellation i.e., 03.11.2016 till the date 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.

60. Complaint stands disposed of.

61. File be consigned to the registry.

 (Sanjeev Kumar Arora) Member	 (Ashok Sangwan) Member	 (Vijay Kumar Goyal) Member
Haryana Real Estate Regulatory Authority, Gurugram		
Dated: 08.02.2022		

