

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

Complaint no. :	146 of 2020
First date of hearing:	12.02.2020
Order Reserve On :	14.07.2023
Order Pronounce On:	22.09.2023

<b>Gayatri Goyal</b> R/o: H. No. 174, Sector-14, Gurugram	<b>Complainant</b>
Versus	
<b>M/s Ireo Private Limited</b> Office at : - C-4, 1 <sup>st</sup> Floor, Malviya Nagar, New Delhi, South Delhi-110017	<b>Respondent</b>

**CORAM:**

Shri Sanjeev Kumar Arora

**Member**

**APPEARANCE:**

Shri Anuj Chauhan

Advocate for the complainant

Shri M.K Dang

Advocate for the respondent

**ORDER**

1. The present complaint dated 15.01.2020 has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se.



**A. Unit and project related details**

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

S. No.	Heads	Information
1.	Project name and location	"Ireo City Central", Sector 59, Gurgaon
2.	Licensed area	3.9375 acres
3.	Nature of the project	Commercial Colony
4.	DTCP license no.	56 of 2010 dated 31.07.2010 valid upto 30.07.2020
	Licensee	SU Estates Pvt. Ltd.
5.	RERA registered/not registered	<b>Registered</b> 107 of 2017 dated 24.08.2017 upto 30.06.2020
6.	Unit no.	R-1201, 12th Floor, Tower R (page no. 20 of complaint)
7.	Unit measuring	1241.67 sq. ft. [page no. 20 of complaint]
8.	Date of approval of building plan	05.09.2013 (annexure R-6 on page no. 96 of reply)
9.	Date of allotment	26.09.2012 (page no. 20 of complaint)
10.	Date of environment clearance	12.12.2013 (annexure R-7 on page no. 99 of reply)
11.	Date of execution of builder buyer's agreement	Not Executed
12.	Date of consent to establish	07.02.2014 (annexure R- 8 on page no. 105 of reply)

13.	Reminders for payment	<p><b>Fourth Instalment:</b> 13.05.2015, 08.06.2015, Final notice: 03.07.2015</p> <p><b>Fifth Instalment:</b> 09.11.2015, 02.12.2015</p> <p><b>Sixth Instalment:</b> 25.01.2016, 18.02.2016 Final Notice: 05.07.2016</p> <p><b>Seventh Instalment:</b> 19.09.2016, 13.10.2016, Final notice: 07.11.2016</p>
14.	Date of cancellation letter	23.01.2017 (annexure R-30 on page no. 94 of reply)
15.	Total consideration	Rs.1,78,18,333/- [as per payment plan on page no. 117 of complaint]
16.	Total amount paid by the complainant	Rs. 52,15,509/- (as per receipts on page no. 118 - 123 of complaint)
17.	Due date of delivery of possession	<b>05.03.2017</b> [calculated from the date of approval of building plans] <b>Note:</b> Grace period is not allowed.
18.	Possession clause	<b>13.3 Possession and Holding Charges</b> Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the

		<p>timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said Rental Pool Serviced Apartment to the Allottee within a period of 42 months from the date of approval of the Building Plans and/or fulfillment of the preconditions imposed there under ("Commitment Period"). The Allottee further agrees and understands that the Company shall additionally be entitled to a period of 180 days ("Grace Period"), after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company.</p> <p><b>(Emphasis supplied)</b></p>
19.	Occupation certificate	Not Obtained
20.	Offer of possession	Not offered but cancelled

### B. Facts of the complaint

The complainant has submitted as under:

- That the applicant booked an apartment admeasuring 1241.67 sq. ft. on 23.01.2012 by paying a sum of Rs.15,00,000/- as booking amount

towards the said unit in the project "The Ireo City Central-Managed Service Apartments" being developed by the respondent.

4. That in lieu of the booking made, the complainant was provisionally allotted the residential unit bearing no. R1201, 12<sup>TH</sup> Floor, admeasuring 1241.67 sq. ft. for a total sale consideration of Rs.1,78,15,303/- vide allotment letter dated 26.09.2012.
5. That the respondent as per clause 13.3 of flat buyer's agreement was to deliver the possession of the said unit by 31.07.2014, however to the utter dismay of the complainant and despite making timely remittance to the demands as per the payment plan annexed with the flat buyers agreement, the respondent have failed to handover the possession of the unit by the committed timeline i.e., 31.07.2014. Thus, the Respondent have miserably failed to adhere to the stipulated timeline mentioned in the agreement which they failed to execute.
6. That the flat buyer agreement, being one sided was never signed by the complainant and despite of several reminders, the respondent failed to address the issue with respect to the agreement and thus failed to execute a balanced-out agreement with the complainant.
7. That as per the set-out payment plan the complainant after paying the initial booking amount which was 9.71% of the BSP continued to pay as and when the demands were raised by the respondent. Thus the respondent have acted in breach of section 13(1) of the act.
8. That in accordance with the above stated payment plan the complainant till now had made payments to the tune of Rs. 52,15,509/- which has been duly acknowledged on the part of the respondent through the issuance of receipts.
9. That as per the Buyer agreement, the possession of the said unit was to be given by 31.07.2014 i.e. within 48 months from the committed date

(i.e. date of approval of building plans) as per clause 13.3 of flat buyer agreement. Further, clause 13.4 of the buyer agreement stated that in case of delay in possession, the respondent shall be liable to pay compensation @ of Rs. 20/- per sq. feet of the super area per month for the period of delay till the time of actual date fixed for offering possession.

10. That though the flat buyer agreement was not signed by the complainant, all the payments were timely made which was also acknowledged by the respondent.
11. That the completion of the project was not at par of the payment plan, and furthermore the respondent has acted in breach of the agreement as well the act and the money collected by the respondent have been misused by them.
12. That section 18 (1)(a) the real estate (Regulation and Development) Act, 2016 (hereinafter the act) makes a promoter liable in case he fails to complete or give possession in accordance with the terms of the agreement for sale or as the case may be. Thus, the act of respondent of accepting and acknowledging the payments made by the complainant forms a deemed and enforceable contract between the above-mentioned parties.

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

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

(i) Direct the respondent to refund the amount of Rs. 52,15,509/- along with pendente lite interest from the due date of payment till the date of actual payment, in favour of complainant and against the respondent.

14. 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: -

15. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The booking application form was signed between the complainant and the respondent prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.
16. That there is no cause of action to file the present complaint.
17. That the complainant has no locus standi to file the present complaint.
18. That this Hon'ble Authority does not have the jurisdiction to try and decide the present complaint.
19. The present complaint is barred by limitation.
20. That the complainant is estopped from filing the present complaint by his own acts, conducts, omissions, admissions, acquiescence and laches.
21. That the complaint is not maintainable for the reason that the booking application form contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 48 of the booking application form.
22. That the complainant has not approached this authority with clean hands and have intentionally suppressed and concealed the material facts in the complaint. The present complaint has been filed by them 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:

23. That complainant after checking the veracity of the project namely, 'Ireo City central', Sector 59, Gurgaon had applied for allotment of an apartment vide their booking application form. The complainant agreed to be bound by the terms and conditions of the booking application form.
24. That based on the application for booking, the respondent sent a letter dated 06.07.2012 intimating the complainant to complete the documentation formalities which were required for the purpose of allotment. Accordingly, the respondent vide its allotment offer letter dated 26.09.2012 allotted to the complainant apartment no. R1201 having tentative super area of 1241.67 sq. ft. for a total sale consideration of Rs. 1,78,18,333/-.
25. That the respondent had as per the terms of the allotment sent three copies of buyer's agreement to the complainant vide its letter dated 19.06.2013 and it had asked the complainant to return all the three copies back to it. However, the complainant miserably failed to sign and return the copies of the buyer's agreement to the respondent despite reminders dated 25.09.2013 and 07.03.2014. The terms of the buyer's agreement were already the part of schedule 1 of the booking application Form.
26. That the respondent raised payment demands from the complainant in accordance with the agreed terms and conditions of the allotment as well as of the payment plan. The complainant made payment of some of the installments and then started committing defaults. It is pertinent to mention herein that the respondent had raised the first installment) demand on 26.09.2012 for the net payable amount of Rs 19,67,151/-. However, the complainant remitted the demanded amount only after reminders dated 22.10.2012 and 14.11.2012 and final notice dated 18.12.2012 were sent by the respondent.



27. That the respondent had raised the third installment demand on 05.03.2014 for the net payable amount of Rs. 17,48,358/-. However, the complainant remitted the payment towards the demanded amount after reminders dated 31.03.2014 and 21.04.2014 were sent by the respondent.
28. That vide payment demand dated 15.04.2015, the respondent raised the payment demand towards the/fourth installment for net payable amount of Rs. 17,45,437.07. However, the complainant failed to adhere to her obligation in making payment towards the demanded amount despite reminders dated 13.05.2015 & 08.06.2015 and final notice dated 03.07.2015 and the same was adjusted in the next installment demand as arrears.
29. That vide payment demand dated 08.10.2015, the respondent raised the payment demand towards the fifth installment for net payable amount of Rs. 37,51,839.57. However, the complainant again failed to remit the demanded amount despite reminders dated 09.11.2015 & 02.12.2015 and the due amount was adjusted in the next installment demand as arrears.
30. That the respondent had raised the sixth installment demand on 28.12.2015 for the net payable amount of Rs. 55,08,082.12. However, the complainant again failed to remit the demanded amount despite reminders dated 25.01.2016 & 18.02.2016 and final notice dated 05.07.2016 and the same was adjusted in the next installment demand as arrears. The respondent had, vide its letter dated 09.02.2016, even intimated the complainant about the interest accrued on account of delay in making payment towards the demanded amount.
31. That vide payment demand dated 24.08.2016, the respondent raised the payment demand towards the seventh installment for net payable



amount of Rs. 72,66,848.67. However, the complainant yet again failed to adhere to her obligation of making payment towards the demanded amount despite reminders dated 19.09.2016 & 13.10.2016 and final notice dated 07.11.2016

32. That it is pertinent to mention here that according to agreed clauses of the booking application form, timely payment of installments within the agreed time schedule was the essence of allotment. The complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, her calculations went wrong on account of slump in the real estate market and the complainant did not possess sufficient funds to honour her commitments. The complainant was never ready and willing to abide by her contractual obligations and she also did not have the requisite funds to honour her commitments.
33. That on account of non-fulfillment of the contractual obligations by the complainant despite several opportunities extended by the respondent, the allotment of the complainant was cancelled and the earnest money deposited by the complainant along with other charges were forfeited vide cancellation letter dated 23.01.2017 in accordance with clause 7 read with clause 11 of the booking application form and clause 3 of the allotment letter.
34. That even otherwise, the due date to handover the possession of the unit had not lapsed at the time of the termination of the allotment of the complainant. The possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions. Of the booking application form. As per clause 38 of the booking application form the possession of the unit was supposed to be offered to the complainant within a period of 42 months from the date of approval of

the building plans and/or fulfilment of the preconditions imposed thereunder. The allottee further agrees that the company shall additionally be entitled to a period of 180 days as grace period.

35. It has been specified in sub-clause (xv) of clause 16 of the building plan dated 05.09.2013 of the said project that the clearance issued by the Ministry of Environment and Forest, Government of India has to be obtained before starting the construction of the project. The environment clearance for construction of the said project was granted on 12.12.2013. Furthermore, in clause 1 of part-A of the environment clearance dated 12.12.2013 it was stated that 'consent to establish' was to be obtained before the start of any construction work at site. The consent to establish was granted on 07.02.2014 by the concerned authorities. Therefore, the pre-condition of obtaining all the requisite approvals were fulfilled only on 07.02.2014.
36. That in terms of the booking application form the proposed time for handing over of possession has to be computed from 07.02.2014. Moreover, as per clause 13.5 of the buyer's agreement, 'extended delay period' of 12 months from the end of grace period is also required to be granted to the respondent. The due date to handover the possession was to elapse on 07.02.2019. However, it is submitted that the said due period was subject to the occurrence of the force majeure conditions and the timely payment of demanded amount by the complainant.
37. That the implementation of the said project has been 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:

i. **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.

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. 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. That in view of the several studies and this report, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should be deemed to be extended for 6 months on account of the above.

- ii. **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 the 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. 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.

- iii. That in the year 2017, there was a **dispute between the respondent and the contractor of the project** on account of which the construction work of project came to a halt and this fact was intimated to the complainant as well. On account of the stoppage of work by the contractor of the project in question, valuable time to complete the construction was lost and the same is covered under the ambit of the definition of 'force majeure' as defined in Clause 1 of the Buyer's Agreement.
- iv. **Non-Payment of Instalments by Allottees:** Several allottees, including the complainant, 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.
- v. **Inclement Weather Conditions viz. Gurugram:** Due to heavy rainfall in Gurugram in the year 2016 and unfavourable 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.
- vi. That Divisional Commissioner, Gurgaon directed District Town Planner, Gurgaon to stop construction at site and for nearly two months the implementation was kept in abeyance. Despite all these circumstances mentioned above the respondent worked hard and tirelessly and was able to complete the construction of the apartment allotted to the complainant.

38. That the construction of tower in which the apartment allotted to the complainant was located is complete. However, after cancellation of the allotment of the complainant she is left with no right, claim, lien or interest. The present complaint is filed with malafide motives and in order to illegally extract benefits from the respondent. The complaint is liable to be dismissed with heavy costs payable to the respondent.
39. 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**

40. The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

**E. I Territorial jurisdiction**

41. 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**

42. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

**Section 11(4)(a)**

*Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

**Section 34-Functions of the Authority:**

*34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

43. 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.
44. 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.*** SCC Online SC 1044 decided on 11.11.2021 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."*

**F. Findings on the objections raised by the respondent.**

**F.I Objection regarding complainant is in breach of application form for non-invocation of arbitration.**

45. The respondent submitted that the complaint is not maintainable for the reason that the buyers 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:

**"48. Dispute Resolution by Arbitration**

*"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".*

46. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the application form as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the

intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

47. 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."*

48. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the application form, the Hon'ble Supreme Court **in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

*"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

49. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within right to seek a special remedy available in a beneficial Act

such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.

**F.II Objections regarding force majeure**

50. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction during 2015-2016-2017-2018, dispute with contractor, non-payment of instalment by allottees and demonetization. The plea of the respondent regarding various orders of the NGT and demonetisation but all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Further, any contract and dispute between contractor and the builder cannot be considered as a ground for delayed completion of project as the allottee was not a party to any such contract. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

**G. Findings regarding relief sought by the complainant.**

- (i) Direct the respondent to refund the amount of Rs. 52,15,509/- along with pendente lite interest from the due date of payment till the date of actual payment, in favour of complainant and against the respondent.
51. The complainant-allottee booked a residential apartment in the project of the respondent named as "Ireo City Central" situated at sector 59, Gurgaon, Haryana for a total sale consideration of Rs. Rs.1,78,18,333/-. The allotment of the unit was made on 26.09.2012. Moreover, no builder buyer agreement was executed between the parties.
52. The respondent vide letter dated 19.06.2013 sent three copies of builder buyer agreement and asked to return it after signing of the same but the complainant failed to do so despite reminders dated 25.09.2013 and 07.03.2014. As per the payment plan the respondent started raising payments from the complainant but they defaulted to make the payments. The complainant-allottee in total has made a payment of Rs. 52,15,509/-. The respondent vide letter dated 05.03.2014 raised the demand towards third instalment and due to non-payment from the complainant it sent reminders on 31.03.2014 and 21.04.2014 and thereafter various instalments for payments were raised but the complainant failed to pay the same. Further the respondent sent final notice dated 07.11.2016 to clear the outstanding dues within 30 days. Thereafter the respondent cancelled the allotment the unit vide letter dated 23.01.2017.
53. The authority observes that the promoter was required to refund the balance amount as per applicable cancellation clause of the application form. The balance amount has not been refunded which is a subsisting obligation of the promoter as per the booking application form as builder buyer agreement was not executed between them. The respondent-



builder must have refunded the balance amount after making reduction of the charges. On failure of the promoter to refund the amount the authority is of considered opinion that the promoter should have refund the balance amount after deducting 10% of the sale consideration.

54. The Hon'ble Apex Court of land in cases of ***Maula Bux Vs. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs Vs. Sarah C. Urs, (2016) 4 SCC 136***, held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provision of the section 74 of the Contract Act, 1872 are attracted and the party so forfeiting must prove actual damage.
55. Even keeping in view, the principle laid down by the Hon'ble Apex Court of the land, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, framed regulation 11 provided as under-

*"AMOUNT OF EARNEST MONEY*

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

56. In view of aforesaid circumstances, the respondent is directed to refund the paid-up amount after deducting 10% of the basic sale price 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 cancellation i.e., 23.01.2017 till the date of its payment.

**H. Directions of the authority: -**

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

- i. The respondent/promoter is directed to refund the paid-up amount after deducting 10% of the basic sale price 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 cancellation i.e., 23.01.2017 till the date of its 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.

58. Complaint stands disposed of.

59. File be consigned to the registry.

  
(Sanjeev Kumar Arora)  
Member

Haryana Real Estate Regulatory Authority, Gurugram  
Dated: 22.09.2023