BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: 6462 of 2022
Date of filing of complaint: 28.09.2022
Order pronounced on: 20.03.2024

1. Mr. Anish Mahavir Prasad Goel
2. Mrs. Veena Goel

Both R/o: - F-5, Dwarka Road,
Pushpanjali Bijwasan, New Delhi. **Complainants**

Versus

1. M/sAthena Infrastructure Ltd.

Regd. office: M-62 & 63, 1st Floor, Connaught place,
New Delhi-110001.

2. Indianbulls Housing Finance Limited

Regd. Office:- M-62 & 63, 1st Floor, **Respondents**
New Delhi-110001.

CORAM:
Shri Ashok Sangwan **Member**

APPEARANCE:

Gunjan Kumar	(Advocate)	Complainants
Rahul Yadav	(Advocate)	Respondent no. 1
Gaurav Dua	(Advocate)	Respondent no. 2

ORDER

1. This complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter

shall be responsible for all obligations, responsibilities and functions under the provisions of the Act or the Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project details

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

S. No.	Heads	Information
1.	Name and location of the project	"Indiabulls Enigma", Sector 110, Gurugram
2.	Nature of the project	Residential complex
3.	Project area	15.6 acres
4.	DTCP License	213 of 2007 dated 05.09.2007 valid till 04.09.2024 10 of 2011 dated 29.01.2011 valid till 28.01.2023
	Name of the licensee	M/s Athena Infrastructure Private Limited
5.	DTCP License	64 of 2012 dated 20.06.2012 valid till 19.06.2023
6.	Name of the licensee	Varali properties
7.	HRERA registered/ not registered	**Registered vide no.** **i.** 351 of 2017 dated 20.11.2017 valid till 31.08.2018

		ii. 354 of 2017 dated 17.11.2017 valid till 30.09.2018 iii. 353 of 2017 dated 20.11.2017 valid till 31.03.2018 iv. 346 of 2017 dated 08.11.2017 valid till 31.08.2018
8.	Allotment letter	Not placed on record
9.	Date of execution of flat buyer's agreement	06.06.2013 (As per page no. 47 of complaint)
10.	Unit no.	F-111, Block-F
11.	Payment plan	Construction linked payment plan
12.	Total sale consideration	Rs. 3,11,11,800/- (As per applicant ledger on page no. 48 of reply)
13.	Total amount paid	Rs. 2,66,42,385/- (Rs.46,4,385/- from own funds + Rs.2,20,00,000/- by respondent no. 2) (As stated by the complainants)
14.	Tri-partite agreement [Between complainants, respondent no.1 and respondent no. 2]	28.05.2013 (As on page no. 36 of reply)
15.	Loan sanction letter dated 30.04.2013	Rs.2,20,00,000/-

		(As on page no. 15 of respondent no. 2 reply)
16.	Notice for re-call of loan by respondent no. 2	08.08.2018 (As on page no. 69 of complaint)
17.	Possession clause	**Clause 21** *(The Developer shall endeavor to complete the construction of the said building /Unit within* ***a period of three years, with a six months grace period thereon from the date of execution of the Flat Buyers Agreement subject to timely payment*** *by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to him or as demanded by the Developer. The Developer on completion of the construction /development shall issue final call notice to the Buyer, who shall within 60 days thereof, remit all dues and take possession of the Unit.)*
18.	Due date of possession	06.12.2016 (Calculated from the date of the agreement i.e.; 06.06.2013 + grace period of 6 months) ***Grace period is allowed***

19.	Occupation Certificate	06.04.2018 (As on page no. 43 of reply)
20.	Offer of possession	02.08.2018 (As per page no. 67 of complaint)
21.	Notice for termination	17.09.2018 (As per page no. 74 of complaint)

B. Fact of the complaint

3. The complainants have made the following submissions: -

I. That respondent no. 1 is a company incorporated under the Companies Act, 1956 and the respondent no. 2 is a financial institution which provides financial support to the prospective home-buyers. Both the respondents are collectively and jointly liable for their unlawful acts and conducts against the complainants.

II. That the project was financed by India Bulls Housing Finance Limited (hereinafter referred to as "respondent no.2"), who is a sister concern of the respondent no.1. Thus the representatives of respondent no. 1 made attractive claims of subvention scheme leading the complainants to opt for it.

III. That relying upon the representations and the goodwill of respondent no. 1, the complainants filed the application form dated 07.01.2013 for provisional booking of residential unit no. I-032, 3rd floor and paid an amount of Rs.1,00,000. The complainants have paid 15% of the total cost of the provisional allotted unit i.e. Rs.44,84,354/- on 13.02.2013.

IV. That it is pertinent to note that after the repetitive following and perusal of complainants for execution of agreement. The flat buyer agreement

was executed between the complainants and the respondent no. 1 on 04.10.2013. As per clause 21 of the Buyers Agreement it was agreed that the unit shall be complete in all respects and thereby the possession shall be handed over within the period of three years along with grace period of 6 months from the date of execution of the Buyers agreement. That the total sale consideration of the unit is Rs. 3,02,65,450. Thereafter, a tripartite agreement was executed between the complainant, respondent no.1 and respondent no.2 recoding the terms and conditions of the arrangement amongst the three parties. It is pertinent to bring to the notice of the authority that respondent no. 1 have not provided the copy of tri-partite agreement to the complainants till date.

V. It is submitted that a loan agreement has been executed in between the complainants and respondent no. 2. That respondent no. 2 has allocated a total loan amount of Rs.2,20,00,000/- to the complainants. The respondent no. 1 undertook the liability to pay the pre-EMI interest to respondent no. 2 on behalf of the complainants till respondent no. 1 offers possession of the unit to the complainants. . Hence, the respondent no. 1 is now trying to shift the onus of failure upon the shoulder of complainant and to draw undue illegal advantage which is non est in the eyes of law.

VI. That somewhere in december, 2013 the first allottee of the unit, Mr. Mahavir Prasad Goel got expired. Hence, the second allottee named as Anish Mahavir Prasad Goel being the son of Late Mahavir Prasad Goel submitted the requisite documents to respondent no. 1 to remove the name of Late Mahavir Prasad Goel. In 2014, the complainants visited

the project site and was appalled to see that the project has only been completed till basement portion. Thus, the complainants under utter shock went to the office of respondent no. 1 in order to enquire regarding the failure.

VII. That the complainants made several telephonic communications and also by visited the office of respondent no. 1 to know about the status of the aforesaid project, but respondent no. 1 paid no heed to the communications which clearly shows the pre-determined mala fide fraudulent intention of respondent no. 1 to the complainants. It is further submitted that respondent no. 1 has been repeatedly engaged in providing false assurances and promises that the unit would be handed over within stipulated time period as agreed in the flat buyer agreement.

VIII. That respondent no. 1 raised a demand of Rs.7,83,090 in regard to payment of VAT liability as contingency deposit. The demand of VAT liability was raised in regard to the notice issued to respondent no. 1 by the Haryana Vat Department for not complying with the payment of VAT liability for the assessment year 2011 to 2014. Thus, the respondent-builder has raised the arbitrary demand in order to hide its failure for not paying VAT liability since 2011, whereas, the complainants made the booking on 07.01.2013 therefore the demand raised is unjustified and arbitrary. Vide notice dated 15.01.2016, respondent no. 1 received a recovery notice from the Haryana Excise and Taxation Department for not complying with the VAT for the period of 2011 to 2014.

IX. That it is submitted that respondent no. 1 failed to hand over possession of the allotted unit to the complainants within the stipulated time period which is expressly mentioned under clause 21 of the flat buyer's agreement. It is submitted that there has been no event of unforeseen circumstances or force majeure which may have delayed the delivery of possession. The complainants so far have made a total payment of Rs.2,65,84,354/- against the total sale consideration of Rs.3,02,65,450/- which amounts to 87% of the total sale consideration. Even after payment of huge amount, respondent no. 1 has failed to hand over the possession of allotted unit.

X. That the complainants being aggrieved of the unfair trade practice of respondent no. 1 sent a legal notice to it to cancel the allotted unit of complainant and to refund the principal money along with the interest @18% p.a. from the date of each respective payment till actual realisation for violation of contractual obligations. Whereas respondent no. 1 neither replied nor refunded back the money collected.

XI. That the complainants filed a police complaint against respondent no. 1 for refunding the principle amount deposited with respondent builder along with interest @18% p.a. from the date of each respective payment till actual realization. That the complainants again sent a legal notice on 20.08.2018 to respondent no. 1 in furtherance to the earlier legal notice dated 25.06.2018 to cancel the allotted unit of complainants and to refund the principal amount along with interest @ 18% p.a. from the date of each respective payment till actual realization.

XII. That the complainants being aggrieved previously filed a complaint before the Adjudicating Officer, bearing Complaint No. 1092 of 2018 seeking refund. However, as there was the on-going dispute with respect to jurisdiction of the refund matters and all matters were adjourned sine die, the complainants were left with no option but to withdraw the matters and file fresh complaint before the State Consumer Dispute Redressal Commission.

XIII. Subsequently, respondent no.1 fraudulently issued an offer of possession letter on 10.12.2018 to the complainants. That it is contended to mention that the respondent no. 1 issued the offer of possession despite being requests made by complainants to cancel the unit and to refund the entire money with prescribed rate of interest. That to the utter shock of the complainants on 20.02.2019, the respondent no. 2 sent a notice to the complainants for paying default amount towards pending EMI against the loan sanctioned.

XIV. That on 11.03.2019, respondent no.2 issued a notice to the complainants and respondent no.1 recalling the loan facility and calling upon respondent no.1 to cancel the allotment of the said unit/flat and make the payment of the due amount to respondent no. 2. It is submitted that the complainants received various reminders and notices for repayment of Pre-EMI due to failure of respondent no. 1 to perform its liability in terms of contracts executed in between complainants, respondent no. 1 and respondent no. 2.

XV. That allegedly a cheque bearing no. 006718 amounting to Rs. 2,20,00,000.00/- was drawn in favor of respondent no.2 by respondent no.1 refunding the loan amount of the complainants.

However, this fact was never disclosed to the complainants until they filed the complaint against the respondents before SCDRC.

XVI. That the complainants sent a letter dated 13.07.2020 to respondent no.2, requesting information on the status of the loan repayment and for a copy of the statement of account. However, no reply has been received till date and a reminder email and a physical copy was sent again on 29.07.2020 in regard to the same.

XVII. In furtherance to the above-stated fact, the complainants filed fresh complaint before SCDRC bearing complaint No. 176 of 2021, thereby praying for the refund of the amount paid along with interest as complainants have suffered immense loss and mental agony due to delay in possession.

C. Relief sought by the complainants:

4. The complainants sought following relief(s):

I. Direct respondent no. 1 to refund the amount of Rs.2,66,42,385/- paid by the complainants along with prescribed rate of interest.

II. Direct respondent no. 2 to give a no dues certificate to the complainants.

D. Reply of the respondent no. 1

5. The respondent no. 1 has contested the complaint on the following grounds:-

I. At the outset, it is most respectfully submitted that the instant complaint filed by the complainant is not maintainable against respondent no.1 and is liable to be dismissed/ rejected at the thresh hold, being filed in the wrong provisions of the law.

II. That the complainants post understanding the terms & conditions voluntarily executed a flat buyer agreement with respondent no.1 on 06.06.2013. It is submitted that as per the said agreement, it was specifically agreed that in the eventuality of any dispute if any, with respect to the provisional unit booked, the same shall be adjudicated through arbitration mechanism as detailed in the agreement. Thus in view of the above, it is humbly submitted that in case of any dispute between the parties it was specifically agreed to refer the dispute qua the agreement to arbitration. Thus, the complainants are contractually and statutorily barred from invoking the jurisdiction of this authority.

III. That the complainants have stated that they paid an amount of Rs. 2,66,42,385/- towards the sale consideration and are claiming refund. It is submitted that the complainants booked the unit under the subvention scheme payment plan till possession. Further availing a home loan of Rs. 2,20,00,000/- from respondent no.2. The complainants have only paid an amount of Rs.46,42,385 towards the sale consideration of the subject unit.

IV. That under the subvention scheme, a Tripartite Agreement dated 28.05.2013 was executed between the complainants, respondent no.1 and respondent no.2, wherein as per clause 3 of the said agreement respondent no. 1 assumed the liability of the interest component payable to respondent no. 2 during the subvention period, relevant para of the Clause 3 is being reproduced hereunder for ready reference:

> *"..... It is agreed that till the commencement of EMI the borrower shall pay Pre-EMI. Which is the simple interest on the loan amount disbursed calculated at the rate of interest as mentioned in the respective loan agreement of the Borrower, however, the Borrower has informed IHFL of the scheme of arrangement between the Borrower and the Builder in*

terms whereof the Builder hereby assumes the liability on account of interest payable by the Borrower to IHFL during the period be referred to as the "liability Period" i.e. till the date of issuance of offer for possession by the Builder.....'

Accordingly, respondent no.1 assumed the liability to pay the pre-EMI's interest to respondent no.2 on behalf of the complainants till the offer of possession to the complainants.

V. It is submitted that the present complaint is not maintainable and the period of delivery as defined in clause 21 of flat buyer's agreement is not sacrosanct as in the said clause it is clearly stated that

"The developer shall endeavor to complete the construction of the said building/unit within a period of three years, with a six months grace period thereon from the date of execution of these Flat Buyer' Agreement subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to his or as demanded by the Developer..."

VI. It is submitted that the basis of the present complaint is that there is a delay in delivery of possession of the unit in question, and therefore, refund plus interest has been claimed by the complainants. It is further submitted that the flat buyer's agreement itself envisages the scenario of delay and the compensation thereof. Therefore, the contention that the possession was to be delivered within 3 years and 6 months of execution of the flat buyer's agreement is based on a complete misreading of the agreement. Also, the complainants have been a wilful defaulter since the beginning. They did not pay the instalments to respondent no.2 on time and accordingly respondent no.2 recalled the loan facility.

VII. The occupation certificate was received for the unit on 06.04.2018 and thus, respondent no.1 vide its letter offered possession of the unit to the complainants on 17.04.2018, and vide the said letter the

complainant were called upon to remit their outstanding dues towards the total sale consideration of the unit. However, the complainants failed to clear their outstanding dues and also never came forward to take physical possession of the subject unit.

VIII. That the respondent no.1 credited an amount of Rs.2,27,434/- towards delay in offering of possession to the complainants. That pursuant to offer of possession by respondent no.1, the obligation of the complainants commenced for paying EMI's interest towards respondent no.2. However due to non-payment of the EMI dues, respondent no.2 issued notice dated 04.07.2018 (page 63 of the complaint)and 11.07.2018 (page 64 of the complaint) under SARFAESI ACT. Subsequently, respondent no.2 vide notice dated 08.08.2018 *"Notice for Loan Recall and Enforcement of Security"* recalled the loan facility advanced to the complainants.

IX. That upon recall of the loan facility by respondent no.2, respondent no. 1 being bound by the terms of the tripartite agreement had to cancel the provisional booking of the complainants and pursuant to it , respondent no. 1 refunded the loan amount of Rs. 2,20,00,000/- to respondent no.2.

X. That the cancellation of the provisional allotment of the complainants was done by respondent no.1 as per the terms and conditions of the flat buyer agreement. In terms of clause 9 of the said agreement, the complainants agreed that the earnest money shall be calculated @15% of the basic sale price of the unit and further the complainants also authorized respondent no.1 to forfeit the earnest money alongwith the interest and cost of delayed payments in case of non-fulfillment of the terms and conditions herein contained.

XI. It is pertinent to mention herein that the flat buyer agreement was executed much prior to coming into force of the RERA Act, 2016 and the HA-RERA Rules, 2017. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under RERA ACT, 2016 has to be in reference to the Agreement for Sale executed in terms of said Act and said Rules and no other Agreement, whereas, the FBA being referred to or looked into in this proceedings is an Agreement executed much before the commencement of RERA and such agreement as referred herein above.

E. Reply by the respondent no. 2

I. That the present complaint is not maintainable as respondent no. 2 being a financial institution is presently governed by the Reserve Bank of India and the authority has no jurisdiction to deal with any matter in respect of financial institution. The respondent no. 2 is not the developer of the project or a real estate agent nor the promoter of the real estate project.

II. That the present complaint is not maintainable as the contentions made in the complaint against respondent no. 2 are only an afterthought. The main dispute as it is apparent from the contents is only between the complainant and respondent no. 1regarding delay in construction, possession of the unit and payment of Pre-EMIs by respondent no. 1 to respondent no. 2.

III. The complainants approached respondent no. 2 for grant of loan against mortgage of property in question. Consequently. Respondent no. 2 vide loan agreement dated 16.03.2013 granted the loan of Rs.2,20,00,000/-. It is submitted that at the behest and under the instructions of the complainants vide letter for request for disbursal dated 22.05.2013, respondent no. 2 disbursed loan amount of Rs.2.20 crore to respondent no. 1 on behalf of the complainants.

IV. That the parties entered into Tripartite agreement on 28.05.2013 whereby it has agreed that there would be no repayment default of loan amount for any reason whatsoever including but not limited to any concern/issues by and between the complainants and respondent no.1.

V. Pursuant to cancellation of the unit, respondent no.1 refunded the amount of Rs.2.20 crore to respondent no. 2 disbursed by it on behalf of the complainants for booking the unit.

6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 19(6), (7) & (10) of the Act to plead guilty or not to plead guilty.

7. Copies of all the relevant documents have been filed and placed on the record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents as well as written submissions made by the complainants.

F. Jurisdiction of the authority

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

F. 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.

F. II Subject matter jurisdiction

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

12. 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. 2020-2021 (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***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."

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

G. Findings on the objections raised by respondent no. 1

G.I Objection regarding complainants are in breach of agreement for non-invocation of arbitration.

14. The respondent has raised an objection that the complainant have not invoked arbitration proceedings as per flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

"Clause49. All or any dispute arising out or touching upon or in relation to the terms of this Application and/or Flat Buyer's agreement including the interpretation and validity of the terms thereof and the rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through Arbitration. The Arbitration shall be governed by Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The venue of the arbitration shall be New Delhi and it shall be held by a sole arbitrator who shall be appointed by the Company and whose decision shall be final and binding upon the parties. The courts in New Delhi alone shall have the jurisdiction over the dispute arising out of the Application/Apartment buyers Agreement....."

15. The respondent contented that as per the terms and conditions of the application form duly exceuted between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainant, the same shall be adjudicated through arbitration mechanism. 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 relianceon catena of judgements 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 or 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. Similarly, 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 builders could not circumscribe the jurisdiction of a consumer forum.

16. While considering the issue of maintainability of a complaint before a consumer forum/commission in the face 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. The relevant para of the judgement passed by the Supreme Court is reproduced below:

"This court in the series of judgements 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 have also been explained in Section 2© 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 complainants are 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.

H. Findings on the relief sought by the complainants

H. I Direct the respondent no. 1 to refund the amount of Rs.2,07,91,358 /- paid by the complainant along with prescribed rate of interest.

18. The complainants were allotted unit no F-111, in the project "Indiabulls Enigma" for a total consideration of Rs.3,07,62,600 /- and a sum of Rs. 2,66,42,385/-was paid, out of which the complainants paid an amount of Rs.46,42,385/- of their own funds and Rs.2,20,00,000/- was disbursed by respondent no. 2 as loan. They opted for a loan from respondent no. 2, which included the subvention scheme till the possession of the unit is handed over to the complainants. Thereafter, the complainants and both the respondents entered into a tri-partite agreement on 25.08.2013 wherein respondent no. 1 undertook the liability to pay the Pre-EMIs till the offer of possession to respondent no. 2 on behalf of the complainants. In pursuance of this, respondent no.2 disbursed the payment of Rs.2,20,00,000/-.

19. On 06.06.2013, a flat buyer's agreement was signed and agreed between the Mr. Anish Mahavir Prasad Goel and Mrs. Veena Goel and respondent no.1. As per Clause 21 of the builder buyer agreement, the due date for completion of the project and offer of possession was 06.12.2016. The respondent no. 1 obtained the occupation certificate on 06.04.2018 (as on page no. 43 of respondent no.1 reply) and thereafter, offer of possession was made to the complainants on 02.08.2018. During the proceedings 10.01.2024, the counsel for the respondent stated that the occupation certificate was received on 06.04.2018 and

offer of possession was made on 17.04.2018. However, the counsel of the complainants rebutted that the so-called offer of possession dated 17.04.2018 was never received by the complainants and no delivery report has been submitted, thereof. The respondent no. 1 thereafter stopped paying the interest on Pre-EMIs to respondent no. 2.

20. The complainants on 25.06.2018 sent a notice to respondent no.1 through its directors, requesting respondent no.1 to cancel the booking of the said unit and refund the amount back with interest to the complainants. The relevant para of the notice is reproduced as below:

> *" 17. That you addresses no. 1 to 5 please note that 1. You have failed to comply with the terms of the Agreement and are unable to give possession of the flat to my client(s) you addresses no.1 to 5 are sending vagabounds at my client(s) residence/work place and they are doing hooliganism and these vagabounds extended life threats to my client(s) and their family members /employees in the name of extracting money for EMIs, inspite of the fact that my client(s) have not got possession of the flat till now, hence my client(s) are no longer interested in the said flat and hereby call upon* ***addresses no. 1 to 5 to cancel the booking of the flat and refund back my client(s) money with 18% interest.***
>
> *[Emphasis supplied]*

21. Thus, it can be ascertained that the complainants have first expressed their willingness to surrender the unit on 25.06.2018. The complainants requested the respondent that they wish to withdraw from the project and made a request for refund of the paid-up amount on its failure to give possession of the allotted unit in accordance with

the terms of buyer's agreement. On failure of respondent to refund the same, they have filed this complaint seeking refund.

22. That respondent no.2 issued notice for loan recall and enforcement of security to the complainants and respondent no. 1 on 08.08.2018. As per clause 8 & 9 of the said notice

> *"**Clause 8**-That in terms of Clause No.9 of the Tripartite Agreement, upon occurrence of event of default under the Loan Agreement, and upon intimation by IHFL to Builder, the Builder is bound to cancel the allotment of the Property and the Builder is liable to refund the outstanding amount under the loan Facility to IHFL as per the Tripartite Agreement."*
>
> *"**Clause 9**- That since event of default has occurred, the Loan Facility has been re called and Rs.2,26,98,657/-(Rupees Two Crore Twenty Six Lakhs Ninety Thousand Six Hundred Fifty Seven only), (hereinafter referred to as "Due Amount") has become due and payable as on August 08,2018 along with future interest. we hereby call upon you the Borowwer(s) to make the payment of Due Amount within 15 (Fifteen) days from the issuance of the present notice with intimation to the Builder. Please note that in the event the Due Amount is not paid within the period of 15 (Fifteen) days, the security under the Tripartite Agreement shall stand invoked. Unless otherwise intimated, on the invocation of security, the Builder i.e. the Adressee no.1 shall without any further notice from IHFL, cancel the allotment of the Property under intimation to IHFL and remit the sum of Rs.22,698,657/- in favour of IHFL. It is pertinent to mention here that the remittance of aforesaid sum is without prejudice to the rights of IHFL to be entitled to future interest and other charges till the actual date of payment in terms of the Loan Agreement."*
>
> *[Emphasis supplied]*

23. The right under section 18(1)/19(4) accrues to the allottees on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottees have not exercised the right to

withdraw from the project after the due date of possession is over till the offer of possession was made to them, it impliedly means that the allottees tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottees interest for the money they have paid to the promoter is protected accordingly and the same was upheld by 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; that:

> *25. The unqualified right of the allottees 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 allottees, 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 allottees/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 allottees 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.

24. 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. This judgement of the Supreme Court of India recognized unqualified right of the allottees and liability of the promoter in case of failure 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. But the complainant/allottees failed to exercise the right. It is observed by the authority that the allottees invest in the project for obtaining the allotted unit and on delay in completion of the project and when the unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottees in case of failure of promoter to give possession by due date either by way of refund if opted by the allottees or by way of delay possession charges at prescribed rate of interest for every month of delay.

25. The Hon'ble Apex court of the land in cases of ***Maula Bux Vs. Union of India (1973) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136***, and followed by the National Consumer

Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as ***Jayant Singhal and Anr. Vs. M/s M3M India Ltd.*** decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under-

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

26. Further, clause 9 of the buyer's agreement, talks about cancellation /withdraw by allottee. The relevant part of the clause is reproduced as under: -

> *9."The Developer and the Buyer hereby agree that the earnest money for the purpose of this Flat Buyers Agreement shall be calculated @15% of the Basic Selling Price of the Unit. the Buyer hereby authorises the Developer to forfeit the earnest money along with the interest and cost on delayed payments in case of non-fulfillement of the terms and conditions herein contained"*
>
> *[Emphasis Supplied]*

27. This view is supported by the judgement of Hon'ble Supreme Court of India in case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Civil appeal no. 5785 of 2019)*** wherein the Hon'ble Apex court took a view that those allottees are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate and also in consonance with the judgement of Hon'ble Supreme Court of India in case of ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors (Supra).***

28. The above said unit was allotted to complainants on 19.08.2010. There is a delay in handing over the possession as due date of possession was 19.08.2013 whereas, the offer of possession was made on 07.02.2017 and thus, becomes a case to grant delay possession charges. However, the complainants want to surrender the unit and want refund. Keeping in view of the aforesaid circumstances that the respondent-builder has already offered the possession of the allotted unit after obtaining

occupation certificate from the competent authority, and judgment of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.202,*** it is concluded that if the complainant/allottees still want to withdraw from the project, the paid-up amount shall be refunded after deductions as prescribed under the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018.

29. It is evident from the above mentioned facts that the complainants paid a sum of Rs.46,42,385 /- by their own funds and Rs.2,20,00,000/- by way of loan against basic sale consideration of Rs.3,07,62,600/-of the unit allotted. The respondent/promoter was bound to act and respond to the pleas for surrender/withdrawal and refund of the paid-up amount but respondent no.1 contented that due to the failure of the complainants in making the payments to respondent no.2 and on respondent no. 2 recalling the loan amount , the respondent no.1 cancelled the unit of the complainants and sent back the amount of Rs.2,20,00,000/- to respondent no. 2 , which respondent no. 2 also agreed to have received. In clause xxv-xxv at page no. 8 of the reply filed by respondent no. 2 , respondent no.2 has clearly admitted that respondent no.1 has refunded the amount of Rs.2.20 crores disbursed by it on behalf of the complainants.

30. Thus, keeping in view the aforesaid factual and legal provisions, the respondent no.1 cannot retain the amount paid by the complainants

against the allotted unit and is directed to refund the same in view of the agreement to sell for allotment by forfeiting the earnest money which shall not exceed the 10% of the sale consideration of the said unit as per payment schedule and return the balance amount along with interest at the rate of 10.85% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of surrender i.e., 26.06.2018 till the actual realization of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the authority

31. 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 no.1 is directed to refund the paid-up amount of Rs.46,42,385 /- after deducting 10% as earnest money of the sale consideration of Rs.3,07,62,600/- with interest at the prescribed rate i.e., 10.85% on the balance amount, from the date of surrender i.e., 26.06.2018 till the actual realization of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

ii. The respondent no. 2 is directed to give a no dues certificate to the complainants within a period of 30 days from this order.

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.

Dated: 20.03.2024

(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram