



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

Complaint no.	1271 of 2021
Date of filing complaint	24.03.2021
Reserved on:	21.04.2023
Date of pronouncement	19.05.2023

Mr. Ajay Malhotra Address:- N-31, TARA Apartments, Alaknanda, Kalkaji, New Delhi-110019	<b>Complainant</b>
Versus	
M/s Native Buildcon Pvt. Ltd. All having registered office at: M-11, Middle Circle, Connaught Circus, New Delhi-110001	<b>Respondents</b>

<b>CORAM:</b>	
Shri Sanjeev Kumar Arora	<b>Member</b>
<b>APPEARANCE:</b>	
Shri Kanish Bangia (Advocate)	Complainant
Shri Harshit Batra (Advocate)	Respondents

**ORDER**

1. The present complaint 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 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. No.	Heads	Details
1.	Name of the project	Pedestal Sec-70 & 70A, Gurugram
2	Project area	102.2 acres
3	Allotment Letter	12.10.2017 (Page 23 of complaint)
4	Unit no.	D-42-FF (Page 161 of complaint)
5	Unit area admeasuring	1603 sq. ft.
6	Date of provisional allotment	12.11.2013 [Page 161 of complaint]
7.	Date of execution of Apartment Buyer's Agreement	25.11.2013 [page 82 of complaint]
8	Possession clause	<b>1.4 of floor Buyer's agreement</b> 1.4 "Commitment Period" shall mean, Subject to Force Majeure Circumstances, intervention of Statutory authorities and Purchaser(s) Having timely complied with all its Obligations, formalities and/or prescribed/requested By

		<p>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</p> <p>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''</p> <p><b>[page 71, of reply]</b></p>
9	Due date of possession	<p><b>25.05.2017</b></p> <p>[calculated from the date of floors buyers' agreement i.e. 25.11.2013 plus 180 grace period]</p> <p>Grace period is allowed</p>
10	Total sale consideration	<p><b>Rs.1,26,44,469/-</b></p> <p>[as per payment plan at page 162 of the complaint]</p> <p><b>Rs. 1,68,66,981.80/-</b></p> <p>[as per SOA dated 14.10.2017 at page 59 of complaint]</p>
11	Amount paid by the complainant	<p><b>Rs. 51,55,926/-</b></p> <p>[as per SOA dated 14.10.2017 at page 59 of complaint]</p>
12	Occupation certificate /Completion certificate	<p><b>18.06.2021</b></p> <p><b>[page 154 of reply]</b></p>



13	Offer of possession	22.01.2021 [page 57 of complaint]
14	Tripartite agreement	25.11.2013 [page 93 of reply]
15	Settlement agreement	30.08.2018 [page 121 of reply] Since there was delay in payment by complainant, to resolve the issues inter-se parties, a settlement agreement dated 30.08.2018 was executed wherein as per clause 2 stating that the balance amount shall be payable at the time of offer of possession. It was also stated that no delay payment charges will be charges and in lieu the allottee waive off his right to claim compensation for delay in possession.

**B. Facts of the complaint:**

3. The complainant has made the following submissions in the complaint:
- That the complainant on various representations and assurances by the respondent filed the provisional booking/ registration application of the unit in the project on the date 07.11.2013 as per clause 'e' of the flat buyer's agreement . That the complainant made a payment of approximately 50% of the total consideration towards the total basic sale price (hereinafter referred to as the BSP), covered car parking, club membership

- charges, power backup, electrification & STP charges, utility connection charges, power backup installation charges, goods and service tax of the unit from 2013 onwards. The complainant opted for construction linked plan and made payments promptly and in a timely manner as and when the demand letters were raised by the respondent.
- ii. That the respondent company issued a notice of offer of possession dated 22.01.2021 intimating of constructive possession of unit No. D-42-FF (hereinafter referred to as 'unit') admeasuring 1603 sq. ft. (super built-up area) in the aforesaid project for a total sale consideration of Rs. 1,26,44,469.00 including basic sale price, development charges etc. From 2013 till the delivery of offer of possession, whenever the complainant wanted to go to the office of the respondent and requested the respondent to allow them to visit the site, they were denied saying that they do not permit any buyer/allottee to see the site during the construction period.
- iii. That though the payment to be made by the complainant was to be made based on the construction on the ground, unfortunately the demands being raised were not corresponding to the factual situation of construction on ground and the payments were still asked for by the respondent.
- iv. That after the payment of each and every demand letter, the complainant was in the hope that he will get possession of the unit soon, but the dreams of the complainant were shattered and scattered as the respondent left no stone unturned to cheat the complainant and extract money from the complainant, when all the while, the development on the site was not in line with the

construction linked plan based on which the payment was being collected. That the complainant lost hope of getting physical possession of the unit and also their hard-earned money, as neither the agents of the respondent nor the company itself were responding about the status or the date of the physical possession of the unit/flat.

V. The respondent demanding for all the illegal amounts like covered car parking, Club Membership Charges, Power Backup, Electrification & STP Charges, Utility Connection Charges, Power Backup Installation Charges, Goods and Service Tax and IFMS (Rs. 71,500) and being unfair and unjust has made Complainant seek out the adjudicating officer of Haryana real estate and regulatory authority for refund of all the amount of total sale consideration paid by the complainant. The complainant contacted the respondent on several occasions and was regularly in touch with the respondent. The respondent was never able to give any satisfactory response to the complainant regarding the status of the construction and was never definite about the delivery of the physical possession. some or the other reason was being given. Unfair and unjust demands of funds made in additional charges on offer of possession. The following charges levied by respondent are not charged as specified in the BBA and hence are not payable at all:

- i. Electrification & STP Charges- Rs. 1,67,005,.80
- ii. Utility Connection Charges- Rs. 25,000.00
- iii. Power Backup Installation Charges- Rs. 1,50,000.00
- iv. Haryana Value Added Tax- Rs. 50,280.00

- v. Goods and Service Tax- Rs. 13,77,144/-
- vi. Power backup installation charges as given in the flat buyer's agreement clause 3.1, shows that the respondent should take a certain amount which are based on the actuals, but instead the respondent has demanded for an absurd and unjustifiable amount of Rs. 1,50,000 in the offer of possession letter.
- vii. That offering possession by the respondent on payment of charges which the flat buyer is not contractually bound to pay, cannot be considered to be a valid offer of possession. HVAT was never, as per the Act, payable by the complainant and hence the offer of possession is not a valid offer of possession.
- viii. As per Rule 49A (2) the composition, the developer is not eligible to collect any amount by way of tax under the Act as well as not eligible to issue taxes invoices. These restrictions are self-explanatory and make it clear that the developer cannot charge any amount as tax under the Act i.e., VAT from its customers. The complainant should have received the offer of possession of the unit on date 25.05.2017 but were delayed possession by almost 4 years approx. by the respondent and the possession letter was received on 22.01.2021. The E-mail sent to the complainant regarding the intimation of offer of possession had interest/holding charges to be levied at the time of final account settlement mentioned which proves that the possession letter is unjust and just like a demand letter.
- ix. **DR. B.L. WADHERA VS GOVT. OF NCT OF DELHI AND ORS. ON 29<sup>th</sup> MAY 2003**

It has been held in the above judgment as under:



The plan, one can "It is clear that no person can occupy or permit any one to occupy any building or use or permit to be used a building or part thereof to any one until occupation certificate has been issued. A duty is cast on the commissioner to issue such certificate if the construction is as per the approved plan and building bye laws. The commissioner has to consider the application only after the fire safety measures are installed and certificate by chief fire officer is issued. However, on account of negligence or connivance on the part of the officer of the corporation in performing his duty, if the occupation certificate is not issued or if the application is not rejected within the stipulated period, and the application is kept pending, the wrong doer cannot get advantage of his own wrong by stating that in view of the deeming fiction occupation certificate is granted. It may be noted that if the construction is as per the plan approved and the officer of the corporation was informed in writing, as per bye laws and the officer of the corporation visited the site and found everything as per the plan and no intimation is given for approval or rejection, in such a case, if the building is erected as per say that the certificate is deemed to have been granted but not otherwise. The builder/architect/ engineer, etc. is aware whether the building is erected. It is submitted that clause in which the respondent can charge a certain interest which becomes payable by the complainant is totally unjust, arbitrary and amounts to unfair trade practices as held by the Hon'ble NCDRC in the case titled as **Shri Satish Kumar Pandey & Anr. v/s M.s Unitech Ltd. (14.07.2015)** and also in the judgment of Hon'ble Supreme Court in **Neel Kamal Realtors Suburban Pvt Ltd. Vs. UOI and Ors. (W.P 2737 of 2017)**.

**IN KAMAL KISHORE & ANR. VERSUS M/S SUPERTECH LIMITED DELIVERED IN CONSUMER CASE NO. 1009 OF 2016 ON 14.9.2017 AS UNDER:**

*"... As stated earlier, the possession in my view could not have been offered to the Allottee without completing the construction of the villa in all respects and obtaining the*



*requisite occupancy certificate. Offering possession without obtaining the Occupancy Certificate is meaningless since the Allottee is not permitted in law to occupy the house, which does not have the requisite occupancy certificate. Therefore, the maintenance charges, in my opinion, would be payable only from the date on which the possession is offered to the Complainant, after obtaining the requisite occupancy certificate and provided the construction of the villa complete in all respects at that time."*

- x. That the present complaint sets out the various deficiencies in services, unfair and/or restrictive trade practices adopted by the respondent in sale of their units and the provisions allied to it. The modus operandi adopted by the respondent, from the respondent's point of view may be unique and innovative but from the consumers point of view, the strategies used to achieve its objective, invariably bears the irrefutable stamp of impunity and total lack of accountability and transparency, as well as breach of contract and duping of the consumers, be it either through not implementing the services/utilities as promised in the brochure or through not delivering the project in time.

**C. Relief sought by the complainant:**

4. The complainant has 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 respondent:**

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



- i. That at the very outset, it is submitted that the complaint filed by the complainant is devoid of any merits. The complainant has instituted the present complaint before this hon'ble officer on the grounds of frivolous and vexatious pleas and hence the complaint is liable to be dismissed on this sole ground only.
- ii. That the complainant has concealed the fact that he had on 30.08.2018 entered into a settlement with the Respondent wherein he had availed certain discounts. In terms of the law laid down by the **Hon'ble Apex Court in Wg. Cdr. Arifur Rahman & Ors. Vs DLF Southern Homes Pvt. Ltd.** (Civil Appeal No. 6239 of 2019 a person cannot go back on the settlement so entered by him voluntarily.

*"However, the cases of the eleven purchasers who entered into specific settlement deeds with the developers have to be segregated. In the case of these eleven persons, we are of the view that it would be appropriate if their cases are excluded from the purview of the present order. These eleven flat purchasers having entered into specific deeds of settlement, it would be only appropriate and proper if they are held down to the terms of the bargain."*

- iii. It is submitted that occupation certificate for unit has been granted by The Director Town and Country Planning, Gurugram dated 18.06.2021. That the complainant has concealed for this authority that execution of settlement deed between the complainant and the respondent on 30.08.2018, wherein the complainant settled all the disputes and grievances with respect to the unit allotted to the complainant. This deed was executed by the complainant out of his own volition and without any force, fraud, coercion or undue influence from any person. The

complainant had promised vide settlement deed executed on 30.08.2018 that he will pay all the pending instalments at the time of offer of possession but instead the complainant is wriggling out his obligation and filing a frivolous complaint just to malign the respondents and to waste this court's time.

- iv. That the complainant falsely stated in the present complaint that the timely payments were made by the complainant as and when demanded by the respondents, however, as detailed in the reply to list of dates, it is submitted that the complainant made defaults in making timely payments. That the complainant has concealed the fact that at the time of booking, as a goodwill gesture, the respondent offered an inaugural discount of Rs.2,27,035.00/- to the complainant. Thus, the net BSP charged from the complainant is less than the original amount of the unit. Also, the respondents vide offer of possession dated 22.01.2021 have also offered the compensation amounting to Rs. 1,007,600.00/- to the complainants for delay in delivery of possession in terms of the duly executed floor buyer's agreement.
- v. That agreement that were executed prior to implementation of RERA Act and Rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented application form and flat buyer's agreement (hereinafter referred to as the "FBA") are bound by the terms and conditions so agreed between them.
- vi. At the outset it is submitted that the construction is complete and post receipt of occupation certificate the respondent has offered possession to the complainant. the relief(s) sought by the



complainant is unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainant entered into the said agreement with the respondent with open eyes and is bound by the same. That the relief(s) sought by the complainant travel way beyond the four walls of the agreement duly executed between the parties. The complainant while entering into the agreement has accepted and are bound by each and every clause of the said agreement. The detailed relief claimed by the complainant goes 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 complainant.

- vii. It is submitted that as per clause-2 of the agreement titled as "sale consideration and other conditions" specifically provided that in addition to Basic Sales Price (BSP), various other cost components such as Development Charges (including EDC, IDC and EEDC), Preferential Location Charges (PLC), Club Membership Charges (CMC), Car parking Charges, Power Back-up Installation Charges (PBIC), VAT, Service Tax and any fresh incidence of tax (i.e. GST), Electrification Charges (EC), Charges for installing Sewerage Treatment Plant (STP), Administrative Charges, Interest Free Maintenance Security (IFMS), etc. shall also be payable by the Complainant.
- viii. The parties had agreed under clause-16 of the flat buyer agreement (FBA) to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for

arbitration. Admittedly, the complainant has raised dispute but did not take any steps to invoke arbitration.

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 respondent:**

**F.1 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 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.
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 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 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:

***"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 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”.*

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 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."*

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 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.

**F.III Objection regarding there is settlement agreement between the parties.**

20. The respondent submitted that the complaint is not maintainable for the reason that the complainant had promised vide settlement deed executed on 30.08.2018 that he will pay all the pending instalments at the time of offer of possession but instead the complainant is wriggling out his obligation and filing a frivolous complaint just to malign the respondents and to waste this court's time. A contention has been raised by the counsel of the complainant that letter of offer of

possession given by the respondent is not a valid offer of possession. The reason has been put forth by the counsel for the complainant such as the said offer made by the respondent on 22.01.2021 was not a valid offer of possession as OC of the unit has been obtained subsequent to the offer i.e., on 18.06.2021. Therefore, at this stage, the authority will clarify the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession, liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

- i. Possession must be offered after obtaining occupation certificate.
- ii. The subject unit should be in habitable condition.
- iii. The possession should not be accompanied by unreasonable additional demands.

21. In the present case, occupation certificate has been obtained by the promoter after the offer of possession and the very first condition has not been satisfied, therefore the said offer of possession cannot be regarded as a valid offer of possession. 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 complainant for refund:**

**G.1 Direct the respondent to refund the entire paid-up amount along with interest at the prescribed rate.**

22. In the instant case, the BBA for the subject unit was executed on 25.11.2013. According to the agreement, the due date of possession comes out to be 25.05.2017. However, the occupation certificate for the tower where complainant unit is situated only came on 18.06.2021 even after filing of the complaint i.e., 24.03.2021. Keeping in view the fact, there is a settlement agreement between the parties on 30.08.2018 as per the settlement agreement, the remaining amount was to be paid at the time of offer of possession, but the said offer made by the respondent on 22.01.2021 was not a valid offer of possession as OC of the unit has been obtained subsequent to the offer i.e., on 18.06.2021 only and hence the complainant is entitled for full refund.
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. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under section 71 read with section 31(1) of the Act of 2016.

25. The authority hereby directs the promoter to return the amount received by it i.e., Rs. 51,55,926/- with interest at the rate of 10.70% (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*.

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

26. 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.

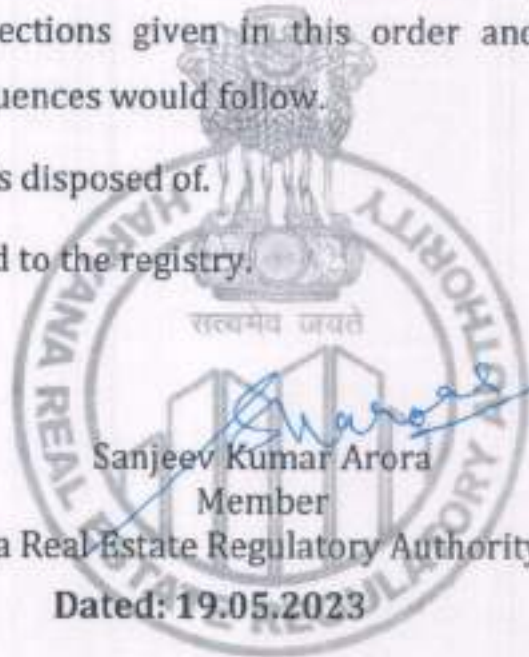
**H. Directions of the Authority:**

27. 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. 51,55,926/- from the complainant along with interest at the rate of 10.70% 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.

28. Complaint stands disposed of.

29. File be consigned to the registry.



Sanjeev Kumar Arora  
Member

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 19.05.2023**

**HARERA**  
**GURUGRAM**