BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1169 of 2021**
First date of hearing:	**31.03.2021**
Date of Decision:	**26.05.2023**

Rupan Ahluwalia **R/O:** H.no. D-393, Defence Colony, New Delhi-110024	**Complainant**
Versus	
1. Ireo Grace Realtech Private Limited **Registered Office:** - C-4, 1st Floor, Malviya Nagar, New Delhi-110017 2. India Infoline Housing Finance Limited **Office:** Plot no. 98, Udyog Vihar, Phase IV, Sector-18, Gurgaon, Haryana- 122016	**Respondents**

CORAM:	
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:	
Shri Gaurav Bhardwaj	Advocate for the complainant
Shri M.K Dang	Advocate for the respondent no. 1
None	Advocate for the respondent no. 2

ORDER

1. The present complaint dated 05.03.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the 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.	402,4TH Floor, A7 Tower (page no. 29 of complaint)
7.	Unit measuring	1920.22 sq. ft. (page no. 29 of complaint)
8.	Date of approval of building plan	23.07.2013

		(annexure R36 on page no. 79 of reply)
9.	Date of allotment	07.08.2013 (annexure R-2 on page no. 37 of reply)
10.	Date of environment clearance	12.12.2013 (annexure R-37 on page no. 83 of reply)
11.	Date of execution of builder buyer's agreement	25.07.2014 (page no. 26 of complaint)
12.	Date of tripartite agreement	27.10.2015 (page no. 87 of complaint)
13.	Date of fire scheme approval	27.11.2014 (annexure R-38 on page no. 94 of reply)
14.	Due date of delivery of possession	23.01.2017 (calculated from the date of approval of building plans) Note: Grace Period is not allowed.
15.	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 fulfillment 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)
16.	Reminders for payment	**For Third Instalment:** 13.04.2014, 04.05.2014, Final notice: 18.02.2015, 23.02.2015 **For Fourth Instalment:** 22.02.2015, 24.03.2015 **For Fifth Instalment:** 07.10.2015, 12.11.2015 **For Sixth Instalment:** 07.01.2016, 10.02.2016 **For Seventh Instalment:** 07.01.2016, 10.02.2016 (part payment made) **For Eight Instalment:** 29.02.2016, 14.03.2016, 23.03.2016 **For Ninth Instalment:** 28.03.2016, 19.04.2016
17.	Cancellation letter	18.10.2017 (page no. 104 of complaint)
18.	Total consideration	Rs. 2,15,64,269/- [as per payment plan on page no. 62 of complaint]
19.	Total amount paid by the complainant	Rs. 37,21,564/- [as per receipts annexed on page no. 13-14 of complaint]
20.	Occupation certificate	31.05.2019 (annexure R-41 on page no. 99 of reply)
21.	Offer of possession	Not offered but cancelled

B. Facts of the complaint

The complainant has submitted as under:

3. That believing the false assurances and misleading representations of the respondent/builder, the complainant booked an apartment in the said project of the respondent/builder by filling a booking letter on 14.03.2013 for a total sale consideration of Rs. 2,15,64,269/- and paid an amount of Rs. 18,00,000/- .

4. That the complainant many times requested the promoter to execute the builder buyer agreement or any such other agreement as till date there was no binding agreement which was executed between the parties. The complainant communicated with the respondent/promoter through numerous emails, but all in vain.

5. That further once the complainant had signed the letter of booking and made the payment towards booking amount as well as the next payment due on them, the complainant then approached the respondent/promoter and further asked them for issuing allotment letter and signing of the buyer's agreement as the complainant has to avail the loan facility on the said property. Despite the filling of the booking application and making the timely payment of Rs. 18, 00,000/- and Rs 19, 21,564/- respectively, the complainant was given false promises on account of issuance of the allotment letter and signing of the buyer's agreement. It was only on 07.08.2013 after a rigorous follow up of complainant with the respondent/promoter that they had issued allotment offer letter.

6. That 3 copies of apartment buyer's agreement were sent vide letter dated 20.12.2013 and the same was requested to get signed and returned as soon as possible. But thereafter a letter dated 24.12.2013 was sent by the respondent/promoter wherein it was mentioned that the apartment

buyer's agreement sent to the complainant carries a formatting deficiency which was detected during proof reading and thus requested the complainant not to sign them and suggested that alternatively they are managing to send fresh set of apartment buyer's agreement.

7. That in the absence of the pre requite documentation from the respondent/promoter the complainant could only apply for the said home loan on the said property in the month of April 2015 as even after applying for the loan the complainant had to run from pillar to post in the office of the promoter in order to get the documentation complete for the purpose to get the loan sanctioned from IIFL. That a tripartite agreement dated 27.10.2015 was executed between complainant, promoter and IIFL. Despite such all odds and that looking up to the credentials of the complainant the IIFL was pleased to sanction a loan for Rs. 2 crores vide confirming mail dated 01.09.2015. Although the actual amount so sanctioned was of Rs. 1,53,00,000/- vide letter dated 29.10.2015. The loan was sanctioned, and the disbursal request form was applied for the release of payment of Rs 82,87,030/-

8. That as the project was continuously getting delayed and there is no sign of its completion even in nearby future times, despite the facts that respondent/promoter was, without any failure, kept on demanding the pending payments due from the customers and to the utmost surprise where respondent/promoter was at default in getting the project delayed, contrary it was respondent/promoter who in turn was charging hefty amounts of interest on any of the delayed payments made by the customers. While enquiring about the fate of the project, complainant heard and read some negative news regarding the said project of respondent/promoter and on dated 17.03.2016 received an email from respondent/promoter whereby they showed their concerns to the said

news regarding the delay of the said project and to safeguard themselves, respondent/promoter in a very clever move shifted the onus of getting the project delayed on to the parliamentary decision on RERA, which was pending for the approval for quite a long time and the respondent/promoter in order to cover up their shortfalls, put all the garb on the said regulation and painted it as real cause of such delay.

9. That on going through the said news and getting no satisfactory response from them, complainant felt that they has cheated the complainant and has grabbed the hard-earned funds of complainant without any proper documentation and as the complainant or any person with common sense or prudence would not want to get stuck in such project which has no future prospects. And even after this delay, respondent/promoter was still demanding the payments from complainant on regular basis and religiously following up the payment to be made. Also the project of respondent/promoter was actually represented as a soft launch sale only without necessary and statutory documents getting ready and sharing incomplete information with their clients which is illegal, and this is for this reason only that the respondent/promoter has opted for the period of 42 months from the date of such approval to initiate project and afterwards a grace period of 6 months in order to complete project and or in order to offer the allotee the benefits of delayed penalty.

10. That after waiting for almost 4 years from the date of booking of the said apartment, the complainant started losing the patience and thus complainant requested respondent/promoter to make transfer the funds to next better property option but respondent/promoter denied that the same cannot be done on lame excuses made and further threatened the complainant that in case of cancellation of the booking the same shall be liable for heavy deductions. At this when the complainant wanted to exit

the said project the respondent/promoter diligently kept on demanding the amount of funds, that as per the mail sent by respondent/promoter on 09.08.2017 instead of taking the complainant in confidence the respondent/promoter rather was more interested in extorting the payment dues as per the schedule

11. That to the surprise of the complainant in response of her various mails regarding the exit plan or transfer of the amount so paid to some other project managed by them, in between the complainant on 09.10.2017, sent an email to the respondent/promoter showing his wish to visit the site. But to the bitter and shocking surprise of the complainant, the respondent/promoter on 18.10.2017, sent an email mentioning that the said booked unit of the complainant stands cancelled in their record.
12. That in reply to the above said email the complainant sent mails on 01.11.2017 and on 16.11.2017 to the respondent/promoter, asking for the basis of the said cancellation and the account summary. The complainant showed his concern that in the event of such cancellation why the IIFL was not informed, and why the money so advanced by the IIFL or even by the complainant herself was not returned.
13. That thereafter the complainant has sent various emails requesting the respondent/promoter to return the money and provide statement of accounts. Due to non- payment to IIFL, the account of the complainant has been turned NPA on 04.02.2019. The respondent/promoter was to return the money in 2017 itself when they unilaterally cancelled the apartment of the complainant as per the tripartite agreement but have illegally withheld the amount. The IIFL is now demanding a sum of Rs.67,61,158/- including principal and other charges, if the money would have been returned timely then the other interest and penal charges

would not have been levied, which the respondent/promoter is liable to pay.

14. That the present complaint has been filed under Section 31 read with Section 18(1) in order to seek refund of the principal amount paid by the complainant along with interest at the rate prescribed as per RERA, 2016 and HRERA Rules, 2017 from the date of receipt of payment till the date of refund, along with compensation for the mental stress and torture as well as financial and physical loss suffered by the complainant due to the fraudulent acts of the respondent no.1.

C. Relief sought by the complainant:

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

(i) Direct the respondent/promoter to refund the total amount of complainant which is Rs. 37,21,564/- to complainant along with the interest at the prescribed rate from the date of receipt of each instalment of payment till the date of refund.

(ii) Direct the respondent no. 2 to recover the loan amount from the respondent no. 1 keeping in view the tripartite agreement and issue NOC to the complainant regarding no liability of theirs towards the respondent no. 2.

(iii) Direct the respondent/promoter that compliant has been harassed mentally, physically and financially by them thus they are liable to pay compensation along with interest @ 18% p.a.

16. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent no. 1.

The respondent/promoter has contested the complaint on the following grounds: -

17. 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 complainant and respondent no. 1 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.
18. That there is no cause of action to file the present complaint.
19. That the present complaint is not supported by a proper affidavit and it is liable to be dismissed on this short ground alone.
20. That the complainant has not filed the present complaint in the proper format as per the Haryana Real Estate (Regulation and Development) Rules, 2017.
21. That the complainant has no locus standi to file the present complaint.
22. That the complainant is estopped from filing the present complaint by his own acts, conduct, omissions, admissions, acquiescence and laches.
23. That this Hon'ble Authority does not have the jurisdiction to try and decide the present complaint.
24. That the present complaint is barred by limitation.
25. 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 buyers agreement.
26. That the complainant has 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:

27. That the complainant, along-with co-applicant Sh. Kamal Ahluwalia after checking the veracity of the project namely, 'The Corridors', Sector 67A, Gurugram had applied for allotment of an apartment vide her booking application form dated 22.03.2013.

28. That based on the said application, respondent no. 1 vide its allotment offer letter dated 07.08.2013 allotted to the complainant apartment no. CD-A7-04-402 having tentative super area of 1920.22 sq. ft. for a total sale consideration of Rs 2,15,64,269/-. When the complainant had booked the unit with respondent no. 1, the Real Estate (Regulation and Development) Act, 2016 was not in force and the provisions of the same cannot be applied retrospectively.

29. That respondent no. 1 raised payment demands from the complainant in accordance with the agreed terms and conditions of the allotment as well as of the payment plan and the complainant made some payments in time and then started delaying and committing defaults. The respondent no. 1 had raised the second installment demand on 14.04.2013 for the net payable amount of Rs 19,21,564/-. However, the complainant made the payment towards the second installment only after issuance of reminder dated 14.05.2013.

30. That respondent no. 1 had sent the apartment buyer's agreement to the complainant vide letters dated 31.01.2014 and 12.03.2014. However, the complainant signed the same on 25.07.2014 only after reminders dated 28.05.2014 and 17.07.2014 were sent by respondent no. 1. Vide payment request dated 18.03.2014, respondent no. 1 raised the third installment demand for a net payable amount of Rs. 28,79,883/-. However, the complainant failed to remit the due amount despite reminders dated 13.04.2014 and 04.05.2014 and final notices dated 18.02.2015 and 23.02.2015.

31. That respondent no. 1 had raised the fourth installment demand on 27.01.2015 for the net payable amount of Rs. 57,37,457/-. However, the complainant failed to remit the demanded amount despite reminders dated 22.02.2015 and 24.03.2015 and the same was adjusted in the next installment demand as arrears.
32. That vide payment demand dated 10.09.2015, respondent no. 1 raised the payment demand towards the fifth installment for net payable amount of Rs. 82,87,030.11. However, the complainant yet again failed to remit the demanded amount despite reminders dated 07.10.2015 and 12.11.2015 and the same was adjusted in the next installment demand as arrears.
33. That on account of paucity of funds, the complainant had availed loan facility from India Infoline Housing Finance Limited (hereinafter referred to as IIFL) and accordingly a tripartite agreement dated 29.10.2015 was entered into between the parties to the complaint with IIFL.
34. That vide payment demand dated 02.11.2015, respondent no. 1 raised the payment demand towards the sixth installment for net payable amount of Rs. 1,08,36,602/-. However, the complainant failed to remit the demanded amount despite reminders dated 07.01.2016 & 10.02.2016 and the same was adjusted in the next installment demand as arrears.
35. That vide payment demand dated 01.12.2015, respondent no. 1 raised the payment demand towards the seventh installment for net payable amount of Rs. 1,28,63,251.39. However, the complainant remitted only part-payment despite reminders dated 07.01.2016 & 10.02.2016.
36. That vide payment demand dated 03.02.2016, respondent no. 1 raised the payment demand towards the eighth installment for net payable amount of Rs. 64,59,745.99. However, the complainant failed to remit the

demanded amount despite reminders dated 29.02.2016, 14.03.2016 and 23.03.2016 the same was adjusted in the next installment demand as arrears.

37. That vide payment demand dated 01.03.2016, respondent no. 1 raised the payment demand towards the ninth installment for net payable amount of Rs. 83,43,270.59. However, the complainant failed to remit the demanded amount despite reminders dated 28.03.2016 and 19.04.2016 the same was adjusted in the next installment demand as arrears.

38. That respondent no. 1 vide demand dated 14.02.2017 sent the tenth installment for the net payable amount of Rs. 94,96,460/-. However, the complainant failed to remit the due amount.

39. That the respondent no.2 vide its email dated 17.08.2017 intimated respondent no.1 that the complainant had defaulted in repayment of monthly loan installments despite repeated requests and that the complainant had been classified as Non-Performing Asset. Respondent no.2 further intimated that as per the terms and conditions of the tripartite agreement dated 29.10.2015, respondent no.2 had revoked the same. Accordingly due to failure of the complainant to make timely payment of installments within the agreed time schedule which was the very essence of the allotment, respondent no.1 was left with no other option to cancel the allotment of the unit in accordance with the clause 7 read with clause 11 of the booking application form. The same was duly intimated to the complainant and the same is very much borne out from the several communications attached by the complainant along with complaint filed by her. Therefore, the complainant is now left with no right, title or interest in the previously allotted unit to her as the same stands cancelled.

40. That the complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, her calculations went wrong on account of slump in the real estate market and complainant did not possess sufficient funds to honour her commitments. The complainant was never ready and willing to abide by her contractual obligations and she also did not have the requisite funds to honour her commitments.

41. That according to clause 43 of schedule- I of the booking application form and clause 13.3 of the buyer's agreement, respondent no. 1 was to offer the possession to the complainant within a period of 42 months + 180 days grace period from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder. Furthermore, complainant had undertaken in clause 44 of Schedule- I of the booking application form and clause 13.5 of the apartment buyer's agreement for an extended delay period of 12 months from the date of expiry of the grace period. From the aforesaid terms of the booking application form and buyer's agreement, it is evident that the time was to be computed from the date of receipt of all requisite approvals. Even otherwise construction could not be raised in the absence of the necessary approvals. It has been specified in sub- clause (iv) of clause 17 of the memo of approval of building plan dated 23.07.2013 of the said project that the clearance issued by the Ministry of Environment and Forest, Government of India has to be obtained before starting the construction of the project. The environment clearance for construction of the said project was granted on 12.12.2013. Furthermore, in clause 39 of part-A of the environment clearance dated 12.12.2013 it was stated that fire safety plan duly was to be duly approved by the fire department before the start of any construction work at site. The fire scheme approval was

granted on 27.11.2014 and the time period for offering the possession, according to the agreed terms of the booking application form and buyer's agreement, would have expired only on 27.11.2019. There could not be any delay till 27.11.2019.

42. That despite failure of the complainant to adhere to her contractual obligations of making payments, respondent no. 1 has completed the construction of the tower in which the unit previously allotted to the complainant was located. Moreover, respondent no. 1 had applied for the grant of occupation certificate vide application dated 06.07.2017. The occupation certificate was granted to respondent no. 1 on 31.05.2019. Moreover, respondent no.1 has already repaid a sum of Rs.57,50,000/- to respondent no.2 and now no amount whatsoever on any account is refundable to the complainant and the present complaint has been filed with totally mala fide motives in order to blackmail, pressurize and harass the respondent no.1.

43. That the fact of the matter is that the complainant is a real estate investor who had booked the apartment in question for earning quick profit. However, on account of the slump in the real estate sector, her calculations went wrong. The only intention of the complainant is to keep respondent no. 1 entangled in false, baseless and untenable litigation. The complaint being an abuse of the process of law is liable to be dismissed.

44. 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

45. The respondent/promoter 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

46. 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

47. 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.*

48. 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.

49. 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."*

50. 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 respondent no. 1.

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.

51. The respondent/promoter submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the buyers agreement was executed between the complainant and the respondent prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

52. The authority is of the view 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. 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 would be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The 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*** 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."

53. Further, 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."

54. 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 application form for non-invocation of arbitration

55. The respondent/promoter 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:

> ***"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".*

56. 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.

57. 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 Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> ...
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

58. 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."*

59. 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/promoter stands rejected.

G. Findings regarding relief sought by the complainant.

(i) Direct the respondent/promoter to refund the total amount of complainant which is Rs. 37,21,564/- to complainant along with the interest at the prescribed rate from the date of receipt of each instalment of payment till the date of refund.

(ii) Direct the respondent no. 2 to recover the loan amount from the respondent no. 1 keeping in view the tripartite agreement and issue NOC to the complainant regarding no liability of theirs towards the respondent no. 2.

60. The complainant-allottee booked a residential apartment in the project of the respondent/promoter named as "Corridors" situated at sector 67-A, Gurgaon, Haryana for a total sale consideration of Rs. 2,15,64,269/-. The allotment of the unit was made on 07.08.2013. Moreover, the builder buyer agreement was executed between the parties on 25.07.2014.

61. As per the payment plan the respondent/promoter started raising payments from the complainant but they defaulted to make the payments. The complainant-allottee in total has made a payment of Rs. 37,21,564/-. The respondent/promoter vide letter dated 13.04.2014 raised the demand towards third instalment and due to non-payment from the complainant it sent reminders on 04.05.2014 and 18.05.2015 and thereafter various instalments for payments were raised but the complainant failed to pay the same. Further the respondent sent final notice dated 19.04.2016. Thereafter the respondent cancelled the allotment the unit vide email dated 18.10.2017. The occupation certificate of the tower where the allotted unit is situated has been received on 31.05.2019.

62. The respondent-builder took a plea that after the cancellation of allotted unit on 18.10.2017, the complainant filed the present complaint on

05.03.2021 i.e., after more than 3 years and thus, is barred by the limitation. The authority observes that the cancellation was done on 18.10.2017 and the period for filing complaint was expired on 18.10.2020 further the complainant is also entitled for a grace period of 6 months which expired on 18.04.2021. So, the complaint is well within its period. The promoter was required to refund the balance amount as per applicable cancellation clause of the buyer's agreement. The balance amount has not been refunded which is a subsisting obligation of the promoter as per the booking application form as well as builder buyer agreement. 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.

63. 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.

64. 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"

65. Keeping in view the aforesaid legal provisions, the respondent/promoter is directed to refund the deposited amount i.e., Rs. 37,21,564/- after deducting 10% of the basic sale price of the unit within a period of 90 days from the date of this order along with interest @ 10.70% p.a. on the refundable amount from the date of cancellation i.e., 18.10.2017 till the date of its payment.

(iii) Direct the respondent/promoter that complainant has been harassed mentally, physically and financially by them thus they are liable to pay compensation along with interest @ 18% p.a.

66. 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

67. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondent /promoter is directed to refund the deposited amount of Rs. 37,21,564/- after deducting 10% of the basic sale price of the unit along with interest @ 10.70% p.a. on the refundable amount from the date of cancellation i.e., 18.10.2017 till the date of its payment.

ii. The respondent/promoter is further directed that the outstanding loan amount paid by the financial institution be refunded to the concerned financial institution.

iii. The balance amount with the respondent builder after paying to the financial institution be refunded to the complainant.

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

68. Complaint stands disposed of.

69. File be consigned to the registry.

(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 26.05.2023