

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

Complaint no.:	309 of 2019
First date of hearing:	17.10.2019
Date of decision:	22.09.2023

Unique Innovation Pvt. Ltd.
R/o D-128 L.G.F. Saket, New Delhi-110017

Complainant

Versus

M/s BPTP. Ltd.
Office address: BPTP Crest, Plot no. 15, Udyog Vihar
Phase IV, Gurugram-122015

Respondent

CORAM:
Shri Sanjeev Kumar Arora

Member

APPEARANCE:
Shri Sahil Batar (Advocate)
Shri Harshit Batra (Advocate)

Complainant
Respondent

ORDER

1. The present complaint dated 28.01.2019 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 as provided under the provision of the Act or the Rules and regulations made there under 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 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 of the project	"BPTP Terra", Sector- 102, Gurugram
2.	Nature of project	Group Housing Towers
3.	RERA registered/not registered.	Registered 299 of 2017 dated 13.10.2017
4.	DTPC License no.	83 of 2008 dated 05.04.2008
	Validity status	04.04.2025
	Name of licensee	SUPER BELTS PVT. LTD and 3 others
	Licensed area	23.18 acres
		94 of 2011 dated 24.10.2011
		23.10.2019
		COUNTRYWIDE PROMOTERS PVT LTD and 6 others
		19.74 acres
7.	Unit no.	T-24-101, Tower24 [pg. 71 of complaint]
8.	Unit measuring	1998 sq. ft. [pg. 71 of complaint]
9.	Date of execution of floor buyer's agreement	15.05.2014 (pg. 62 of complaint)
10.	Possession clause	5. Possession 5.1 The seller/confirming party proposes to offer possession of the unit to the purchaser(s) within the commitment period. The seller/confirming party shall be additionally entitled to a grace period of 180 days after the expiry of the said commitment

		<p>period for making offer of possession of the said unit.</p> <p>1.6 "Commitment Period" shall mean, subject to, force majeure circumstances; intervention of statutory authorities and purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by seller/confirming party, under this agreement and not being in default under any part of this agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, development charges (DC). Stamp duty and other charges, the seller/confirming party shall offer the possession of the unit to the purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of flat buyer's agreement, whichever is later."</p>
12.	Due date of possession	15.11.2017 (Calculated from the execution of BBA as the date of building plan is not known. Grace period not allowed.)
13.	Total sale consideration	₹ 1,32,11,326/- [pg. 155 of reply]
14.	Basic sale consideration as per BBA	₹ 1,04,89,500/- [pg. 72 of complaint]
15.	Total amount paid by the complainant	₹ 1,25,60,230/- (As alleged by the complainant in para 25 of complaint)
16.	Occupation certificate dated	not obtained
17.	Offer of possession	not offered
18.	Surrender letter	24.03.2018

	[as per postal receipt pg. 94 of compliant]
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B. Facts of the complaint.

3. The complainant pleaded the complaint on the following facts:

- a. That having been induced by the respondent, the complainant booked a flat in the project of respondent known as "BPTP Terra Home" situated at Sector 37-D, Gurgaon, Haryana, in the year 2012 and paid the booking amount of ₹ 7,00,000/- dated 4.09.2012. Again, in terms of subsequent demand raised by the respondent, the complainant company paid further amount of ₹14, 41,098/-.
- b. That upon making the above said payment, the complainant received a letter dated 27.11.2012 along with two copies of the buyer's agreement to be executed, thereby asking the complainant to sign on the bottom of all the pages thereof at mark (x) with regard to unit no. T-22-2202 and to return both the copies of the signed agreement to the respondent within 30 days.
- c. That as per the said buyer agreement of 2012, with regard to unit no. T-22-2202, the possession of the Unit was to be given to it within 3.5 years i.e., on or before May 2016.
- d. That the complainant received the letter of allotment, informing it that flat/unit no. **T-22-2202** has been allotted to it on the basis of construction linked plan, followed by a demand letter dated 12.12.2012, whereby the complainant was again asked to pay a sum of ₹ 10, 70,549/- dated 31.12.2012.
- e. That surprisingly, the complainant received yet another allotment letter dated 27.02.2013, thereby informing it that unit no. **T-24-101** has been allotted to it, which came as a shock as the said



change in allotment of unit after execution of buyer's agreement was unilateral and without the consent/approval from the complainant and as such the complainant raised its objections in this regard, however, the respondent convinced the complainant claiming that new unit is situated at a much better location than the previous unit and that too without any PLC charges and further that the possession would be given as per the schedule mentioned in buyers agreement of 2012 and since the complainant had already paid a substantial amount of ₹ 32, 27,262/- to the respondent and as such finding no option, accepted the same.

- f. That again without entering into the fresh buyer's agreement qua the new unit offered, a further demand of ₹ 15,615/-vide demand letter dated 25th March 2013 was raised by the respondent claiming the same to be the balance interest on account of delayed payment, which was also deposited by the complainant on 28.03.2013.
- g. That though the change of unit had already been done by the respondent unilaterally, however in order to cover up its misdeeds; the respondent persons in the month of May 2013 asked the complainant to furnish an undertaking for accepting the change of unit, location, measurement etc. pertaining to allotment letter dated 07.12.2012 without assigning any reason whatsoever, whereas the said change was already done it even prior to obtaining any undertaking, which clearly proves their mala fide intention. The complainant, under compelling circumstances, furnished the said undertaking.

- h. That the complainant received another demand letter dated 25th June 2013, thereby demanding a payment of ₹ 13, 76,584/-, without even entering into the buyer's agreement qua the new unit offered to it. It is pertinent to point out that in the said demand letter, a sum of ₹ 2,06,255/- and ₹ 1,17,860/- were shown to be PLC charges, whereas, the complainant never asked for any preferential location and was even assured by the respondent after changing the unit that no PLC charge would be claimed from the complainant and accordingly, the complainant through its authorized representative objected to the said illegal demand, however the respondent instead of rectifying the mistake, threatened to forfeit the amount already paid to them by the complainant in case the complainant refuse to pay the same and as such having been compelled by the respondent and further in order to save its deposits, the complainant even cleared the said illegal demand and paid an amount of ₹ 13,76,585/- on 10.07.2013.
- i. That again without executing any buyer's agreement in favor of the complainant, the respondent issued another demand letter dated 01.10.2013, asking the complainant to pay a sum of ₹ 13, 76, 584/- which the complainant paid on 08.10.2013. That the complainant again shocked and surprised to receive an mail from the customer care department of respondent on 6th November 2013, thereby informing the complainant that the location and specification of the unit allotted to it has been changed from 4 BHK to 3 BHK+ terrace having the area of 1860 sq. feet and since the said illegal act was again a unilateral act to dupe the complainant and as such objected to by the complainant vide its mail dated 7th November 2013.



- j. That not only this, but the complainant also again shocked and surprised upon receiving a letter dated 19.12.2013 from the respondent, whereby the complainant was threatened to either send the builder buyers agreement and failure in this regard; the complainant was threatened to cancel the allotment and to forfeit the earnest money/booking amount along with other non-refundable amount without specifying the same. In this regard, it is pertinent to mention herein that no such agreement was ever sent to the complainant with regard to the new unit i.e. unit no. T24-101 by the office of the respondent and it seems that the said letter was sent by the respondent persons just to cover up their misdeeds in receiving the huge amount without entering in to the buyer's agreement, which was not even due on the date of demanding the same without first executing the builder buyer agreement in favor of the complainant.
- k. That the mala fides of the respondent persons in sending letter dated 19.12.2013; can be judged from their own letter dated 8th January 2014, whereby they sent two copies of the buyer's agreement to the complainant with regard to unit no. T24-101, asking the complainant to sign the same on the dotted lines; which was handed over to the respondent by signing the same at the place marked.
- l. That as per the previous buyer's agreement signed by the complainant in November 2012, the possession of the residential unit allotted to the complainant was agreed to be delivered within a period of 42 months from the date of said buyer's agreement and thus the complainant was entitled to have the possession of the flat

in or about May 2016 qua the old unit allotted to it, however by this new agreement of May 2014, again the time for giving the possession was mentioned 42 months from the date of execution of this agreement, which was absolutely illegal and an act of high handedness as such the complainant again raised serious objections in this regard, but it was assured by the respondent persons that possession of the new unit would be given to the complainant as per the schedule mentioned in the agreement of November 2012 and that the clause in the new agreement is inserted as a standard clause, which may vary from case to case and since the complainant till that time invested huge amount in the project, it was left with no alternative but to accept and believe the story put forth by the respondent.

- m. Before submitting the new agreement, the complainant again received a demand letter dated 20th February 2014 from the respondent, thereby asking the complainant to pay a sum of ₹ 13,90,350/-, which was not at all due if taken into consideration the previous allotment/booking and schedule of payment. It is pertinent to mentioned herein that in compelling circumstances, the complainant paid the said amount and further signed copies of both the builder buyer's agreement was handed over to the respondent in the month of May 2014 under the threat of forfeiture of its hard-earned money already paid to the respondent.
- n. That in addition to above, the respondent vide demand letter dated 1st October 2014 further asked the complainant to deposit a sum of ₹ 13,90,349/-, whereas the fact remains that even the said amount



was also not due, but again the said amount was paid by the complainant.

- o. That after making a payment of more than 85% of the total cost of the unit in question, the directors of the complainant company smelling some foul play by the respondent persons, visited the site in the month of March 2015 and shocked to see the progress at site and not being satisfied with the same, wrote a letter dated 24th March 2015 to the respondent asking them to refund the entire amount deposited by it along with interest accrued thereupon due to the misleading and fraudulent demands raised from time to time, but despite receipt of the said letter, the respondent named above maintained complete silence, which strengthen the apprehension of the complainant that the respondent persons have no intention to hand over the possession of the unit to it within the scheduled date.
- p. That till date a total sum of ₹ 1,25,60,230/- have been paid/deposited by the complainant against the said unit, whereas, the fact remains that the respondent persons were under obligation to hand over the possession of the flat till May 2016 and thus have caused a delay of more than 24 months in handing over the possession of the unit, hence the respondent persons also became liable to pay the interest to the complainant equal to the rate of interest they claimed and charged from the complainant and form their other customers on account of the delay of making the payment.
- q. That the complainant had meetings with the respondent persons in their office and expressed its apprehension and reservations about

the project and sought information regarding the delay in handing over the possession, however all the respondent maintained complete silence except giving assurances that the project is nearing to completion.

- r. That bare perusal of the photographs of site taken on 15.05.2017, are sufficient to conclude that despite the expiry of the schedule time of handing over the possession of the flat/unit in question, the entire tower is lying incomplete. That it has been further learnt to the complainant that the statutory clearances as falsely claimed by the complainant, have not been obtained/sanctioned by the competent authority and even the amount collected from the complainant on account of EDC, IDC and service tax has not been deposited with the competent authority.
- s. That finally the complainant decided to take appropriate legal action against the respondent persons for various illegal acts committed by them as detailed above and further not to wait any more and decided to seek refund of its entire investments made till date along with interest @ 20% per annum from the date of its deposit till the realization thereof and accordingly issued a legal notice dated 24.01.2018. However, even upon receiving the said legal notice, the respondent persons named above instead of responding the said legal notice, issued another demand, which was absolutely illegal and liable to be withdrawn in as much the complainant through its advocate has already served a legal notice dated 24.1.2018, thereby calling upon the respondent persons to refund the entire amount deposited by it along with interest @18% per annum.



- t. That finally looking no solution, the complainant lodged a criminal complaint against the respondent persons and their associates in committing the crimes, with the station house officer, police station Connaught Place, New Delhi, thereby requesting him to register an F.I.R against the respondent persons, however till date no FIR has been registered against the respondent persons. Hence the present complaint.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:
- Initiate proceedings against the respondent for violating various provisions of the Act, 2016.
 - Direct the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest.
5. Any On the date of hearing, the authority explained to the respondents/promoters about the contravention 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.

6. The respondent has contested the complaint on the following grounds:
- It is submitted that the respondent had diligently applied for registration of the project in question i.e., "Terra" located at Sector-37D, Gurugram including towers-T-20 to T-25 & EWS before this Hon'ble Authority and accordingly, registration certificate dated 13.10.2017 was issued by this Hon'ble Authority wherein the registration for the said project is valid for a period commencing from 13.10.2017 to 12.10.2020.



- b. It is submitted that the complainant has approached this Hon'ble Authority with unclean hands i.e., by concealing and misrepresenting facts material to the present purported complaint. It is submitted that the Hon'ble Supreme Court in a plethora of cases has held that anyone approaching court must come with clean hands as any concealment/misrepresentation of facts amount to fraud not only on the respondent but also on the Court and as such, the complaint warrants dismissal without any further adjudication.
- c. It is submitted that the relief(s) sought by the complainant are unjustified, baseless and beyond the scope/ambit of the FBA duly executed between the parties, which forms a basis for the subsisting relationship between the parties. It is further submitted that the complainant has entered into the said FBA with the respondent with open eyes and is bound by the same. It is further submitted that the relief(s) sought by the complainant travel way beyond the four walls of the FBA duly executed between the parties. It is submitted that the complainant while entering into the FBA has accepted and is bound by each and every clause of the said FBA, including clause-6.1 which provides for delayed penalty in case of delay in delivery of possession of the said unit by the respondent.
- d. It is further submitted that, the above submission implies that while entering into the FBA, the complainant had the knowledge that there may arise a situation whereby the possession could not be granted to the complainant as per the commitment period and in order to protect and/or safeguard the interest of the complainant, the respondent has provided reasonable remedy under clause-6.1, and, the complainant having accepted to the same in totality, cannot



claim anything beyond what has been reduced to in writing between the parties.

- e. It is very important to note that the rule 8 deals with documents executed by and between promoter and allottee after registration of the project by the promoter, however with respect to the documents including agreement for sale/ flat buyers agreement/plot buyers agreement executed prior to the registration of the project which falls within the definition of "Ongoing Projects" explained herein below and where the promoter has already collected an amount in excess of 10 percent of the total price rule 8 is not applicable.
- f. The parties had, vide clause 5.1 of the FBA [clause G (1) of the application form], duly agreed that subject to force majeure and compliance by the complainant of all the terms and conditions of the FBA, the respondent proposes to hand over possession of the flat to the complainant within 42 months from the date of sanction of the building plans or execution of the FBA, whichever is later along with a further grace period of 180 days. The said relevant clauses of FBA are re-produced hereinabove.
- g. That vide clause 7.3 of the FBA, an option to cancel the allotment is available to the complainant, however, acceptance of the same is on discretion of the respondent. It is pertinent to mention herein that the project in question is at advance stage of construction. It is submitted that the respondent shall stand by its commitment as per the terms of FBA. It is further submitted that the respondent has already invested huge money and at this stage cancelling the allotment is not acceptable.



- h. That vide clause-G.2 of the application form, which was later reiterated vide clause 6.1 of the FBA, it was duly agreed between the parties that subject to the conditions mentioned therein, in case the respondent fails to hand over possession within 42 months from the date of sanctioning of the building plans or execution of FBA, whichever is later along with 180 days of grace period, the respondent shall be liable to pay to the complainant compensation calculated @ Rs.5 per sq. ft. for every month of delay. It is further submitted that the parties had agreed the penalty in case of delay in offering possession prior to entering into the transaction. Prior to entering into the transaction, the parties had further agreed vide clause G.2 of the application form that in case the complainant fail or default in making timely payment of any of the instalments, then the complainant would not be eligible for delay compensation and the said understanding was also reiterated in clause 6.1 of the FBA. Thus, the understanding between the parties regarding compensation for delay in offering of possession had been agreed and accepted prior to entering into the transaction.
- i. It is submitted that the construction of unit in question is going on at full swing and that the respondent would be offering possession of the unit shortly.
7. 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

8. 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

9. 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

10. 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) 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.

11. 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.

12. 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. (Supra)* 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."

13. 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 objection raised by the respondent.



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

14. Objection raised the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will 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 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."

15. 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."

16. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the 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, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II. Objection regarding agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement.

17. The agreement to sell entered into between the parties on 15.05.2014 contains a clause 17 relating to dispute resolution between the parties.

The clause reads as under: -

"All or any disputes arising out or touching upon in relation to the terms of this Application/Agreement to Sell/ Conveyance Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereof for the time being in force. A sole arbitrator who shall be nominated by the seller/confirming party's managing director, shall hold the arbitration proceedings at Gurgaon. The purchaser(s) hereby confirms that he shall have no objection to such appointment and the purchaser(s) confirms that the purchaser(s) shall have no doubts as to the independence or impartiality of the said arbitrator and shall not challenge the same. The arbitration proceedings shall be held in English language and decision of the arbitration including but not limited to costs of the proceedings/award shall be final and binding on the parties."

18. 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. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

19. 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 builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

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

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

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in *A. Ayyaswamy (supra)*, the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large

extent, are similar to the disputes falling for resolution under the Consumer Act.

...

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."

20. 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 paras are 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."

21. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within their rights 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.

G. Findings on the relief sought by the complainants.

G.I. Direct the respondent to refund entire amount paid by the complainants along with the interest.

22. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by them in respect of subject unit along with interest. 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."

(Emphasis supplied)

23. Clause 5.1 & 1.6 of the BBA dated 15.05.2014 provides for the handing over of possession and is reproduced below for the reference:

"5.1 The seller/confirming party proposes to offer possession of the unit to the purchaser(s) within the commitment period. The seller/confirming party shall be additionally entitled to a grace period of 180 days after the expiry of the said commitment period for making offer of possession of the said unit.

1.6 Commitment Period" shall mean, subject to, force majeure circumstances; intervention of statutory authorities and purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by seller/confirming party, under this agreement and not being in default under any part of this agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, development charges (DC). Stamp duty and other charges, the seller/confirming party shall offer the possession of the unit to the purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of flat buyer's agreement, whichever is later."

24. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement

by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

Admissibility of grace period: The promoter has proposed to hand over the possession of the apartment within a period of 42 months from the date of sanction of the building plan or execution of flat buyer's agreement, whichever is later. Due date of possession is calculated from the date of agreement i.e., 15.05.2014 as the date of building plan is not known. The period of 42 months ends on 15.11.2017. Since in the present matter the BBA incorporates qualified reason for grace period/extended period of 180 days in the possession clause for making offer of possession and the promoter till date has neither offered the possession of the unit to the complainant nor applied for OC before the competent authority accordingly, the grace period of 180 days is not allowed to the promoter at this stage.

25. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund of the amount paid along with interest at the prescribed rate. However, the allottee intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.



Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

26. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
27. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **22.09.2023** is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.
28. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.
29. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021:***



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

30. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** it was observed:

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

31. 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.



32. 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 sections 71 & 72 read with section 31(1) of the Act of 2016.
33. The authority hereby directs the promoter to return the amount received by him i.e., ₹ 1,25,60,230/- along with interest at the rate of 10.75% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G.II. Initiate proceedings against the respondent for violating various provisions of the Act,2016

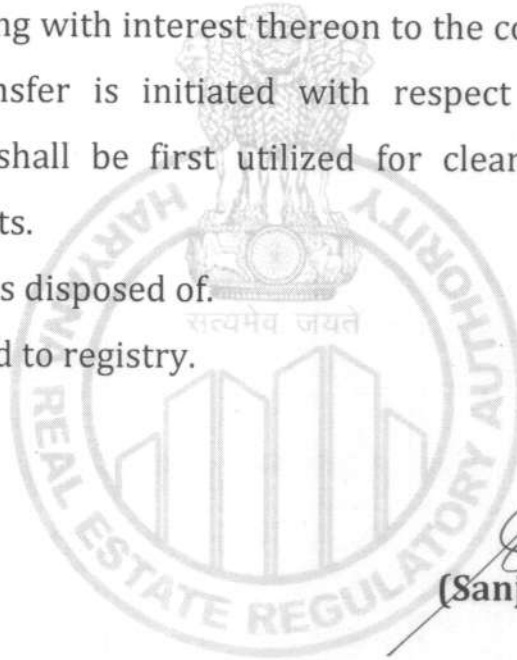
34. In view of the findings detailed above on issue no. 1, the above said relief becomes redundant as the complete amount paid by the complainant is refunded back.

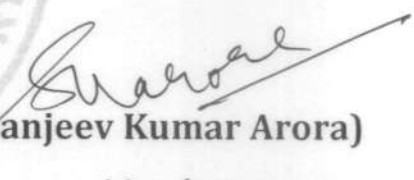
H. Directions of the authority

35. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):
- a. The respondent/promoter is directed to refund the entire amount of ₹ 1,25,60,230/- along with interest at the rate of 10.75% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the

amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

- b. 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.
 - c. The respondent is further directed not to create any third-party rights against the subject unit before the full realization of paid-up amount along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainants.
36. Complaint stands disposed of.
37. File be consigned to registry.




(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.09.2023

HARERA
GURUGRAM