BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**4220 of 2023**
Date of complaint	:	**12.09.2023**
Date of order	:	**22.05.2024**

Rajiv Chatel,
R/o: 15A/13, East Patel Nagar,
Opposite Lal Mandir, New Delhi-110008. **Complainant**

Versus

M/s Ireo Grace Realtech Private Limited
Office at: - C-4, 1st floor, Malviya Nagar,
South Delhi, Delhi-110017. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Sukhbir Yadav (Advocate) Complainant
M.K Dang (Advocate) Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the 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. N.	Particulars	Details
1.	Name and location of the project	"The Corridors" at sector 67A, Gurgaon, Haryana
2.	Nature of the project	Group Housing Colony
3.	Project area	37.5125 acres
4.	DTCP license no.	05 of 2013 dated 21.02.2013 valid upto 20.02.2021
5.	Name of licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
6.	RERA Registered/ not registered	**Registered** Registered in 3 phases Vide 378 of 2017 dated 07.12.2017(Phase 1) Vide 377 of 2017 dated 07.12.2017 (Phase 2) Vide 379 of 2017 dated 07.12.2017 (Phase 3)
	Validity Status	30.06.2020 (for phase 1 and 2) 31.12.2023 (for phase 3)
7.	Apartment no.	202, 2nd floor, Tower-A6 (As on page no. 32 of complaint)
8.	Unit area admeasuring	1726.91 sq.ft [Super-Area] (As on page no. 32 of complaint)
9.	Date of approval of building plan	23.07.2013 (as per project details)
10.	Date of environment clearance	12.12.2013 (as per project details)
11.	Date of builder buyer agreement	14.05.2014 (As on page no. 29 of complaint)

12.	Date of fire scheme approval	27.11.2014 (as per project details)
13.	Possession clause	**13.3 Possession and Holding Charges** Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, registration chares, stamp duty and other charges and also subject to the allottee having complied with all the formalities or documentation as prescribed by the company, the company proposes to offer **the possession of the said apartment to the allottee within a period of 42 months from the date of approval of building plans and/or fulfillment of the preconditions imposed thereunder (Commitment Period).** The Allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for unforeseen delays beyond the

		reasonable control of the Company. **(Emphasis supplied)**
14.	Due date of possession	23.01.2017 (calculated from the date of approval of building plans) Note: Grace Period is not allowed.
15.	Total sale consideration	Rs.1,94,18,545.60/- (As per payment plan on page no. 65 of complaint)
16.	Amount paid by the complainants	Rs.60,00,000/- (As per cancellation letter dated 01.09.2016 on page 83 of complaint)
17.	Occupation certificate	31.05.2019 (As on page no.82 of reply)
18.	Offer of possession	Not offered
19.	Reminders and final notice	19.04.2016, 09.05.2016 28.07.2016 (page 69-71 of reply)
20.	Cancellation letter	01.09.2016 (As on page 83 of complaint)

B. Facts of the complaint

3. The complainant has made the following submission: -

I. That the complainant booked a 3 BHK apartment bearing no. CD-A6-02-202 admeasuring 1726.91 sq. ft. in the project of the respondent named "The Corridors" situated at Sector 67A, Gurugram under the instalment payment plan for a sale consideration of Rs. 1,94,18,545/-and signed a pre-printed application form on 05.03.2013. The complainant paid an amount of Rs.40,00,000/- as booking amount and thereafter, the respondent issued a payment receipt on 13.04.2013.

II. That on 10.09.2014, the complainant further made two more payments of Rs.10,00,000/- each through cheque. Thereafter, on 26.09.2014, the respondent issued the payment receipts against two payments made by the complainant.

III. That after a long follow-up, on 14.05.2014, a pre-printed, unilateral, arbitrary flat buyer agreement was executed between the parties. As per para 13.3 of the builder buyer's agreement, the builder has to give possession of the flat/unit within 42 months (6 months grace period) from the date of approval of building plan or fulfillment of the preconditions imposed there under (commitment period).

IV. That due to some financial constraint, the complainant could not make the payment and asked the respondent to refund the paid amount. Thereafter on 01.09.2016, the respondent sent a letter for cancellation of allotment.

V. That the complainant kept visiting the office of the respondent for recovery of the amount, but all went in vain. The complainant chased the issue of refund with the respondent CRM, but every time the respondent's CRM department always made lame excuses that they had escalated the case with higher management and will revert shortly.

VI. That one fine day when the Complainant was on the way to office of the respondent, he lost the original document of the said unit. When the complainant apprised the CRM department of the respondent, they asked for a FIR and publication in two different newspapers for loss of original documents. Therefore, the complainant registered an online complaint on 11.08.2020 and made a publication in two different newspapers i.e. Jansatta and the Indian Express dated 13.08.2020.

VII. That due to the above acts of the respondent and of the terms and conditions of the buyer's agreement, the complainant has been unnecessarily harassed mentally as well as financially. Therefore, the

opposite party is liable to compensate the complainant on account of the aforesaid act of unfair trade practice.

VIII. The complainant vide written submissions dated 22.04.2024 has submitted that due to some financial constraint, he requested the respondent to cancel his allotment vide email dated 28.05.2015. However, the complainant is chasing the respondent for refund of his money since 2015, and the respondent after a lapse of a year sent the termination letter reflecting the default of the complainant in lieu of the non-payment of demands raised by the respondent not on the request of the complainant.

C. Relief sought by the complainant:

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

   i. Direct the respondent to refund the paid-up amount after deduction of 10% earnest money as per regulation.

5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent has contested the complaint on the following grounds: -

   i. That the apartment buyer's agreement was executed between the parties prior to the enactment of the Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

   ii. 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.

   iii. That the complainant, after checking the veracity of the project namely, 'The Corridors', Sector 67-A, Gurgaon had applied for allotment of an apartment vide booking application form dated 13.04.2013. The

complainant had agreed to be bound by the terms and conditions contained therein.

iv. That based on the said application, respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainant an apartment no. CD-A6-02-202 having tentative super area of 1726.91 sq. ft. for a sale consideration of Rs.1,94,18,545.60 exclusive of applicable service tax, stamp duty and registration charges. The complainant signed and executed the apartment buyer's agreement on 14.05.2014 and agreed to be bound by the terms and conditions contained therein.

v. That the respondent raised payment demands from the complainant in accordance with the mutually agreed terms and conditions of the allotment as well as of the payment plan. The complainant has made the part-payment out of the total sale consideration and is bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, stamp duty, service tax as well as other charges payable along with it at the applicable stage.

vi. That complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, his calculations went wrong on account of slump in the real estate market and complainant did not possess sufficient funds to honour his commitments. The complainant was never ready and willing to abide by his contractual obligations and he also did not have the requisite funds to honour his commitments.

vii. That the respondent had issued several reminders to the complainant for payment of the outstanding installments as well as previous arrears. However, the complainant failed to remit the demanded amount despite repeated requests.

viii. That it is admitted by the complainant that he has failed to make the payment to the respondent against the demands raised by it through various demand letters issued on different dates. The fact is that it was the complainant who was in continuous default of the terms and conditions of the allotment.

ix. That on account of non-fulfillment of the contractual obligations by complainant despite several opportunities extended by the respondent, the allotment of complainant was cancelled and the earnest money was forfeited vide cancellation letter dated 01.09.2016 in accordance with clause 6 read with clause 21 of the apartment buyer's agreement and the complainant is now left with no right, claim, lien or interest whatsoever in respect of the said booking/allotment.

x. That despite failure of the complainant to adhere to his contractual obligations of making payments, the respondent has completed the construction of the tower in which the unit previously allotted to the complainant was located. Moreover, the respondent has also obtained occupation certificate from the competent authorities on 31.05.2019.

xi. The respondent vide written submission dated 29.04.2024 has submitted that it has sent 15 reminders to the complainant for payment of outstanding installments. Thereafter, final notice dated 28.07.2016 was sent by the respondent to the complainant. Despite all this, no payment whatsoever was made by the complainant and the respondent cancelled the unit allotted to the complainant vide cancellation letter dated 01.09.2016.

xii. That the complainant has only reproduced e-mail dated 28.05.2015 but has intentionally chosen not to produce the other emails exchanged between them. Although the complainant had initially sought refund of his amount but later, he had again approached the respondent with a request

that his unit be transferred to someone else. The procedure for transfer of his allotment had also been initiated by the complainant as evident from the email dated 03.05.2016. While the formalities for transfer were ongoing, the complainant had also informed the respondent vide email dated 03.07.2016 that he had lost the original builder buyer's agreement and also the transfer papers.

xiii. That the complainant deliberately chose to sleep over the matter and the present complaint is absolutely time barred on the face of it as the complaint has been filed only on 12.09.2023 i.e. after more than 7 years from the date of cancellation letter.

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

E. Jurisdiction of the authority

8. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

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

> **Section 11(4)(a)**
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> **Section 34-Functions of the Authority:**
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

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.

F. Findings on the objections raised by the respondent.

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

12. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

13. The authority is of the view 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. The Act nowhere provides, nor can be so construed, that all previous agreements

would 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 would be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

14. Further, 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 <u>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</u>. 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."

15. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer 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 and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

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

16. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.

17. 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.

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

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of*

Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

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

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

20. 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 his rights 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 complaint being barred by limitation.

21. The respondent contended that the present complaint is not maintainable and barred by the law of limitation as the alleged cause of action arose in September 2016, when the cancellation letter was issued to the complainant and any grievance w.r.t. the said cancellation should have been filed within 3 years i.e. till September 2019. However, after considering documents available on record as well as submissions made by the parties, it is determined that post cancellation of the unit, the respondent has failed to refund the refundable amount to the complainant so far, which clearly shows a subsisting liability. Moreover, the deductions made from the paid up amount by the respondent are not as per the law of the land laid down by the Hon'ble apex court of the land in cases of ***Maula Bux vs Union of India 1969(2) SCC 554*** and where in it was held that a reasonable amount by way of earnest money be deducted on cancellation and the amount so deducted should not be by way of damages to attract the provisions of section 74 of the Indian Contract Act,1972. Further, the law of limitation is, as such, not applicable to the proceedings under the Act and has to be seen case to case. Thus, the objection of the respondent w.r.t. the complaint being barred by limitation stands rejected.

F. IV Objection regarding the complainant being investor.

22. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, he is not entitled to the protection of the Act and 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 respondents is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and

states main aims and objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it 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 suites buyer's agreement, it is revealed that the complainant is a buyer and paid total price of Rs.60,00,000/- to the promoter towards purchase of a unit 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;"*

23. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And Anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings regarding relief sought by the complainant

G. I Direct the respondent to refund the paid-up amount after deduction of 10% earnest money as per regulation.

24. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by her in respect of subject unit along with interest as per section 18(1) of the Act and the same is reproduced below for ready reference:

> *"**Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-*
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
> ***he shall be liable on demand to the allottees**, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, **to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed** in this behalf including compensation in the manner as provided under this Act:*
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*
> *(Emphasis supplied)*

25. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 14.05.2014, provides for handing over possession and the same is reproduced below:

> *13.3*
> ***Schedule for possession of the said unit***
> *"Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said Rental Pool Serviced Apartment to the Allottee within a period of 42 months from the date of approval of the Building Plans and/or fulfilment of the preconditions imposed there under ("Commitment Period"). The Allottee further agrees and understands that the Company shall additionally be entitled to a period of 180 days ("Grace Period"),*

after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company."

26. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 180 days grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter.

27. On a bare reading of the clause 13.3 of the agreement, it becomes apparently clear that the possession in the present case is linked to the "fulfilment of the preconditions" which is so vague and ambiguous in itself. Nowhere in the agreement it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due date of possession is subjected to in the said possession clause. If the said possession clause is read in entirety the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the "fulfilment of the preconditions" has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject apartment. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and totally against the interests of the allottees must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans i.e., 23.07.2013 ought to be taken as the date for determining the due date of

possession of the unit in question to the complainant. Therefore, the due date of possession comes out to be 23.01.2017.

28. The complainant was allotted an apartment bearing no. CD-A6-02-202 admeasuring 1726.91 sq. ft. in the project of the respondent named "The Corridors" situated at Sector 67A, Gurugram vide apartment buyer's agreement dated 14.05.2014 for a sale consideration of Rs.1,94,18,545/- against which the complainant has paid an amount of Rs.60,00,000/- in all. The complainant has submitted that due to some financial constraint, he had sought cancellation of the allotment vide email dated 28.05.2015, but the said request was not acceded by the respondent and has not refunded the refundable amount till date. The respondent has submitted post cancellation request made by the complainant vide email dated 28.05.2015, he had again approached the respondent with a request that his unit be transferred to someone else and the procedure for transfer of his allotment had also been initiated by the complainant as evident from the email dated 03.05.2016. He further submitted that 15 reminders were sent to the complainant to pay the outstanding dues. However, the complainant defaulted in making payments and the respondent was to issue final notice dated 28.07.2016 requesting the complainant to comply with his obligation before finally cancelling the allotment of the unit vide cancellation letter dated 01.09.2016. After, considering the documents available on record as well as submissions made by the parties, the authority is of view that post cancellation request made by the complainant vide email dated 28.05.2015, he had sent another email to the respondent dated 03.05.2016 through which he impliedly wished to continue with the allotment stating that *"This is to bring to your kind notice that I would like to transfer my apartment to someone due to which I require the Transfer papers. Kindly do the needful at the earliest."* Therefore, now the

question before the Authority is whether the cancellation made by the respondent vide letter dated 01.09.2016 is valid or not.

29. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainant has paid an amount of Rs.60,00,000/- against the total sale consideration of Rs.1,94,18,545.60/- and no payment was made by the complainant after September 2014. The respondent/builder has sent 15 reminders, before issuing a final notice dated 28.07.2016 asking the allottee to make payment of the amount due, but the same having no positive results and ultimately leading to cancellation of unit vide letter dated 01.09.2016. Further, section 19(6) of the Act of 2016 casts an obligation on the allottees to make necessary payments in a timely manner. Hence, cancellation of the unit in view of the terms and conditions of the payment plan annexed with the buyer's agreement dated 14.05.2014 is held to be valid. But while cancelling the unit, it was an obligation of the respondent to return the paid-up amount after deducting the amount of earnest money. The respondent has submitted that earnest money is clearly defined in the booking application form and builder buyer's agreement as 20% of the sale consideration of the unit. This is a contractual term agreed between the parties out of their own free will before coming into force of the Act, 2016.

30. The Authority after taking into consideration the scenario prior to the enactment of the Act, 2016 as well as the judgements passed by Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, has already prescribed vide Regulations, 11(5) of 2018 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. Therefore, in view of the above, the contention of the respondent w.r.t forfeiture of 20% of the sale consideration/cost of the property to be considered/treated as earnest money stands rejected.

31. Further, the deductions made from the paid-up amount by the respondent are not as per the law of the land laid down by the Hon'ble apex court of the land in cases of ***Maula Bux VS. Union of India, (1970) 1 SCR 928 and Sirdar K.B. Ram Chandra Raj Urs. VS. Sarah C. Urs., (2015) 4 SCC 136,*** and wherein it was held that *forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of section 74 of Contract Act, 1872 are attached and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage.* National Consumer Disputes Redressal Commissions in ***CC/435/2019 Ramesh Malhotra VS. Emaar MGF Land Limited*** (decided on 29.06.2020) and ***Mr. Saurav Sanyal VS. M/s IREO Private Limited*** (decided on 12.04.2022) and followed in ***CC/2766/2017*** in case titled as ***Jayant Singhal and Anr. VS. M3M India Limited decided on 26.07.2022,*** *held that 10% of basic sale price is reasonable amount to be forfeited in the name of "earnest money".* Keeping in view the principles laid down in the first two cases, a regulation known as the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, was farmed providing as under-.

> ***"5. AMOUNT OF EARNEST MONEY***
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer*

Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money ***shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment /plot /building as the case may*** *be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

32. Keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.60,00,000/- after deducting 10% of the sale consideration of Rs.1,94,18,545.60/- being earnest money along with an interest @10.85% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of cancellation i.e., 01.09.2016 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the authority: -

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

i. The respondent/promoter is directed to refund to refund the paid-up amount of Rs.60,00,000/- after deducting 10% of the sale consideration of Rs.1,94,18,545.60/- being earnest money along with an interest @10.85% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the refundable amount, from the date of cancellation i.e., 01.09.2016 till its realization.

ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

34. Complaint stands disposed of.

35. File be consigned to the registry.

Dated: 22.05.2024

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