BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**6809 of 2019**
Date of filing complaint	**30.12.2019**
First date of hearing	**20.01.2020**
Date of decision	**08.12.2022**

	Nishant Kumar Gupta **R/o:** Flat no. 701, Tower 14, valley View Estate, Gurgaon Faridabad Road, Gurugram, Haryana	**Complainant**
	Versus	
	Maxworth Infrastructure Pvt. Ltd. **Registered office at:** F-30-31, First Floor, Mgf Megacity Mall, M.G. Road, Gurugram-122002	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Shri Gaurav Rawat (Advocate)	Complainant
Ms. Neha Sharma proxy counsel for Shri Shankar Wig (Advocate)	Respondent

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	"City Residencies", Sector 10A, Gurugram
2.	Nature of the project	Group Housing Colony
3.	RERA registration	Registered as 252 of 2017 dated 09.10.2017 valid up to 08.10.2021
4.	TP Planning Scheme	Vide DULB/TP/A2/2013/47344 dated 05.11.2013
5.	Allotment Letter	10.11.2016 (Page 06 of complaint)
6.	Unit no.	102, 1st floor, Block A (Page 12 of complaint)
7.	Unit area admeasuring	1600 sq. ft. (Page 12 of complaint)
8.	Date of execution of Apartment Buyer's Agreement	19.11.2016 (Page 08 of complaint)
9.	Possession clause	**14.** Developer will based on its present plans and estimates and subject to all just exceptions, contemplates **to give / offer possession of**

		Unit to Buyer(s) within 36/3 months/years from the date commencement of construction of that particular tower where Buyer(s) unit is located (with a grace period of 6months), subject to force majeure events or governmental action/inaction or due to failure of Buyer(s) to pay in time the price of the said Unit along with other charges and dues in accordance with the schedule of payments or any other activity of Buyer(s) deterrent to the progress of the Project. However the Buyer(s) is entitled to Rs. 5/- per Sq. ft. per month for the delay in offering possession beyond the said period. That the Buyer(s) shall take possession of the Unit within 30 days from the date of issuance of final notice of possession failing which the Buyer(s) shall be deemed to have taken possession of the Unit on 30 day of such notice. In such case the developer shall not be responsible for any encroachment in the Unit occasioned due to failure of the Buyer(s) to take possession within the stipulated time. Besides, holding charges @Rs.5/- per sq. ft. per month and the maintenance charges, as determined by the Developer / Maintenance Agency, shall also be payable by the Buyer(s). However, the Buyer(s) shall be responsible and liable for all civil and liabilities, which may accrue qua such Unit.
10.	Date of start of construction	15.12.2014 **Note**: During the course of hearings dated 08.12.2022, the counsel of complainant himself stated that the aforesaid date should be taken as date of start of construction as already determined by the Authority in CR/643/2019 vide order dated 02.02.2022.
8.	Due date of possession	**15.12.2017** **(Calculated as 36 months from date of start of construction i.e., 15.12.2014)** **Note: Grace period is not allowed**
9.	Quadrapartite Agreement inter se complainant, respondent,	19.11.2016

	Axis Bank and land owner for loan by complainant	(page 27 of complaint)
10.	Total sale consideration	Rs. 94,75,000/- (Page 07 of complaint)
11.	Amount paid by the complainant	Rs. 18,55,000/- (As per receipts annexed at annexure 4) Amount paid by Axis bank under Quadrapartite Agreement: Rs. 66,15,000/- (As pleaded by complainant on page 3 of complaint)
12.	Occupation certificate /Completion certificate	Not annexed
13.	Offer of possession	Not offered

B. Facts of the complaint:

3. The complainant is an allottee who booked an apartment after payment of booking amount for the said premise, in the project being developed by the respondent in the name and style of "City Residencies" located at Sector 10A, Village Kadipur and District- Gurugram, Haryana (hereinafter referred to as Project').
4. After the booking, an allotment letter was issued on 10.11.2016 acknowledging that the premise number A-0102 has been in the name of complainant herein. The allotment letter further stated that the premise admeasuring 1600 sq. ft. @ Rs 5,000 per sq. ft.
5. Thereafter, both the parties ventured into a buyer's agreement on 19.11. 2016. The buyer's agreement also mentioned that the construction shall be completed in 36 months from the date of commencement of particular tower, where buyer's unit is located. The provision of the allotment letter has been quoted verbatim for the convenience of the Hon'ble tribunal:

"14 Possession

14. Developer will based on present plans and estimates and subject to all just exceptions, contemplates to give offer of possession of Unit No Buyers within 36 months/ year from the date commencement of construction of that particular tower where buyer unit is located".

6. In the present matter the buyers' agreement was executed on 19.11.2016, therefore, the period of 36 months has lapsed on 18.11.2019, and the respondent have failed to deliver the possession of the unit within the agreed period and there is no hope to get possession in near future.
7. That in terms of the contractual stipulation the basic sale price of the unit was described as Rs. 80,00,000/- (Rupees Eighty Lakh Only). However, in instalments the Complainant herein has already paid a sum of Rs. 84,70,000/- (Rupees Eighty Four Lakhs Seventy Thousand Only). Out of which Rs. 18,55,000/- is self payment and Rs. 66,15,000/- is bank loan. It is pertinent to mention herein that based on demand raised by respondent complainant have availed financial assistance of Rs. 66,15,000/- from Axis bank.
8. It is important to state that company have not honoured the commitment of subvention scheme for resultantly complainant were unable to pay EMI and Axis bank had already initiated the recovery proceedings against the complainant.
9. That in the said duration from 2016 till date there has been many instances wherein the complainant, has asked about the project status after visiting site and respondent has failed to hand over the premise in question even after expiry of 3 years from the expected time for delivery of possession but to no avail.

10. That till date the total amount paid by the complainant was Rs. 84,70,000/- (Rupees Eighty Four Lakhs Seventy Thousand Only). Since the respondent failed to deliver the possession of the unit by 18.11.2019, there is default on the part of the respondent and the same is liable to refund the entire amount along with interest to the complainant.
11. It is pertinent to note that, as per clause 7 of buyers' agreement that in case the respondent fails to pay the instalment on time, the respondent will be liable to pay interest @18% p.a. from the due date till the final settlement of amount payable. Therefore, by the same principle, in case of default by the respondent in defaulting the agreement respondent is also liable to pay interest at the rate of 18% p.a. as since the date of payment till the date of realisation.
12. The complainant being aggrieved by the continuous omissions and default committed by respondent in providing handing over the possession of the unit as per the agreed date, the present complaint is being filed. Therefore, the complainant most respectfully prays to refund entire principal amount along with interest at the rate of 18 percent from the date of payment till the date of payment made to us.

C. Relief sought by the complainants:

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

i. Direct the respondents to refund the amount of Rs. 84,70,000/- along with interest at the prescribed rate.

D. Reply by respondent:

The respondent by way of written reply made following submissions:

14. That the complaint is neither maintainable nor tenable and is liable to be dismissed as the apartment buyer's agreement was executed prior to

coming int force of the Act of 2016 and thus, the provisions of this Act cannot be applied retrospectively.

15. That the complaint is not maintainable for the reason that the builder buyer agreement contains an arbitration clause and hence, as per Arbitration and Conciliation Act, 1996, the dispute resolution mechanism should be arbitration.

16. That the flat buyer agreement was executed inter se the parties on 19.11.2016. It is relevant to mention here that from November 2019 onwards things started moving out of control of the respondent as many force majeure events, situations and circumstances occurred that made the construction at site impossible for a considerable period of time. Such events and circumstances included inter-alia,

a) Repeated bans on construction activities by EPCA, NGT and Hon'ble Supreme Court of India,

b) Nationwide lockdown due to emergence of Covid-19 pandemic.

c) Massive Nationwide migration of labourers from metropolis to their native villages creating acute shortage of labourers in NCR region,

d) Disruption of supply chains for construction materials and non-availability of them at construction sites due to Covid-19 pandemic,

e) closure/restricted functioning of various private offices as well as government offices disrupting the various approvals required for the real estate projects,

f) Resultant financial distress etc.

g) The Environmental Pollution (Prevention and Control) authority for NCR ("EPCA") vide its notification bearing no. EPCA-R/2019/L49

dated 25.10,2019 banned construction activity in NCR during night hours (6 pm to 6am) from 26.10.2019 to 30.10.2019 which was later on converted into complete 24 hours ban from 01.11.2019 to 05.11.2019 by EPCA vide its notification no. EPCA -R/2019/ L-53 dated 01.11.2019. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ Petition no. 1309/1985 titled as "M.C. Mehta....vs.....Union of India" completely banned all construction activities in NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020.

h) The repeated bans forced the migrant labourers to return to their native states/villages creating an acute shortage of labourers in NCR region. Due to the said shortage, the construction activity could not resume at full throttle even after lifting of ban by the Hon'ble Supreme Court. Even before the normalcy in construction activity could resume, the world was hit by the Covid-19 pandemic presented yet another force majeure event that bought to halt all activities related to the project including construction of remaining phase, processing of approval files etc.

i) The Ministry of Home Affairs, GOI vide notification dated March 24, 2020 bearing no. 40-3/2020-DM-I (A) recognised that India was threatened with the spread of Covid-19 epidemic and ordered a complete lockdown in the entire country for an initial period of 21 days which started from March 25, 2020. By virtue of various subsequent notifications, the ministry of Home Affairs, GOI further extended the lockdown from time to time. Various State Governments including the Government of Haryana have also

enforced several strict measures to prevent the spread of Covid-19 pandemic including imposing curfew, lockdown, stopping all commercial, construction activity.

j) This situation again resulted in massive nationwide migration hit of labourers from metropolis to their native villages creating acute shortage of labourers in NCR regions, disruption of supply chains for construction materials and availability of them at construction sites and the full normalcy has not returned so far.

k) Even before the nation could recover fully from the impact of the first wave of Covid-19, the second wave hit very badly the entire nation, particularly NCR region which resulted in another lockdown from April 2021 till June 2021 and now the threat of third wave is looming large.

l) It is a matter of common knowledge and widely reported that even before the advent of such events, the real estate sectors were reeling under severe strain. However, such events/ incidents as above noted really broke the back of the entire sector and many real estate projects got stalled and came to the brink of collapse. The situation was made worse by the dreaded second wave which again impeded badly the construction activities. The said unprecedented factors beyond control of the respondent and force majeure events have resulted so far in time loss of almost 14 months in total and as such all timelines agreed in settlement agreement stood extended at least by 14 months, if not more.

m) The respondent is perhaps one of the very few developers in NCR region who had fought valiantly during these testing times/odd circumstances and completed the project.

17. That the complaint is premature according to builder buyer agreement. The effective date of delivery of possession is 01.09.2022 and hence, no case for refund is made out.

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

19. 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:

20. 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 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 coming into force of the Act.

21. 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.

22. 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."*

23. 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."

24. 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 clause

25. 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:

*"**51.** That all disputes arising out of this Agreement between the parties shall be adjudicated by arbitration in accordance with the Arbitration &*

Conciliation Act, 1996. The Buyer(s) has agreed that...Business Head of .....or in case his designation is changed, or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted with similar duties. There will be no objection by Buyer(s) to nay such Appointment on the ground that the arbitrator is Developer's employee or that he has dealt with matter to which the agreement relates or that in the course of his duties as a company employee, he has expressed his views on all or any of the matters in dispute. The venue of Arbitration shall be Delhi."

26. 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.

27. 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."

28. 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."

29. 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.

F.III. Objection regarding force majeure

30. The respondent has raised plea regarding force majeure conditions which led to halting of the construction of project repeatedly. The respondent has submitted that the ban on construction due to orders of NGT, the Supreme Court order banning construction and the COVID-19 pandemic. With respect to NGT orders, it is to specified that the same had effect only for short duration of time and thus cannot be said to have adverse effect on construction. Thus, this pela is devoid of merit. Even the Supreme Court order and the government notification thereafter

only banned construction for 04 days as submitted by respondent itself, hence, the same plea is also devoid of merit. The plea regarding COVID-19 and its impact is also liable to rejected as the due date of possession is of 2017 and the pandemic struck only in 2019. Hence, all pleas of respondent regarding force majeure circumstances affecting the construction is 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.

31. 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 after the due date was over way back in 2016 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 refund of the amount deposited. More-over, the letter dated 19.11.2018 is also not a cancellation or termination letter, as submitted by the respondent, as vide this letter only a demand for outstanding amount was made.

32. 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.

33. 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.

34. 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

35. 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.

36. 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.

37. The authority hereby directs the promoter to return the amount received by him i.e., **Rs. 84,70,000/-** 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

36.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:

37. 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.

i. The respondent/promoter is directed to refund the amount received from the complainant and the bank i.e., in total of Rs. 84,70,000 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 balance amount to 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.

iv. 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 receivable shall be first utilized for clearing dues of allottee-complainants.

38. Complaint stands disposed of.

39.File be consigned to the registry.

Sanjeev Kumar Arora	Ashok Sangwan	Vijay Kumar Goyal
Member	Member	Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.12.2022