

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

Complaint no. : 4165 of 2019
First date of hearing: 15.10.2019
Order Reserve On : 20.01.2023
Order Pronounce On: 31.03.2023

1. Ragini Malhotra
2. Rupali Malhotra

R/O: M-6, Guru Har Kishan Nagar,
Paschim Vihar, New Delhi-110087

Complainants

Versus

Ireo Grace Realtech Private Limited
Registered Office: - C-4, 1st Floor, Malviya Nagar,
New Delhi-110017

Respondent

CORAM:

Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

**Member
Member**

APPEARANCE:

Shri Riju Mani
Shri M.K Dang

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 09.09.2019 has been filed by the complainants/allottees 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	"The Corridors" at sector 67A, Gurgaon, Haryana
2.	Licensed area	37.5125 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no.	05 of 2013 dated 21.02.2013
	License valid up to	20.02.2021
	Licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
5.	RERA registered/not registered	Registered Registered in 3 phases Vide 378 of 2017 dated 07.12.2017(Phase 1) Vide 377 of 2017 dated 07.12.2017 (Phase 2) Vide 379 of 2017 dated 07.12.2017 (Phase 3)
	Validity	30.06.2020 (for phase 1 and 2) 31.12.2023 (for phase 3)
6.	Unit no.	102, First Floor, Tower C11 (annexure C-2 on page no. 35 of complaint)
7.	Unit measuring	1631.52 sq. ft.

		(annexure C-2 on page no. 35 of complaint)
8.	Date of approval of building plan	23.07.2013 (as per project details)
9.	Date of allotment	07.08.2013 (annexure C-2 on page no. 35 of complaint)
10.	Date of environment clearance	12.12.2013 (as per project details)
11.	Date of execution of builder buyer's agreement	Not executed
12.	Date of fire scheme approval	27.11.2014 (as per project details)
13.	Reminders for payment	For Second Instalment: 14.05.2013, 28.05.2013, 02.09.2013 For Third Instalment: 13.04.2014, 04.05.2014, 21.10.2014(Final notice)
14.	Cancellation letter	11.02.2015 (annexure C-4 on page no. 45 of complaint)
15.	Total consideration	Rs. 1,66,40,103/- (as per payment plan on page no. 66 of complaint)
16.	Total amount paid by the complainants	Rs. 14,50,000/- (as alleged by complainant)
17.	Due date of delivery of possession	23.01.2017 (calculated from the date of approval of building plans) Note: Grace Period is not allowed.
18.	Possession clause (Taken from executed buyers agreement of same project in similar complaint in CR/1105/2021)	13. Possession and Holding Charges Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its

		<p>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.</p> <p>(Emphasis supplied)</p>
19.	Occupation certificate	27.01.2022 (as per project details)
20.	Offer of possession	16.02.2022

B. Facts of the complaint

The complainants have submitted as under:

3. That the complainants being lured by the representations made by the respondent decided to make application for the booking in the project namely, Ireo Corridors situated at sector-67 A, Gurugram on 22.03.2013 and paid a booking amount of Rs. 14,50,000/-.
4. That on the application of the complainants and on the payment of the booking amount, the respondent issued the allotment letter on 07.08.2013 to them allotting the above-mentioned unit.
5. That the allotment letter accompanied with 3 copies of buyers agreement and upon perusal of the terms and conditions of the said agreement complainants were shocked. The entire apartment buyer's agreement was drafted in the favour of the respondent and the complainants were left with no right whatsoever. The agreement was lopsided in the sense that in case of the delay in the construction, the complainants were not entitled to any realistic compensation whereas the respondent was allowed to charge 20% interest in case of the delay in the payment of the instalment.
6. That the complainants had no authority to make any alterations or changes to the draft apartment buyer agreement. The complainants were aggrieved since the respondent was abusing its position in comparison to the complainants.
7. That on one hand the respondent was raising demands from them, and on the other hand there was no visible development on the project site. The complainants were begging the respondent to draft a fair buyer agreement with equal rights for both the complainants and the respondent and only then raise demands for instalments. That further the complainants were requesting the respondent to provide development updates to the complainants before raising demands.

8. That without execution of the apartment buyer agreement the respondent could not have raised any demand from them. The respondent could have only raised the demands from the complainants upon the execution of the buyer agreement which was on stall as the draft provided by the respondent was one sided and unilateral leaving no scope for the complainants to breathe her rights.
9. That being annoyed with the requests of the complainants, the respondent cancelled the allotment of the complainants in respect of the mentioned apartment. The respondent issued a letter dated 11.02.2015 to the complainants informing her that they have cancelled the allotment of the complainant and forfeited the entire paid amount of Rs 14,50,000/-
10. That the respondent ought to have refunded the entire amount paid by the complainants on the date it had decided to cancel the booking of the complainants. That instead of refunding the same, the respondent had forfeited the entire paid amount on some baseless and misconceived understanding.

C. Relief sought by the complainants:

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

(i) Direct the respondent to refund the amount to the tune of Rs. 14,50,000/- to the complainants along with interest at prescribed rate of interest from the date of payment made by the complainants till the date of refund.

12. 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: -

13. 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.
14. That there is no cause of action to file the present complaint.
15. That the complainants have no locus standi to file the present complaint.
16. That the respondent has filed the present reply within the period of limitation as per the provisions of Real Estate (Regulation and Development) Act, 2016.
17. 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 54 of schedule-1 of the booking application form.
18. That the complainants have not approached this authority with clean hands and have intentionally suppressed and concealed the material facts. The present complaint has been filed maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:
19. That the complainants, after checking the veracity of the project namely, 'Corridor; sector 67-A, Gurugram applied for allotment of an apartment vide booking application form and agreed to be bound by the terms and conditions stipulated therein.

20. That based on the application for booking, the respondent vide its letter dated 07.08.2013 allotted to the complainants apartment no. CD-C11-01-102 having tentative super area of 1631.52 sq. ft for a total sale consideration of Rs. 1,66,40,103/-. Vide letter dated 18.03.2014, the respondent sent 3 copies of the apartment buyer's agreement to the complainants. However, the complainants failed to return the signed copies of the agreement despite reminders dated 28.05.2014 and 17.07.2014 by the respondent.
21. That vide payment request dated 14.04.2013, the respondent had raised the demand towards second installment demand for net payable amount of Rs. 16,44,760/-. However, despite reminders dated 14.05.2013, 28.05.2013 and 02.09.2013, the complainants failed to remit the due amount and the same was adjusted in the next installment demand as arrears.
22. That vide payment request dated 18.03.2014, the respondent had raised the demand towards the third installment for net payable amount of Rs. 36,66,033.05. However, the complainants again failed to pay the due installment amount despite reminders dated 13.04.2014 and 04.05.2014 and final notice dated 21.10.2014.
23. That timely payment of installments within the agreed time schedule was the essence of allotment. The complainants are real estate investors who had booked the unit in question with a view to earn quick profit in a short period. However, their calculations went wrong on account of slump in the real estate market and the complainants did not possess sufficient funds to honour their commitments. The complainants were never ready and willing to abide by their contractual obligations and they also did not have the requisite funds to honour their commitments.

24. That on account of non-fulfilment of the contractual obligations by the complainants despite several opportunities extended by the respondent, the allotment of the complainants was cancelled, and the earnest money was forfeited vide cancellation letter dated 11.02.2015 in accordance with clause 10 read with clause 12 of the booking application form and the complainants are now left with no right, claim, lien or interest whatsoever in respect of the said booking/allotment.
25. 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

26. The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

27. 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

28. 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.

29. 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.

30. 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(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."

31. 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.1 Objection regarding complainants are in breach of application form for non-invocation of arbitration

32. The respondent submitted that the complaint is not maintainable for the reason that the application form 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:

"54. 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".

33. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the application form 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.
34. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and

builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

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

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

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

...

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

35. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the application form, 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."

36. 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.

G. Findings regarding relief sought by the complainants.

- (i) Direct the respondent to refund the amount to the tune of Rs. 14,50,000/- to the complainants along with interest at prescribed rate of interest from the date of payment made by the complainants till the date of refund.**

37. The complainant-allottees booked a residential apartment in the project of the respondent named as "Corridors" situated at sector 67-A, Gurgaon,

Haryana for a total sale consideration of Rs. 1,66,40,103/-. The allotment of the unit was made on 07.08.2013. Moreover, no builder buyer agreement was executed between the parties.

38. As per the payment plan the respondent started raising payments from the complainants but they defaulted to make the payments. The complainant-allottees in total has made a payment of Rs. 14,50,000/-. The respondent vide letter dated 14.04.2013 raised the demand towards second instalment and due to non-payment from the complainants it sent reminders on 28.05.2013 and 02.09.2013 and thereafter another instalment for payments were raised but the complainants failed to pay the same. Further the respondent sent final notice dated 21.10.2014. Thereafter the respondent cancelled the allotment the unit vide letter dated 11.02.2015. The occupation certificate of the tower where the allotted unit is situated has been received on 27.01.2022.
39. The respondent-builder took a plea that after the cancellation of allotted unit on 11.02.2015, the complainants filed the present complaint on 09.09.2019 i.e., after more than 4 years and thus, is barred by the limitation. The authority observes that the case of the complainants is not against the cancellation letter issued way back as on 11.02.2015 as the same cannot be agitated as complaint was filed after more than 5 years well beyond the limitation period. But the promoter was required to refund the balance amount as per applicable cancellation clause of the application form. The balance amount has not been refunded which is a subsisting obligation of the promoter as per the booking application form as builder buyer agreement was not executed between them. The respondent-builder must have refunded the balance amount after making reduction of the charges. On failure of the promoter to refund the

amount the authority is of considered opinion that the promoter should have refund the balance amount after deducting 10% of the sale consideration.

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


"AMOUNT OF EARNEST MONEY

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

42. Keeping in view the above-mentioned facts the promoter was to return the paid-up amount after retaining 10% of the basic sale consideration and that amount should have been paid on the date of cancellation itself. However, in the present matter the complainants have paid only Rs. 14,50,000/- against the total sale consideration of Rs. 1,66,40,103/-

which constitutes about only 8.7% of consideration money and hence, no case for refund of any amount is made out.

43. Complaint stands disposed of.
44. File be consigned to the registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.03.2023



HARERA
GURUGRAM