BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2382 of 2018
First date of hearing: 09.10.2019
Date of decision : 04.01.2023

1. Renu Dhawan
2. Siddharth Dhawan

R/O: 277, Model Town, Ambala City, Haryana — **Complainants**

Versus

M/s Ireo Private Limited
Office: - A-11, 1st Floor, Neeti Bagh,
New Delhi-110049 — **Respondent**

CORAM:
Shri Ashok Sangwan — **Member**
Shri Sanjeev Arora — **Member**

APPEARANCE:
Shri Sushil Yadav — Advocate for the complainants
Shri M.K Dang — Advocate for the respondent

ORDER

1. The present complaint dated 21.12.2018 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 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 complainants, 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	"Ireo City Central", Sector 59, Gurgaon
2.	Licensed area	3.9375 acres
3.	Nature of the project	Commercial Colony (Managed Serviced Apartments)
4.	DTCP license no.	56 of 2010 dated 31.07.2010
	License valid up to	30.07.2020
	Licensee	M/s SU Estates Pvt. Ltd.
5.	RERA registered/not registered	**Registered** 102 of 2017 dated 24.08.2017
	Validity	30.06.2020
6.	Unit no.	FF16, 1st Floor, Tower R (page no. 18 of complaint)
7.	Unit measuring	632.73 sq. ft. (page no. 18 of complaint)
8.	Revised unit area admeasuring	461.82 sq. ft. (page no. 61 of complaint)

9.	Date of Provisional allotment	26.04.2013 (page no. 55 of complaint)
10.	Date of approval of building plan	05.09.2013 (annexure R-7 on page no. 81 of reply)
11.	Date of execution of builder buyer's agreement	21.11.2013 (page no. 16 of complaint)
12.	Date of environment clearance	12.12.2013 (annexure R-8 on page no. 84 of reply)
13.	Total consideration	Rs.1,21,62,087/- [as per payment plan on page no. 58 of complaint]
14.	Total amount paid by the complainants	**Rs. 46,44,574/-** (Rs. 53,52,574/- minus 7,08,000/- adjusted towards unit in another project) [as per statement of account on page no. 60 of complaint]
15.	Due date of delivery of possession	**05.03.2017** (calculated from the date of approval of building plans) Note: Grace Period is not allowed.
16.	Possession clause	**13. Possession and Holding Charges** Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions 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)**
17.	Email for change in area	14.06.2017 (page no. 61 of complaint)

18.	Refund demanded by complainants	19.06.2017 (page no. 62 of complaint)
19.	Occupation certificate	28.08.2019 (annexure R-10 on page no. 93 of reply)
20.	Offer of possession	Not offered

B. Facts of the complaint

The complainants have submitted as under:

3. That the complainants booked a shop admeasuring super area 632.73 sq. ft in aforesaid project of the respondent for total sale consideration of Rs 1,21,47,087 /- which includes BSP, car parking, IFMS, PLC etc including Taxes. A builder buyers' agreement was executed on 21.11.2013. Out of the total sale consideration amount, the complainants made payment of Rs.53,52,574/- to the respondent vide different cheques/RTGS on different dates.

4. That as per buyers' agreement the respondent allotted a unit bearing No ICC-FF-16 having super area of 632.73 sq. ft. to the complainants.

5. That the complainants regularly visited the site but were surprised to see that construction was very slow. It appears that respondent has played fraud upon them. Even the respondent itself was not aware that by what time the possession would be granted. The respondent also constructed the basic structure linked to the payments and majority of payments were made too early. However, subsequent to that, there has been very little progress in construction of the project. The only intention of the respondent was to take payments without completing the work. The structure was being erected at great speed since the

structure alone was related to the vast majority of the payments in the construction linked plan. That shows that respondent mala-fide and dishonest motives and intention to cheat and defraud the complainants.

6. That as per clause 13.3 of the buyer agreement, the respondent had agreed to deliver the possession of the unit within 42 months from the date of approval of building plan or fulfilment of preconditions with an extended period of 180 days.
7. That on June 14, 2017, the respondent informed the complainants that the size of the aforesaid shop was reduced from 632.73 sq. ft to 461.82 sq. ft due to the reasons best known to the it.
8. That as per clause no 10.4/5 of the buyer agreement dated 21.11.2013 "In the Event that variation in the super area of the said commercial unit is greater than +-15 % at the time of final measurement and the same is not acceptable to the allotee, every attempt shall be made to offer an alternative commercial unit of similar size " and further clause no 10.4 envisaged that in the event that allottee does not accept such substitute commercial unit and if there is no other commercial unit of similar size at another location then allotee shall be refunded its paid up sale consideration along with simple interest thereon at the rate of 8% per annum within 3 months of its intimation to the company to its effect.
9. That as the reduction in the size of the shop was more that 15%, the complainants as per the builder buyer agreement opted not to accept the unit and asked for the refund from the respondent on June 19, 2018
10. That the respondent also agreed to refund the amount paid by the complainants. But after continuous follow up and personal visit the respondent failed to refund the amount paid by the complainants. They

also own a flat in the "Ireo grand arch" project of the respondent and somehow managed to adjust an amount of Rs 708,000/- against club membership in that account. But the balance amount of Rs 4644574/- and interest is still pending towards the respondent.

11. That despite repeated requests and reminders over phone calls and personal visits of the complainants, the respondent failed to refund the balance amount of the shop within stipulated period. Lastly on 15.11.2018 the complainants sent an email to the respondent asking for refund as the conditions mentioned in clause 10.4/10.5 of agreement but it failed to do so which clearly shows that ulterior motive of the respondent to extract and use money from the innocent people fraudulently.
12. That due to this omission on the part of the respondent, the complainants suffered from disruption on their arrangement, mental torture, agony and also continue to incur severe financial losses. This could be avoided if the respondent had given refund of the shop on time.
13. That on the ground of parity and equity the respondent also be subjected to pay the same rate of interest i.e., 20%, as charged by it in case of default. Hence, the respondent is required to pay interest on the amount paid by the complainants @ 20% per annum from the date of booking along the refund of entire money paid as per clause 10.4/5 of the builder buyer agreement. It is however pertinent to mention here respondent is refusing to do so. This is totally an unfair trade practice, and shows that respondent malafide and dishonest motives and intention to cheat and defraud the complainants.

C. Relief sought by the complainants:

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

- Direct the respondent to refund the balance amount paid by the complainants i.e., Rs. 46,44,574/- along with prescribed interest per annum on total paid amount i.e., Rs 53,52,574/- at compounded rate from the date of booking of the shop in question.

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 complainants have no locus standi to file the present complaint.
19. That this Hon'ble Forum does not have the jurisdiction to try and decide the present complaint.
20. 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 34 of the apartment buyer's agreement.

21. That the complainants have not approached this authority with clean hands and have intentionally suppressed and concealed the material facts. The 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:

- That the complainants after checking veracity of the project namely, 'Ireo City Central' Sector-59, Gurugram had applied for an allotment of a commercial unit vide the booking application dated 21.03.2013 and had also deposited an amount of Rs. 18 lacs towards the part earnest money.
- That the complainants undertook and accepted that they had made the booking and had signed the booking application on the basis of their own estimations and understanding and that they have not been influenced by any advertisement, representations whatsoever. The complainants had also perused all documents with regard to approvals, sanctions, permissions, right, title, interest of the respondent, payment plan, terms and conditions of booking/ allotment of the unit. Furthermore, the complainants undertook that in case there are any changes in the layout plans and or/drawings then in that case they shall not have any objection and gave their consent to it.
- That on the basis of the booking application form submitted by the complainants, the respondent vide its provisional allotment letter dated 26.4.2013 allotted to them a commercial unit no. ICC-FF- 16,

first floor, having tentative super area of 632.73 sq. feet for total sale consideration of 1,21,62,087/-. The complainants were aware from the very inception that the super area of the commercial unit allotted to the complainants was tentative and was subject to the change as per statutory requirements. Vide letter dated 3.7.2013, the respondent sent three copies of the buyer's agreement to the complainants which was signed and executed by them on 21.11.2013.

- That as per the agreed payment schedule, the respondent raised the second instalment demand vide payment request dated 03.07.2013 for net payable amount of Rs. 16,61,690.24. That the amount was received by the respondent only after reminders dated 29.07.2013 and 19.08.2013 were issued by the respondent to the complainants.
- That as per clause 7.1 of the buyer's agreement there could be changes, alterations, modifications in the layout plan/ building plans and/or drawings, layout, elevations etc., that are necessitated during the construction of the said commercial unit or as may be required any statutory authorities or otherwise and they undertook to raise no objection thereto. It is submitted that on account of certain planning imperatives, there was a revision in the areas of certain commercial units of the project. Consequently, the super area of the commercial unit allotted to the complainants stood revised from 632.73 sq. feet to 461.82 sq. feet approximately. The said revision was due to circumstances beyond the control of the respondent company and the same is covered under the ambit of 'Force Majeure' condition as defined in clause I of the buyer's agreement. The said fact was intimated to the complainants by the respondent verbally as well as

vide email dated 14.06.2017. However, the complainants vide email dated 19.06.2017 intimated to the respondent that they are not interested in the commercial unit allotted to them on account of reduction of super area, which has already stated above was beyond the reasonable control of the respondent company.

- That although the complainants were aware that the building plans/ layout plans were tentative and that they had undertaken to raise no objections thereto, yet the respondent being customer-oriented company intimated to the complainants vide their email dated 21.06.2017 that it has taken up the request internally with the management regarding the refund of the amount as deposited by them. The complainants kept on raising repetitive pleas vide several emails and the respondent kept on informing them that they have already forwarded their request internally and that they shall revert back to them.
- That, in order to resolve the issue, the officials of the respondent company met the complainants and offered them to opt for a substituted unit of similar area from units bearing no. FF12B and FF12C in place of the allotted unit. The complainants accepted the offer made by the respondent company and requested it for some time so as to decide the unit number they wanted in place of the originally allotted unit. Despite accepting the offer of the respondent company, the complainants now instead of resolving the issue in question, are trying to wriggle out of their contractual obligations by concocting a baseless and false story as an afterthought in order to

mislead this Hon'ble Authority and to unnecessarily harass and pressurize the respondent to submit to their unreasonable demands.

- That the possession of the unit is supposed to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement. That clause 13.3 of the buyer's agreement and clause 46 of the schedule 1 of the booking application form states that the...subject to force majeure conditions and subject to 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 fulfilment 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).... 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 (xv) of clause 16 of the building plan dated 05.09.2013 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 1 of part-A of the environment clearance dated 12.12.2013 it was stated that 'Consent to Establish' was to be obtained before the start of any

construction work at site. The consent to establish was granted on 07.02.2014 by the concerned authorities. Therefore, the pre-condition of obtaining all the requisite approvals were fulfilled only on 07.02.2014. There has been no delay on the part of the respondent who has throughout acted in accordance with the provisions laid down by law and in accordance with the rules and regulations. In terms of the buyer's agreement the proposed time for handing over of possession has to be computed from 07.02.2014. Moreover, as per clause 13.5 of the buyer's agreement 'extended delay period' of 12 months from the end of grace period is also required to be granted to the respondent. Therefore, 60 months from 07.02.2014 (including the 180 days grace period), expired on 07.02.2019. However, it is pertinent to mention herein that the respondent being a customer-oriented company had already applied for the grant of occupation certificate on 04.05.2017 i.e., prior to the due date of handing over the possession of the said commercial unit. It is submitted that the respondent has already received the occupation certificate dated 28.08.2019. The complainants had filed the present complaint with wholly malafide motives and prematurely and they are now trying to mislead this Hon'ble authority by making baseless, false and frivolous averments. It is submitted that there has been no failure on the part of the respondent company in completing the construction of the project in which the commercial unit allotted to the complainants is located and that the respondent has always acted in accordance with the agreed terms and conditions of the allotment, rules and regulations and provisions laid down by the law.

- That the complainants have till date made the part payment of Rs. 53,52,574/- out of the total sale consideration of Rs. 1,21,62,087/-. It is submitted that the complainants are bound to pay the remaining amount towards the total sale consideration of the unit along with the applicable registration charges, stamp duty, service tax as well as other charges payable along with it at the applicable stage. It is submitted that the complainants are real estate investors who had booked the commercial unit in question with a view to earn quick profit in a short span of time. However, their calculations went wrong on account of slump in the real estate market, and they are now raising baseless and false pleas in order to harass and pressurize the respondent company.

22. 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

23. The plea of the respondent regarding rejection of complaint on ground of jurisdiction 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

24. As per notification no. *1/92/2017-1TCP dated 14.12.2017* issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all

purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

25. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11***
> .....
> *(4) The promoter shall-*
>
> *(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.*

26. 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 respondent

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

27. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the buyers agreement was executed between the complainants and the respondent 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 would be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The 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*** 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. Further, 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. 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 are in breach of agreement for non-invocation of arbitration

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:

> ***"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".

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.*
>
> *...*
>
> *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 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 majeure

36. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainants is 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 but 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.

G. Findings on the relief sought by the complainants

- **Direct the respondent to refund the balance amount paid by the complainants i.e., Rs. 46,44,574/- along with Prescribed interest per annum on total paid amount i.e., Rs 53,52,574/- at compounded rate from the date of booking of the shop in question.**

37. That the complainants booked a managed serviced apartment in the commercial project of the respondent named as "Ireo City Central" situated at Sector-59, Gurugram, Haryana for a total sale consideration of Rs. 1,21,62,087/-. The allotment of the unit was made on 26.04.2013. Thereafter buyers' agreement was executed between the parties on 21.11.2013 for the unit admeasuring 632.73 sq. ft.

38. The respondent vide email dated 14.06.2017 informed the complainants that the said unit area i.e., 632.73 sq. ft. was decreased to 461.82 sq. ft. The complainants on 19.06.2017 informed the respondent that they were not interested to accept the commercial unit with significant reduction of super area.

39. The complainants submitted that as per clause 10.4 an allottee is entitled for refund in case variation is more than 15%. The relevant clause is reproduced as hereunder:

> *In the event that variation in the super area of the said commercial unit is greater than 15%, at the time of final measurement and the same is not acceptable to the allottee, every attempt shall be made to offer the allottee an alternative commercial unit of a similar size at another location within Ireo City Central project subject to availability. In the event that such an alternative commercial unit is available and the allottee accepts the substitute commercial unit, the proportionate sale consideration for any variation of substitute commercial unit shall be payable or refundable as the case may be at the rates agreed herein. No other claims, whatsoever, monetary or otherwise shall lie against the company and/or the confirming parties nor shall be raised otherwise or in any other manner whatsoever by the allottee.*

40. Furthermore, as per clause 13.3 of the apartment buyer agreement the respondent has to handover the possession of the allotted unit within a period of 42 months from the date of approval of building plans or fulfilment of the preconditions imposed thereunder. The due date for handing over of possession is calculated from the approval of building plans which comes out to be 05.03.2017.

41. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and

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

42. The respondent/ promoter has proposed to handover the possession of the subject apartment within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 180 days grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter.

43. Further, it is submitted by the respondent promoter that the due date of possession should be calculated from the date of consent to establish

which was obtained on 07.02.2014, as it is the last of the statutory approvals which forms a part of the preconditions.

44. The authority has gone through the possession clause of the agreement in the present matter. On a bare reading of the said clause of the agreement reproduced above, it becomes clear that the possession in the present case is linked to the "fulfilment of the preconditions" which are so vague and ambiguous in itself. Nowhere in the agreement, it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due date of possession is subjected to in the said possession clause. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the unit in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the "fulfilment of the preconditions" has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject unit. According to the established principles of law and natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and against the interests of the allottee must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of possession of the unit in question to the

complainants. Accordingly, in the present matter the due date of possession is calculated from the date of approval of building plans i.e., 05.09.2013 which comes out to be 05.03.2017.

45. Keeping in view the fact that the allottee/complainants wish to withdraw from the project and are 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.

46. The due date of possession as per agreement for sale as mentioned in the table above is **05.03.2017** and there is delay of 1 year 9 months 16 days on the date of filing of the complaint.

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

prescribed rate. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

48. 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. 2021-2022 (1) RCR (c), 357** reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022. it was observed

> 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.

49. 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.

50. 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.

51. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 46,44,574/- with interest at the rate of 10.60% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid

H. Directions of the authority

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

    i. The respondent/promoter is directed to refund the amount i.e., Rs 46,44,574/-received by him to the complainants with interest at the rate of 10.60% as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.

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

iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainants.

53. Complaint stands disposed of.

54. File be consigned to the registry.

Sanjeev Kumar Arora
Member

Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 04.01.2023