BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**5313 of 2022**
Complaint filed on	**:**	**28.07.2022**
Date of decision	**:**	**02.02.2024**

1. Jasvinder Singh Rana 2. Jatinder Kaur **Address:** Central Park-2, Tower 26 14D, Sector 48, Sohna Road, Gurugram 122018	**Complainants**
Versus	
M/s Raheja Developers Limited. **Regd. Office at**: W4D, 204/5, Keshav Kunj, Western Avenue, Carippa Marg, Sainik Farms, New Delhi- 110062	**Respondent**

CORAM:	
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:	
Sh. Nilotpal Shyam (Advocate)	Complainants
Sh. Garvit Gupta (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/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 to the allottees as per the agreement for sale executed *inter se* them.

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	"Raheja Revanta", Sector 78, Gurugram, Haryana
2.	Project area	18.7213 acres
3.	Nature of the project	Residential Group Housing Colony
4.	DTCP license no. and validity status	49 of 2011 dated 01.06.2011 valid up to 31.05.2021
5.	Name of licensee	Sh. Ram Chander, Ram Sawroop and 4 Others
6.	Date of environment clearances	23.10.2013 (Page no. 86 of the complaint)
7.	Date of revised environment clearances	31.07.2017 [Note: - the date of revised EC is taken from the complaint no. 1681 of 2022 of the same projects being developed by the same promoter]
8.	RERA Registered/ not registered	Registered vide no. 32 of 2017 dated 04.08.2017
9.	RERA registration valid up to	31.01.2023 5 Years from the date of revised Environment Clearance + 6 months grace period in view of Covid- 19
10.	Unit no.	B-081, 8TH floor, Tower/block- B (Page no. 46 of the complaint)

11.	Unit area admeasuring	2813.31 sq. ft. (Page no. 46 of the complaint)
12.	Allotment letter	27.02.2014 (Page no. 41 of the complaint)
13.	Date of execution of agreement to sell – Raheja Revanta	28.02.2014 (Page no. 43 of the complaint)
14.	Possession clause	**4.2 Possession Time and Compensation** *That the Seller shall sincerely endeavour to give possession of the Unit to the purchaser* ***within thirty-six (36) months in respect of 'TAPAS' Independent Floors and forty eight (48) months in respect of 'SURYA TOWER' from the date of the execution of the Agreement to sell*** *and after providing of necessary infrastructure specially road sewer & water in the sector by the Government, but subject to force majeure conditions or any Government/ Regulatory authority's action, inaction or omission and reasons beyond the control of the Seller.* ***However, the seller shall be entitled for compensation free grace period of six (6) months in case the construction is not completed within the time period mentioned above****. The seller on obtaining certificate for occupation and use by the Competent Authorities shall hand over the Unit to the Purchaser for this occupation and use and subject to the Purchaser*

		having complied with all the terms and conditions of this application form & Agreement To sell. In the event of his failure to take over and /or occupy and use the unit provisionally and/or finally allotted within 30 days from the date of intimation in writing by the seller, then the same shall lie at his/her risk and cost and the Purchaser shall be liable to compensation @ Rs.7/- per sq. ft. of the super area per month as holding charges for the entire period of such delay....." (Page no. 54 of the complaint).
15.	Grace period	**Allowed** As per clause 4.2 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 48 months plus 6 months of grace period. It is a matter of fact that the respondent has not completed the project in which the allotted unit is situated and has not obtained the occupation certificate by July 2016. As per agreement to sell, the construction of the project is to be completed by July 2016 which is not completed till date. **Accordingly, in the present case the grace period of 6 months is allowed**.
16.	Due date of possession	28.08.2018 (Note: - 48 months from date of agreement i.e., 28.02.2014 + 6 months grace period)

17.	Total sale consideration	Rs.2,49,07,896/- (As per payment plan at page no.71 of the complaint)
18.	Amount paid by the complainants	Rs.85,74,895/- (As per applicant ledger on page no 72 of complaint)
19.	Demand/reminders letter issued by the respondent company	26.09.2014, 28.02.2015, 03.03.2015 (Page no. 74 to 78 of the complaint)
20.	Cancellation Mail by respondent	17.03.2015 (Page no 24 of reply)
21.	Occupation certificate /Completion certificate	Not received
22.	Offer of possession	Not offered

B. Facts of the complaint

3. That the complainants accordingly booked unit no. B-081 in 8th floor tower B of the impugned project and also made a payment of Rs,20,00,000/- towards booking of the unit.

4. That the complainants entered into the agreement to sale for unit no. B-081 on 8th Floor, Tower-B, "Raheja Revanta" Sector 78, Gurgaon and the agreement was executed on 28.02.2014 between M/s Raheja Developers Ltd., (as First Part- seller) and Mr. Jasvinder Singh Rana and Jatinder Kaur (as Second Part -Purchaser) for total sale consideration is of Rs.85,74,895/- to the respondent company towards the consideration for the impugned unit.

5. That the respondent as per the agreement to sale to handover the possession of the impugned unit no. B-081 within 4 years from the date of execution of the agreement to sale. Thus, the commitment of the respondent company was up till November 2018.

6. That the clause 4.2 of the agreement to sale further provided that if respondent company failed to complete construction of the said unit within forty-eight (48) months plus the grace period of six months from the date of execution of the agreement to sale, shall pay compensation @ 7/-per sq. ft. of the super area per month of the entire period of such delay which proportionate to the rental income for similar property in the area or average rental equivalent sized unit in the vicinity, whichever is higher.

7. That the respondent failed to keep their promise of delivery of the unit within the time prescribed under the agreement to sale i.e. February, 2018. The respondent company not even bothered to give reason about such unreasonable delays in handing over the possession of impugned flat to the complainants. The respondent company does not respond to the genuine problems faced by the complainants. While the respondent company failed to keep its legally binding promise of due deliver, at the other hand, the complainants were compelled to pay compound interest @18% per annum for any delay in payment of due instalments.

8. That the complainants have paid total Rs.85,74,895 /- paid of the total demand made as per demand letter issued by the respondent company in accordance with the payment plan.

9. That there is almost 3 and half years of unexplained delay in handing over the possession of impugned unit by the respondent to the complainants. Therefore, the complainants has genuine grievance which require the intervention of the Hon'ble Authority in order to do justice with them.

C. Relief sought by the complainants:

10. The complainants have sought following relief(s).

I. **Direct the respondent to set aside the cancellation notice dated 17.03.2015 and refund amount the amount forfeited towards earnest money.**

II. **Direct the respondent company to pay a cost of Rs. 1,00,000/- towards the cost of the litigation.**

D. Reply by the respondent

11. The respondent contested the complaint on the following grounds: -

12. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The agreement to sell was executed between the parties prior to the enactment of the Act, 2016 and the provisions laid down in the said Act cannot be enforced retrospectively. Although the provisions of the Act, 2016 are not applicable to the facts of the present case in hand yet without prejudice and in order to avoid complications later on, the respondent has registered the project with the authority under the provisions of the Act of 2016, vide registration no. 32 of 2017 dated 04.08.2017.

13. That the respondent is traversing and dealing with only those allegations, contentions and/or submissions that are material and relevant for the purpose of adjudication of present dispute. It is further submitted that save and except what would appear from the records and what is expressly admitted herein, the remaining allegations, contentions and/or submissions shall be deemed to have been denied and disputed by the respondent.

14. 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 14.2 of the buyer's agreement.

15. That the complainants have not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the

present complaint. The complaint has been filed by it 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:

- That the respondent/builder 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 such as 'Raheja Atlantis' 'Raheja Atharva', and 'Raheja Vedanta' and in most of 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.
- That the project is one of the most Iconic Skyscraper in the making, a passionately designed and executed project having many firsts and is the tallest building in Haryana with highest infinity pool and club in India. The scale of the project required a very in-depth scientific study and analysis, be it earthquake, fire, wind tunneling facade solutions, landscape management, traffic management, environment sustainability, services optimization for customer comfort and public heath as well, luxury and iconic elements that together make it a dream project for customers and the developer alike. The world's best consultants and contractors were brought together such as Thorton Tamasetti (USA) who are credited with dispensing world's best structure such as Petronas Towers (Malaysia), Taipei 101(Taiwan), Kingdom Tower Jeddah (world' tallest under construction building in Saudi Arabia and Arabtec

makers of Burj Khalifa, Dubai (presently tallest in the world), Emirates palace Abu Dhabi etc.

- That compatible quality infrastructure (external) was required to be able to sustain internal infrastructure and facilities for such an iconic project requiring facilities and service for over 4000 residents and 1200 Cars which cannot be offered for possession without integration of external infrastructure for basic human life be it availability and continuity of services in terms of clean water, continued fail safe quality electricity, fire safety, movement of fire tenders, lifts, waste and sewerage processing and disposal, traffic management etc. Keeping every aspect in mind this iconic complex was conceived as a mixture of tallest high-rise towers & low-rise apartment blocks with a bonafide hope and belief that having realized all the statutory changes and license, the government will construct and complete its part of roads and basic infrastructure facilities on time. Every customer including the complainants was well aware and was made well cautious that the respondent cannot develop external infrastructure as land acquisition for roads, sewerage, water, and electricity supply is beyond the control of them. Therefore, as an abundant precaution, the respondent company while hedging the delay risk on price offered made an honest disclosure in the application form itself in clause no. 5 of the terms and conditions.
- That the complainants is a real estate investors, who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that its calculations have gone wrong on account of severe slump in the real estate market, and she was now raising untenable and illegal pleas on highly flimsy and

baseless grounds. Such malafide tactics of the complainants cannot be allowed to succeed.

- That based on the application for booking, the respondent vide its allotment offer letter dated 27.02.2014 allotted to the complainants unit no. B-081, tower-C, admeasuring 2813.31 sq. ft., complainants signed and executed the agreement to sell on 28.08.2014 and agreed to be bound by the terms contained therein.
- That the possession of the unit was supposed to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement.
- That the respondent raised payment demands from the complainants in accordance with the mutually agreed terms and conditions of allotment as well as of the payment plan and the complainants made the payment of the earnest money and part-amount of the total sale consideration and was bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, stamp duty, service tax as well as other charges payable at the applicable stage. However, the complainants defaulted in adhering to their contractual obligations.
- That despite being aware that timely payment of the installment amount was the essence of the allotment, the complainants failed to remit the due amount and the respondent was constrained to terminate the allotment as per the allotment/cancellation letter dated 17.03.2015. The defaults are visible and are evident from a bare perusal of the statement of account.

16. 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 submissions made by the parties.

E. Jurisdiction of the authority

17. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

18. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

19. 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.*

20. 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 complainant at a later stage.

21. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** *and reiterated in case of* ***M/s Sana Realtors 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."*

22. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent.
F.I. Objections regarding the complainants being investor.

23. The respondent has taken a stand that the complainants are the investor and not consumer, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they has paid total price of Rs.85,74,895/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

24. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and

there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr***. has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

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

25. Another 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."

26. 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."

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

28. The agreement to sell was entered into between the parties on 28.02.2014 contains a clause 14.2 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. The arbitration proceedings shall be held at the office of the seller in New Delhi by a sole arbitrator who shall be appointed by mutual consent of the parties. If there is no consensus on appointment of the Arbitrator, the matter will be referred to the concerned court for the same. In case of any proceeding, reference etc. touching upon the arbitrator subject including any award, the territorial jurisdiction of the Courts shall be Gurgaon as well as of Punjab and Haryana High Court at Chandigarh".*

29. 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.

30. 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 Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

31. 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."*

32. 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 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.

G. Findings on the relief sought by the complainants.

I. Direct the respondent to set aside the cancellation notice dated 17.03.2015 and refund amount the amount forfeited towards earnest money.

33. In the present complaint, the complainants intends to withdraw from the project and is seeking return of the amount paid by him 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)

34. The complainants were allotted unit no. B-081, 8th floor, in tower/block- B, in the project "Raheja Revanta" by the respondent/builder for a total consideration of Rs.2,49,07,896/-. A buyer's agreement was executed on 28.02.2014. The possession of the unit was to be offered within 48 months from the date of the execution of the Agreement to sell plus the seller shall be entitled for grace period of six (6) months in case the development is not completed within the time period mentioned above. Therefore, the due date of possession comes out to be 28.08.2018 along with grace period of 6 months.

35. The respondent-builder cancelled the unit of the complainants vide email dated 17.03.2015 after issuance of demand email dated 26.09.2014, 28.02.2015 and 03.03.2015, respectively on account of non-payment of consideration by the allottee. The complainants replied vide email dated 21.05.2015 that my loan is getting sanctioned from PNB bank. They will disburse approximately Rs. 50 lacs for my allotment within 10 days. Rest amount if any, I will be able to pay myself within 3-4 months (interest incurred on outstanding, I will bear). However, reminder through vide email

dated 26.09.2014, 28.05.2015 and 03.03.2015 was send by the respondent through email which is valid email js_rana106@yahoo.com.

36. The complainants took a plea that respondent vide email dated 17.03.2015 illegally and unilaterally cancelled the provisional allotment of the impugned unit and forfeited the amount paid towards earnest money. The respondent-builder took a plea that after the cancellation of allotted unit on 17.03.2015, the complainants filed the present complaint on 28.07.2022 i.e., after more than 7 years and thus, is barred by the limitation. The authority observes that the case of the complainants are not against the cancellation letter issued way back as on 17.03.2015 as the same cannot be agitated as complaint was filed after more than 7 years well beyond the limitation period. But the promoter was required to refund the balance amount as per applicable cancellation clause of the builder buyer agreement. The balance amount has not been refunded which is a subsisting obligation of the promoter as per the builder buyer agreement. The respondent-builder must have refunded the balance amount after making reduction of the charges as mentioned in the buyer's agreement. On failure of the promoter to refund the amount the authority is of considered opinion that the promoter should have refunded the balance amount after deducting 10% of the sale consideration.

37. The issue with regard to deduction of earnest money on cancellation of a contract arose before the Hon'ble Apex court 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., (2015) 4 SCC 136,*** *and wherein it was 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 provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is*

hardly any actual damage. National Consumer Disputes Redressal Commissions in CC/435/2019 ***Ramesh Malhotra VS. Emaar MGF Land Limited*** (decided on 29.06.2020) *and* ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** (decided on 12.04.2022) ***and followed in CC/2766/2017 in case titled as Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022,*** *held that 10% of sale price is reasonable amount to be forfeited in the name of "earnest money".* Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed providing as under-

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

38. So, keeping in view the law laid down by the Hon'ble Apex court and provisions of regulation 11 of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram, the respondent/builder can't retain more than 10% of sale consideration as earnest money on cancellation but that was not done. So, the respondent/builder is directed to refund the amount received from the complainants after deducting 10% of the sale consideration and return the reaming amount along with interest at the rate of 10.85% (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 termination/cancellation 17.03.2015 till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

II. Direct the respondent company to pay a cost of Rs. 1,00,000/- towards the cost of the litigation.

39. The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as **M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.** (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority

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

i. The respondent is directed to refund the paid-up amount of Rs.85,74,895/- after deducting 10% as earnest money of the sale consideration of Rs.2,49,07,896/- with the interest at the prescribed rate i.e., 10.85% on the balance amount, from the date of termination/cancellation i.e., 17.03.2015 till date of actual refund.

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.

41. Complaint stands disposed of.

42. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 02.02.2024