

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

Complaint no.	1443 of 2019
Date of filing complaint	03.04.2019
First date of hearing	26.09.2019
Date of decision	01.12.2022

Naresh Sanwal, S/o Bhuwan Chandra Sanwal <b>R/o:</b> Sanwal Sadan, Sadbhawna Colony-B, Laldhant, Haldwani, Nainital, Uttarakhand- 263139	<b>Complainant</b>
Versus	
1. M/s Native Buildcon Pvt. Ltd. 2. Mr. Jawahar Chawla 3. Mr. Digvijay Chawla 4. Mr. Deep Nath Sharma <b>All having registered office at:</b> M-11, Middle Circle, Connaught Circus, New Delhi-110001	<b>Respondents</b>

<b>CORAM:</b>	
Shri Vijay Kumar Goyal	<b>Member</b>
Shri Sanjeev Kumar Arora	<b>Member</b>
<b>APPEARANCE:</b>	
Shri Hemant Phogat (Advocate)	Complainant
Shri Harshit Batra (Advocate)	Respondents

**ORDER**

1. The present complaint has been filed by the complainant/allottees 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 of the project	"Pedestal", Sector- 70A, Gurugram
2.	Nature of project	Residential
3.	<b>RERA registered/not registered</b>	Not Registered
4.	<b>DTPC License no.</b>	15 of 2011 dated 07.03.2011
	Validity status	06.03.2024
	Name of licensee	Impartial Builders Developers Pvt. Ltd. and others
7.	Unit no.	D- 50C, Second floor [As per page no. 12 of complaint-amended CAO]
8.	Unit measuring	1400 sq. ft. [As per page no. 12 of complaint-amended CAO]
9.	Allotment Letter	12.11.2013 (Page no. 21 of complaint)





10.	Date of execution of Floor buyer's agreement	25.11.2013 (Page no. 64 of reply)
11.	Possession clause	<b>5. Possession</b> <b>5.1 The Seller/Confirming Party proposes to offer possession of the Unit to the Purchaser (s) within Commitment Period.</b> The Seller/Confirming Party shall be additionally entitled to a Grace Period of 180 days after the expiry of the said Commitment Period for making offer of possession to purchaser(s). <b>1.4 "Commitment Period"</b> shall mean, subject to, Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC). Stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 36 months from the date of execution of Floor Buyer's Agreement.
12.	Due date of possession	25.11.2016 (Calculated from the execution of BBA)
13.	Total sale consideration	Rs. 1,25,70,004/- (As per page 22 of complaint)
14.	Total amount paid by the complainant	Rs. 63,62,860/- (As alleged by the complainant)
15.	Occupation certificate dated	18.06.2021 (As per page 108 of reply)

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Offer of Possession

Not offered

**B. Facts of the complaint:**

3. That after going through the advertisement published by the respondents in the newspapers and as per the broacher/prospectus provided by them, complainant had booked a flat/unit bearing no. D-50-C, second floor, having its super area 1400 sq. ft. in the project named "BPTP PEDESTAL" situated in sector-70-A, Gurugram for a total sale consideration of Rs. 1,25,70,004/-, and the complainant had paid a sum of Rs. 18,91,648/- (Rupees Eighteen Lacs Ninety-One Thousand Six Hundred and Forty Eight only) vide cheque/DD no. 587150 dated 07-11-2013 drawn on Punjab National Bank as booking amount in respect of the above said flat/unit to be developed by the respondents/developers.
4. That till today, the respondents have not signed /registered the builder buyer agreement, even after repeated requests by the complainant. The allotment letter dated 12-11-2013 in respect of the above said flat was issued by the respondents and till today a total amount of Rs. 63,62,860/- (Rupees Sixty Three Lacs Sixty Two thousand Eight hundred and Sixty only) has been paid by the complainant to the respondents in respect of the above said flat.
5. That it is also pertinent to mention here that at the time of booking, the complainant was under impression that the project was being developed by BPTP as the project name was BPTP PEDESTAL but later on during signing of tripartite agreement, the complainant came to know that the project is being developed by the respondent no. 1 i.e. M/s Native Buildcon Pvt. Ltd. as such information was not disclosed and similarly was concealed by the officials of the respondents.

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6. That the complainant purchased the flat under the subvention scheme where the respondents assured the complainant that the EMIs will start only on the offer of possession. That it is also pertinent to mention here that the respondents have failed to fulfil the conditions of the subvention scheme and in lieu of which the complainant is being harassed and has been paying the EMIs to the bank. That till today the complainant has paid 5 instalments amounting to Rs. 1,07,580/- (in total) to the bank.
7. That as per the commitment of the official of the respondents, the possession of the flat/unit was to be delivered till November, 2015, and 36 months from the execution of the builder buyer agreement. That as per the commitment, the possession was due from 01-12- 2015 to till date, but the project works have still not been completed.
8. That the complainant visited the site during the course of construction and acknowledged that the construction work is delayed way beyond the possession date and since then he has been trying to communicate with the respondents by visiting their office and through telephonic conversations.
9. That till today the complainant had not received any satisfactory reply from the respondents regarding the completion date of the project and has been suffering a lot of mental, physical and financial agony and harassment.
10. That finally, after several follow-ups and losing all hopes, the complainant sent a legal notice dated 21-01-2019 to the respondent no. 1 through his counsel and advised to refund the deposited amount of Rs. 63,62,860/- (Rupees Sixty-Three Lacs Sixty Two thousand Eight hundred and Sixty only) alongwith interest, but the developer have failed to refund the amount.

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11. That under section 18 of RERA, the respondents are bound, and the complainant is entitled to get the refund of amount paid by him to the respondents and also entitled for interest and compensation as per the RERA provisions and hence, has approached the Authority for refund of its amount.

**C. Relief sought by the complainants:**

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

- i. Direct the respondents to refund the entire paid-up amount along with interest at the prescribed rate.
- ii. Direct the respondent to pay compensation and litigation costs.

**D. Reply by respondent:**

The respondent by way of written reply made following submissions:

13. It was stated at the outset that all the averments made in the complaint under reply may be considered to have been replied to and all the allegations contained therein may be considered to have been specifically denied and controverted, unless admitted hereinafter.

14. That the complainant himself is a defaulter/offender under section 19 (6) and 19 (7) of The Real Estate (Regulation and Development) Act, 2016 and hence, cannot be allowed any relief by this Authority. That the respondent made various follow ups with them to seek due payments. However, instead of making payment of outstanding amounts, they approached the Hon'ble Authority to get the refund along with interest. Even after termination of allotment, complainant did not come forward to clear their due amounts.

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15. It was submitted that the complainant has approached this Hon'ble Authority for redressal of their alleged grievances with unclean hands, i.e. by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of decisions has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondent no. 1 but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

16. That the complainant has wrongly stated that he has always adhered to the terms of the agreement and have made payments of the instalments within time as and when demanded by the respondent no. 1 as per the agreed payment schedule. It is submitted that he has been a habitual defaulter in making payments and in this regard, reference may be made to the following facts:

- a) That the respondent no. 1, as per the agreed payment plan, issued a demand upon reaching the milestone 'start of construction' for a sum of Rs.31,52,749/- payable on or before 30.11.2013, however, the complainant failed to pay the same on time. After such demand a reminder letter dated 02.12.2013 was sent to the complainant whereby he was requested for payment of outstanding dues.
- b) That the respondent no. 1 again issued a demand letter upon reaching the milestone 'casting of the 1st floor slab' for an amount of Rs. 13,60,800/- to be paid by 19.04.2018. That the complainant failed to pay the same within the stipulated time. Later, a part-payment was

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made by him via cheque bearing no. 357730 dated 03.05.2018 and a receipt acknowledging the said payment was issued on 05.05.2018. meanwhile, a balance of Rs. 2,55,624/- was pending on behalf of the complainant against the demand raised. Thus, reminder letters dated 08.05.2018 and 04.07.2018 were issued to him requesting him for payment of outstanding dues.

- c) Yet another demand letter was issued by the respondent to the complainant for payment but to no avail. The respondent was thus constrained to send reminder letter dated 20.08.2018 to the complainant.
- d) On non-payment by the complainant, the respondents were left with no option but to issue a last and final opportunity letter dated 19.11.2018 whereby the complainant was requested for immediate payment of Rs. 43,81,058/- to avoid cancellation of the unit in question, however he again failed to clear the pending dues, which resulted in termination of the unit.

17. That the respondent no. 1 vide e-mail dated 29.10.2015, as a gesture of goodwill and as special consideration extended the subvention scheme till the date of offer of possession and also informed the complainant that the interest portion of per-EMI for this extended time will be borne by the respondent no. 1. The same was again confirmed by the respondent no. 1 vide e-mail dated 04.11.2015.

18. That the complainant has wrongly portrayed before this Hon'ble Authority, that he has paid an amount of Rs.63,62,860.00/-, whereas, he has only paid a sum of Rs. 20,61,602.60/-, HDFC paid an amount of Rs.35,59,453.00/- and the respondent No. 1 paid an amount of Rs.17,74.066.00/- as Pre-Emi interest on behalf of the allottee-

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complainant to the bank. It is also pertinent to mention that complainant has failed to clear outstanding balance of Rs.43,38,025.60/- till date.

19. Thus, it is very well established, that the complainant has approached this Hon'ble Authority with unclean hands by distorting/concealing/misrepresenting the relevant facts pertaining to the case at hand. It was further submitted that the sole intention of the complainant is to unjustly enrich themselves at the expense of the respondent by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that in light of the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.

20. It was submitted that the relief(s) sought by the complainant is unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is submitted that the complainant has entered into the said agreement with the respondent no. 1 with open eyes and is bound by the same. It was further submitted that the detailed reliefs claimed by the complainant go beyond the jurisdiction of this Hon'ble Authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainants.

21. As contemplated in Section 13 of the Act, after the commencement of the rules, a promoter has to enter into an agreement for sale with the allottees and get the same registered prior to receipt of more than 10 percent of the cost of the plot, or building. The form of such agreement for sale must be prescribed by the relevant State Government and such

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agreement for sale shall specify amongst various other things, the particulars of development, specifications, charges, possession timeline, provisions of default etc. Further, rule 8 (1) clearly specifies that the form of the "agreement for sale" is prescribed in Annexure A to the rules and in terms of section 13 of the Act the promoter is obligated to register the agreement for sale upon receipt of any amount in excess of 10 percent of the cost of the plot. Rule 8(2) provides that any documents such as allotment letter or any other document executed post registration of the project with the RERA between the promoter and the allottee, which are contrary to the form of the agreement for sale, Act or Rules, the contents of the form of the agreement for sale, Act or Rules shall prevail.

22. The parties had agreed under clause 16 of the Floor Buyer's Agreement (FBA) to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the Complainant has raised dispute but did not take any steps to invoke arbitration. Hence, is in breach of the agreement between the parties. The allegations made requires proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.

23. It was submitted that construction of the unit in question is complete and the respondent being a customer centric company, is still willing to restore the unit in question in case, the complainant clears the outstanding dues including interest.

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

25. 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:**

26. The plea of respondent regarding lack of jurisdiction of Authority stands 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 complainants at a later stage.

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. 2020-2021 (1) RCR (c) 357*** and 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 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."*

Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the

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jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

**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 registration of project.**

27. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

28. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and would be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of *Neelkamal Realtors Suburban Pvt.*

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**Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 and which provides as under:

- "119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."
122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

29. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

30. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein.

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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 clause**

31. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute and the same is reproduced below for the ready reference:

***"16 DISPUTE RESOLUTION:***

*A or any disputes arising from or out of or touching upon or in relation to the terms or formation of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments, modifications or re-enactment thereof for the time being in force. A Sole who shall be nominated by the Seller/Confirming Party's Managing Director, shall hold the arbitration proceedings at New Delhi. The arbitration proceedings shall be held in English language and decision of the Sole Arbitrator including but not limited to costs of the proceedings/award shall be final and binding on the Parties. The Purchaser(s) hereby confirms that he shall have no objection to such appointment".*

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32. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.
33. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

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

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

*in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*

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

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

34. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court **in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

*"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there*

*is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

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

**G. Entitlement of the complainants for refund:**

**G.I Direct the respondents to refund the entire paid-up amount along with interest at the prescribed rate.**

36. In the instant case, the complainant was allotted a unit vide letter dated 12.11.2013. The BBA for the subject unit was executed on 25.11.2013. According to the agreement, the due date of possession comes out to be 25.11.2016. However, the occupation certificate for the tower where complainant's unit is situated only came on 18.06.2021 i.e., even after filing of the complaint. No doubt, a legal notice for refund was issued to the respondent-promoter in January 2019 but the same was after the due date of possession had expired and hence, the allottee has become entitled for seeking the refund but the respondent never gave any response to the said letter intimating any termination of the unit or

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refund of the amount deposited. Moreover, the respondent has submitted that the letter dated 19.11.2018 is a cancellation or termination letter but vide the letter itself, a demand for outstanding amount was made. Hence, the letter dated 19.11.2018 cannot be considered as a termination letter and thus, the plea of respondent stands rejected.

37. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and is demanding for 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. The due date of possession as per agreement for sale as mentioned in the table above is 25.11.2016 and there is delay of 2 years 4 months 9 days on the date of filing of the complaint.

38. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after filing of application by the complainant for return of the amount received by the promoter on failure of promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. The complainant-allottee has already wished to withdraw from the project and the allottee has become entitled his right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as the promoter fails to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return the amount received by him



from the allottee in respect of that unit with interest at the prescribed rate.

39. 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*** and 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*

40. 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.

41. 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.



42. The authority hereby directs the promoter to return the amount received by him i.e., **Rs. 63,62,860/-** 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*.

**G.II Direct the respondent to pay litigation expense incurred by the complainants**

43. 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:**

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

*A*



- i. The respondent/promoter are directed to refund the amount received by it i.e., Rs. 63,62,860/- from the complainants 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/promoter is further directed that the amount paid by the bank under the subvention scheme be first refunded back to the bank and remaining amount shall be paid to the complainant.
- iii. 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.

45. Complaint stands disposed of.

46. File be consigned to the registry.

  
Sanjeev Kumar Arora  
Member

  
Vijay Kumar Goyal  
Member

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 01.12.2022**