BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 5109 of 2019
Order reserved on: 22.03.2023
Date of pronouncement of order: 31.05.2023

Subhash Kumar Gupta and Mamta Gupta
Address: - House no. 7454, Sector-B, Pocket-10, Vasant Kunj, New Delhi — **Complainants**

Versus

1. Mahindra Homes Pvt. Ltd
2. IREO Pvt. Ltd.

Address:- Mahindra Towers, 5th floor, Dr. G.M.Bhosale Marg, Worlui, Mumbai-400018 — **Respondents**

CORAM:
Shri Ashok Sangwan — **Member**

APPEARANCE:
Shri Anil Parkash Gupta — Advocate for the complainants
Ms. Bheeni Goyal (Proxy) — Advocate for the respondents

ORDER

1. The present complaint dated 21.11.2019 has been filed by the complainants 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 allottees as per the agreement for sale executed inter se.

A. Project and unit 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, delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name and location of the project	"Liminare Phase I (Sirius)", Sector 59, Gurugram
2.	Apartment no.	1403, 14th floor, tower A (As per BBA on page no. 64 of complaint)
3.	Unit area admeasuring (super area)	2985 sq. ft. (As per BBA on page no. 64 of complaint)
4.	Date of apartment buyer agreement	20.05.2015 (Page 58 of complaint)
5.	Possession clause	**4.3.** *Subject to the terms of this Agreement and occurrence of any force majeure event, the developer shall endeavour to handover the possession of the apartment to the buyer within a period of* ***four (4) years nine (9) months from the date of start of excavation of the tower****/building in which the Apartment would be located (*"***commitment period***"). However, notwithstanding anything mentioned herein, the Developer shall be entitled to a period of*

		*6 (six) months ("**grace period**") as grace/extension period after expiry of the said Commitment Period.*
6.	Due date of possession	20.02.2020 Due date of possession is calculated from the date of execution of BBA i.e., 20.05.2015 which comes out to be 20.02.2020 in the absence of date of start of excavation .
7.	Total sale consideration	Rs. 4,15,70,468/- (As per annexure-G on page 152 of complainant)
8.	Amount paid by the complainants	Rs. 1,30,81,829/- (As per SOA on page 153 of complaint)
9.	Occupation certificate	22.01.2019 (Annexure 7 of complaint)
10.	Offer of possession	Not offered
11.	Cancellation of unit	Request for cancellation was made by complainant on 15.04.2019 and the same was accepted by respondent on 08.05.2019 (Annexure I and K of the complaint)
12.	Cancellation Deed	20.06.2019 (Annexure L of the complaint)
13.	Amount received by complainants in lieu of cancellation	Rs. 83,30,596/-

		(As submitted by respondent on page 13 of reply and also pleaded by complainant)

B. Facts of the complaint

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

i. That the Respondent No.1 allotted to the Complainants Residential Apartment bearing No. A-1403, in the Tower/Building "A" of the Project "Luminare" for a total sales consideration of Rs. 3,93,81,125/- vide letter dated February 10, 2015, read with Apartment Buyer's Agreement dated 20.05.2015 read with letter dated 23.11.2018. That the Complainants paid to the Respondent No. 1 an amount of Rs. 10,00,000/- as booking amount for the said Apartment as confirmed by the Respondent No. 1 vide letter dated February 10, 2015, read with Apartment Buyer's Agreement dated 20.05.2015 read with letter dated 23.11.2018.

ii. That the Complainants paid to the respondent no. 1 an amount of Rs.1,30,81.829/- which includes Rs.10,00,000/- towards booking amount and balance Rs. 1,20,81,8291- towards the instalments for the said Apartment vide letter dated 23.11.2018 (d) That in view of the legal rights available to the Complainants, the Complainants vide letter dated 15.04.2019 followed by letter dated 28.06.2019 the Complainants exercised their legal right and requested the Respondent No.1 to cancel / withdraw from the allotment of the said Apartment and the Complainants sought refund of the amount after forfeiture of booking amount in accordance with the applicable provisions of the Real Estate (Regulation and

Development) Act, 2016 and Haryana Real Estate (Regulation and Development) Rules, 2017 and notifications and regulations thereunder.

iii. That the Respondent No. 1 was legally entitled to forfeit / deduct the booking amount and refund to the Complainants, the balance amount to be calculated para No.7.5 of the Agreement for Sale prescribed by The Rules, 2017read with Regulation No.5 of the Forfeiture Regulations (Forfeiture of earnest money by the builder) Regulation 2018. That (as mandated by para-No.7.5 of Annexure-A (See Rule 8) of the Agreement for Sale prescribed by The Haryana Real Estate (Regulation & Development) Rules, 2017 (Annexure "E") read with Regulation No.5 of the Forfeiture Regulations (Forfeiture of earnest money by the builder) Regulation 2018) out of the amount of Rs. 1,30,81,829/- paid by the Complainants. The Respondent No. 1 were legally entitled to forfeit/deduct booking amount of Rs. 10,00,000/- and refund to the Complainants the balance amount of Rs. 1,20,81,829/-.

iv. That on 11.07.2019, the Respondent No. 1 instead of refunding Rs. 1,20,81,829/- to the Complainants, actually refunded an amount of Rs. 83,30,596/- by forfeiting / deducting an amount of Rs.47,51,233/-instead of forfeiting / deducting the booking amount of Rs. 10,00,000/-

v. That the Respondent No. 1 deducted / forfeited an excess amount of Rs.37,51,233/-, and therefore the Complainants are legally entitled to claim from the Respondent No. 1, the refund of excess/ deducted/ forfeited amount of Rs.37,51,233/- with 12% interest from 11.07.2019 till the date of refund. That vide letter dated

29.07.2019 followed by letter dated 14.08.2019 the Complainants requested the Respondent No. 1 to refund to the Complainants, the excess deducted / forfeited amount of Rs.37,51,233/- with 12% interest from 11.07.2019 till the date of refund.

vi. That the Respondent No. 1 have till date not refunded to the Complainants, the excess deducted forfeited amount of Rs.37,51,233/- with 12% interest from 11.07.2019 till the date of refund. Hence the Complainants are filing the present Complaint before the Authority.

C. The complainants are seeking the following relief:

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

(i) Direct the respondent to refund the complainant excess forfeited/deducted amount of Rs. 37,51,233/- alongwith interest @ 12% calculated from 11.07.2019 i.e., from the date on which the respondent no. 1 transferred the amount of Rs. 83,30,596/-.

(ii) Litigation expenses

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:

a. That the respondent is most respectfully submitted that the Complainants have filed the present complaint in utter disregard of the law of the land and in as much as is based on blatant misreading of the Act, Rules as well as the Forfeiture Regulations framed by this Authority in terms of Section 85 of the Act. The understating and interpretation of the Complainants of the aforesaid Act, Rules and Regulations is baseless, misconceived and

leads to confusion. The present complaint is based on an unsound advice and incorrect interpretation of the aforesaid Act, Rules and Regulations by the lawyer as is evident from a reading of paragraph (xix) (b) of the complaint, and upon a perusal of the same, it is evident that the present complaint is an afterthought to arm twist the Respondents. For this reason, the complaint merits dismissal at the threshold. The relevant potion of the paragraphs is reproduced for the ready reference of this Authority:

> *"(xix)(b) That the lawyer has advised that the amount to be forfeited/deducted by the company & the amount to be refunded to the complainants in respect of cancelation/withdrawal of the allotment of the said apartment by the Complainants is to be calculated in accordance with para no. 7.5 of Annexure A (See rule 8 of the Agreement for Sale prescribed by the Haryana Real Estate (Regulations & Development) Rules 2017 read with Regulation 5 of Forfeiture Regulation. The Lawyer further advised that as per these provisions pursuant to the cancellation/withdrawal of the allotment of the said apartment by the complainants from the project, the respondent no.1 were entitled to deduct only the booking amount of Rs. 10,00,000/- and not Rs. 47,51, 233/- and hence the respondent no. 1 deducted /forfeited an access amount of Rs. 37,51,233/-."*

b. It is submitted that if the aforesaid interpretation would be in complete violation of not only the principles set forth in judgments of the Hon'ble Supreme Court (relied upon by the Authority itself while framing the Forfeiture Regulations) but even the Act read with the Rules and Regulations. Such an interpretation, while being contrary to law, would amount to disparity as it is in complete contradiction to the principles of awarding damages in the event of breach of contract by one party. It is humbly submitted that if the interpretation of the Complainant is taken to be correct, the same would result in irreparable harm, injury and huge losses to the Respondent No. 1 by such abrupt and unilateral cancelation by the

Complainants, who would at any stage, for no fault of the Respondents, be allowed to cancel their allotment, and get away by paying a meagre amount. Further, it is to be stressed that the complaint itself is premised on the fact that there is no fault (default) on the part of the Respondents. It is most humbly submitted that if such a practice is allowed, various unscrupulous elements can thwart the entire project of a developer. This was neither the legislative intent nor the intent of the Authority while framing the Act, Rules and Regulations, respectively.

c. The legislators, in order to ensure parity, vide Section 13 of the Act inserted a requirement whereby no deposit or advance was to be taken by the promoters without first entering into a written agreement for sale. The said Section 13 restricts the promoter from accepting more than 10% of the cost of the apartment, plot or building as an advance payment or an application fee. While framing the said section, the legislators were mindful of the concept of earnest money, which is (a) to ensure that the buyer deposits an amount of money in good faith with the intention to complete the transaction and (b) to protect the interest of the developer in the event the buyer defaults or decides to cancel the agreement for no fault of the developer. The 'term earnest money' is defined in Black's Law Dictionary (Tenth Edition) as "A deposit paid (often in escrow) by a prospective buyer (esp. of real estate) to show a good faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults..... The amount of earnest money deposited rarely exceeds 10% of the purchase price, and its

primary purpose is to serve as a source of payment of damages should the buyer default."

d. Thus, from the aforesaid, the legislative intent behind the deposit of 10% was to also protect the rights of the developer in the event the buyer defaults or decides to cancel the agreement for no fault of the developer.

e. In the present case as well, the amount deducted as earnest money has been done so in terms of the Judgment of Hon'ble National Consumer Disputes Redressal Commission in **"DLF Ltd. vs. Bhagwanti Narula** [RP No. 3860/2014 decided on 06.01.2015], which has been followed by this Hon'ble Authority while framing the Forfeiture Regulations. The relevant paragraph of the afore-mentioned judgment is reproduced herein under:

> It is also evident from a perusal of Clause 9 of the Agreement that in the event of failure of the complainant to make payment in terms of the agreement between the parties, the Petitioner Company was entitled to forfeit the entire amount of the earnest money and the Agreement to Sell was to stand cancelled. In view of the aforesaid Clause, it cannot be disputed that since the complainant had failed to make payment as per her Agreement with the Petitioner Company, the Agreement between the parties could be cancelled and *the Petitioner Company was entitled to forfeit the earnest money. However, the question which primarily arises for consideration in this case is as what would constitute the "earnest money" and to what extent the Petitioner Company is entitled to forfeit the same. The contention of the petitioner is that as agreed by the parties in terms of Clause 8 of the Agreement, 20% of the sale price, irrespective of the stage at which the payment was made constitutes earnest money whereas the case of the complainant as submitted during the course of arguments was that only the amount of Rs. 63,469/- which was paid at the time of booking the apartment can be said to be the earnest money and only that amount could be forfeited."*

f. In **Maula Bux Vs. Union of India - MANU/SC/ 0081/ 1969 : 1969 (2) SCC 554,** the Hon'ble Supreme Court quoted the following

observations made by the Judicial Committee in Kunwar Chiranjit Singh Vs. Har Swarup - MANU/PR/0083/1925 : AIR 1926 PC 1- "Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee". In **Shree Hanuman Cotton Mills & Ors. Vs. Tata Aircraft Ltd. - MANU/SC/0086/1969 : 1969 (3) SCC 522**, the Hon'ble Supreme Court quoted the following characteristics of the earnest money- "15. Borrows, in Words & Phrases, Vol. II, gives the characteristics of "earnest". According to the author, "An earnest must be a tangible thing. That thing must be given at the moment at which the contract is concluded, because it is something given to bind the contract, and, therefore, it must come into existence at the making or conclusion of the contract. The thing given in that way must be given by the contracting party who gives it, as an earnest or token of good faith, and as a guarantee that he will fulfil his contract, and subject to the terms that if, owing to his default, the contract goes off, it will be forfeited. If, on the other hand, the contract is fulfilled, an earnest may still serve a further purpose and operate by way of part payment."

g. After considering several decisions on the subject, the following principles were laid down by the Hon'ble Supreme Court regarding 'earnest': (1) It must be given at the moment at which the contract is concluded. (2) It represents a guarantee that the contract will be fulfilled, or, in other words, 'earnest' is given to bind the contract. (3) It is part of the purchase price when the transaction is carried out. (4) It is forfeited when the transaction falls through by reason

of the default or failure of the purchaser. (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest. The earnest money, in terms of the aforesaid judgments, was given as a token of good faith that the contract would be fulfilled by the Complainant. In terms of Maula Bux (supra) and Sree Hanuman Cotton Mills (supra), at the moment at which the contract is concluded, i.e. at the time of executing the Apartment Buyer's Agreement an amount of Rs. 51,73,139/- has admittedly been paid by the Complainants. The cancellation has been admittedly sought by the Complainants. Despite the Complainants having deposited an amount of Rs. 51,73,139/-, the Respondent No. 1 still deducted only in terms of Regulation 5 of the Forfeiture Regulation, which has been framed by the Hon'ble Authority keeping in mind the Act and the plethora of judgments of the Hon'ble Supreme Court of India.

h. The definition of "Earnest Money" as provided in the ABA is reproduced herein below for ready reference:

> *""Earnest Money" shall mean 10% (ten percent) of the 'Amount Payable' mentioned in the 'Details of Pricing' annexed herewith as Schedule IX hereto, to ensure the performance, compliance and fulfillment of the obligations and responsibilities of the Buyer under this Agreement."*

It is submitted that the law of the land is well settled, which is reflected in the statutes as well as the precedents rendered by the Hon'ble Courts, that a party to a contract must be made to honor the terms thereof and be bound by the same. Thus, the Respondent No. 1 is entitled to forfeit 10% of the sale consideration, which was the "reasonable" quantification of damages done by both the

parties to the contract i.e. the ABA, in case the buyer (Complainants herein), wishes to cancel the allotment.

i. It is pertinent to add here that the Forfeiture Regulations issued by the Haryana RERA expressly provide that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount in cases where inter-alia the buyer intends to withdraw from the project and any agreement containing any clause contrary to the said regulations shall be void and not binding on the buyer. Further, Forfeiture Regulation No 6 categorically provides for discretion of this Hon'ble Authority to make departure from the said Forfeiture Regulations, the said regulation no. 6 has been conveniently overlooked by the Complainants in their complaint while interpreting the Forfeiture Regulations. It is submitted that had the intention been to cap the maximum amount that could be forfeited, there was no requirement of aforesaid regulation 6.

j. It is the humbly submitted that the Respondent No.1 in term of the Forfeiture Regulations and the ABA, has forfeited the correct amount. The details of the total amount payable by the Complainants for the subject apartment and the forfeiture/cancellation amount of Rs. 47,51,233/-. The Complainants have received the aforesaid amount. It is thus submitted, that Complainants have no locus to invoke the jurisdiction of this Hon'ble Forum. The present complaint is a vexatious litigation filed by the Complainants; in fact it is the Respondent No.1 who has suffered loss due to the premature termination by the Complainants. It is humbly submitted that the

Respondent No. 1 is very much entitled to the earnest money in the event of cancellation of the ABA by the Complainants for no fault of the Respondents.

k. It is respectfully submitted that the Complainants cancelled / terminated the allotment on their whims and fancies. Therefore, it is evident that the present complaint has been filed with an ulterior motive to circumvent the forfeiture of the Earnest Money as per the binding ABA between the parties and the provisions of the Forfeiture Regulations. Hence, the captioned Complaint merits outright dismissal on this ground alone.

l. That the Respondent No. 2 is the non-executive Director of Respondent No. 1 company, and she is neither in-charge of nor looks after any day-to-day business of the Respondent No.1 and of the real estate project. It is the Respondent No. 1 company which is registered with the Hon'ble Haryana Real Estate Regulatory Authority ("Haryana RERA") as the promoter of this real estate project, and therefore, the only necessary party. The Complainants have, under mistaken belief and in order to arm twist the Respondents to succumb to the unlawful demands of refund, have purposefully arrayed the top brass of the Respondent No. 1 as party in the present complaint. It is submitted that Respondent No. 2 is neither a necessary nor a proper party in so far as the present alleged dispute is concerned, further no allegation of any sort has been leveled against the Respondent No. 2 in the entire complaint. It is further submitted that complainants have not made any specific allegation or for that matter any allegation whereby any liability can be fastened on the Respondent No. 2; and no relief has

been claimed against the Respondent No. 2 in her personal capacity or otherwise, thus her impleadment is unjustified and such is bad in law. Even otherwise, no liability can be fastened on Respondent No. 2 in her personal capacity as there is no privity of contract between Complainants and the Respondent No. 2. In view of the aforesaid, the Respondent No. 2 is needed be dropped from the array of parties. The Respondents reserve their right to file appropriate application in this regard

m. It is also submitted that the present Complaint is not maintainable in terms of the Clause 13.4 of the ABA wherein it is clearly provided that any dispute arising out of the terms of the ABA must be settled through Arbitration as per the Arbitration and Conciliation Act, 1996. In view of the aforesaid Clause the captioned Complaint is bad in law and is liable to be dismissed as the Parties have categorically agreed to refer any dispute which may arise between them, in the very first instance, for resolution to arbitration. This being the case, the Complainants are now barred from acting in violation of the agreed terms of the contract and invoking the jurisdiction of this Hon'ble Forum. Hence, the captioned Complaint merits outright dismissal on this ground also.

E. Jurisdiction of the authority

6. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E.I Territorial jurisdiction

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

8. Section 11(4)(a) of the Act 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) The promoter shall-*
>
> *(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.*

9. 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant 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." 2021-2022(1) RCR(Civil), 357 and reiterated in case of M/s Sana Realtors Pvt. Ltd. and other Vs. Union of India and other 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."*

11. 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.I Objection regarding complainants in breach of agreement for non-invocation of arbitration clause.

12. 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:

> ***"13.4 GOVERNING LAW AND DISPUTE RESOLUTION:***
>
> *(i) "This Agreement entered into between the Parties and/or the terms and conditions herein shall be subject and interpreted according to the Applicable Laws.*
>
> *(ii) All or any disputes that may arise with respect to the terms and conditions of the Agreement or matters arising there from, including the interpretation and validity of the provisions hereof and the respective rights and obligations of the Parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be under the Arbitration and Conciliation Act, 1996 and any statutory amendments / modification thereto to be conducted by a sole arbitrator who shall be mutually appointed by the Parties or if unable to be mutually appointed, then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties. The venue and seat of arbitration shall be at Delhi. It is clarified that if due to any Applicable Laws or any other reason, this Article, pertaining to arbitration cannot be enforced in the same manner as stated herein, then it will be considered that there is no arbitration agreement between the Parties.*
>
> *(iii) Subject to the arbitration mentioned above, the civil Courts at Gurgaon and the High Court of Punjab and Haryana at Chandigarh alone shall have the jurisdiction to entertain and decide the dispute between the parties hereto.".*

13. 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.

14. 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."

15. 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."

16. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of

going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected

G. Findings on the relief sought by the complainants/allottees.

G.I Direct the respondent to refund the complainant excess forfeited/deducted amount of Rs. 37,51,233/- along with interest @ 12% calculated from 11.07.2019 i.e., from the date on which the respondent no. 1 transferred the amount of Rs. 83,30,596/-.

17. In the present complaint, the complainants intend to withdraw from the project and is seeking return of the amount paid by it in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

> *"**Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-*
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
> ***he shall be liable on demand to the allottees,** in case 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 that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed** in this behalf including compensation in the manner as provided under this Act:*
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

18. The builder buyer's agreement was executed on 20.05.2015. The possession of the subject unit was to be offered within four (4) years nine (9) months from the date of start of excavation of the tower/building in which the Apartment would be located. The due date of possession is calculated from the date of execution of BBA i.e., 20.05.2015 which comes out to be 20.02.2020 in the absence of date of start of excavation. That the complainants paid a sum of Rs. 1,30,81,829/- against basic sale consideration of Rs. 4,15,70,468/- of the unit. Though the amount paid by the complainants against the allotted unit is about 31% of the basic sale consideration.

19. The complainants have approached the authority on 21.11.2019 i.e., before due date of handing over of possession. They also made request to the respondent-builder through letter dated 15.04.2019 i.e., before due date of handing over of possession seeking refund against the allotted unit and the request was accepted on 08.05.2019 and subsequently the respondent refunded an amount of Rs. 83,30,596/- after deducting an amount of Rs. 47,51,230/-.

20. The Hon'ble Apex court of the land in cases of ***Maula Bux Vs. Union of India (1973) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136***, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as ***Jayant Singhal and Anr. Vs. M/s M3M India Ltd.*** decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of

penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under-

> ***"5. AMOUNT OF EARNEST MONEY***
>
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money* ***shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment /plot /building as the case may*** *be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer.*

21. Thus, Keeping in view, the aforesaid legal provision, the respondent/promotor directed to refund the paid-up amount i.e., Rs. 1,30,81,829/- after deducting 10% of the basic sale consideration i.e. Rs. 4,15,70,468/- and shall return the balance amount along 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 cancellation i.e., 15.04.2019 till the date of actual refund of the amount within the timelines provided in Rule 16 of the Rules. Also, the amount of Rs. 83,30,596/- already paid to the complainant by the respondent while cancelling the unit shall be adjusted towards the amount payable as per the aforesaid direction.

G.II Direct the respondent to pay litigation expenses.

22. 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 complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority

23. 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 is directed to refund the paid-up amount of Rs. 1,30,81,829/- after deducting 10% of the basic sale consideration of Rs. 4,15,70,468/- with interest at the prescribed rate i.e., 10.70%

is allowed on the balance amount if any, from the date of cancellation i.e., 15.04.2019 till the date of actual refund of the amount within the timelines provided in Rule 16 of the Rules. Also, the amount of Rs. 83,30,596/- already paid to the complainant by the respondent while cancelling the unit shall be adjusted towards the amount payable as per the aforesaid direction.

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.

24. Complaint stands disposed of.

25. File be consigned to registry.

Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.05.2023