

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

Date of decision: 03.11.2023

NAME OF THE BUILDER		M/S ANAND DIVINE DEVELOPERS PRIVATE LIMITED	
PROJECT NAME		TRIUMPH	
S. No.	Case No.	Case title	Appearance
1	CR/4866/2020	Varinder Singh Bedi V/s M/S Anand Divine Developers Private Limited	Sh. Rajan Gupta Sh. M.K Dang
2	CR/4868/2020	Jayant Sood V/s M/S Anand Divine Developers Private Limited	Sh. Rajan Gupta Sh. M.K Dang

CORAM:

Shri Sanjeev Kumar Arora

Member

ORDER

1. This order shall dispose of the 2 complaints titled above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, Triumph situated at Sector-104, Gurugram being developed by



the same respondent/promoter i.e., M/s Anand Divine Developers Private Limited. The terms and conditions of the buyer's agreements fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter seeking refund of the allotted unit.

3. The details of the complaints, reply status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project Name and Location	"Triumph" at sector 104, Gurgaon, Haryana.
Project area DTCP License No. Name of Licensee	14.093 acres 63 of 2011 dated 16.07.2011 valid upto 15.07.2019 10 of 2012 dated 03.02.2012 valid till 02.02.2020 M/s Great Value HPL Infratech Pvt. Ltd.
RERA Registration	Not Registered (Planning Branch is directed to initiate suo moto proceedings.)
Possession Clause: 18: Time of Handing Over Possession Barring unforeseen circumstances and Force Majeure events as stipulated hereunder, the possession of the said apartment is proposed to be offered by the Company by the Allottee within a period of 36 months with a grace period of 6 months from the date actual start of construction of a particular Tower Building in which the registration for allotment is made. Such date shall herein after referred to as stipulated date, subject always to timely payment of all amounts including the Basic Sale Price, EDC/IDC, IFMS, Stamp Duty, registration Fees and other Charges as stipulated herein or as may be demanded by the Company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/engineer-in-charge of the complex and the said certification shall be final and binding on the Allottee.	
Occupation Certificate: 28.05.2019	
Offer of Possession : 07.06.2019	



Sr. No	Complaint No., Case Title, and Date of filing of complaint	Date of apartment buyer agreement	Unit No.	Unit admeasure	Due date of Possession	Total Sale Consideration / Total Amount paid by the complainant	Relief Sought
1.	CR/4866 /2020 Varinder Singh Bedi V/s Anand Divine Developers Private Limited DOF: 22.12.2020 Reply Status: 03.09.2021	16.08.2014 Booking date: 09.06.2014 Allotment Letter: 16.08.2014 MOU: 16.08.2014 Tripartite agreement: 16.08.2014 Email for buyback policy: 19.02.2017, 20.06.2019	4241, 24 th Floor, Tower 4	2290 sq. ft.	16.02.2018 [calculated from the date of agreement as date of commencement of construction is not provided on record]	TSC: - Rs. 2,10,23,750/- AP: - Rs. 2,07,92,647/-	Refund



2.	CR/4868 /2020 Jayant Sood V/s Anand Divine Develope rs Private Limited DOF: 22.12.20 20 Reply Status: 24.01.20 22	30.08.20 14 Booking date: 15.07.20 14 Allotmen t Letter: 30.08.20 14 MOU: 30.08.20 14 Tripartit e agreeme nt: 30.08.20 14 Email for buyback policy: 16.01.20 17, 22.03.20 17 05.10.20 20	2191, 19 th Floor, Tower 2	2290 sq. ft.	28.02.20 17 [calculat ed from the date of agreeme nt as date of commen cement of construct ion is not provided on record]	TSC: - Rs. 2,10,23, 750/- AP: - Rs. 2,08,22, 853/-	Refund
----	---	---	--	-----------------	---	---	--------

Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:

Abbreviation Full form

TSC Total Sale consideration

AP Amount paid by the allottee(s)

4. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter /respondent in terms of section 34(f) of the Act which mandates the



authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.

5. The facts of all the complaints filed by the complainant(s)/allottee(s) are similar. Out of the above-mentioned case, the particulars of lead case **CR/4866/2020 Varinder Singh Bedi V/s M/s Anand Divine Developers Private Limited** are being taken into consideration for determining the rights of the allottee(s).

A. Project and unit related details

6. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

CR/4866/2020 Varinder Singh Bedi V/s M/s Anand Divine Developers Private Limited

S. N.	Particulars	Details
1.	Name of the project	"Triumph" at sector 104, Gurgaon, Haryana
2.	Nature of the project	Group Housing Colony
3.	Project area	14.093 acres
4.	DTCP license no. and validity status	63 of 2011 dated 16.07.2011 valid till 15.07.2019 10 of 2012 dated 03.02.2012 valid till 02.02.2020
5.	Name of licensee	M/s Great Value HPL Infratech Private Limited



		M/s Kanha Infrastructure Private Limited
6.	RERA Registered/ not registered	Not Registered (Planning Branch is directed to initiate suo moto proceedings)
7.	Unit no.	4241, 24 th Floor, Tower 4 (as per BBA on page no. 12 of complaint)
8.	Unit area admeasuring	2290 sq. ft. (as per BBA on page no. 12 of complaint)
9.	Date of booking	09.06.2014 (page no. 10 of complaint)
10.	Date of allotment letter	16.08.2014 (page no. 28 of reply)
11.	Date of builder buyer agreement	16.08.2014 (page no. 9 of complaint)
12.	MOU dated	16.08.2014 (page no. 34 of complaint)
13.	Tripartite agreement	16.08.2014 (Page no. 53 of reply)
14.	Email sent by complainant for exercising buy back option	19.02.2017 (page no. 41 of complaint)
15.	Possession Clause	18: Time of Handing Over Possession Barring unforeseen circumstances and Force Majeure events as stipulated hereunder, the possession of the said apartment is proposed to be offered by

		<p>the Company by the Allottee within a period of 36 months with a grace period of 6 months from the date actual start of construction of a particular Tower Building in which the registration for allotment is made. Such date shall herein after referred to as stipulated date, subject always to timely payment of all amounts including the Basic Sale Price, EDC/IDC, IFMS, Stamp Duty, registration Fees and other Charges as stipulated herein or as may be demanded by the Company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/engineer-in-charge of the complex and the said certification shall be final and binding on the Allottee</p>
16.	Date of commencement of construction	Not provided on record
17.	Due date of possession	<p>16.02.2018</p> <p>[calculated from the date of agreement i.e., 16.08.2014 as date of commencement of construction of tower is not provided on record]</p>
18.	Total sale consideration	<p>Rs. 2,10,23,750/-</p> <p>(as per payment plan on page no. 32 of complaint)</p> <p>BSP- Rs. 2,00,65,000/-</p>

		(as per payment plan on page no. 32 of complaint)
19.	Amount paid by the complainant	Rs. 2,07,92,647/- [as alleged by complainant on page no. 04 of complaint]
20.	Occupation certificate	28.05.2019 (page no. 107 of reply)
21.	Offer of possession	07.06.2019 (page no. 102 of reply)
22.	Reminder Email sent by complainant after offer of possession wherein reference of request dated 19.02.2017 was reiterated	20.06.2019 (Page no. 43 of complaint)

B. Facts of the complaint

The complainant has made the following submissions in the complaint: -

7. That respondent had launched group housing project known as "ATS Triumph" in sector-104, Gurugram-Haryana in the year 2011.
8. That the respondent company had spent a huge amount of money for the launch of the above project and assured the interested buyers that it will be a dream project for the investors. The complainant, being simple person, believed the promise of the respondent company and became inclined towards the project, invested all his life savings in the above project.
9. That complainant booked a residential apartment in above mentioned project vide application Nn. 293 dated 09.06.2014 and on dated 16th August

2014 a buyer's agreement was entered between complainant and respondent company.

10. That vide above buyer's agreement the respondent allotted one apartment bearing no. 4241 on 24th floor in tower no. 4, super area admeasuring 2290 Sq. ft. along with two no. of car parking's for a basic sale price of Rs. 2,00,65000/- in ATS Triumph, sector-104, Gurugram, Haryana. The complainant also paid booking amount of Rs. 28,90,553/- at the time of entering into builder's agreement.
11. That as per clause 18 of the buyer's agreement the offer of the possession of the said unit was to be given in 36 months with grace period of 6 months i.e. by 15.01.2018 from the date of execution of buyer's agreement but respondent failed to deliver the possession as promised.
12. That on the same day i.e. the day on which the buyer's agreement was entered between the parties, the parties also enter into one memorandum of understanding (MOU) dated 16.08.2014. That as per clause "E" & "F" in the said MOU respondent gave assurance to the complainant to buy back the said apartment at premium of Rs. 1500/- per sq. ft. after the expiry of 36 months from the date of booking. That said sections of the MOU are reproduced hereunder for ready reference:

"E. The Owner/Developer has offered an apartment No. 4241 in the said Project for a Basic Selling Price of Rs. 8500/- per sq. ft. on the sale on guaranteed buy back basis to the Purchaser/Investor.

F. That relying on the representation and assurance of the Owner/Developer, the Purchaser/Investor has agreed to invest in the said Project, subject to the Owner/Developer assuring him the guaranteed buy back premium of Rs. 1500/- per sq. ft. for the

Apartment Bearing No. 4241 in the said Project after the expiry of 36 months."

13. That further in the said MOU housing loan arrangement has been made by the respondent under subvention scheme for the said apartment and accordingly the complainant was eligible for sanction of home loan under the subvention scheme. The complainant applied for home loan on the said apartment.
14. That complainant has already made a payment of Rs. 2,07,92,647/- till date i.e. more than the basic price but respondent failed to deliver the possession in time. That complainant also suffered huge losses because of not delivering the possession in time, as the complainant has been forced to deposit interest of approximate Rs. 1,11,000/- every month to the lender bank and till today have already paid an amount of Rs.23,481,387/- towards interest on the home loan on the said apartment.
15. That complainant having gone through immense mental agony, stress and harassment has constantly raising the issue of huge delay with respondent, but unfortunately no satisfactory response or any concrete information or the reasons of this huge delay has come forth from respondent's end.
16. That on dated 19.02.2017 the complainant sent an email to the respondent and informed him that complainant wants to exercise his buy back option for the said apartment. However, no steps have been taken by the respondent company to refund the amount paid by the complainant. The complainant kept in touch with the respondent's officers and asked them to refund the money paid by the complainant but only assurance has been given by the officers to buy back the said apartment once approval received from the top officials.

17. That instead of buy back the said apartment the respondent company sent an email dated 20.06.2019 to the complainant regarding offer of possession. However, vide email dated 20.06.2019 & 20.12.2019 the complainant refused to accept the offer of possession and asked to refund the amount paid by the complainant.
18. That since the respondent failed to fulfil its promise to deliver the project in time i.e. 15.01.2018 as per the term of buyer's agreement, the complainant is entitle for refund of amount along with interest and further complainant also entitle for refund of amount as per buy back option given to the complainant at the time of signing of MOU, the complainant is no more interested in the project and wants refund of his money invested in the above project along with interest @ 24 % per annum from the date of payment till realization and respondent/opposite party also directed to pay guaranteed buy back premium of Rs. 1500/- per sq.ft.
- C. Relief sought by the complainant: -**
19. The complainant has sought following relief(s):
- I. Direct the respondent to return the money paid by the complainant i.e., Rs. 2,07,92,647/- along with interest @ 24% p.a. from the date of payment till realization.
 - II. Direct the respondent to pay an amount of Rs. 34,35,000/- as assured buy back premium along with interest @ 24% p.a. from the date of due till realization.
20. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondent

The respondent has contested the complaint on the following grounds.

21. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed.
22. That there is no cause of action to file the present complaint.
23. That the present complaint is bad for non-joinder of necessary parties. ICICI bank has not been accrued as a party in the present complaint.
24. That the complainant has no locus standi to file the present complaint.
25. That the complainant is estopped from filing the present complaint by his acts, omissions, admissions, acquiescence's and laches.
26. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 39 of the buyer's agreement.
27. That the complainant has not approached this Hon'ble Forum with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by him maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:
28. That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects in and around NCR region such as ATS Greens-I, ATS Greens-II, ATS Village, ATS Paradiso, ATS Advantage Phase-I & Phase-II, ATS One Hamlet, ATS Pristine, ATS Prelude & ATS Dolce and in these projects large number of families have already shifted after having

taken possession and Resident Welfare Associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.

29. That the complainant, after checking the veracity of the project namely, 'ATS Triumph', sector 104, Gurugram had applied for allotment of a residential unit and agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint. It is submitted that based on the application of the complainant, unit no. 4241, Tower no.4 was allotted to the complainant by the respondent vide allotment letter dated 16.08.2014.
30. That the buyer's agreement was executed on 16.08.2014. The Real Estate (Regulation and Development) Act, 2016 was not in force when the agreement was entered into between the complainant and the respondent. The provisions of the Real Estate (Regulation and Development) Act, 2016 thus cannot be enforced retrospectively.
31. That it was agreed that as per clause 4 of the buyer's agreement, the sale consideration of Rs. 2,00,65,000/- was exclusive of other costs, charges including but not limited to maintenance, stamp duty and registration charges, service tax, proportionate taxes and proportionate charges for provision of any other items/facilities. As per clause 12 of the buyer's agreement, timely payment by the complainants of the basic sale price and other charges as stipulated in the payment plan was to be the essence of the agreement.
32. That for making the payment towards the sale consideration, the complainant opted for loan to purchase the said apartment and entered into a tripartite agreement dated 16.08.2014 with ICICI Bank and the respondent. It was agreed vide several clauses of the tripartite agreement

that without the prior consent of the ICICI Bank, the complainant would not mortgage/charge/transfer/sell/assign or part with

33. That the implementation of the said project was hampered due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of the respondent and which have affected the materially affected the construction and progress of the project. Some of the Force Majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under :

34. Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to Demonetization: [Only happened second time in 71 years of independence hence beyond control and could not be foreseen]. The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f from 9-10 November 2016 the day when the Central Government issued notification with regard to demonetization. During this period, the contractor could not make payment to the labour in cash and as majority of casual labour force engaged in construction activities in India do not have bank accounts and are paid in cash on a daily basis. During Demonetization the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on a site of the magnitude of the project in question are Rs. 3-4 lakhs per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence the implementation of the project in question got delayed due on account of

- issues faced by contractor due to the said notification of Central Government.
35. Further there are studies of Reserve Bank of India and independent studies undertaken by scholars of different institutes/universities and also newspaper reports of Reuters of the relevant period of 2016-17 on the said issue of impact of demonetization on real estate industry and construction labour.
36. The Reserve Bank of India has published reports on impact of Demonetization. In the report- Macroeconomic Impact of Demonetization, it has been observed and mentioned by Reserve Bank of India at page no. 10 and 42 of the said report that the construction industry was in negative during Q3 and Q4 of 2016-17 and started showing improvement only in April 2017.
37. Furthermore, there have been several studies on the said subject matter and all the studies record the conclusion that during the period of demonetization the migrant labour went to their native places due to shortage of cash payments and construction and real estate industry suffered a lot and the pace of construction came to halt/ or became very slow due to non availability of labour. Some newspaper/print media reports by Reuters etc. also reported the negative impact of demonetization on real estate and construction sector.
38. That in view of the above studies and reports, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should deemed to be extended for 6 months on account of the above.

39. Orders Passed by National Green Tribunal: In last four successive years i.e. 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. Also the Hon'ble NGT has passed orders with regard to phasing out the 10 year old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The Contractor of Respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to following, there was a delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November- December 2016 and November-December 2017. The district administration issued the requisite directions in this regard.
40. In view of the above, construction work remained very badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondent and the said period is also required to be added for calculating the delivery date of possession.
41. Non-Payment of Instalments by Allottees: Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.
42. Inclement Weather Conditions viz. Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavorable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the

project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions. The said period is also required to be added to the timeline for offering possession by the respondent.

43. That the respondent after completing the construction of the unit in question, applied for the grant of the occupation certificate on 03.10.2016 and the same was granted by the concerned authorities on 28.05.2019. The respondent offered the possession of the unit to the complainant vide letter dated 07.06.2019. The complainant was intimated to remit the outstanding amount on the failure of which the delay penalty amount would accrue. The complainant is not coming forward to take the possession of the unit after remitting the due amount. The complainant is bound to take the physical possession of the unit after making payment towards the due amount along with interest and holding charges.
44. That the complainant is a real estate investor who has invested his money in the project of the respondent with an intention to make profit in a short span of time. However, his calculations have gone wrong on account of slump in the real estate market and they are now deliberately trying to unnecessarily harass, pressurize and blackmail the respondent to submit to their unreasonable demands.
45. 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

46. 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

47. 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

48. 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.

49. 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.

F. Findings on the objection raised by respondent

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

50. 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.

51. 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."

52. 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."

53. 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

54. 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:

"39. Dispute Resolution by Arbitration
"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 as amended up to date. A sole Arbitrator, who shall be nominated by the Board of the Directors of the Company, shall hold the arbitration proceedings at the office of the Company at Noida. The Allottee hereby confirms that he shall have no objections to this appointment, more particularly on the ground that the Sole Arbitrator, being appointed by the Board of Directors of the Company likely to be biased in favor of the Company. The Courts at NOIDA, Uttar Pradesh shall to the specific exclusion of all other courts, alone have the exclusive jurisdiction in all matters arising out of/touching and/or concerning this Agreement, regardless of the place of execution or subject matter of this Agreement. Both the parties in equal proportion shall pay the fee of the "Arbitrator".

55. 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.

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

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

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

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

57. 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."

58. 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 mandatorily. 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 complainant

- I. Direct the respondent to return the money paid by the complainant i.e., Rs. 2,07,92,647/- along with interest @ 24% p.a. from the date of payment till realization.
 - II. Direct the respondent to pay an amount of Rs. 34, 35,000/- as assured buy back premium along with interest @ 24% p.a. from the date of due till realization.
59. 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 as per section 18(1) of the Act and the same 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)

60. Clause 18 of the buyer’s agreement provides the time period of handing over possession and the same is reproduced below:

18: Time of Handing Over Possession

*Barring unforeseen circumstances and Force Majeure events as stipulated hereunder, the possession of the said apartment is proposed to be offered by the Company by the Allottee **within a period of 36 months with a grace period of 6 months from the date actual start of construction of a particular Tower Building in which the registration for allotment is made.** Such date shall herein after referred to as stipulated date, subject always to timely payment of all amounts including the Basic Sale Price, EDC/IDC, IFMS, Stamp Duty, registration Fees and other Charges as stipulated herein or as may be demanded by the Company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company’s architect/engineer-in-charge of the complex and the said certification shall be final and binding on the Allottee.”*

61. The complainant had booked the unit in the project of the respondent company namely ATS Triumph, situated at sector 104, Gurugram for a total sale consideration of Rs. 2,10,23,750/- out of which the complainant has made a payment of Rs. 2,07,92,647/-. The unit no. 4241 on 24th Floor in Tower 4 was allotted to the complainant vide allotment letter dated 16.08.2014. Similarly, on the same day i.e., 16.08.2014 buyer’s agreement was executed between the parties, MOU was executed between the parties and tripartite agreement was also executed on the same day. As per possession clause 18 of the buyer’s agreement, the possession of the unit was to be handed over within 36 months with a grace period of 6 months from the date of actual start of construction of a particular tower. The date

of actual start of construction is not provided on record therefore, the due date is calculated from the date of agreement i.e., 16.08.2014 which comes out to be 16.02.2018 including the grace period.

62. It is pleaded on behalf of the complainant that as per clause E, F and 8 of the MOU dated 16.08.2014 the respondent has guaranteed the complainant to buyback the said unit. The said clauses are reproduced below for ready reference:

E. The Owner/Developer has offered an apartment bearing no. 4241 in the said Project for a Basic Selling Price of Rs. 8500/- per sq. ft. on sale on guaranteed buy back basis to the Purchaser/Investor.

F. That relying on the representation and assurances of the Owner/Developer, the Purchaser/Investor has agreed to invest in the Said Project, subject to the owner/Developer assuring him the guaranteed buy back premium of Rs. 1500/- per sq. ft. for the Apartment bearing no. 4241 in the Said Project after expiry of the 36 months from the date of booking, on the terms contained hereinafter.

8. It is hereby agreed by the parties that the Purchaser/Investor, within a time frame of 33 months from date of booking to 36 months from the date of booking, shall be entitled to call upon the Owner/Developer in writing, to purchase the aforesaid apartment at a premium of Rs. 1500/- per sq. ft. and in such a case the Owner/Developer shall repurchase the said Apartment within 30 days of expiry of 36 months from the date of booking.

63. As per the clause 8 of the MOU dated 16.08.2014, the complainant has to write to the developer for repurchasing of unit within a time frame of 33 months to 36 months from the date of booking. The date of booking is 09.06.2014 (page no. 10 of complaint). As per the clause 8 the 33 months was ended on 09.03.2017 and 36 months ended on 09.06.2017. The

complainant has a right to exercise its option of buyback policy from 09.03.2017 till 09.06.2017.

64. In the present complaint, complainant has exercise his option of buyback policy by sending an email on 19.02.2017 i.e., before the time frame of 33 months to 36 months as per clause 8 of the MOU dated 16.08.2014.
65. Thus in the face of above mentioned terms and conditions of buyer agreement w.r.t. due date for completion of the project, offer of possession and as per buy back policy dated 16.08.2014 the request made by the complainant for withdrawal for the project and seeking refund vide letter dated 19.02.2017 was premature and was rightly rejected by the respondent builder. The occupation certificate for the project was received on 28.05.2019 and thereafter offer has also been made by the respondent/builder to the complainant/allottee. Further after receiving the offer of possession the complainant again sent an email regarding buy back policy. But the question for consideration arises as to whether in the facts and circumstances detailed above, the builder-respondent can force the complainant to take possession of the allotted unit and pay the remaining amount though they withdrew from the project on 19.02.2017. Though it is contended on behalf of respondent builder that the allottees are bound to take possession of the unit after paying the amount due but there plea advanced in this regard is devoid of merit.
66. As the allottees have already withdrawn from the project prematurely, they are entitle to refund of paid up amount after deduction of 10% of the basic sale price of the unit as settled by the Hon'ble Apex Court in number of cases and even leading to framing of Regulation 11 in the year 2018 by the authority.

67. The deduction should be made as per the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, which states that-

"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."

68. In view of aforesaid circumstances, the respondent is directed to refund the paid-up amount after deducting 10% of the sale consideration of the unit being earnest money within 90 days along with an interest @ 10.75% p.a. on the refundable amount, from the date of withdrawal i.e., 19.02.2017 till the date of its payment.

H. Directions of the authority

69. 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 amount of Rs. 2,07,92,647/- and Rs. 2,08,22,853/- respectively after deducting 10% of the sale consideration of the unit being earnest

money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 along with an interest @10.75 % p.a. on the refundable amount, from the date of withdrawal i.e., 19.02.2017 and 16.01.2017 in both the cases respectively till the date of payment.

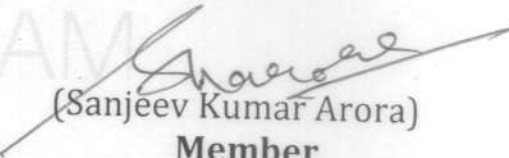
- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
- iii. Out of the total amount so assessed, the amount paid by the bank/payee be refunded first in the account of the bank and the balance amount along with interest if any, be refunded to the complainant-allottees.

70. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.

71. The complaints stand disposed of.

72. Files be consigned to registry.

HARERA
GURUGRAM


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.11.2023