BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1228 of 2020**
First date of hearing:	**10.04.2020**
Order Reserve On :	**11.11.2022**
Order Pronounce On:	**02.02.2023**

AK Varma **R/o:** H. no. 793, Sector-15A, Hisar, Haryana, 125001	**Complainant**
Versus	
Ireo Grace Realtech Private Limited **Registered Office:** - C-4, 1st Floor, Malviya Nagar, New Delhi-110017	**Respondent**

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

APPEARANCE:	
Shri K.K Kohli	Advocate for the complainant
Shri M.K Dang	Advocate for the respondent

ORDER

1. The present complaint dated 06.03.2020 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 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 complainant, 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.	604,6th Floor, C-6 Tower (page no. 67 of complaint)
7.	Unit measuring	1438.28 sq. ft. (page no. 67 of complaint)
8.	Date of approval of building plan	23.07.2013 (as per project details)

9.	Date of allotment	12.08.2013 (page no. 54 of complaint)
10.	Date of environment clearance	12.12.2013 (as per project details)
11.	Date of execution of builder buyer's agreement	30.04.2014 (page no. 64 of complaint)
12.	Date of fire scheme approval	27.11.2014 (as per project details)
13.	Reminders for payment	**For Fourth Instalment:** 16.03.2015 **For Fifth Instalment:**09.07.2015 **For Sixth Instalment:** 28.08.2015 **For Seventh Instalment:** 28.09.2015, 10.02.2016 **For Eight Instalment:** 07.01.2016, 16.02.2016 **For Ninth Instalment:** 07.01.2016, 16.02.2016.
14.	Date of cancellation letter	**05.01.2017** (annexure R-18 on page no. 77 of reply)
15.	Total consideration	Rs. 1,46,05,050/- [as per payment plan on page no. 57 of complaint]
16.	Total amount paid by the complainant	Rs. 49,97,156/- [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	**13. Possession and Holding Charges** Subject to force majeure, as defined herein and further

		subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, registration chares, stamp duty and other charges and also subject to the allottee having complied with all the formalities or documentation as prescribed by the company, the company proposes to offer the possession of the said apartment to the allottee **within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder**(Commitment Period). The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the Company. **(Emphasis supplied)**
19.	Occupation certificate	31.05.2019 (A6 to A10, B1 to B4 and C3 to C7)

		[as per project details]
20.	Offer of possession	Not offered but cancelled

B. Facts of the complaint

The complainant has submitted as under:

3. That the respondent approached the complainant for the booking of apartments in the project namely 'Ireo Corridors' situated at Sector-67 A, Gurugram and painted a rosy picture of the project. The complainant agreed to buy an apartment of 2 BHK @ Rs. 8750/- per sq. ft. which includes basic sale price, EDC, IDC, PLC, parking charges and any all-other charges.
4. That an unfair application form was given to be signed by the complainant without allowing any time to read the terms of the said application form and demanded a cheque of Rs. 12,00,000/- being the booking amount calculated at the rate of Rs. 8750/- to complete booking procedure.
5. That the respondent vide payment request letter dated 17.04.2013 demanded a second installment for Rs. 16,13,569/- which contained Rs. 2,06,784/- towards unexplained arrears, Rs. 13,64,618/- towards instalment and Rs. 42,167/- service tax. This instalment was to be paid by 09.05.2013.
6. That on enquiry about the arrears demanded in the said payment request letter, respondent informed them that the price of the unit has been increased from Rs. 8750/- per sq. ft. to price of Rs. 9200/- per sq. ft. and even the size of the flat has been increased.
7. That due to such behaviour of the respondent, complainant demanded refund of the paid-up amount but the respondent threatened him by

forfeiting the amount of Rs. 12,00,000/-. Therefore, in order the complainant paid the second instalment of Rs. 10,00,000/- .

8. That after a few months on 12.08.2013 respondent sent allotment letter and offered the allotment of the apartment no. 604 on 6th floor in tower C6 for a unit admeasuring 1483.28 sq. ft.

9. That on 18.03.2014 third instalment was demanded by the respondent towards payment for Rs. 16,84,292/- bearing Rs. 16,263/- towards arrears Rs. 16,07,808/- towards instalment and Rs. 59,617/- towards service tax. The said instalment to be paid by 09.04.2014.

10. That on 11.04.2014 respondent sent three copies of the buyer's agreement to the complainant for signing the same. However, the complainant was highly disappointed to see that none of the earlier issues regarding size, rate, floor level, PLC and other arbitrary charges were resolved.

11. That the complainant communicated vide telephone calls and personal visits with the respondent to resolve the issues and correct the one-sided clauses of the buyer's agreement, but the respondent baldly refused to entertain any changes in the clauses of the buyers agreement.

12. That to save their hard-earned money from forfeiture and with fear of cancelling the allotment the buyer's agreement was executed between the parties on 30.04.2014.

13. That as per the buyer's agreement the respondent had shown entry to the project from 90-meter road. But as per actual status of site there was no such access road available to the project neither any land had been acquired for the said purpose.

14. That the complainants went to the respondent's office several times regarding the said issues and to seek redressal, but all such efforts were in vain. That the complainants being fed up filed a case before the

commission on 23.03.2015 bearing case no. CC/195/2016. However, during the pendency of case, the landmark judgement of Ambrish Kumar Shukla & Ors. Vs. Ferrous Infrastructure Pvt. Ltd. was pronounced hence vide order dated 18.10.2016 the said compliant was dismissed as withdrawn with the liberty to file under section 12(1) (c) of the Consumer Protection Act, 1986. During the pendency of the said complaint commission was pleased to grant stay on cancellation of allotment by respondent even if the buyers chose not to pay the demand.

15. Despite initiating the consumer case, the respondent demanded the fourth instalment towards payment for Rs. 16,67,426/- vide letter dated 27.01.2015. The said instalment was to be paid by 11.03.2015.
16. Thereafter fifth instalment demand towards payment for Rs. 30,89,357/- bearing Rs. 16,67,426/- towards arrears received vide letter dated 05.06.2015 from the respondent. Instalment to be paid by 27.06.2015.
17. That respondent also demanded sixth instalment of Rs. 45,11,288/- bearing Rs. 30,89,357/- towards arrears, received vide letter dated 01.07.2015 from the respondent. Instalment to be paid by 23.07.2015.
18. While the said consumer complaint was pending before commission, the complainants also moved criminal complaints with the commissioner of Police, Gurgaon, Economic Offences Wing and SHO of Sadar police Station, Gurgaon for cheating by the respondent which got tagged with a similar case filed by another buyer wherein an FIR bearing No.561 dated 20.12.2014 u/s 420, 406 IPC with the police of police station: Sushant Lok Gurgaon.
19. That complainants also filed an application under section 482 of the Code of Criminal Procedure, 1973 bearing Crl. M.A. No.7687/2015 for

impleadment of respondents in the matter titled as "M/s. Ireo Grace Realtech P. Ltd. v. State of Haryana and others" bearing number: in Crl. Misc. Main No.42618/2014. Subsequently the complainants also filed a Writ Petition under Articles 226 and 227 of the Constitution of India read with Section 482 CRPC for issuance of appropriate directions/order in respect of the FIR.

20. Thereafter the respondent demanded three more instalments in the following manner:

- Seventh installment demand towards payment for Rs. 60,75,720/- bearing Rs. 45,11,288/- towards arrears received vide letter dated 02.09.2015 from the respondent. Installment to be paid by 24.09.2015.
- Eighth Installment demand towards payment for Rs.74,97,652/-.
- Ninth Installment demand towards payment for Rs.89,19,583/- bearing Rs.74,97,652/-towards arrears, received vide letter dated 10.11.2015 from the respondent. Installment to be paid by 02.12.2015.

21. However, the investigation agencies being in active collusion with respondent filed closure on the said criminal complaint filed by the complainant with the commissioner of Police, Gurgaon, Economic Offences Wing and SHO of Sadar Police Station, Gurgaon for cheating by the respondent bearing FIR no. 561 dated 20.12.2014.

22. Thereafter the complainant also filed a protest petition against the closure report filed by the police on 07.05.2016 bearing no. 1440/2016 against the cancellation report filed by the police on false grounds before the Court of Sh. Devender, ld JMIC, Gurgaon Court Haryana.

23. Thereafter the complainants along with 8 other buyers also filed a suit for declaration with consequential relief of permanent injunction titled

"Rajan Gupta and Ors vs. M/s IREO Grace Realtech Pvt Ltd & Ors." bearing CS No. 179/2016 before the Ld. Gurgaon District Court praying to pass a decree of declaration in favour of complainants and other buyers and against the respondent declaring the site shown by the respondent in their sale brochure earmarked for laying 90 mtr wide road only and to reinstate the said 90mtr road along with a decree of permanent injunction restraining the respondent or any person on their behalf from cancelling the allotment or alienating the apartment in the name of any other person and directing the respondent not to force the complainants and other buyers to make pending payments on account of demands raised at enhanced rate before access is given to the project through the 90 mtr road and also directing the respondent not to charge any interest/ penalty till the dispute is resolved amongst a few other prayers.

24. That the trial court passed interim order on 22.12.2016 in terms of statement given on behalf of respondents that if the appellants deposit instalments @Rs.8750/- per sq. ft. within 7 days, the respondents shall not cancel the allotment as interim arrangement. The certified copy of interim order dated 22.12.2016 was applied on 23.12.2016.

25. That meanwhile a letter dated 16.12.2016 from the respondent demanding payment of Rs. 45,539/- to be paid before 26.12.2016 on account of VAT Amnesty Scheme introduced by the Haryana Government with reference to the applicability of VAT under the Act on sale of construed property was received by the complainant.

26. The copy of order was supplied / delivered to complainants on 07.01.2017 as Hon'ble Courts were closed for winter vacation. The respondent cancelled the allotment of the apartment thought its letter dated 05.01.2017 i.e., before expiry of seven days as per well settled

legal preposition and without any intimation to the complainants. The respondent also conveyed that they have forfeited the entire amount paid by them i.e., Rs.49,97,862/-, though no such direction was passed by the Ld. Trial court to forfeit the amount, nor the respondent were entitled to forfeit the hard-earned money of the complainants.

27. That not only was the said cancellation wrongly made but also cancelled in an unfair manner without paying any refund of the monies to the complainants.

28. That the complainants filed application u/s 151 CPC in the Ld. Trial court on 10.01.2017 seeking permission to deposit the aforesaid amount subject to the submissions made in the said application. It is respectfully submitted that this application has not been adjudicated by the trial court.

29. That the respondent filed an application under Order 7 Rule 11 CPC for rejection of the plaint contending that the suit of the complainants herein is barred by law.

30. That the trial court has allowed the application under Order 7 Rule 11 CPC, vide order dated 31.10.2017, whereby learned trial court has dismissed the suit of the appellants and being aggrieved by the same, the complainants along with others filed an appeal against the said dismissal of the said Suit. However unfortunately the said appeal was also dismissed against the complainants.

C. Relief sought by the complainant:

31. The complainant has sought following relief(s):

(i) Direct the respondent to refund the total amount paid to them amounting to Rs. 49,97,862- along with interest calculated at the rate of 18% from the date of booking the apartment till date of realization.

(ii) Grant the cost of litigation of Rs. 1,00,000/- in favour of the complainant and against the respondent.

32. 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: -

33. 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.
34. That there is no cause of action to file the present complaint.
35. That the complainant has no locus standi to file the present complaint.
36. That the complainant is estopped from filing the present complaint by his own acts, omissions, admissions, acquiescence's, and laches.
37. 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 35 of the buyer's agreement.
38. That the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. 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:

39. That the complainant, after checking the veracity of the project namely, 'Corridor; sector 67-A, Gurugram applied for allotment of an apartment vide booking application form dated 25.03.2013. The complainant agreed to be bound by the terms and conditions stipulated in the application for provisional registration of the residential apartment.

40. That based on the application for booking, the respondent vide its allotment offer letter dated 12.08.2013 allotted to the complainant apartment no. CD-C6-06-604 having tentative super area of 1483.28 sq.ft for a total sale consideration of Rs. 1,46,05,050/- and the buyers agreement was executed on 30.04.2014.

41. That the complainant made certain payment towards the installment demands on time and as per the terms of the allotment. However, it started committed defaults from fourth installment demand onwards. Vide payment request dated 27.01.2015, the respondent had raised the demand of fourth installment for net payable amount of Rs. 16,67,426/- However, the complainant failed to pay the due amount only after reminder dated 16.03.2015.

42. That vide payment request dated 05.06.2016, the respondent had raised the demand of fifth installment for net payable amount of Rs. 30,89,357/-followed by a reminder dated 09.07.2015. However, the complainant failed to pay the due instalment amount.

43. That vide payment request dated 01.07.2015, the respondent had raised the demand of sixth installment for net payable amount of Rs. 45,11,288/- followed by reminder dated 28.08.015. However, the complainant again failed to pay the due installment amount.

44. That again vide payment request dated 02.09.2015, the respondent had raised the demand of seventh installment for net payable amount of Rs.

60,75,720/- followed by reminders dated 28.09.2015 and 10.02.2016. However, the same was never paid by the complainant.

45. That vide payment request 06.10.2015, the respondent had raised the demand of eighth installment for net payable amount of Rs. 74,97,652/- followed by reminders dated 07.01.2016 and 16.02.2016. However, the complainant again failed to pay the instalment amount.

46. That vide payment request dated 10.11.2015, the respondent had raised the demand of ninth installment for net payable amount of Rs. 89,19,583/- followed by reminders dated 07.01.2016 and 16.02.2016. Yet again complainant defaulted in abiding by its contractual obligations.

47. That on account of non-fulfilment of the contractual obligations by the complainant despite several opportunities extended by the respondent, the allotment of the complainant was cancelled, and the earnest money deposited by the complainant along with other charges were forfeited vide cancellation letter dated 05.01.2017 in accordance with clause 21 read with clause 21.3 of the apartment buyer's agreement.

48. That the complainant is a habitual litigator who has filed several baseless, false cases against the respondent on untenable grounds and most of them have already been dismissed by the competent authorities.

49. 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

50. 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

51. 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

52. 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.*

53. 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.

54. 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." SCC Online SC 1044*** decided on 11.11.2021 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."*

55. Furthermore, the said view has been reiterated by the Division Bench of Hon'ble Punjab and Haryana High Court in "***Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021***. The relevant paras of the above said judgment reads as under:

> ***"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no***

occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court, the Rules have to be in tandem with the substantive Act.

25) In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer."

56. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra),*** and the Division Bench of Hon'ble Punjab and Haryana High Court in ***"Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others. (supra)***, the authority has the jurisdiction to entertain a complaint seeking refund of the amount paid by allottee alongwith interest at the prescribed rate.

F. Findings on the objections raised by the respondent.

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

57. 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.

58. 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."*

59. 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."*

60. 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

61. 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:

> ***"35. 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".*

62. 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.

63. 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."*
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> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
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> ...
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

64. 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."*

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

G. Findings regarding relief sought by the complainant.

(i) Direct the respondent to refund the total amount paid to them amounting to Rs. 49,97,862/- along with interest calculated at the rate of 18% from the date of booking the apartment till date of realization.

66. The complainant has booked the residential apartment in the project named as 'The Corridors' situated at sector 67 A for a total sale consideration of Rs. 1,46,05,050/- The complainant was allotted the above-mentioned unit vide allotment letter dated 12.08.2013. Thereafter the apartment buyer agreement was executed between the parties on 30.04.2014.

67. The complainant pleaded that at the time of booking, the price of the booked unit was stated @ Rs. 8750/- per sq. ft. but thereafter when demand was raised, the basic sale price of the unit was increased to Rs. 9200/- per sq. ft. Even to substantiate that plea, reference has been made to the civil litigation initiated by the complainant along with others in case bearing No. CS 179/2016 before the Civil Courts at Gurugram and wherein the trial court restrained the respondent from cancellation of the allotted units on deposit of instalments due @ Rs. 8750/- sq. ft. within 7 days. No doubt certain directions in this regard were given by the civil court to the respondent and to be complied by the allottees but nothing is on the record with regard to their compliance. The suit filed in this regard was ultimately dismissed on the basis of an application under order 7 Rule 11 CPC and that order was admittedly upheld in appeal. So, the plea of the complainant with regard to the price of the allotted unit being @ Rs. 8750/- per sq. ft. instead of Rs. 9200/- per sq. ft. does not hold ground and is without any substance. Moreover, in the booking application the basic sale price is mentioned as Rs. 9200/- per sq. ft. and thereafter the builder buyer agreement was

executed interse parties on 30.04.2014 wherein the same basic sale price is also mentioned.

68. As per the payment plan the respondent started raising payments from the complainant. The complainant in total has made a payment of Rs. 49,97,862/- . The respondent vide letter dated 27.01.2015 raised the demand towards fourth instalment and due to non-payment from the complainant it sent reminder on 16.03.2015 and thereafter various instalments for payments were raised but the complainant failed to pay the same. Thereafter the respondent cancelled the allotment of the unit on 05.01.2017. The authority is of the view that cancellation is as per the terms and conditions of agreement and the same is held to be valid. However, while cancelling the allotment of the complainant, the respondent has forfeited the total paid up amount by way of earnest money, interest on delayed payment, brokerage and applicable taxes. It is contended on behalf of respondent that it was entitled to forfeit the paid up amount on account of earnest money, interest on delayed payments, statutory taxes and brokerage etc. So, the complainant is not entitled to claim any amount from it. But the plea advanced in this regard is devoid of merit. The cancellation of unit was made by the respondent after the Act of 2016 came into force. So, the respondent was not justified in forfeiting the whole of the paid amount under the above-mentioned heads. It could have at the most deduct 10% of the basic sale price of the unit and the statutory dues already deposited with the government. Though it has been argued on behalf of respondent that it has paid statutory charges to different authorities against the allotted unit and the same being non-refundable and even observed in this regard during the proceedings of the case dated 02.02.2023. But neither there is any evidence w.r.t. there payments nor

any details have been placed on the file which may entitle the builder to claim those charges under the head *statutory taxes.* Secondly, the respondent has not substantiated that the statutory taxes, paid if any have not been recovered from subsequent allottee after cancellation. So, under that head and for brokerage, the respondent can't be allowed to deduct any amount from the paid-up amount of the complainant. The issue w.r.t. deduction of earnest money arose before the hon'ble Apex Court of the land in cases of ***MaulaBux V/s Union of India (1970)1 SCR 928 and Sirdar KB Ramchandra Raj Urs V/s Sarah C Urs (2015) 4SCC 136*** and followed by NCDRC in cases of ***Ramesh Malhotra V/s EMAAR MGF Land Limited and Mr. Saurav Sanyal V/s M/s IREO Pvt. Ltd.*** decided on 12.04.2022 and wherein it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of "earnest money".

69. The deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

> ***"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 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."*

70. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the paid-up amount after deducting 10% of the sale

consideration of the unit being earnest money within 90 days along with an interest @ 10.60% p.a. on the refundable amount, from the date of cancellation i.e., 05.01.2017 till the date of its payment.

(ii) Grant the cost of litigation of Rs. 1,00,000/- in favour of the complainant and against the respondent.

71. 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: -

72. 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 promoter as per the functions entrusted to the authority under sec 34(f) of the Act:-

i. The respondent/promoter is directed to refund the paid-up amount of Rs. 49,97,156/-after deducting 10% of the sale consideration of the unit being earnest money within 90 days along with an interest @ 10.60% p.a. on the refundable amount, from the date of cancellation i.e., 05.01.2017 till the date of its payment.

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

73. Complaint stands disposed of.

74. File be consigned to the registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 02.02.2022