



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

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| Complaint no. | 1570 of 2022 |
| Date of filing complaint | 07.04.2022 |
| Reserved on: | 18.07.2023 |
| Date of pronouncement | 16.08.2023 |

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| 1. Anurag Mittal 2. Neha Narain Both R/O: House No. 21, 2 nd floor, Navjeevan Vihar, Sector-70A, Gurugram | Complainants |
| Versus | |
| 1. M/s Native Buildcon Pvt. Ltd. 2. M/s Countrywide Promoters Pvt. Ltd. Both R/O: OT-14, 3 rd Floor, Next Door, Parklands, Sector 76, Faridabad, Haryana 121004 3. Housing Development Finance Corporation Ltd. Residence: - Raman House, 169, Backbay Reclamation, Mumbai 40020 | Respondents |

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

None

Complainants

Shri Bhrigu Dhami (Advocate)

Respondents

ORDER

1. The present complaint 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 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for



violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

| S. N. | Particulars | Details |
|-------|--|---|
| 1. | Name of the project | BPTP Pedestal, Sector-70-A |
| 2. | Project area | 102.2 acres |
| 3. | Nature of the project | Residential complex |
| 4. | DTCP license no. and validity status | 15 of 2011 dated 07.03.2011 valid upto 06.03.2024 |
| 6 | Unit no. | D-43,T-F, 3 rd floor |
| 7 | Unit area admeasuring | 2207 sq. ft. |
| 8. | Allotment letter | 12.11.2013 (Page 59 of the reply) |
| 9. | Date of execution of agreement to sell | 06.12.2013 (Page 69 of the reply) |
| 10. | Possession clause | 1.4 of floor Buyer's agreement <i>1.4 "Commitment Period" shall mean, Subject to Force Majeure Circumstances,</i> |

| | | |
|-----|--|---|
| | | <p><i>intervention of Statutory authorities and Purchaser[s] Having timely complied with all its Obligations, formalities and/or prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default Under any Part of this Agreement' Including but not limited to the timely Payment of all instalments of the sale consideration as per the payment plan Opted, the Seller/Confirming Party shall Offer the possession of the Unit to the Purchaser[s] within at period of 36 Months from the date of execution of Floor Buyer's Agreement"</i></p> <p>1.15 "Grace Period" refers to the additional period of 180 days after the expiry of the committed period for making an offer of possession of the unit.</p> |
| 11. | Tripartite agreement | <p>09.12.2013 (Page 48 of the complaint)</p> |
| 12. | Due date of possession | <p>06.06.2017 [calculated from the date of floors buyers' agreement i.e. 06.12.2013 plus 180 grace period] Grace period is allowed</p> |
| 14 | Basic sale consideration | <p>Rs. 1,22,59,463/- (As per payment schedule page 61 of the reply)</p> |
| 15 | Amount paid by the complainants | <p>Rs. 56,16,730/- (As stated by the complainants)</p> |
| 16 | Occupation certificate /Completion certificate | N/A |

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| 17 | Offer of possession | N/A |
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B. Facts of the complaint:

3. The complainants have made the following submissions in the complaint:

1. That the complainants herein are law abiding citizens who have invested their hard-earned money to book a residential flat/apartment in the project proposed to be developed by the respondent no. 1 under the name and style "Pedestal @70A" located at Sector-70A, Gurugram, Haryana (hereinafter referred as "**project**") which was supposed to be handed over by the respondent no. 1 within 36 months from the date of execution of the Builder Buyer Agreement. However, till date, the Respondent Builder has miserably failed to hand over possession of the flat/unit to the Complainants till date despite a prolonged delay of almost 5 years. Moreover, the Respondent No. 1 has also failed to discharge its obligation to make payment of the Pre-EMI instalments in complete breach of the various agreements/ agreement for Sale executed by the Respondent Builder. Hence, the present Complaint is being preferred seeking inter-alia, refund/return of the total sale consideration amount received by Respondent No. 1 in respect of the subject allotment alongwith prescribed interest; refund of all outstanding Pre-EMI instalments of the loan availed by the Complainants alongwith penal interest imposed thereon by Respondent No. 2 on account of the long delay in making payment and/or non-payment of these Pre EMI

- amounts by the Respondent Builder; and a direction to the Respondent No. 1 to make timely payments of all future Pre-EMI Instalments along with interest (if any in case of delayed payments) alongwith compensation for violation of various provisions of the RERA Act, including but not limited to section 12, 18 & 19 of the act in addition to the provisions of the various agreements entered into between the parties/ agreement for sale.
2. That the subject project came to the knowledge of the complainants by the shrewd marketing gimmick of the respondents. The complainants were given representations of the high-class aesthetic apartment and the timely delivery of their projects. The complainants being simple people were caught into the trap and believed the respondents on the representations made by them which were subsequently proved to be false. The Complainant's being attracted by the tall claims and advertisements released by the Respondent no. 1 booked a unit with the Respondent no. 1 builder (hereinafter referred to as "Builder") in its project named as "Pedestal @ 70A" (hereinafter referred to as the "said project") and submitted an Application for provisional allotment dated 29.07.2013 along with an amount of Rs. 12,00,000/- for a Finished Unit.
 3. Subsequently the Builder issued the Allotment letter dated 12.11.2013 in favour of the complainants vide which the Complainant's were allotted unit no. D - 43 - TF (3-bedroom flat with servant quarter) under the subvention payment plan in the said project.
 4. That as the unit was booked under the subvention plan the

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Complainants were constrained to approach the financiers which were already associated with the Builder and had a prior agreement/ understanding with them.

5. That being constrained by the said dominating position exercised by the Developer the Complainant's were asked to approach the Respondent No. 2, i.e. HDFC Ltd. (hereinafter referred to as the "Financier"). Thus, the Complainants availed a loan of Rs. 1,00,18,288/- from the Financier. The Home loan agreement was executed between the Complainants and the Respondent no. 2 on 25.12.2013. In order to facilitate the said sub-vention scheme the builder issued permission to mortgage letter dated 13.11.2013 in favour of the financier.
6. The possession of the unit was to be handed over within the Commitment period (36 months from the date of execution of the Agreement). The Agreement further had a provision of a grace period of 180 days for making offer of possession. It is pertinent to note that the said period of 180 days is only to cover for events and would be applicable only if the OC has been applied for within the time period. It is pertinent to note that even as on date no OC has been received for the project even after a long and excruciating delay of around 8 years from the date of execution of the Agreement.
7. That corresponding to the malafide conduct on part of both the Respondents, the complainants have always had a bonafide conduct. They have always made payments in a timely manner. The Complainants have till date made a total payment amount to Rs. 55,99,730.50/- plus TDS deposited for an amount of Rs. 17,000/-,

against the total sale consideration of Rs. 1,38,18,060/- from which Rs. 22,60,313.50/- has been paid by the Complainants from their own pocket and Rs. 33,39,417/- has been paid by the Financier. It is imperative to note that till date the possession of the flat has not been delivered despite receipt of a considerable amount of the total sale consideration.

8. That the Respondent No. 1 has also not been making timely payments of the Pre-EMI charges despite receiving numerous reminders and requests from the Complainants which is in contravention of the terms of the Tripartite Agreement, thereby a gross violation of Section 18 and more specifically Sub Clause 3 of Section 18 of the RERA Act. As a result, the Complainants are being repeatedly constrained to make payment of the Pre EMI instalments for no fault of their own. That the Respondent No. 1 has wilfully neglected to pay the pre-EMIs from July, 2019, from which date the burden of clearing the Pre-EMIs has fallen upon the Complainants. It is submitted that till date the Complainants have paid a total amount of Rs. 5,68,366/- which has till date not been reimbursed by the Respondent No. 1 (Builder).
9. It is submitted that after issuance of the Agreement, the parties herein entered into the agreement in form of the 'Terms and Condition' as mentioned in the Agreement in respect of the mentioned unit. The Complainants were not allowed to make any changes to the terms which were completely one sided, arbitrary and unilateral in nature. The terms were drafted in such a manner that only the interest of the Respondent No. 1 was taken care off and that too without the consent of the Complainants. This

Agreement was clearly not in accordance with Model Form of Agreement as provided under the RERA Act. The Complainants, who had already made the substantial payments for the unit were not in a position to argue with the Respondent No. 1 and could not risk losing the entire amount.

10. That the Complainants had repeatedly requested the Respondent No. 1 to handover possession of the flat and pay the Pre-EMI Instalments till possession is handed over to the Complainants as per the terms of the No- Pre EMI Till Possession Scheme entered into by the Respondent No. 1. But after waiting for such an indefinite long period the Complainants have lost all hope and trust in the Respondents and seek refund of all amounts as per the prayer clause.
11. It is also important to note that the Respondent No. 1 has never communicated any reason for delay in the completion of the project and also there have been no *force majeure* circumstances which could lead to any delay in the completion of the project, rather, it has been due to the deliberate negligence and mismanagement on part of the Respondent No. 1.

C. Relief sought by the complainants:

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

- i. Direct the respondents to refund the entire paid-up amount along with interest at the prescribed rate.
- ii. Direct the respondent to pay compensation and litigation costs.

D. Reply by respondents:

5. The respondents by way of written reply made following submissions:

- I. That the complainants have alleged to having placed reliance on the alleged various representations made by the respondent no. 1 for booking a unit in question, whereas the complainants have approached the respondent on their own volition, after conducting due diligence of the relevant real estate geographical market and after ascertaining the financial viability of the same.
- II. In this regard, it is submitted that the complainants are investors and have booked the unit in question to yield gainful returns by selling the same in the open market, however, due to the ongoing slump in the real estate market, the complainants have filed the present purported complaint to wriggle out of the agreement which they are lawfully not entitled under the said agreement. The complainants have wrongly stated in the complaint under reply that vide Clause G (1) of the Application Form, the possession of the unit was to be handed over within a period of 36 months from the execution of Agreement. As a matter of record, vide said Clause, subject to force majeure circumstances and not being in default under any part thereof including but not timely payment of the instalments of the cost of property, the Respondent proposed to offer possession of the unit in question within a period of 36 months from the execution of the Agreement along with additional grace period of 180 days after expiry of the said commitment period.
- III. That the complainants have approached this authority with unclean hands by distorting/concealing/misrepresenting the

relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the Complainants is to unjustly enrich themselves at the expense of the Respondent by filing this frivolous Complaint which is nothing but gross abuse of the due process of law. It is further submitted that in light of the law laid down by the hon'ble apex court, the present complaint warrants dismissal without any further adjudication.

IV. It is further submitted that the detailed reliefs claimed by the Complainants go beyond the jurisdiction of this Authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present Complaint is not maintainable qua the reliefs claimed by the Complainants. It is further submitted that, the above submission implies that while entering into the Agreement, the Complainants had the knowledge that there may arise a situation whereby the possession could not be granted to the Complainants as per the commitment period and in order to protect and/or safeguard the interest of the Complainants, the Respondent have provided reasonable remedy under Clause-6, and, the Complainants having accepted to the same in totality, cannot claim anything beyond what has been reduced to in writing between the parties. In this regard, reference may be made to Section-74 of the Indian Contracts Act, 1872, which clearly spells out the law regarding sanctity and binding nature of the ascertained amount of compensation provided in the Agreement and further specifies that any party is not entitled to anything beyond the same. Therefore, the Complainants, if at all, are only entitled to compensation under Clause-6 of the

Agreement. It is further submitted that having agreed to the above, at the stage of entering into the Agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the Agreement, the Complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the 'Doctrine of Aprobate & Reprobate". In this regard, the Respondent reserves its right to refer to and rely upon decisions of the Hon'ble Supreme Court at the time of arguments, if required. Therefore, in light of the settled law, the reliefs sought by the Complainants in the Complaint under reply cannot be granted by this Authority.

- V. The agreements that were executed prior to the registration of the project under Rera shall be binding on the parties and cannot be re-opened. In terms of the Rules, the Government prescribed the agreement for sale and specified the same in Annexure A of the Rule 8(1) of the Rules. Rule 8(2) provides that any documents such as allotment letter or any other document executed post registration of the project with the RERA between the promoter and the allottee, which are contrary to the form of the agreement for sale, Act or Rules, the contents of the form of the agreement for sale, Act or Rules shall prevail. It is very important to note that the Rule 8 deals with documents executed by and between promoter and allottee after registration of the project by the Promoter, however with respect to the documents including agreement for sale/ flat buyers agreement/plot buyers agreement executed prior to the registration of the project which falls within the definition of "Ongoing Projects" explained herein below and



where the promoter has already collected an amount in excess of 10 percent of the total price Rule 8 is not applicable.

- VI. The Complainant himself is a defaulter/offender under section 19 (6) and 19 (7) of The Real Estate (Regulation and Development) Act, 2016 and not in compliance of these sections. The Complainant cannot seek any relief under the provision of The Real Estate (Regulation and Development) Act, 2016 or rules frame thereunder. The Last and Final Opportunity letter has been sent in the ground of non-payment of outstanding amount to the Respondent no. 1. The Complainants intentionally waived and relinquished their rights in lieu of the allotment of the Unit and hence, the Unit was considered terminated. Accordingly, in the event that you fail to strictly adhere to the complete terms of this final demand notice and the agreements, such action on your part shall amount to a voluntary, conscious and intentional waiver and relinquishment by you of all your rights and privileges under the terms of the agreements and this letter shall, in exercise of our rights under the terms of the agreements, be treated as termination/cancellation of allotment of the aforesaid unit and you shall cease to have any right or interest whatsoever in the said unit or under the Agreements and shall also be liable to forfeiture of earnest money deposit, accumulated interest and brokerage paid (if any). Further, we shall deal with the said unit in any manner as we may deem fit. That vide this letter, the last opportunity was granted to the Complainants. It is pertinent to note at this instance that prior to the same, 4 reminders were already given in 2018 - reminders dated 07 March 2018, 09 April

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2018, 04 July 2018, and 23 Aug 2018. However, despite the same, the Complainants continued to stay in default and hence, intentionally waived and relinquished their rights under the Unit. It is evident from the spirit of the letter that such intentional waiver would amount to termination of the Unit. Consequently, the account with Respondent no. 2 was settled. In such a circumstance, the answering respondents, who have ensured the due compliance of their obligations are within their rights to deduct the earnest money along with interest on delayed payments, brokerage, if any, and any other non-refundable amounts.

VII. The complainants are in breach of the agreement for non-invocation of arbitration. The parties had agreed under the Floor Buyer's Agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Clause 16 of the Agreement is reproduced below for ready reference-

"16. All or any disputes arising from or out of or touching upon or in relation to the terms or formation of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion, failing which the same shall be settled through Arbitration. The Arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996, or any statutory amendments, modifications or re-enactment thereof for the time being in force. A Sole Arbitrator, who shall be nominated by the Seller/Confirming Party's Managing Director, shall hold the arbitration proceedings at New Delhi. The arbitration proceedings shall be held in English language and decision of the Sole Arbitrator including but not limited to costs of the proceedings/award shall be final and binding on the Parties. The Purchaser(s) hereby confirms that he shall have no objection to such appointment.

VIII. Admittedly, the Complainants have raised dispute but did not take any steps to invoke arbitration. Hence, is in breach of the agreement between the parties. The allegations made requires proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.

6. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and written submissions made by the parties and who reiterated their earlier version as set up in the pleadings.

E. Jurisdiction of the authority:

7. The plea of respondent regarding lack of jurisdiction of Authority stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

8. 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

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

10. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2021 (1) RCR (c) 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint

reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondents:

F.I Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to registration of project.

11. The respondent submitted that the complaints are 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.
12. 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

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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."

13. 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."

14. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F.II. Objection regarding complainant is in breach of agreement for non-invocation of arbitration clause

15. The respondents submitted that the complaints are 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:

"16 DISPUTE RESOLUTION:

A or any disputes arising from or out of or touching upon or in relation to the terms or formation of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments, modifications or re-enactment thereof for the time being in force. A Sole Arbitrator shall be nominated by the Seller/Confirming Party's Managing Director, shall hold the arbitration proceedings at New Delhi. The arbitration proceedings shall be held in English language and decision of the Sole Arbitrator including but not limited to costs of the proceedings/award shall be final and binding on the Parties. The Purchaser(s) hereby confirms that he shall have no objection to such appointment".

16. 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.

17. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

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

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

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate 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.

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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."

18. 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."

19. 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. Entitlement of the complainants for refund:

G.I Direct the respondents to refund the entire paid-up amount along with interest at the prescribed rate.

20. In the instant case, the BBA for the subject unit was executed on 06.12.2013. According to the agreement, the due date of possession comes out to be 06.06.2017. However, the occupation certificate for the tower where complainant unit is situated not received. Keeping in view the fact, and hence the complainant is entitled for full refund.

21. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by **Hon'ble Supreme Court of India in Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021**

"" The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

22. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)** reiterated in case of **M/s Sana**



**Realtors Private Limited & other Vs Union of India & others SLP
(Civil) No. 13005 of 2020 decided on 12.05.2022. it was observed**

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed

23. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

24. The authority hereby directs the promoter to return the amount received by it i.e., Rs. 55,99,730/- with interest at the rate of 10.75% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

h

G.II Direct the respondent to pay compensation and litigation costs.

25. The complainants in the aforesaid relief are 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:

26. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016.

- i. The respondent/promoter is directed to refund the amount received by it i.e., Rs. 55,99,730/- from the complainants along with interest at the rate of 10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.

- ii. 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.

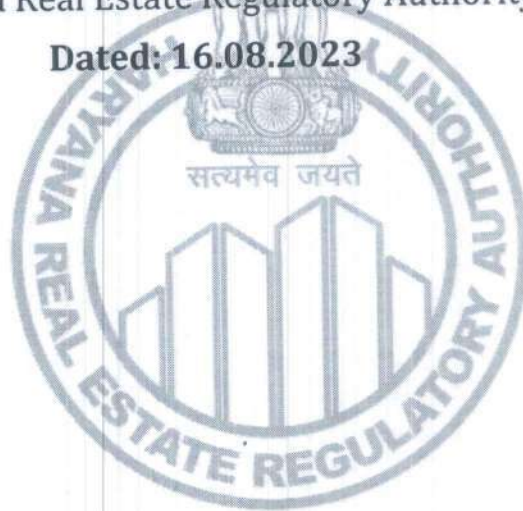
27. Complaint stands disposed of.

28. File be consigned to the registry.

Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.08.2023



HARERA
GURUGRAM