

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

Complaint no.:	1570 of 2021
Order reserved on:	11.08.2023
Date of pronouncement:	01.12.2023

Rupesh Kambo
R/o #C-85, Sushant Apartments, Sushant Lok, Phase 1,
Gurugram, Haryana

Complainant

Versus

M/s. Anand Divine Developers Private Ltd.
Office address: 711/92, Deepali Nehru Place,
New Delhi-110019

Respondent

CORAM:

Shri Sanjeev Kumar Arora

Member

APPEARANCE:

Mr. Samayak Raj (Advocate)
Mr. Rahul Thareja (Advocate)

Complainant
Respondent

ORDER

1. The present complaint dated 05.04.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the

provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the 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.	Name and location of the project	"ATS Triumph", Sector 104, Village-Dhanwapur, Gurugram
2.	Nature of the project	Group housing colony
3.	Project area	14.093 acres
4.	DTCP License	63 of 2011 dated 16.07.2011 valid till 15.07.2019 10 of 2012 dated 03.02.2012 valid till 02.02.2020
	Name of the licensee	M/s Great Value HPL Infratech Private Limited M/s Kaanha Infrastructure private Limited
5.	HRERA registered/ not registered	Not registered *Since the project is not registered the registration branch may take the necessary action under the provisions of the Act, 2016
6.	Application form	21.06.2014 [pg. 28 of reply]
7.	Allotment letter dated	29.08.2014 (Aa per page no. 31 of reply)
8.	Date of execution of flat buyer's agreement	29.08.2014 (As per annexure- P1 on page no. 20 of the complaint)
9.	Unit no.	4211 on 21 st floor, tower 4 (Aa per page no. 21 of the complaint)
10.	Super Area	2290 sq. ft. (As per page no. 21 of the complaint)



11.	Possession clause	<p>As per clause 18 of the agreement: Time of handing over possession Barring unforeseen circumstances and force majeure events as stipulated hereunder, possession of the said apartment is proposed to be, offered by the company to the allottee within a period of 36(thirty six) months with a grace period of 6(six) months from the date of actual start of the construction of a particular tower building in which the registration for allotment is made, such date shall hereinafter referred to as "stipulated date", subject always to timely payment of all amounts including the basic sale price, EDC/IDC, IFMS, stamp duty, registration fees and other charges as stipulated herein or as may be demanded by the company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/engineer-in-charge of the complex and the said certification shall be final and binding on the allottee.</p>
12.	Date of commencement of construction of the tower	Not provided on record
13.	Due date of delivery of possession	28.02.2018 [Calculated from the date of agreement i.e. 29.08.2014 as date of commencement of construction tower is not provided on record+ 6 months grace period is allowed being unqualified]
14.	Payment plan	Subvention scheme payment plan
15.	Total consideration	Rs. 2,10,23,750/- (As per payment plan on page no. 43 of complaint)

		BSP- Rs. 2,00,65,000/- (As per payment plan on page no. 43 of complaint)
16.	Total amount paid by the complainant	Rs. 2,00,65,000/- (As alleged by the complainant on page no. 05 of CRA)
17.	MOU dated	29.08.2014 (As per page no. 46 of complaint)
18.	Letter extending MOU	03.04.2017 (As per page no. 80 of complaint) (For 12 months)
19.	E-mail sent by the complainant exercising buy-back option.	19.12.2017 * inadvertently mentioned as 27.07.2019 in the proceeding dated 11.08.2023 [pg. 90 of complaint]
20.	Occupation Certificate	28.05.2019 (As per page no. 116 of reply)
21.	Offer of possession	07.06.2019 (As per page no. 92 of complaint)
22.	Legal notice dated seeking buy-back	27.07.2019 (As per page no. 96 of complaint)
23.	Tri-partite agreement dated	29.08.2014 (As per page no. 57 of reply)

B. Facts of the complaint

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

- a. It is most respectfully submitted that based on the representations and claims of the respondent that it is in process of developing a group housing project known as "ATS TRIUMPH" situated in Village Dhanwapur, falling in Sector - 104, Gurgaon, India (hereinafter referred to as "said project") in accordance with the sanctioned building plans and necessary permissions from the concerned government authorities, and that the said project offered the great opportunities for the investment to the members of public by way of committed assured returns under the

guaranteed buyback scheme formulated by the respondent. It was also represented by the respondent that the said project was also approved by various banks/financial institutions for the EMI subvention scheme floated by the respondent in arrangement with such banks/financial institutions. On the basis of such representations, the complainant herein, was induced to book an apartment bearing no 4211, having a super built up area of 2290 sq. ft., located on 21st floor, in Tower -04th of the said project ('said apartment' for short), on 21st June, 2014 at the rate of ₹ 8,500/- per sq. ft. of basic sale price on guaranteed buyback basis.

- b. That pursuant thereto, necessary documents such as buyer's agreement dated 29.08.2014 and MoU dated 29.08.2014 were executed between the complainant and the respondent. Further, a tripartite agreement dated 29.08.2014 was also executed amongst complainant, respondent and ICICI Bank Ltd. (hereinafter referred to as 'Bank') in respect to the loan taken by complainant for the part payment to be made to the respondent under the subvention scheme. The total consideration/sale price (inclusive of basic sell price, EDC/IDC, maintenance deposit and power back up) of the said apartment was agreed to be ₹ 2,10,23,750/- out of which ₹ 2,00,65,000/- was the basic sale price.
- c. That the MoU dated 29.08.2014 stipulates the terms and conditions of the guaranteed buyback and is having an overriding effect on the terms contained in buyer's agreement of even date. As per the terms contained in said MoU the respondent was/is to buyback/repurchase the said apartment within 30 days of the expiry of 36 months from the date of booking at a premium of

₹ 1,500/- per sq. ft. In addition the respondent is also liable to refund the entire amount paid by complainant along with service tax including the loan amount paid by the bank on behalf of the complainant. In case of delay in making the payment of the repurchase price by the respondent beyond 30 days, the respondent is also liable to pay interest @18% per annum for the period of delay on total repurchase price payable. Further till the time repurchase price is fully paid by the respondent, the respondent is also liable to pay to the bank all the installments, pre-possession EMI, interest directly and keep the complainant indemnified in this regard.

- d. Accordingly, the complainant paid a total of ₹ 2,02,10,126/- to the respondent against the said apartment under the aforesaid arrangement of guaranteed buyback and loan subvention scheme in the following manner:
- i. ₹ 50,28,253/- paid directly by the complainant out of his own pocket.
 - ii. ₹ 1,51,81,873/- disbursed by ICICI bank on behalf of the complainant under subvention scheme.
- e. That since the booking was done on 21st June, 2014, the said period of 36 months got expired on 20th June, 2017. However, to the disappointment of the complainant, the respondent did not adhere to the terms and conditions of the buyback agreement and pay the repurchase price, but rather, while ignoring repeated objections and requests of the complainant, the respondent unilaterally extended the period of said MoU dated 29.08.2014 for another 12 months without the consent of complainant while citing the reason

as slowdown in the market. Nonetheless, the respondent categorically reiterated and assured to pay interest @18% per annum in addition to continue paying pre-EMI and other benefits of MoU vide letter dated 03.04.2017 read with email dated 17.04.2017.

- f. That however, to the utter shock and chagrin of complainant, the respondent did not honour the said MoU and its commitment of buyback and did not pay the buyback/repurchase price to complainant even after expiry of unilaterally extended period of 12 months, which expired on 20th June, 2018. It is submitted that the complainant made repeated and continuous follow ups and requests of complainant through emails, phones and personal visits to corporate office of the respondent at Noida. Various requests were also made for fixing a meeting with the managing director and senior management of the respondent in this regard but the same fell on deaf ears. Even the pre EMI amount payable to ICICI bank directly by the respondent also became irregular after September, 2017 and it was only after much protest and requests, the respondent reimbursed a few of pre-EMI paid by complainant out of his own pocket, and assured to start paying the pre-EMI directly to ICICI, however, the same again started defaulting from June 2019 onwards.
- g. Not only this but with a view to gag and brow beat the complainant, the respondent had also sent offer of possession letter dated 07.06.2019 with mala fide, unscrupulous and dishonest intentions. The said offer of possession letter maliciously and mischievously asked the complainant to clear the alleged dues of ₹ 18,23,825/-

on or before 21st June, 2019 and take possession of the said apartment. It further says that EMIs due from June, 2019 onwards are payable by the complainant. It is respectfully submitted that the said offer of possession letter is absolutely contrary to the agreed terms of guaranteed buyback and is clearly an attempt on the part of the respondent to resile from its commitments and agreement/MoU hence, as such illegal and arbitrary and not binding on the complainant. The transaction was for guaranteed buyback at the premium with refund of entire amount as detailed above, which the respondent has deliberately and deceptively failed to honour and is now attempting to usurp the hard earned and tax paid money of complainant. Further the non-payment/irregular payment of EMI/pre-EMIs to the bank by the respondent is also severely denting the credit eligibility of the complainant. This arbitrary, callous and unscrupulous conduct of the respondent have also caused tremendous mental agony and sufferings to the complainant besides causing him loss of opportunities and time, for which the respondent is also liable to pay the compensation to the tune of ₹ 5,00,000/- to the complainant.

- h. Therefore, in addition to paying the buyback/repurchase price and refund of the amount received from and on behalf of complainant, the respondent also became liable to pay interest @18% p.a. to complainant in terms of MoU dated 29.08.2014 besides being liable to compensate the complainant for mental agony and harassment suffered by the complainant due to acts and deliberate omissions of the respondent.

- i. That in view of aforesaid circumstances the complainant was forced to serve a legal notice dated 27.07.2019, through his counsel, on the respondent whereby demanding the payment of ₹ 2,71,54,326/- (as on 20.07.2019) as dues together with ₹ 5,00,000/- as compensation amount within 7 days of the receipt of the legal notice. The said legal notice dated 27.07.2019 was sent through speed post and has been duly served upon the respondent on 29.07.2019 on registered as well as corporate offices of the respondent. However, neither any payment has been made by the respondent nor any reply to the said legal notice has been given by it till date.

C. Relief sought by the complainants:

4. The complainant has sought following reliefs:

- a. Direct the respondent(s) to buy back said apartment from the complainant at a premium of ₹ 1,500/- per sq. ft. and pay the premium amount of ₹ 34,35,000/- as per the terms and conditions as stipulated in the MoU dated 29.08.2014.
- b. Direct the respondent to refund amount of ₹ 50,28,253/- which was directly paid by the complainant out of his own pocket as per agreed terms of MoU dated 29.08.2014.
- c. Direct the respondent to pay sum of ₹ 1,69,50,386/- on account of outstanding dues of the loan taken from ICICI Bank, as on 29.08.2021 either to the complainant or directly to the Bank.
- d. Direct the respondent to pay interest @ 18% p.a. on the sum of ₹ 84,63,253/- w.e.f. 21.06.2017 till actual payment is made to the complainant as per agreed terms of the MoU dated 29.08.2014.



- e. Direct the respondent to pay applicable interest chargeable by ICICI bank for non-payment of EMI/Pre-EMI as per agreed terms.
 - f. Compensation of ₹ 5,00,000/- for breach and violation of agreed terms and for the harassment and mental agony suffered by the complainant.
5. On the date of hearing, the authority explained to the respondent/promoters about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds:
- a. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 39 of the buyer's agreement, which is reproduced for the ready reference of this hon'ble authority-

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

- b. That the complainant, after checking the veracity of the project namely, 'ATS Triumph', sector 104, Gurugram had applied for allotment of a residential unit and agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint. It is submitted that based on the application of the complainant, unit no. 4211, Tower no.4 was allotted to the complainant by the respondent vide allotment letter dated 29.08.2014.
- c. That the buyer's agreement was executed on 29.08.2014 and the Real Estate (Regulation and Development) Act, 2016 was not in force when the agreement was entered into between the complainant and the respondent. The provisions of the Real Estate (Regulation and Development) Act, 2016 thus cannot be enforced retrospectively.
- d. That it was agreed that as per clause 4 of the buyer's agreement, the sale consideration of ₹ 2,00,65,000/- was exclusive of other costs, charges including but not limited to maintenance, stamp duty and registration charges, service tax, proportionate taxes and proportionate charges for provision of any other items/facilities. As per clause 12 of the buyer's agreement, timely payment by the complainants of the basic sale price and other charges as stipulated in the payment plan was to be the essence of the agreement.
- e. That for making the payment towards the sale consideration, the complainant opted for loan to purchase the said apartment and entered into a tripartite agreement dated 29.08.2014 with ICICI Bank and the respondent. It was agreed vide several clauses of the tripartite agreement that without the prior consent of the ICICI

Bank, the complainant would not mortgage/ charge/transfer/sell as sign or part with the possession of the apartment to any person/bank/financial institution.

- f. 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. It is submitted that clause 18 of the buyer's agreement clearly states that *"barring unforeseen circumstances and force majeure events as stipulated hereunder, the possession of the said apartment is proposed to be offered by the company to the allottee within a period of 36 months with a grace period of 6 (six) months from the date of actual start of the construction of a particular tower building in which the registration for allotment is made, such date shall hereinafter referred to as 'stipulated date', subject always to timely payment of all amounts including the basic sale price, EDC/IDC, IFMS, stamp duty, registration fees and other charges as stipulated herein or as may be demanded by the company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/engineer-in-charge of the complex and the said certification shall be final and binding on the allottee."*
- g. That it is pertinent to mention herein that the implementation of the said project was hampered due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of the respondent and which have affected the materially affected the construction and progress of

the project. Some of the force majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under:

1) 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. 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 ₹ 24,000/- per week initially whereas cash payments to labour on a site of the magnitude of the project in question are ₹ 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.

Furthermore, there have been several studies on the said subject matter and all the studies record the conclusion that during the period of demonetization the migrant labour went to their native places due to shortage of cash payments and construction and real estate industry suffered a lot and the pace of construction came to halt/ or became very slow due to non-availability of labour. Some newspaper/print media reports by Reuters etc. also reported the negative impact of demonetization on real estate and construction sector.

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

(II) Non-Payment of instalments by allottees: Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.

(III) Inclement weather conditions viz. Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavorable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions.

- h. It is pertinent to mention herein that the respondent has even offered the possession of the unit to the complainant vide letter dated 07.06.2019 after obtaining the occupation certificate on 28.05.2019.
- i. A perusal of the tripartite agreement establishes that the complainant had portrayed himself as a home buyer and had requested the ICICI bank to disburse loan amount to finance his desire of acquiring immovable property. There was no commitment from the respondent in the said tripartite agreement to pay any kind of assured return direct or indirect to the complainant. On the basis of the request made to ICICI Bank, the complainant not only mortgaged all his rights, title, benefits in the said apartment in favour of the lender bank but also undertook that he will not without the prior consent of ICICI Bank further mortgage/charge/transfer/sell/assign rights or part with the possession of the said unit. It is pertinent to mention here that in an immovable property any right, title or interest can be mortgaged only by the owner of such rights/interest. The complainant had acquired these rights in respect of apartment



no.4211 and willingly and consciously mortgaged the same in favour of ICICI bank. As already stated above, as a legal and contractual repercussions of the tripartite agreement, all rights, present or future in respect of the transfer of the subject unit or any interest or title therein could have been transferred assigned or surrendered only with the prior consent of ICICI bank. There is nothing on record that the complainant ever approached the ICICI bank for release of this lien and charge over the flat or obtained consent of the bank for transfer/sell/surrender of the subject unit. Furthermore, there is no document on record that after availing finance/loan from ICICI bank and after having assigned all his rights, title and interest in favour of the bank, he ever informed the bank that he has got option to sell the flat and that he would be selling the mortgaged flat to any third party without the consent of the bank. The unit booked by the complainant was not as per the buy bank offer as is evident from a bare perusal of the agreement in question. The said MoU relied upon by the complainant cannot be read in isolation but is to be read in line and in furtherance to the buyer's agreement and the tripartite agreement. The intention of the parties was very clear that the repurchase or buy back was contingent on the exercise of the option by the ICICI bank and the complainant. The complainant has clearly tried to mislead this Hon'ble Forum by taking absolutely incorrect stand in the present complaint by misinterpreting the terms as per his own whims, fancies and convenience.

- j. The complainants are real estate investors who have invested their money in the project of the respondent with an intention to make

profit in a short span of time. However, their calculations have gone wrong on account of slump in the real estate market and they are now deliberately trying to unnecessarily harass, pressurize and blackmail the respondent to submit to their unreasonable demands instead of abiding by contractual obligations of making timely payment towards the due amount.

7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

E. Jurisdiction of the authority

8. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I. Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II. Subject matter jurisdiction

10. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

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

11. The agreement to sell entered into between the two side on 29.08.2014 contains a clause 39 relating to dispute resolution between the parties.

The clause reads as under:

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

12. 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.

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

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

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

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

decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

14. 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 judgment 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."

15. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within the 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.

F.III. Objections regarding the complainant being investor

16. The respondent has taken a stand that the complainants are the investors and not consumers, 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 consumers 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 have paid total price of ₹ 2,00,65,000/-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;"

17. 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 them 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.* have also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

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

18. An objection is raised by 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 and which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough

study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

19. 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."

20. 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.

G. Findings on the relief sought by the complainant

G.I. Direct the respondent(s) to buy back said apartment from the complainant at a premium of ₹ 1,500/- per sq. ft. and pay the premium amount of ₹ 34,35,000/- as per the terms and conditions as stipulated in the MoU dated 29.08.2014.



G.II. Direct the respondent to refund amount of ₹ 50,28,253/- which was directly paid by the complainant out of his own pocket as per agreed terms of MoU dated 29.08.2014.

G.III. Direct the respondent to pay sum of ₹ 1,69,50,386/- on account of outstanding dues of the loan taken from ICICI Bank, as on 29.08.2021 either to the complainant or directly to the Bank.

G.IV. Direct the respondent to pay interest @ 18% p.a. on the sum of ₹ 84,63,253/- w.e.f. 21.06.2017 till actual payment is made to the complainant as per agreed terms of the MoU dated 29.08.2014.

G.V. Direct the respondent to pay applicable interest chargeable by ICICI bank for non-payment of EMI/Pre-EMI as per agreed terms.

21. The above mentioned reliefs are being taken up together as the findings with respect to one relief will affect the findings of other reliefs. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by them in respect of subject unit along with interest as per section 18(1) of the Act and the same is reproduced below for ready reference:

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building-

in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or 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 18 of the buyer's agreement provides the time period of handing over possession and the same is reproduced below:



18: Time of Handing Over Possession

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

23. The complainant had booked the unit in the project of the respondent company namely ATS Triumph, situated at sector 104, Gurugram for a total sale consideration of ₹ 2,10,23,750/- out of which the complainant has made a payment of ₹ 2,00,65,000/-. The unit no. 4211 on 21st Floor in Tower 4 was allotted to the complainant vide allotment letter dated 29.08.2014. Similarly, on the same day i.e., 29.08.2014 buyer's agreement was executed between the parties, MOU was executed between the parties and tripartite agreement was also executed on the same day. As per possession clause 18 of the buyer's agreement, the possession of the unit was to be handed over within 36 months with a grace period of 6 months from the date of actual start of construction of a particular tower. The date of actual start of construction is not provided on record therefore, the due date is calculated from the date of agreement i.e., 29.08.2014 which comes out to be 28.02.2018 including the 6 months grace period being unqualified.

24. It is pleaded on behalf of the complainant that as per clause E, F and 8 of the MOU dated 29.08.2014 the respondent has guaranteed the



complainant to buyback the said unit. The said clauses are reproduced below for ready reference:

E. The Owner/Developer has offered an apartment bearing no. 4211 in the said Project for a Basic Selling Price of Rs. 8500/- per sq. ft. on sale on guaranteed buy back basis to the Purchaser/Investor.

F. That relying on the representation and assurances of the Owner/Developer, the Purchaser/Investor has agreed to invest in the Said Project, subject to the owner/Developer assuring him the guaranteed buy back premium of Rs. 1500/- per sq. ft. for the Apartment bearing no. 4211 in the Said Project after expiry of the 36 months from the date of booking, on the terms contained hereinafter.

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

25. As per the clause 8 of the MOU dated 29.08.2014, the complainant has to write to the developer for repurchasing of unit within a time frame of 33 months to 36 months from the date of booking. The date of booking is 21.06.2014 (page no. 28 of complaint). As per the clause 8 the 33 months was ended on 21.03.2017 and 36 months ended on 21.06.2017. Further, vide letter dated 03.04.2017 the respondent extended the period for 12 months accordingly the complainant has a right to exercise its option of buyback policy till 21.06.2018.
26. In the present complaint, complainant has exercise his option of buyback policy by sending an email on 19.12.2017 i.e., within the time frame as extended vide letter dated 03.04.2017.
27. Thus in the face of above mentioned terms and conditions of buyer agreement w.r.t. due date for completion of the project, offer of possession and as per buy back policy dated 29.08.2014 the request made by the complainant for withdrawal for the project and seeking

refund vide email dated 19.12.2017 was right in time. The occupation certificate for the project was received on 28.05.2019 and thereafter offer has also been made by the respondent/builder to the complainant/allottee on 07.06.2019. Further after receiving the offer of possession the complainant again sent a legal notice dated 27.07.2019 regarding buy back policy. But the question for consideration arises as to whether in the facts and circumstances detailed above, the builder-respondent can force the complainant to take possession of the allotted unit and pay the remaining amount though they withdrew from the project on 19.12.2017. Though it is contended on behalf of respondent builder that the allottees are bound to take possession of the unit after paying the amount due but there plea advanced in this regard is devoid of merit.

28. As the allottees have already withdrawn from the project well within the time as mentioned in the MoU agreed between the parties accordingly the complainant is entitled for full refund of the amount paid along with prescribed rate of interest. As far as the premium of ₹1,500/- as per MoU dated 29.08.2014 is concerned the complainant may approach the competent court for its specific performance.
29. The authority hereby directs the respondent- promoter to return the amount received by it i.e., ₹ 2,00,65,000/- with interest at the rate of 10.75% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the date of refund of the deposited amount.
- G.I. Compensation of ₹ 5,00,000/- for breach and violation of agreed terms and for the harassment and mental agony suffered by the complainant.**

30. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India, in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (Civil appeal nos. 6745-6749 of 2021, 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. Therefore, the complainant may approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority

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

- i. The authority hereby directs the respondent- promoter to return the amount received by it i.e., ₹ 2,00,65,000/- with interest at the rate of 10.75% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the date of refund of the deposited amount.
- ii. Out of the total amount so assessed, the amount paid by the bank/payee be refunded first in the account of the bank and the balance amount along with interest if any, be refunded to the complainant-allottees.



- iii. 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.
32. Complaint stands disposed of.
33. File be consigned to registry.

(Signature)
(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 01.12.2023



HARERA
GURUGRAM