BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1973 of 2022**
Date of complaint	:	**11.05.2022**
Date of order	:	**06.12.2023**

Arun Malhotra, S/o Late Sh. P.N. Malhotra,
R/o B-11005, Raheja Sherwood,
Nirlon, W.E. Highway, Goregaon (E), Mumbai-400063. **Complainant**

Versus

IREO Private Limited.
Regd. Office at: IREO Campus, Sector-59,
Near Behrampur, Gurugram-122101, Haryana. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Akhil Agarwal (Advocate) Complainant
M.K Dang (Advocate) Respondent

ORDER

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

A. 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.	Particulars	Details
1.	Name of the project	"Ireo City Central", Sector 59, Gurgaon
2.	Project area	3.9375 acres
3.	Nature of the project	Commercial Colony
4.	DTCP license no. and validity status	56 of 2010 dated 31.07.2010 valid upto 30.07.2020
5.	Name of licensee	SU Estates Pvt. Ltd.
6.	RERA Registered/ not registered	107 of 2017 dated 24.08.2017
7.	RERA registration valid up to	30.06.2020
8	Allotment Letter	28.06.2016 (Page 62 of complaint)
9.	Unit no.	ICC-R-LG-FC-01, Lower Ground Floor (Page 83 of complaint)
10.	Unit area admeasuring (super area)	721 sq. ft. (Page 83 of complaint)
11.	Date of execution of Buyer's Agreement	08.09.2016 (Page 75 of complaint)
12.	Possession clause	**13.3 Possession and Holding Charges** 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 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 commercial unit to the Allottee within a period of **48 months from the date of execution of this agreement ("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.
13.	Due date of possession	08.03.2021 (Calculated as 48 months from date of agreement + 6 months as per HARERA notification no. 9/3-2020 dated 26.05.2020 for the projects having completion date on or after 25.03.2020.])
14.	Total sale consideration	Rs. 2,23,81,025/- (as per SOA dated 20.09.2019 on page no. 77 of reply)
15.	Amount paid by the complainant	Rs. 72,00,000/- (as per SOA dated 28.06.2016 on page no. 77 of reply)
16.	Occupation certificate /Completion certificate	28.08.2019 (page no. 74 of reply)
17.	Offer of Possession	20.09.2019 (page no. 75 of reply)

B. Facts of the complaint:

3. The complainant has made the following submissions: -

I. That the complainant was alloted a unit bearing no. ICC-R-LG-FC-01, admeasuring 720 sq. ft. super area in food court located on lower ground floor in the project of the respondent named "Ireo City

Central", Sector 59, Gurgaon vide provisional allotment letter dated 28.06.2016 for a total sale consideration of Rs.1,89,25,680/-.

II. That as per payment plan, almost 40% of the BSP plus taxes was to be paid before 10.07.2016 and the balance sale consideration of Rs.1,20,35,728/- was payable at the time of offer of possession.

III. That subsequently without even executing the builder buyers' agreement, the respondent made the complainant to pay a huge amount of Rs.62,00,000/- in July, 2016 which was in addition to Rs.10,00,000/- paid at the time of application and cumulatively amounted to almost 40% of the BSP plus taxes.

IV. That after illegally collecting almost 40% of the BSP from the complainant, BBA was finally executed between the parties on 08.09.2013.

V. That as per clause 13.3 of the BBA, the respondent was obligated to handover possession of the unit in question within 48 months from the date of execution of BBA i.e. by 07.09.2020. However, the respondent has offered possession of the unit on 20.09.2019 which was nothing but illegal and merely a paper possession due to the following issues:

a) That the essential amenities and construction in the project was far from complete and the project was offered for possession with incomplete works like incomplete facade, no landscaping as shown in advertisements and presentation, incomplete false ceilings in corridors, incomplete parking, incomplete internal whitewash, incomplete internal and external horticulture, non-functioning escalators/toilets/fountains, no signage of shops, zero clarification on sewage and water connections, incomplete/inaccessible periphery service road, no boundary

wall towards parking basement ramp, incomplete and non-existing walkways/ramps inside the complex, etc.

b) That the respondent reduced the specific area of the unit from 55% of the super area to 23% without even informing the complainant.

VI. That when the complainant learnt about the illegalities committed by the respondent, he immediately objected to the offer of possession dated 20.09.2019 vide letter dated 30.09.2019 and raised his objections to the respondent regarding unilateral reduction of the actual wall to wall carpet area of the unit to only 173.7 sq. ft. i.e. 23.8% of the chargeable area which was in stark contradiction/violation and material breach of clause L of the BBA.

VII. That the respondent in order to abuse its dominant and authoritative position imposed an addendum agreement on the complainant vide letters dated 19.12.2019 and 15.01.2020.

VIII. That the complainant instantly objected to the same and issued letter dated 04.02.2020 requesting the respondent to first make good the deficiencies and complete the project and also to restore the original specific area of 55% of the super area. However, the respondent turned deaf ears to the request of the complainant and started threatening the complainant of cancelling the unit and kept on raising illegal demands when the project was far from complete and was not at all fit for possession.

IX. That the complainant made various visits and phone calls to the respondent for refund of the money independently and along with the project RWA. However, the respondent out rightly denied to refund the hard-earned money of the complainant which is not just contrary

to the law but is also in violation of various provisions of the BBA. Hence, the present complaint.

C. Relief sought by the complainant:

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

I. To refund the entire paid-up amount along with prescribed rate of interest.

5. 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.

6. The respondent vide reply dated 10.01.2023 contested the complaint on the following grounds: -

i. 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.

ii. That the complainant was allotted a unit bearing no. ICC-R-LG-FC-01, situated on the lower ground floor having a tentative super area of 721 sq. ft. vide allotment offer letter dated 28.06.2016. Further, the complainant was aware from the very inception that the super area of the commercial unit allotted to him was tentative and was subject to the change as per statutory requirements and final construction of the project.

iii. That as per the terms of the allotment letter, it was intimated that the buyer's agreement was to be executed by the complainant and the terms and conditions of the agreement would be final and binding

and the same was signed and returned by him to the respondent only on 08.09.2016.

iv. That the possession of the unit/shop was to be offered to the complainant in accordance with clause 13.3 of the buyer's agreement. Further, clause 13.5 of the agreement also provided for an extended delay period of 12 months from the date of end of the grace period. Therefore, the due date of possession was 07.03.2022.

v. That the respondent had applied for the grant of occupation certificate on 04.05.2017 and the same was granted by the concerned authorities on 28.08.2019. Furthermore, the respondent has even offered the possession of the unit to the complainant vide notice of possession dated 17.09.2019. As per the statement of account attached along with the notice of possession, an amount of Rs.1,51,81,025/- was due to be paid by the complainant against the said allotment. However, the due amount has still not been paid by the complainant despite receiving reminders dated 28.02.2020 and 12.03.2020 from the respondent. Therefore, the respondent, upon deliberate failure of the complainant to remit the substantial outstanding amount against the unit as well as failure to complete the documentation formalities was compelled to issue a final notice dated 05.01.2021, affording a final opportunity to rectify the aforesaid defaults and take due possession of the unit.

vi. That although the respondent has already offered the possession of the unit, the implementation of the said project was hampered due to the events and conditions which were beyond the control of respondent. The force majeure events/conditions which were beyond the control of respondent and affected the implementation of the project are demonetization by the central government, orders

protecting the environment passed by the National Green Tribunal, non-payment of installments by allottees, heavy rainfalls in Gurugram in the year 2016 due to which construction was stalled.

vii. That the complainant is a real estate investor who had booked the unit/shop in question with a view to earn quick profit in a short period. However, it appears that his calculation has gone wrong on account of severe slump in the real estate market and the complainant now wants to unilaterally wriggle out his contractual obligations of making payment towards the due amount. Such malafide tactics of the complainant cannot be allowed to succeed. The complainant, furthermore, is also liable to make payment towards the holding charges on account of the delay in taking over the possession as per the terms of the allotment and complete the documentation formalities instead of filing such present baseless and false complaint.

E. Jurisdiction of the authority

7. The respondent has raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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

8. 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

9. 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.*

10. 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.

11. 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(C), 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*** and 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."

12. 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 Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

13. 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:

"34. 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".

14. 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.

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

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

> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

16. 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."

17. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that the complainant is well within right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.

F.II Objection regarding the complainant being investor.

18. The respondent has taken a stand that the complainant is an investor and not a consumer and therefore, he is 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 the preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time, the 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 he 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 buyer's agreement, it is revealed that the complainant is a buyer and paid total price of Rs.72,00,000/- to the promoter towards purchase of an unit in the project of the promoter. 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;"*

19. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the unit application for allotment, it is crystal clear that the complainant is an allottee as the subject unit was allotted to him 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.III Objections regarding the circumstances being 'force majeure'

20. The respondent-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, dispute with contractor, non-payment of instalment by allottees and demonetization. The plea of the respondent regarding various orders of the NGT and demonetisation and 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. 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 on the relief sought by the complainant.

G.I To refund the entire paid-up amount alongwith prescribed rate of interest.

21. The complainant intends to withdraw from the project and is seeking refund of the amount paid by him in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

> *"**Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-*
> *(a). in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *(b). due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
> ***he shall be liable on demand to the allottees**, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, **to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed** in this behalf including compensation in the manner as provided under this Act:*

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."
(Emphasis supplied)

22. Clause 13 of the buyer's agreement provides the time period of handing over possession and the same is reproduced below:

> ***13.3***
> ***Schedule for possession of the said unit***
> *"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 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 commercial unit to the Allottee within a period of* ***48 months from the date of execution of this agreement ("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."*

23. **Due date of handing over possession and admissibility of grace period:** The respondent promoter has proposed to handover the possession of the unit within a period of 48 months of signing of this agreement plus 180 days grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter. In the present case, the buyer's agreement was executed on 08.09.2016. Further, as per HARERA notification no. 9/3-2020 dated 26.05.2020, an extension of 6 months is granted for the projects having completion date on or after 25.03.2020. The completion date of the aforesaid project in which the subject unit is being allotted to the complainant is 08.09.2020 i.e., after 25.03.2020. Thus, an extension of 6 months is to be given over and above the due date of handing over possession in view of notification no. 9/3-2020 dated 26.05.2020, on account of force majeure conditions

due to outbreak of Covid-19 pandemic. As far as grace period is concerned, the same is disallowed as no substantial evidence/document has been placed on record to corroborate that any such event, circumstances, condition has occurred which may have hampered the construction work. Therefore, the due date of handing over possession comes out to be 08.03.2021(inadvertently grace period of 6 month as per HARERA notification dated 26.05.2020 was left to be added on proceedings dated 27.09.2023).

24. The complainant was allotted a unit bearing no. ICC-R-LG-FC-01, admeasuring 720 sq. ft. super area in food court located on lower ground floor in the project of the respondent named "Ireo City Central" at Sector 59, Gurgaon vide provisional allotment letter dated 28.06.2016 for a total sale consideration of Rs.1,89,25,680/-out of which he has made a payment of Rs.72,00,000/-. Thereafter, a buyer's agreement was executed between the parties on 08.09.2016. The Occupation certificate was granted by the concerned authority on 28.08.2019 and thereafter, the possession of the subject unit was offered to the complainant on 20.09.2019.

25. The complainant submitted that the offer of possession letter dated 20.09.2019 cannot be held valid as the respondent has illegally and arbitrarily violated the terms of the BBA and has reduced the specific area of the unit from 55% of the super area to 23% without even informing the complainant. Thereafter, the complainant vide letters dated 30.09.2019 and 04.02.2020 raised his objections to the respondent regarding unilateral reduction of the actual wall to wall carpet area of the unit to only 173.7 sq. ft. i.e. 23.8% of the chargeable area which was in stark contradiction/violation and material breach of clause L of the BBA. Further, the respondent instead of redressing the grievance of the

complainant, sent addendum to the agreement on the complainant vide letters dated 19.12.2019 and 15.01.2020, but the same was not executed by him. However, the respondent contended that the complainant was aware from the very inception that the super area of the commercial unit allotted to him was tentative and was subject to the change as per statutory requirements and final construction of the project. Further, the unit allotted to the complainant was for the food court which has lockable area as well as sitting area for consumers and there was hardly any variation in the super area offered to the complainant.

26. In the instant case, vide clause L of the buyer's agreement dated 08.09.2016, it was agreed between the parties that the specific area of the said commercial unit shall be 55% of the super area. Clause L of the buyer's agreement dated 08.09.2016 is reproduced as under:

> ***L.*** *"It is clarified and the Allottee has agreed that the concept of Super Area of the said Commercial Unit ("Super Area" as used herein, is a mechanism only for the purpose of deriving the consideration payable for the said Commercial Unit and it is not a physical area or a measurable component.* ***In fact what will be transferred pursuant to this Agreement will only be the Specific Area of the said Commercial Unit, which shall be 55% of the Super Area."***

27. However, the respondent after receipt of OC from the competent authority offered possession of the unit vide offer of possession letter dated 20.09.2019 along with and addendum agreement vide which it comes to the knowledge of the complainant that the area offered to the complainant constitutes to only 23.7% of the super area which is strictly against the terms and conditions of the buyer's agreement as agreed between the parties. Thus, the complainant vide letters dated 30.09.2019 and 04.02.2020 objected to the same and requested the respondent to offer the super area as agreed vide clause L of the buyer's agreement. Thereafter, the respondent again sent an addendum agreement dated 19.12.2019 to the complainant to modify and replace the specific area of

the food court from 55% of the super area to 23.7%. Due to the said illegality, the same was not executed by the complainant. Therefore, the offer of possession letter dated 20.09.2019 cannot be termed as valid in the eyes of law.

28. Further, vide clause 21.1 of the buyer's agreement dated 08.09.2016, it was agreed that the allottee shall have the right to withdraw from the agreement in the event of clear and unambiguous failure of the warranties of the company that leads to frustration of that agreement and in such case, the allottee shall be entitled to a refund of the instalments paid along with interest @8% per annum. Clause 21.1 of the agreement is reproduced as under:

{21} LIMITED RIGHT OF CANCELLATION BY THE ALLOTTEE
21.1
"Except to the extent specifically and expressly stated elsewhere in this Agreement allowing the Allottee to withdraw from this Agreement, the Allottee shall only have the very limited right to cancel this Agreement solely in the event of the clear and unambiguous failure of the warranties of the Company/Confirming Parties that leads to frustration of this Agreement on that account. In such case, the Allottee shall be entitled to a refund of the installments actually paid by it along with interest thereon at the rate of 8% per annum, within a period of 90 days from the date of a determination to this effect. No other claim, whatsoever, monetary or otherwise shall lie against the Company and/or the Confirming Parties nor shall be raised otherwise or in any manner whatsoever by the Allottee."

29. The alteration of super area from 55% to 23.7% vide addendum agreement dated 19.12.2019 clearly leads to frustration of the buyer's agreement dated 08.09.2016. Therefore, as per the agreed terms of the buyer's agreement the complainant is entitled to refund of the amount paid along with interest. Further, the said act of the respondent is clear violation of Section 18(1)(a) of the Act of 2016. Therefore, in this case, the complainant is well within his right to seek full refund of the amount paid alongwith prescribed rate of interest as provided under Section 18 of the Act.

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

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

31. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.

32. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to refund of the entire amount paid by him at the prescribed rate of interest i.e., @10.75% p.a.

(the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the authority

39. 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/promoter is directed to refund the entire amount i.e., Rs.72,00,000/- received by it from the complainant alongwith interest at the rate of 10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.

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 the registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 06.12.2023