

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

Complaint no.:	341 of 2020
First date of hearing:	03.03.2020
Order Reserve On:	12.04.2024
Order Pronounced On:	05.07.2024

Upinder Singh Ahlawat R/o H. no. 145/22, Lakshmi Nagar, Rohtak-124001, Haryana	Complainant
Versus	
M/s Sana Reltors Pvt. Ltd. Office address: H-69, Upper Ground Floor, Connaught Circus, Connaught Place, New Delhi-110001	Respondent

CORAM:	
Shri Sanjeev Kumar Arora	Member

APPEARANCE:	
Shri Manu Ahlawat (Advocate)	Complainant
Shri Gaurav Raghav (Advocate)	Respondent

ORDER

1. The present complaint dated 27.01.2020 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:

Sr. No.	Particulars	Details
1.	Name of the project	"Precision Soho Tower" in Sector 67, Sohna, Gurgaon.
2.	Nature of the project	Commercial
3.	Project area	2.46 acres
4.	RERA Registered/ not registered	Not registered
5.	DTCP License No.	72 of 2009 dated 26.11.2009 valid upto 25.11.2019
6.	Name of licensee	Hari Singh
7.	Unit no.	06 A, Ground Floor (Page no. 18 of complaint)
8.	Unit admeasuring	731 sq. ft. (Page no. 18 of complaint)
9.	Date of MOU	05.07.2010 (page no. 17 of complaint)
10.	Assured return clause	4. The developer shall pay the Assured Investment Return @ Rs. 60/- to the second party respectively of the proposed space on or before 15 th of every month from July 2010.
11.	Possession clause	<i>Not mentioned</i>
12.	Due date of delivery of possession	Cannot be ascertained.
13.	Total sale consideration	Rs. 27,85,110/-

		(as per MOU on page no. 18 of complaint)
14.	Total amount paid by the complainant	Rs. 27,85,110/- + Rs. 20,00,000/- for second unit (as per SOA on page no. 47 of complaint)
15.	Amount of assured return paid by respondent	Rs. 47,35,880/- From July 2010 to August 2019 (As alleged by respondent)
16.	Occupation certificate	10.10.2019 (page no. 16 of reply)
17.	Offer of possession	22.10.2019 (Page no. 18 of reply)

B. Facts of the complaint

3. The complainant has pleaded the complaint on the following facts:
4. That the complainant invested in the project floated by the respondent. Upon the offer made by the respondent, the complainant transferred his hard earned money an amount of Rs. 47,85,110/- in the bank account of respondent in lieu of booking of two commercial spaces/shops upon the promises and assurances made by the respondents. It was mutually agreed upon by both the parties that the total sale consideration of the unit to be Rs. 27,85,110/-. Further, the respondent offered another adjoining commercial space/unit at a lucrative price of Rs. 20,00,000/- making the total amount payable as Rs. 47,85,110/-. The total amount was credited in respondent's account by 03.07.2010.
5. That a memorandum of understanding was signed between the parties on 05.07.2010 where the developer agreed to allot to the buyer the



space number 06A on ground floor, admeasuring super area of 731 sq. ft. @ Rs. 3810/- per sq. ft. of the super area amounting to a total consideration of Rs. 27,85,110/-. The respondent showed his inability to allot another commercial space at a reduced price as was offered by them earlier. However, the respondent agreed to repay the excess amount of Rs. 20,00,000/- to the complainant in a short span of time.

6. That the respondent transferred a total of Rs. 14,00,000/- to complainant in three instalments, last instalment being on 04.02.2011. Thereafter, the respondent failed to pay the balance amount of Rs. 6,00,000/- till date and has now straightaway started to decline the complainant's demand by stating that no such balance payment is due from his side. Also, as stated in the memorandum of understanding that the buyer has opted for "Assured Investment Return Plan" whereby the respondent shall pay to the complainant Rs. 43,860/- per month with effect from July 2010.
7. That the respondent has now started to commit a default by not paying the said amount for the month of February 2018 and then from the month of September 2019 till date. Moreover, the respondents have failed to deliver the possession in time as the time specified in the builder buyer agreement is three years from the date of the agreement. The respondents have miserably failed to deliver possession of the said commercial shop/ space in the stipulated time and till date no possession is delivered by the respondent. Also, an additional demand of Rs. 4,77,486/- is made by the respondent vide letter dated 22.10.2019 bearing subject "on offer of possession". Upon a clarification sought by the complainant, as according to the memorandum of understanding the total sale consideration was Rs. 27,85,110/-, no reasonable explanation was provided by the

respondent. This amounts to unfair trade practice and deficiency in services on the part of respondents and is clear violation of Real Estate (Regulation and Development) Act, 2016.

C. Relief sought by the complainant:

8. The complainant has sought following reliefs:

a. Direct the respondent to pay interest for every month of delay @ 18% p.a. from the date of deposit.

9. On the date of hearing, the authority explained to the respondents/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

10. The respondent has contested the complaint on the following grounds:

11. That the present complaint is not maintainable as against the total invested amount of 27,85,110/- excluding the service Tax, the total amount as received by the complainant as assured return is Rs.47,35,880/- i.e. from July 2010 to Aug-2019.

12. That the present complaint filed by the complainant is liable to be dismissed as no builder buyer agreement is placed on record to corroborate the submissions as made in the application.

13. That the present complaint is barred on account of the provisions of the Arbitration and Conciliation Act. The present complaint is liable to be dismissed at the very threshold as the same is barred by Section 8(1) of the Arbitration & Conciliation Act, 1996.

14. That as the complete complaint is revolving around the memorandum of understanding dated 05.07.2010 executed between the parties and as the agreement is apparently not a builder buyer agreement,

containing clauses of assured returns, hence the present complaint is not maintainable before the Hon'ble Authority.

15. That the present complaint filed by the complainant is liable to be dismissed as in the memorandum of understanding (MOU) dated 05.07.2010 it is categorically mentioned that the disputes if any shall be subject to the jurisdiction of the Courts at New Delhi.
16. That the present complaint is not maintainable as the memorandum of understanding dated 05.07.2010. The specific agreement entered into between the respondent and the complainant is prior to coming into force of the Act and Haryana Rules, hence the provisions of HRERA are not applicable to the present complaint.
17. That the present complaint filed by the complainant is liable to be dismissed as there is no agreement in respect of the unit of the complainant and as such there are no terms that were settled. MOU can't be kept at par with the flat buyer agreement as the MOU is referring to the returns on investment but has nothing about the allotment of unit. As the flat buyer agreement was not signed, hence the present matter does not come within the ambit of the HRERA.
18. That the entire MOU is required to read as a whole and can't be read in isolation with reference to one clause, as per the said MOU it was categorically agreed that the after first lease out of the proposed space, the respondent shall stand completely discharged, absolved and relieved of all responsibilities / obligations under the said MOU including the liability to give Assured Investment Return. As the complainant was time and again requested for signing the flat buyer agreement but it was the complainant who had neither signed the agreement nor taken the possession which was offered way back on October 2019, hence the present complaint is not maintainable as the



- respondent was not supposed to pay the assured returns after the construction was completed.
19. That already an amount of Rs. 47,35,880/- paid to the complainant on the investment of Rs. 27,85,110/- as per the terms of the is the memorandum of understanding (MOU) dated 05.07.2010.
 20. That the complainant thus didn't signed the builder buyer agreement, but still the complainant as per the terms of the memorandum of understanding (MOU) dated 05.07.2010 was offered possession of the Unit No. 06 A in the project namely Precision SOHO Tower, Gurgaon on October 2019. On the date of the offer of the possession a sum of Rs. 4,77,486/- was outstanding and payable by the complainant. As on date after including interest @12% per annum a sum of Rs. 7,06,679/- is outstanding and payable by the complainant. As far the payment of the minimum assured returns is concerned the complainant was paid the minimum assured return of Rs. 47,35,880/- on his investment till August- 2019.
 21. The complainant to get the Sale deed registered after making the balance payment on the offer of possession, the unit could not be leased out. The complainant against the investment of Rs. 27,85,110/- have already received a sum of Rs. 47,35,880/- and is not qualified for the reliefs under HRERA.
 22. That the present complaint filed by the complainant is liable to be dismissed as in the projects wherein the occupation certificate is issued prior to the enactment of HRERA (RERA in Haryana was set up on 28July 2017), hence the complaint is not maintainable.
 23. That the present complaint filed by the complainant is liable to be dismissed as the complainant failed to comply the terms of the said MOU dated 05.07.2010.



24. That the present complaint is not maintainable as per the provision of Section 19 (6) of Real Estate (Regulation and Development) Act 2016 as no buyers agreement was executed between the parties, hence there is no actual allotment of any unit in favour of the complainant and the MOU was nothing more than an agreement of advancement of some amount.
25. That there was no agreement between the parties and hence there was even no time line ever fixed in respect of the construction. Even the complainant also failed to execute any flat buyer agreement.
26. That the present complaint filed by the complainant is liable to be dismissed as the complainant had made false allegations against the respondent without any substantial evidence, hence the present complaint is not maintainable and is liable to be dismissed with heavy cost.
27. That the present complaint filed by the complainant is nothing other than the abuse of process of law, hence the present complaint is liable to be dismissed.
28. That as far as the project is concerned the same was delivered in the September 2017 after the receipt of the occupation certificate. If the complainant would had any intention to purchase the unit then at the first instance the complainant would had signed the buyers agreement as per the terms of the MOU and further pursuant to the receipt of the letter dated October 2019 offering possession, the complainant must have taken the possession of the unit.
29. 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 theses undisputed documents.

E. Jurisdiction of the authority



30. The respondent has raised objection regarding jurisdiction of the present complaint. 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

31. 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

32. 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.

33. 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.

F. Findings on the objections raised by the respondents.

F.I Objection regarding complainant is in breach of MOU for non-invocation of arbitration.

34. The respondent submitted that the complaint is not maintainable for the reason that the MOU contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute and the same is reproduced below for the ready reference:

"13. That all disputes or differences arising between the parties under or in relation to this Memorandum Of Understanding, shall be resolved by reference to Arbitration in accordance with the Arbitration and Conciliation Act, 1996. The venue of arbitration shall be New Delhi only."

35. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the MOU 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.



36. 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 builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

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

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

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate 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."

37. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the application form, the Hon'ble Supreme Court **in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of**



2017 decided on 10.12.2018 has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

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

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

F.II Objection regarding jurisdiction of the complaint w.r.t the MOU executed prior to coming into force of the Act.



39. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the MOU was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.
40. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and would 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 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."

41. 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."

42. 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.

G. Findings on the relief sought by the complainant



G.I. Direct the respondent to pay interest for every month of delay @ 18% p.a. from the date of deposit.

43. In the present complaint, the complainant is seeking delayed possession charges on the amount paid and stated that the respondent has failed to deliver the possession of unit on the stipulated time. The plea of the respondent is otherwise and stated that present complaint should be dismissed as there is no agreement in respect of the unit of the complainant and as such there are no terms that were settled regarding delay possession charges.
44. The authority observes that the complainant has booked a unit in the project of the respondent namely, Precision Soho Tower situated at sector-67, Gurugram. The Memorandum Of Understanding (MOU) for the said unit was executed on 05.07.2010 for the total sale consideration for ₹27,85,110/- and the complainant fully paid an amount of ₹27,85,110/- and also an amount of ₹20,00,000/- in lieu of another unit in the same project. Thereafter the second unit was cancelled by the complainant and an amount of ₹14,00,000/- was refunded by the respondent to the complainant.
45. The occupation certificate for the project was received on 10.10.2019 and thereafter the possession was offered on 22.10.2019. The authority is of the view that the MOU dated 05.07.2010 is an assured return investment plan and as per clause 4 of the MOU the respondent has to pay an assured return @ ₹60/- to the allottee. The said clause is reproduced hereunder:

4. The Developer shall pay the Assured Investment Return @Rs.60/- to the second party respectively of the Proposed Space on or before 15th of every month. From July 2010.



46. Moreover, clause 5 of the MOU is also relevant and reproduced hereunder for ready reference:

5. That the Developer upon completion of the construction of the proposed building/complex containing the said proposed Space and after all amounts due have been paid by the Buyer with respect thereof in full by the Buyer, the Developer shall cause the proposed Space to be leased out as per the then generally prevailing market rates. The Buyer hereby duly authorises the Developer unconditionally to lease out the proposed space and shall inform the Buyer about the terms & conditions of the lease as settled with lessee. The Buyer under no circumstances shall be entitled to lease the said proposed Space and/or to otherwise deal with the same directly without the consent in writing of the Developer. The terms and conditions of lease negotiated by the Developer, as aforesaid, shall be final and binding upon the Buyer. In the event, the Buyer obstructs or neglects or defaults to sign the necessary documents of lease after it has been finalized by the Developer, the Developer shall have the right to terminate the Allotment of the proposed space in favour of the Buyer and shall further have right to deal with the proposed space as it may deem fit ad proper including right to execute the lease in Developer's own name. In that eventuality this MOU shall stand terminated and the Developer shall return the consideration amount as paid by the Buyer to the Buyer, only after deducting all the sums paid by the Developer on account of Assured Investment Return to the Buyer.

47. Clause 5 of the Memorandum of Understanding (MOU) stipulates that upon completion of construction, the respondent builder is responsible for leasing out the unit in question. Hence it is an investment return plan as assured return payment was started from date of allotment itself. Furthermore, according to Clause 4 from July 2010, the respondent is obligated to provide assured returns to the



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complainant. Therefore, there is no basis for a claim of delayed possession in this matter and hence no case of DPC is made out.

48. Complaint stands disposed of.
49. File be consigned to registry.

Sanjeev Kumar Arora
(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.07.2024



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