BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**4158 of 2021**
First date of hearing:	**26.11.2021**
Date of decision :	**09.02.2023**

Rajpal Singh Duggal S/o Sh. Daleep Singh **R/o :** House No. 7/32, Roop Nagar, New Delhi – 110 007	**Complainant**
Versus	
1. M/s Pareena Infrastructure Pvt. Ltd. **Office:** C-7A, Second Floor, Omaxe City Centre, Sector-49, Sohna Road, Gurugram-122018 2. Indiabulls Housing Finance Ltd. **Office:** M 62 & 63, First Floor, Connaught Place, New Delhi – 110 001 3. Indiabulls Asset Reconstruction Co. Ltd. **Office:** Indiabulls Finance Centre, Tower – 1, 9th Floor, Senapati Bapat Marg, Elphinstone Road, Mumbai – 400013	**Respondents**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:	
Sh. Mohd. Sharique Hussain (Advocate)	**Complainant**
Sh. Prashant Sheoran (Advocate)	**Respondent no. 1**
Sh. Gaurav Dua (Advocate)	**Respondent no. 2**
None	**Respondent no. 3**

ORDER

1. The present complaint dated 12.10.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions 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 unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.n.	Particulars	Details
1.	Name and location of the project	"Micasa", sector-68, Gurgaon
2.	Nature of the project	Group Housing Project
3.	Project area	12.25085 acres
4.	DTCP license no.	111 of 2013 dated 30.12.2013 valid up to 12.08.2024 (area 10.12 acre) 92 of 2014 dated 13.08.2014 valid up to 12.08.2019 (area 0.64 acre) 94 of 2014 dated 13.04.2014 valid up to 12.08.2024 (area 2.73 acre)
5.	RERA Registered/ not registered	**Registered vide no. 99 of 2017 issued on 28.08.2017 up to 30.06.2022**
6.	Unit no.	1403, tower 5, 14th floor (page 43 of complaint)
7.	Unit admeasuring area	1245 sq. ft. of super area
8.	Allotment letter	25.09.2015 (page 12 of complaint)
9.	Date of builder buyer agreement	05.12.2017 (page 37 of complaint)
10.	Date of Start of construction	N/A

11.	MoU between the allottee and the builder	15.03.2018 (page 110 of complaint)
12.	Tripartite Agreement between the parties to the complaint	01.05.2018
13.	Possession clause	**13. Completion of project** *That the Developer shall, under normal conditions, subject to force majeure, complete construction of Tower / Building in which the said Flat is to be located* ***within 4 years of the start of construction or execution of this agreement, whichever is later. (Emphasis supplied)***
14.	Due date of possession	05.06.2022 (Date of construction is not given in file. So, due date is calculated from the date of execution of BBA i.e. 05.12.2017 + 6 months grace period due to Covid-19)
15.	Total sale consideration	87,43,305/- (page 65 of complaint) (Basic Sale Price : Rs. 71,58,750/-)
16.	Total amount paid by the complainant	14,07,500/- + 29,66,262/- (amount released by respondent no.2 *"Indiabulls Housing Finance Ltd."* in favour of respondent no.1 under the subvention payment plan)
	Loan availed by Indiabulls Housing Finance Ltd.	70,00,000/-
17.	Occupation certificate	N/A
18.	Offer of possession	N/A
19.	Complainant letters to R1 to restrict payment of any EMI in favour of R2	12.10.2020 and 28.12.2020

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:

I. That the complainant came across an advertisement of respondent no. 1's wherein promoting its group housing society at sector 68, Gurugram claiming it to be a state of art & promising all sorts of modern facilities

which may be aspired for in a residential unit in the contemporary times.

II. That the complainant applied for the allotment of flat in the above project on 10.08.2015. On basis of such application, a unit no. T-5/1403 was allotted to him on 25.09.2015. Thereafter, builder buyer's agreement dated 05.12.2017 was executed between the parties. As per said agreement, the possession of the flat was promised to be delivered within 4 years from the date of allotment i.e. 10.08.2015.

III. That total consideration of the flat booked by complainant was Rs. 87,433,05/- excluding taxes. The complainant availed a loan of Rs. 70,00,000/- against the flat from respondent no. 2 whereas amount of Rs.14,07,500/- stands already paid to respondent/builder by complainant at the time of booking from his hard-earned money as down payment.

IV. After receiving the above-mentioned payment, allotment letter dated 25.09.2015 was issued in respect of the flat in question. Thereafter, the execution of flat buyer's agreement was delayed for next two years & the same was executed on 05.12.2017 because the offer of subvention as promised by respondent no. 1 was not readily available between 2015 to 2017 which could have been afforded by the complainant. For the remainder amount after the initial down-payment of Rs. 14,07,500/- paid by complainant, loan of Rs. 70,00,000/- was sanctioned by respondent no. 2 under subvention scheme and by accepting the flat booked by complainant as collateral by creating equitable mortgage against the said flat. Out of the total loan amount of Rs. 70,00,000/-, Rs. 29,66,262/- already stands released to the developer from the financier as on October 2020, and therefore, the developer has already received

Rs. 14,07,500/- + Rs. 29,65,262/- = Rs. 43,73,762/- against the flat in question.

V. Thereafter, the complainant was given an option to avail subvention payment plan against the above loan, by highlighting that it would be of immense convenience to him, on the promise that till the time the possession of flat is not offered, he need not to pay any amount to the respondent no. 2 towards the loan availed against the subject unit. It was highlighted under the said subvention scheme that the interest proponent against the loan shall be borne and repaid to respondent no. 2 by the respondent no. 1 as monthly pre-EMI's during the liability period in which the respondent no. 1 promised to handover the possession of flat. He was only required to pay booking amount as the initial down payment to the respondent no. 1 from his own pocket and rest everything towards repayment of loan was exclusively be taken care of by the respondent no. 1 till possession was offered.

VI. That in view of the above, a memorandum of understanding dated 15.03.2018 (MOU) was executed between respondent no. 1 and the complainant. The relevant clause from the MOU dated 15.03.2018 is reproduced below for ready reference:

> *"7. The Developer shall pay on behalf of the Allottee (which is recoverable from the Allottee as per the terms of this MOU), the interest chargeable or such loan amount to Financial Institution from the date of execution hereof, till 36 months up to the date of offer of possession letter whichever is earlier, or such other period as may be agreed to between the Parties at such terms as may be decided."*

VII. That as per said MOU and the representation given by the respondent no. 1, a tripartite agreement dated 01.05.2018 was executed among complainant and his wife Sarabjit Kaur (*now deceased*) as borrowers, respondent no. 1 as builder, and respondent no. 2 as financier under the

subvention scheme qua the under-construction property in respondent no. 1's project.

VIII. That as per relevant clause of the tripartite agreement and MOU, respondent no. 1, agreed and undertook to make payments of pre-EMI till the stated delivery of the flat i.e. for the period of 36 months promised from the date of signing the tripartite agreement which falls due on 01.05.2021. It is further stated in the said agreement that if the delivery is delayed beyond this stipulated date, then respondent no. 1 shall continue to pay the pre-EMI to the respondent no. 2.

IX. That the above loan of Rs. 70,00,000/- extended by respondent no. 2 was secured against the mortgage of the subject unit. Therefore, any default in making the agreed repayment of pre-EMIs by respondent no. 1 was to have direct bearing on the above flat (*for which complainant has already paid Rs. 14,07,500/- towards down payment against the total consideration*) which may be secured by respondent no. 2 in terms of the relevant provisions of SARFAESI Act, apart from the credit score of the complainant being adversely impacted. Further, it would also be important to refer to the subvention payment plan vide which the loan amount was to be released to respondent no. 1 by respondent no. 2.

X. That the present loan extended by respondent no. 2 also stands on the same premise wherein perusal of clause 3 of the tripartite agreement makes it abundantly clear that the liability of borrower for making payment against the loan financed by respondent no. 2 shall commence after disbursal of the loan amount is complete in the light of subvention payment plan. Till that time, the liability against payment of pre-EMIs towards interest proponent shall vests upon respondent no. 1 who shall be making monthly payment to respondent no. 2 against the interest

accruing on the portion of loan amount disbursed as per above subvention payment plan in terms of clause 2 & 7 of MOU and clause 3 & 4 of the above tripartite agreement.

XI. That as per the subvention payment plan, respondent no. 2 released Rs. 29,66,262/- to respondent no. 1, and as per the schedule of amount disbursement over the course of time, respondent-builder, right from the commencement of the loan till October 2020 has made payments to respondent no. 2 against the pre EMIs viz interest accruing on the amount so disbursed. However, subsequent to October 2020, the respondent-builder for the reasons best known to it stopped making payment to respondent no. 2 towards the pre-EMIs. This comes as a clear breach on the part of respondent-builder of the stipulated terms and conditions as mentioned in the tripartite agreement and MOU and this act is substantially contrary to the essence of subvention scheme.

XII. That the malafide design of respondent no. 1 acting in close connivance with respondent no. 2/3 to further cheat and defraud complainant and customers similarly placed was also discovered when it was noted that respondent-builder had been diverting funds collected from the home buyers to its other lossmaking subsidiary companies. Attention is drawn to the balance sheet filed with MCA wherein the amount of loans and advances as on 31.03.2018 stands at Rs. 152,30,40,474/-. Reference to this effect is also drawn to page no. 7 of balance sheet wherein reference of advancing loan to its 6 subsidiary companies i.e., 1. Monex Infrastructure Pvt. Ltd.; 2. Survir Infrastructure Pvt. Ltd.; 3. Maharaja Buildstate Pvt. Ltd.; 4. Bellevue Holidays Homes Pvt. Ltd.; 5. Pareena Builders and Promotors Pvt. Ltd. and 6. Pareena Homes Pvt. Ltd. are categorically mentioned. The fact that respondent no. 1 has given loans

and advances from buyer's payments tantamount to diversion of funds and perpetuating fraud which is causing delay in execution of the project in question. This is a matter that needs the attention of the Authority for taking appropriate action against the respondents herein.

XIII. That at the outset, the Authority may appreciate that under the facts and circumstances mentioned above, there appears a clear connivance on the part of developer and financier in subvention scheme whereby the bounden duty of respondent no. 1 to make payments against the monthly interest proponent has been completely ignored by respondent no. 2 and action of NPA is undertaken against the complainant exclusively without showing any cause as to what actions have been taken by the respondent no. 2 against respondent-builder for non-payment in terms of tripartite agreement. It is pertinent to mention that upon respondent-builder's default in making payments against the pre-EMIs to respondent no. 2, the loan has been recalled by respondent no. 2 and further been classified as non-performing asset, and thereafter, this loan asset has been sold by respondent no. 2 to the respondent no. 3 for initiating recovery proceedings against complainant. During the course of recovery proceedings under SARFAESI, the respondent no. 3 took over the flat in question which stands as security for the loan, thereby, resulting in forfeiture of Rs. 14,07,500/- which was earlier paid by complainant (from his own resources and savings) to respondent no. 1 as down payment while booking the flat. The cumulative effect of this taking over of flat by respondent no. 3 (under the circumstances mentioned above) would be that this flat would subsequently be sold to a third party at auction on the then current market value (much more than consideration amount decided in the year 2015 when the flat was

booked by complainant). As such giving huge monetary benefits to the respondents collectively at the cost of complete loss caused to him. This is the precise intent of respondents since the complainant was left to suffer for no fault at his end. The liability to make payment against pre EMIs was of respondent no. 1 in which it defaulted, and the respondent no. 2 & 3 are taking action against this default of respondent no. 1 against the complainant (who is reflected as borrower), and therefore, the entire down payment amount of Rs. 14,07,500/- paid by him against the flat is in real threat of being wasted. Therefore, by way of present complaint, the complainant is seeking recovery of Rs. 14,07,500/- (along with applicable interest from the day it was actually paid to the respondent no. 1) from respondent no. 1 with no liability towards loan repayment to respondent no. 2/3 being burdened upon him, because default in making repayment of pre-EMIs under the subvention scheme has been committed by respondent no. 1 and not the complainant herein.

XIV. That the developer from October 2020, for the reasons best known to it stopped paying the agreed monthly pre-EMIs against the loan, and towards the funds received so far from the financier. For the default in paying the contractually binding pre-EMIs by the developer, the financier (*Respondent No. 2*) unreasonably initiated SARFAESI proceedings against the complainant, though the liability of paying pre-EMIs solely vests with the developer, and therefore, jeopardizing the interests of the complainant who already had invested his hard earned money towards paying down-payment of Rs. 14,07,500/-, and for rest, availed loan from respondent no. 2, and also, the credit history (CIBIL) of complainant is hugely dented at the hands of developer who

deliberately defaulted in paying monthly pre-EMIs to the financier, and as on date a total outstanding of Rs. 42,62,753.05/- is escalated by the respondent nos. 2 and 3 against complainant vide notice dated 13.02.2023 under section 13(2) SARFAESI on account of the default committed by the respondent no. 1, but since complainant is the borrower, he is facing heat of the defaults committed by respondent no. 1, and he is being chased by respondent nos. 2 and 3 to repay the loan outstanding of Rs. 42,62,753.05/- which is inclusive of interests, penalty and the principal amount of Rs. Rs. 29,66,262/- disbursed to respondent nos. 1 from respondent no. 2. Therefore, the credit record of complainant is hugely getting affected by the defaults committed by respondent no. 1 towards timely repayment of monthly pre-EMIs to the respondent no. 2.

XV. That upon receiving the reply dated 13.07.2021 to the notice dated 22.05.2021 issued by respondent no. 3 under section 13(2) of SARFAESI Act, the respondent no. 3 anticipating the possible legal action against their illegal act, recalled its earlier notice dated 22.05.2021 vide its separate letter dated 28.07.2021.

XVI. That, there is unreasonable delay in offering the possession, and in fact the construction appeared far from completion till the time the present complaint was filed. Even till date, OC is not obtained by the developer.

XVII. That under the garb of the subvention finance facility, the developer was given a major chunk of loan amount (Rs. 29,66,262/- out of total loan amount of Rs. 70,00,000/-) from the financier without following schedule of payment and the developer successfully diverted those funds and the funds of other such home buyers to its different subsidiary companies as lending (*as can be noticed from Developer's Company*

Balance Sheet filed at page 136 in which liability towards subsidiary companies is huge), and the completion of the subject project and timely offer of possession of the flat was ignored by the developer.

XVIII. The respondent no. 1 to justify their action of stopping payment of the monthly pre-EMIs from October 2020 relies on letters dated 12.10.2020 and 28.12.2020, which were written by complainant and exclusively addressed to the respondent no. 2. However, the respondent no. 1 in process of taking this defence cannot evade its contractual liability of paying the monthly pre-EMIs. This letter was written in a context that from November 2020 onwards the pre-EMIs were instructed to be paid by the complainant instead of the respondent no. 1. The complainant vide this letter dated 12.10.2020 was objecting to unilateral instructions which is in clear contradiction of clause 3 and 4 of the tripartite agreement, and therefore, the complainant was requesting respondent no. 2 not to fasten this liability on the complainant. In addition, by citing certain unavoidable reasons such as COVID related constraints in letter dated 12.10.2020, the complainant requested respondent no. 2 to cancel the loan, however, unless that request was not accepted, the respondent no. 1 cannot evade from its liability of paying monthly pre-EMIs to the respondent no. 2 because respondent no. 1 indeed has received Rs. 29,66,262/- out of total loan amount of Rs. 70,00,000/- from respondent no. 2. Further, the subsequent letter dated 28.12.2020 written by complainant to respondent no. 2 (Financier) is more clear to this effect in which he specifically communicated to the respondent no. 2 not to release more funds (against loan) to respondent no. 1 because they are not meeting their commitments of construction progress. This communication again does not qualify respondent no. 1 to stop paying

pre-EMIs to respondent no. 2 because the fact remains that they already have been disbursed with Rs. 29,66,262/- out of total loan amount for which respondent no. 1 has to continue paying the interest in the form of pre-EMIs.

XIX. The respondent no. 2 has already conveyed the asset of present loan to respondent no. 3 which is an asset reconstruction company for taking adverse actions qua the loan account in question.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).

I. Direct the respondent to refund of the entire amount i.e. Rs. 14,07,500/- along with interest at the rate of 24% received from the complainant by the respondent no. 1.

II. To pass appropriate direction that no liability may be fastened upon complainant inter-alia loan against flat in question which has been classified as NPA by respondent no.2/3, and as such respondent no.1 may be directed to close the loan account without impacting the credit score of the complainant.

III. Direct the respondents to pay Rs. 2,00,000/- to the complainant towards litigation expense.

5. 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 no. 1

6. The respondent no. 1 has contested the complaint on the following grounds.

a. That the present complaint is out of purview of the provisions of RERA. It is submitted that by way of present complaint, complainant has

challenged notices issued by respondent no 2 & 3 under the provisions of SARFASI ACT, which is beyond the scope of RERA. The complainant is also seeking directions against respondent no. 2 & 3 i.e. financial institutions, which is also beyond the purview RERA. Even the date of possession as per agreement is yet to arrive and tentatively the date of possession is in year 2023.

b. That the construction of the said project is at advanced stage and the construction of various towers has already been completed and remaining work would be completed as soon as possible. The project is near completion and within a very short span of time it will be completed and thereafter, the possession shall be offered, if entitled after obtaining occupancy certificate as agreed in builder buyer's agreement.

c. That quite conveniently, the certain facts have been concealed by the complainant. The concealment has been done with a motive of deriving undue benefit by filing the present complaint at the expense of the respondent.

d. That the respondent continues to bonafidely develop the project despite there being various instances of non-payments of installments by various allottees. This clearly shows unwavering commitment on the part of the respondent to complete the project. Yet, various frivolous petitions, such as the present one seriously hampered the capability of the respondent to deliver the project on time. The amounts which were realized from the allottees have already been spent in the development work of the proposed project. On the other hand, the respondent is still ready to deliver the unit on due completion

to the complainant, of course, subject to payment of due installments and charges.

e. That as per apartment buyer's agreement, the due date of delivery of possession was not absolute and was subject to terms and conditions of agreement itself. Admittedly, it was written in clause 13, the company shall endeavour to complete the construction within period of four years from start of construction or execution of this agreement, whichever is later but said time period of four years was not absolute and was subject to further extension of six months. However, said period of four years and six months was also subject to several reasons beyond the control of respondent as agreed by the complainant that if the project gets delayed due to force majeure circumstances then the said period consumed during concerned circumstances shall stand extended. That, in the present case agreement was executed on 05.12.2017, thus the date of possession shall commence from 05.12.2017 and final date of possession shall be calculated after considering all the relevant circumstances.

f. That since prescribed period of 4.6 years was subject to force majeure circumstances. It is submitted that there were a number of judicial orders, notifications and other circumstances which were completely beyond the reasonable control of the respondent, which directly impeded the ability and even the intention of the respondent to continue with the development and construction work of the said project. It will be detailed hereinafter that on account of various notifications and judicial orders the development and construction work of the said project was impeded, stopped and delayed.

g. That the complainant himself has admitted the fact that an addendum was executed between the parties in the year 2016. Even in the said addendum, the complainant duly acknowledged and admitted the fact that on happening of events in force majeure clause, the respondent would be entitled to extension of date of delivery of possession. He has now filed the present complaint in breach of builder buyer agreement and addendum as well. Thus, he has no right to seek any sort of relief. There is no such provision under any law that only one party is bound by the agreement. Since, the complainant also agreed with the terms and conditions of builder buyer agreement and thereafter to addendum, so he is also bound by the same. Thus, as per terms of said agreement, the complainant is not entitled to seek refund of the entire amount.

h. That completion of the project shall be considered as 4 years after the addition of force majeure circumstances. Similarly, on account of corona virus pandemic HRERA granted additional time of six months for completion of project in year 2020 and additional three months in year 2021 from 01.04.2021 to 30.06.2021.

i. That whenever construction was stopped due to any reason either because of lockdown or any interim orders of Hon'ble Supreme court/MCG/Environment Pollution Control Boards of State of Haryana and separately of NCR, it created a hurdle in pace of construction and after such period was over, it required considerable period of time to resume construction activity. Whenever construction activity remains in abeyance for a longer period of time, then the time required to gather resources and to re-commence construction; also became longer, which further wasted considerable time. That longer the

construction remains in abeyance due to circumstances discussed herein, longer the time period required to start again. That above stated orders are absolute and beyond the control of developers. That there are several other orders and notifications which causes delay in the construction of project and are beyond its control.

j. That even the Hon'ble Apex Court has already held that notice, order, rules, notification of the Government and/or other public or competent authority, including any prohibitory order of any court against development of property comes under force majeure and period for handing over of the possession stands extended during the prevalence of the force majeure event.

k. That the complainant concealed few important documents that after payment of last pre-EMI, in the month of Oct 2020, the complainant directed the respondent no 2 to stop disbursement of any further amount in favour of respondent no 1 and intimated the same to respondent no 1 as well. That as per statement of loan account, repayment of loan in shape of EMI shall start from 05.05.2018 till 05.10.2025. That for the reason best known to complainant and respondent no. 2, said period was delayed till Nov 2020 and in the month of Nov 2020. Respondent no. 2 demanded start of repayment from November 2020 itself. However, complainant refused to repay the loan amount to the respondent no 2 and also directed the respondent no 2 not to disburse any amount to respondent no 1 as well. That the complainant also sent a written request in this regard to the respondent no. 2.

l. That vide letter dated 12.10.2020 complainant cancelled the tripartite agreement and requested respondent no 2 to do the same and further

requested the respondent no 2 to recover the amount disbursed from respondent no 1 only. It is submitted that it is the duty of complainant to repay the loan and respondent no 1 was only liable to pay Pre-Emi in form of interest on amount disbursed by respondent no 2 to respondent no 1. However, a dispute arose between respondent no 2 and the complainant over repayment of loan in Oct 2020 and he refused to repay the loan and demanded recovery of loan from respondent no 1, without there being any right to do so. That complainant even directed respondent no. 2 not to disburse any amount to respondent no 1. That the said act was direct breach of apartment buyer agreement , tripartite agreement , both MOUs dated 15.03.2018, thus complainant by his own act disentitled himself from getting benefit of subvention scheme and for the same reason respondent stopped paying pre-EMI from the month of Nov 2020.

m. That legally the respondent no. 2 has a right to recover the loan amount disbursed in favour of respondent no. 1 from complainant by following due course of law. However, by way of present complaint, complainant is trying to defeat the legal right of all the respondents. That as the complainant clears his intention from withdrawing from the project much prior to the date of possession and without there being any fault of respondent, the respondent no. 1 is entitled to cancel the allotment and forfeit the earnest money as per RERA along with other taxes and charges as per agreement and only liable to return the amount which was received from respondent no 2 as per tripartite agreement. That as per tripartite agreement, in the event of cancelation of unit, builder can forfeit earnest money after returning of amount received from bank without interest.

n. Thus, keeping in view of above stated facts and circumstances it is clear that the present complaint is just an abuse of process of law in order to defeat the valuable rights of all the respondents. It is therefore prayed that present complaint may kindly be dismissed in the interest of justice.

E. Reply by the respondent no. 2 & 3.

7. The respondent no. 2 & 3 have contested the complaint on the following grounds.

a. That, at the outset it is submitted that the present complaint is not maintainable in the eyes of law before the authority as the complaint itself does not disclose any cause of action to maintain it before the authority. The complainant has only sought refund of amount of the down payment of Rs. 14,07,500/- based upon the premise that the respondent no.1 being builder allegedly in terms memorandum of understanding and tripartite agreement failed to pay the pre-EMI to the respondent no.2 being the financier as agreed.

b. That the complainant has made no allegation regarding non-delivery of possession of the unit within the time stipulated in the builder buyer agreement and/or fraud committed to him in respect of unit in terms of sections 12 and 18 of the Act, 2016 as amended. This Authority under the provisions of Act, 2016 has no jurisdiction to deal with any issue regarding non- payment of loan amount and/or any other issue in respect of loan facility. Thus, the present complaint is liable to be dismissed on this ground alone.

c. That the respondent no. 2 and 3 are neither developers/promoter of the project, nor real estate. Therefore, the present complaint is not

maintainable and is liable to be dismissed under the provisions of Act of 2016.

d. That the present complaint is an example of clever drafting and mala fide intentions of the complainant, who falsely implicated the respondent no. 2 and 3 without any reason and fault. That the main dispute is between the complainant and respondent no. 1 regarding non- payment of pre-EMI's by the respondent no.1 to the respondent no.2 in terms of the tripartite agreement. It is submitted that the respondent no.2 and 3 are entitled to recover the loan amount granted/disbursed to the complainant and his wife (deceased) in terms of the loan agreement and the tripartite agreement signed and entered by the complainant voluntarily. However, the complainant without any just or proper reason made totally false, sham and frivolous allegations against them and the same has no basis.

e. That the present complaint is not maintainable qua the answering respondents, the respondent no. 2 is a financial institution registered under the provision of the National Housing Bank Act, 1987 and presently governed by Reserve Bank of India. Further, respondent no. 3 is an asset reconstruction company registered with the Reserve Bank of India and governed by the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. It is submitted that the Authority has no jurisdiction to deal with any matter in respect of financial institutions and asset reconstruction companies. Thus, the present complaint is liable to be dismissed on this ground alone qua the respondent no. 2 and 3.

f. That the complainant has approached the respondent no. 2 for grant of loan against mortgage of residential unit in question. Consequently,

based upon the representations made by the complainant and documents furnished, it sanctioned the loan of Rs. 70,00,000/- vide loan agreement against the mortgage of property being residential flat no-1403, 14th floor, tower-5, Micasa, Sector-68. Gurugram-122001, Haryana, as security for the aforesaid loan facility based upon the terms and conditions as mentioned vide the loan agreement and tripartite agreement executed by the parties respectively.

g. That, admittedly complainant, respondent no. 1 and respondent 2 entered into a tripartite agreement whereby it has been agreed that there would be no repayment default of loan amount for any reason whatsoever including but not limited to any concern/issues by and between the complainant and respondent no.1. It is further agreed that the complainants' obligation to repay the loan shall be distinct and independent of any issues/concern dispute of whatsoever nature between the complainant and respondent no. 1.

h. The complainant declared and confirmed that builder/respondent is of their choice, and they are confident of the builder's capability for quality construction and timely completion of the said project. Not only this, but he also declared and confirmed that they have agreed and consented to the terms of the payment plan upon understanding the nature of risks and consequences associated with the payment plan opted by them. It was undertook by him that he shall solely be responsible and continue to repay the loan amount in terms of the loan agreement irrespective of the stage of construction/delay or failure to develop/ construct the said project by builder within the stipulated period.

i. That the respondent no. 2 has recalled the loan and further declared his account as NPA following due process of law. Further the respondent no. 2 has assigned all its legal rights in respect of the loan account to the respondent no. 3 vide assignment deed dated 31.03.2020. Therefore, since the respondent no. 2 has already assigned all its rights in respect of the loan account of the complainant and his wife to respondent no. 3, the respondent no. 2 ought to be deleted from the array of the parties in the facts and circumstances of the case.

j. That the respondent no. 2 being a non-banking financial institution and the debt being a secured debt, respondent no. 2 is entitled to recover its lawful dues and interest, if any as per law. It is settled law that recovery by non-banking financial institutions is of paramount interest. Furthermore, the answering respondents have been acting within the four corners of the loan agreement executed between the parties towards the lawful recovery of their dues, as per law.

k. That the complainant by way of present complaint is trying to obviate from its obligations as undertaken by him under the loan agreement and tripartite agreement. Thus the prayers as sought by the complainant are totally misconceived and hence is liable to be dismissed on this ground alone.

8. All other averments made in the complaint were denied in total.

9. Both the parties also filed written submissions to substantiate their averments made in the pleadings as well as in the documents and the same were taken on record and have been perused.

10. 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 based on these undisputed documents.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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

13. 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.*

14. 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.

15. 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. 2021-2022 (1) RCR (Civil), 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."*

16. 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.

E. Finding on objections raised by the respondent

E. I Objection regarding force majeure conditions:

17. The respondent/developer alleged that grace period on account of force majeure conditions be allowed to it. It raised the contention that the construction of the project was delayed due to force majeure conditions such as orders of Hon'ble Supreme Court of India to curb pollution in NCR, various orders passed by NGT, EPCA and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. The apartment buyer's agreement was executed between the parties on 05.12.2017 and as per terms and conditions of the said agreement, the due date of handing over of possession comes out to be 05.12.2021. The authority is of considered view that circumstances such as various orders passed by the Environmental Pollution (Prevention and Control) Authority for NCR (hereinafter, referred as EPCA) from 26.10.2019 to 14.12.2019 and NGT were for shorter period of time and were not continuous and thus, no leniency in this regard can be given to the respondent/builder. However, due to spread of covid 19, the authority vide its order dated 26.05.2020 allowed a grace period of six months for completion of the projects, the due date of which fell after 23.03.2020. So taking into consideration the pandemic, a period of six months is allowed to the developer to complete the project beyond 05.12.2021 and the same comes to 05.06.2022 (though inadvertently the due date for completion of project and offer of possession has been mentioned as 05.12.2021).

F. Findings on the relief sought by the complainant.

F. I Direct the respondent to refund of the entire amount i.e. Rs. 14,07,500/- along with interest at the rate of 24% received from the complainant by the respondent no. 1.

18. Considering the above-mentioned facts, the complainant along with his wife Smt. Sarabjit Kaur (since deceased) was allotted the subject unit vide allotment letter dated 25.09.2015 on the basis of application dated

25.08.2015, for a total sale consideration of Rs. 87,433,05/-. A buyer's agreement was executed between the parties on 05.12.2017 detailing the terms and conditions of allotment, the dimensions of the allotted unit, the payment schedule and the due date of possession. As per said agreement, the due date of handing over of possession was fixed as 05.12.2021 i.e., within 4 years from the date of execution of that document. It is also evident that the allottee paid a sum of Rs. 14,07,500/- to the respondent/builder at the time of booking as down payment. For the remaining sum of Rs. 70,00,000/-, a loan was taken by them against the mortgage of the allotted unit from respondent no. 2/ financer institution (*"Indiabulls Housing Finance Ltd."*). It is also not disputed that the respondent no. 2 released a sum of Rs. 29,66,262/- under the subvention payment plan on the basis of tripartite agreement dated 01.05.2018 entered into between the parties. It is also evident that prior to that, a MoU was entered into between the allottees and the builder on 15.03.2018, vide which the later agreed to pay interest chargeable on loan amount to the financial institution from the date of execution of that document till 36 months or up to the date of offer of possession, whichever is earlier as per clause 7 of MoU. It was also agreed between them that the financial institution would pay the amount of Rs. 65,57,482/- i.e., 75% of the BSP of the allotted unit. However, in this case before the due date for completion of the project and offer of possession of the allotted unit expired, the complainant withdrew from the project vide letter dated 12.10.2020 written to respondent no. 2 and also filed a complaint seeking refund of the paid-up amount besides interest. It is an eventuality where provision of section 18(1) does not apply. Thus, it a clear case of surrender.

19. Clause 7 of the BBA dated 05.12.2017 is relevant for the purposes of the matter concerned which provides for forfeiture of earnest money on the failure of the allottee to pay the amount due along with interest within 60 days and in that eventuality, the unit could have been cancelled. The payments against the allotted unit was made by respondent no. 2(*"Indiabulls Housing Finance Ltd."*) under the subvention payment plan and a sum of Rs. 7,70,138/- has already been paid by the respondent/builder to the financial institution till October 2020. The amount received against the allotted unit is Rs. 43,73,762/-. Out of which an amount equivalent to Rs. 14,07,500/- was paid by the complainant-allottee from his own sources and Rs. 29,66,262 was paid by the financial institution. Though the complainant submitted that his unit was cancelled on account of non-payment of Pre-EMI's by the respondent no. 1. Subsequent to which the same was declared NPA & sold to respondent no. 3 by respondent no. 2. However it has been bought on record that the allottee informed the financial institution vide letters dated 12.10.2020 (annexure R4) and 28.12.2020 (annexure R5) requesting it to cancel the tripartite agreement and to recover the amount advanced against the allotted unit from the builder. It was clearly mentioned in those letters that *DON'T ADVANCE ANY FURTHER AMOUNT TO THE BUILDER* and the allottee would not be responsible for the same. Further, during the course of proceedings dated 09.02.2023, it was brought on record by the counsel for respondent/builder that no cancellation has been initiated against the subject unit and if the complainant was still interested in the unit, it is ready to consider the same subject to payment of outstanding dues.

20. Despite aforesaid circumstances, the complainant vide proceedings of even date opted to withdraw from the project and further requested for

adjustment of account with the financial institution. Thus, keeping in view the factual position detailed above, the allottee wishes to withdraw from the project before the due date of completion of the project. So, in view of request made vide letters dated 12.10.2020 & 28.12.2020, by the allottee to respondent no. 2, the respondent/builder should have refunded the amount paid by the complainant after necessary deductions as per builder buyer agreement and also should have returned the amount of loan received against the allotted unit to the financial institute. But the same has not been done, which means that the respondent-builder has been utilizing the funds of the allottee as well as the loan amount received against the allotted unit.

21. Further, as per clause 7 of buyer's agreement dated 05.12.2017 and Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which is provides as under-

> *"5. AMOUNT OF EARNEST MONEY*
>
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases :vhere the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"*

22. The respondent/builder is directed to refund the paid up amount after deducting 10% of the basic sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 within 90 days from the date of this order along with an interest @ 10.60%

p.a. on the refundable amount, from the date of surrender i.e., 12.10.2020 till the date of realization of payment. Out of amount so assessed, amount of financer/banker shall be returned first.

23. Further, although there has been provision of pre-EMI interest to be paid by the builder but nothing relevant in this regard such as amount paid for pre-EMI by the respondent-builder, etc. has been brought on record by either of the parties. Therefore, in these circumstances, it is further directed that out of amount so assessed, the amount paid by the bank/payee be refunded in the account of bank and the balance amount along with interest, if any be refunded to the complainant thereafter.

G. Directions of the authority

24. 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 paid-up amount of Rs. 14,07,500/- to complainant-allottee after deducting 10% as earnest money of the basic sale consideration of Rs. 71,58,750/- with interest at the prescribed rate i.e., 10.60% on such balance amount, from the date of surrender i.e., 12.10.2020 till the date of realization.

ii. The respondent-builder is further directed that out of amount so assessed, the amount outstanding towards the bank/payee i.e. respondent no. 2 be refunded in the account of bank and the balance amount along with interest be refunded to the complainant thereafter.

iii. The respondent-builder is further entitled to deduct amount paid by it towards Pre-EMI's as per Tripartite agreement dated 01.05.2018.

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

25. Complaint stands disposed of.

26. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.02.2023