

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

Complaint no. :	5391 of 2022
Date of filing complaint:	01.08.2022
Date of decision :	02.04.2024

Sunita Agarwal R/O: D-1009, New Friends Colony, New Delhi	<b>Complainant</b>
Versus	
1. Almond Infrabuild Private Limited Regd.Office: 711/92, Deepali, Nehru Place, New Delhi-110019 2. ICICI Bank	<b>Respondents</b>

<b>CORAM:</b>	
Shri Arun Kumar	<b>Chairman</b>
Shri Vijay Kumar Goyal	<b>Member</b>
Shri Ashok Sangwan	<b>Member</b>
<b>APPEARANCE:</b>	
Sh. Chander Shekhar Yadav (Advocate)	Complainant
Sh.Vinayak Gupta (Advocate)	Respondents

**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 29 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 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 the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Name of the project	"ATS Tourmaline", Sector- 109, Gurgaon
2.	Nature of project	Residential apartment
3.	DTPC License no.	250 of 2007 dated 02.11.2007 Valid till 01.11.2019 Licensed area 19.768 acres Name of licensee Raj Kiran & 2 others
4.	RERA registered/not registered	Registered vide registration no. 41 of 2017 dated 10.08.2017
5.	Date of apartment buyer agreement	05.03.2014 [As per page no. 13 of complaint]
6.	Unit no.	4182 on 18 <sup>th</sup> floor of tower 04 [As per page no. 34 of complaint]
7.	Unit area admeasuring	1750 sq. ft. [Super area] [As per page no. 34 of complaint]
8.	Memorandum understanding of	22.03.2014 (Page 44 of the complaint)
9.	Tripartite Agreement	07.04.2015 (At page no. 16-34 of the reply )
10.	Possession clause	<b>Clause 6.2</b> <i>The Developer endeavour to complete the construction of the apartment <u>within 42 months from the date of this agreement (completion date)</u>. The company will send possession notice and</i>

		<i>offer possession of the Apartment to the applicant as and when the company receives the occupation certificate from the competent authority.</i>
11.	Due date of possession	05.09.2017 [Calculated from the date of agreement i.e., 05.03.2014]
12.	Total sale consideration	Rs. 1,87,56,250/- (As admitted by both the parties )
13.	Amount paid by the complainant	Rs. 1,71,90,403/- [As alleged by the complainant in facts]
14.	Occupation certificate	09.08.2019 (At page 46-47 of the reply)
15.	Offer of possession	09.08.2019 (At page 48-49 of the reply)

**B. Facts of the complaint:**

3. That the complainant, induced by various advertisements issued by the respondent for their housing project "Tourmaline" situated at Sector-109, Gurgaon, Haryana, applied for allotment of a residential apartment no. 4182, in tower-4 on 18th floor, admeasuring super area of 2150 sq. fts. for a total sales consideration of Rs. 1,87,56,250/-.

4. That the complainant paid a sum of Rs. 27,86,613/- towards part payment of the total amount payable to the respondent vide cheque no. 307652 dated 17.01.2014 drawn on HDFC Bank, and cheque no. 307655 dated 17.02.2014 drawn on HDFC Bank, and the respondent issued a receipts bearing no. 000967, 000968 dated 21.01.2014. & receipts bearing no. 001113,001114 & 001115 dated 18.02.2014.

5. That thereafter, the complainant was allotted a residential apartment no. 4182, in Tower-4 on 18th floor vide allotment letter dated 05.03.2014. An

'apartment buyer agreement' was executed between the complainant and the respondent on 05.03.2014.

6. That it is pertinent to mention herein that, in order to make the payment to the respondent, the complainant applied for a housing loan with the ICICI Bank, for Rs. 1,50,00,000/- and same was sanctioned vide letter dated 14.03.2014.

7. That thereafter, on 22.03.2014, a memorandum of understanding was entered into between the complainant and the respondent wherein under clause 3, the respondent acknowledged the receipt of a sum of Rs. 27,86,613/-. Under clause 5, it is mentioned that the complainant shall be liable to pay loan processing charges to the bank for obtaining loan. It is also provided that upon buy back after expiry of 36 months, the respondent shall be liable for foreclosure charges, processing fees and any other charges levied by the bank on the complainant. Under clause 6, it is mentioned that allotment is under subvention scheme and there is no interest liability on the complainant to the bank for a period of 36 months from the date of the booking of apartment and any interest liability shall be payable by the respondent for the period of 36 months. Under clause 8 it is mentioned that the complainant shall be entitled to call upon the respondent in writing, to purchase the aforesaid apartment at the basic selling price calculated at Rs. 9500/- per sq. ft. plus other charges and service tax paid till date by the complainant and in such case respondent shall repurchase the said apartment within 30 days of the expiry of 36 months from the date of booking. It is also agreed that in case of the delay in the payment of repurchase price by the respondent to the complainant beyond 30 days then the respondent shall be liable to pay interest @ 18% per annum for the period of delay on the total repurchase price payable to the complainant. It

is also mentioned that till the time repurchase price is fully paid to the complainant, the respondent shall be liable to pay bank, all installments, pre possession EMI, and interest to the bank directly.

8. That in pursuance of the various payment demands raised by the respondent, the complainant made further payments by getting the disbursement from ICICI bank. It is submitted that following disbursements were made to the respondent:-

- (i) Rs. 67, 58,144/- was disbursed on 30.04.2014,
- (ii) Rs. 34, 26,214/- was disbursed on 30.10.2014,
- (iii) Rs. 4, 03,124/- was disbursed on 22.01.2015,
- (iv) Rs. 17, 36,656/- was disbursed on 30.04.2015
- (v) Rs. 17, 43,862/- was disbursed on 12.02.2016.

The bank issued the letters as well as the statement of loan account to the complainant confirming the disbursement of the above mentioned amounts.

9. That as demanded by the respondent, the complainant further made the payment of sum of Rs. 2,32,462/- on 29.02.2016 vide cheque No. 000074 dated 29.02.2016 drawn on HDFC Bank Ltd. making the total payment made by complainant to Rs. 1,71,90,403/-.

10. A tripartite agreement was also executed between the complainant, respondent and the ICICI Bank on 22.03.2014. Under clause 16 of the tripartite agreement states that if the respondent company fails to deliver the possession of the apartment as per agreed terms, the borrower shall, now withstanding anything to the contrary contained in the said agreement,

be entitled to terminate the allotment and the developer is liable to pay to the bank the dues to the extent outstanding. The respondent has failed to comply with the terms and conditions of the buyer's agreement and handover the possession by 04.09.2017 .In this case the entire liability to clear the dues of the bank lies upon the respondent company and not upon the complainant. Further in terms of clause 18, 20, 23 of the tripartite agreement, the respondent is laible to the bank to pay its dues.

11. That thereafter, the complainant met the representatives of the respondent and asked them to repurchase of the said apartment as per the terms and conditions of said Mou. However respondent failed to buy back the apartment and make the payments in accordance with said mou.

12. That after receiving no clear information from representatives of respondent, the complainant visited the project site and was shocked to see that there is little construction activity going on at the site. It is submitted that the respondent neither made the refunds of the said amount nor gave any communication to the complainant.

13. That the respondent had promised and undertaken to the complainant that the project shall be completed and possession be handed over within the stipulated time period by the month of 04.09.2017 with a grace period of 3 months but respondent has miserably failed and defaulted in completion of the project and handing-over the possession of the booked apartment on the agreed date. Neither the refund was made. Therefore, the default on the part of respondent has occurred and is still continuing.

14. During the pendency of the present case, on 12.08.2023, the complainant received notice dated 05.08.2023 issued by ICICI Bank regarding sale of secured assets under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest

(Enforcement) Rules, 2002 read with Rules 8(6) and 9(1) of the Security Interest (Enforcement) Rules, 2002. The mode of sale has been stated to be "Online E-Auction/Bidding Through their website". The reserve price was fixed as Rs. 1,51,10,000/-. Alongwith the said notice, the bank also annexed the notice published in the Pioneer on 04.08.2023.

15. Thereafter, ICICI Bank Ltd. published notice for Auction which led to filing of MA No. 291/2023 seeking restrain upon ICICI Bank Ltd. from auctioning the flat or in alternate directing the respondent to clear the dues of the bank and get the NoC from ICICI Bank. However, the said MA was dismissed by this Hon'ble Authority vide order dated 05.09.2023.

16. Admittedly, the construction was not completed and possession was not handed over within the time stipulated in clause 6.2 of "apartment buyer agreement" dated 05.03.2014 i.e. by 04.09.2017. The alleged offer of possession is dated 09.08.2019 i.e. about 2 years after the agreed date of possession and that too, the alleged letter was never communicated. In these circumstances, the respondent no. 1 is liable to refund the principle amount of Rs. 1,71,90,403/- which was paid by the complainant alongwith Interest @ MCLR + 2% from the respective date of payments till the date of till the refund.

17. Written submissions are filed by the complainant and the same are taken on record and perused.

**C. Relief sought by the complainant:**

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

- i. Direct the respondent to refund the entire amount paid by the complainant along with interest.

**D. Reply by respondent no. 1 :**

The respondent by way of written reply made the following submissions

19. That the complainant, after checking the veracity of the project namely, 'ATS Tourmaline', Sector 109, Gurugram had applied for allotment of a residential unit and agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint. It is submitted that based on the application of the complainant, unit no. 4182, Floor 18<sup>th</sup> tower no. 4 was allotted to the complainant by the respondent.

20. That the buyer's agreement was executed on 05.03.2014. It is pertinent to mention herein that the Real Estate (Regulation and Development) Act, 2016 was not in force when the Agreement was entered into between the complainant and the respondent. The provisions of the Real Estate (Regulation and Development) Act, 2016 thus cannot be enforced retrospectively. It is respectfully submitted that the complainants have consciously and voluntarily executed buyer's agreement dated 05.03.2014 after reading and understanding the terms and conditions incorporated therein to their full satisfaction

21. That it was agreed that as per clause 4 of the buyer's agreement, the sale consideration of Rs. 1,87,56,250/- was exclusive of other costs, charges including but not limited to maintenance, stamp duty and registration charges, service tax, proportionate taxes and proportionate charges for provision of any other items/facilities. The possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the buyer's agreement. The possession of the unit was subject to the occurrence of the force majeure events.

22. That it is pertinent to mention herein that the implementation of the said project was hampered due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the





control of the respondent and which have affected the materially affected the construction and progress of the project. Some of the Force Majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under

I) Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to Demonetization:

II) Orders Passed by National Green Tribunal: In last four successive years i.e. 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region, phasing out the 10 year old diesel vehicles from NCR. In view of the above, construction work remained very badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondent and the said period is also required to be added for calculating the delivery date of possession.

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

(IV) Restraint order dated 23.04.2014 passed by the SDM Kapashera: That it is submitted that the respondent company has been constructing the project in a timely manner and as per the terms of the Agreement for Sale and no default whatsoever has been committed by it. It is pertinent to mention herein that the project was badly affected on account of a restraint order dated 23.04.2014 passed by the SDM Kapashera on the basis of a report submitted by Halka Patwari,

Kapashera that the respondent was making encroachment on the Gram Sabha Land. In the restraint order dated 23.04.2014, it was stated that a case titled as Dilbagh Singh vs GNCTD of Delhi pertaining to the land in dispute was pending before the Delhi High Court and SDM, Gurugram was requested to conduct joint demarcation. It is pertinent to mention herein that the order passed by the SDM Kapashera is covered under the ambit of the definition of 'Force Majeure Event' as stipulated in the mutually agreed terms of the Agreement for Sale.

23. That the respondent after completing the construction of the unit in question, the occupation Certificate on was granted by the concerned authorities on 09.08.2019 and offered the possession of the unit to the complainant vide letter dated 09.08.2019. The complainant was intimated to remit the outstanding amount on the failure of which the delay penalty amount would accrue. The complainant was bound to take the physical possession of the unit after making payment towards the due amount along with interest and holding charges.

24. That the complainant is a real estate investor who has invested his money in the project of the respondent with an intention to make profit in a short span of time. However, his calculations have gone wrong on account of slump in the real estate market and he is now deliberately trying to unnecessarily harass, pressurize and blackmail the respondent to submit to the unreasonable demands.

25. The present complaint is neither maintainable nor tenable before this Hon'ble Forum and is liable to be out rightly dismissed. The agreement in question was executed between the complainant and the respondent prior



to the enactment of RERA, 2016 and the provisions laid down in the said Act cannot be enforced retrospectively.

26. 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 this clause 21.1 of the buyer's agreement.

27. Loan Agreement between the complainant and ICICI Bank limited: While negotiating the terms and conditions of the housing loan from the bank, the complainant entered into a loan agreement with ICICI Bank. It is pertinent to mention that though the respondent was not a party in the above said loan agreement but the complainant restricted the capability of the respondent to adhere to certain terms and conditions of the MOU by entering into the loan agreement together with the tripartite agreement. The complainant has not brought the said loan agreement on record and as such adverse inference ought to be drawn against the complainant. Besides, the complainant also promised the bank to use the housing loan only for the purpose of purchase of unit from the respondent.

28. That the complainant represented that he is eligible for housing loan and in furtherance whereof, the complainant approached ICICI Bank Limited to apply for a housing loan. Since the complainant has been a person of limited means and were not having enough resources to acquire the subject unit, he persuaded the respondent to execute a memorandum of understanding dated 24.03.2014 providing for refund of the entire earnest money paid by him in the event of non-disbursement of housing loan by the bank to the complainant.



29. As per the terms of the MOU, it was represented by the complainant that he is financially eligible for sanction of housing loan from bank. However, the terms and conditions for obtaining the housing loan by the complainant from the bank were not envisaged or captured in the MOU. Since the transaction of obtaining housing loan was strictly between the complainant and the bank, the terms and conditions for obtaining the said loan were completely at the wisdom and sole discretion of the complainant and the negotiations between him and the bank whilst granting the housing loan. It was further specifically agreed that the mou shall come to an end in case of any default directly attributable to the complainant.

30. Under the MOU it was also agreed that in case of housing loan, complainant shall bear the initial loan processing charges to the bank for obtaining the loan. However, in case of buy-back by the respondent, which shall be applied between 33<sup>rd</sup> to 36<sup>th</sup> month from the date of booking, the respondent shall be liable for the foreclosure charges, processing fee and other charges levied by the bank, subject to respondent procuring of no objection (NOC) from the bank as per terms of tripartite agreement.

31. The parties also agreed that timeframe of 33<sup>rd</sup> to 36<sup>th</sup> month from the date of booking, is important for applying for buyback option along with NOC from the concerned bank/financial institution in terms of tripartite agreement as bank has all the rights/title/claim with respect to unit/apartment under mortgage created by complainant in favour of concerned bank/financial institution. Thereby, it is important to note that at no point of time the said buy-back was beyond the terms and conditions of the buyers' agreement and tripartite agreement between the parties in relation to the sale-purchase of the unit.

32. Further, it is pertinent to note that the buy-back of the unit was just an option given to the complainant subject to him fulfilling his obligations under the various agreements and was in no means a guarantee that the unit shall be re-purchased by the respondent in any event whatsoever.

33. That in order to give effect to housing loan requested by the complainant to ICICI Bank Limited, the complainant, respondent and ICICI Bank entered into a tri-partite agreement dated 22.03.2014. The tripartite agreement recorded the scheme of loan disbursement on behalf of and for the benefit of the complainant. While negotiating with the bank for grant of housing loan, the complainant not only mortgaged his rights and interests in the unit but also subrogated his rights in favour of the bank.

34. That it was specifically agreed under the tripartite agreement that the complainant without the prior written consent of the bank shall not further mortgage / charge / transfer / sell / assign or part with the possession of the said unit / apartment to any other person. Under the tripartite agreement it was also agreed between the parties, that the respondent has no objections in creation of the mortgage on the unit / apartment by the complainant in favour of the bank. In fact the respondent as per the terms of the tripartite agreement was under an obligation to observe the terms and conditions of the said mortgage of the unit by the complainant in favour of the bank. It is pertinent to note that immovable property or any right, title or interest can be mortgaged by the owner of such rights / interest / title. The complainant acquired these rights in respect with the unit/apartment and willingly and consciously mortgaged the same in favour of the bank by executing the tri-partite agreement with the bank. Under the tripartite agreement it was also agreed between the parties, that complainant and respondent shall adhere to terms of buyer's agreement and tripartite

agreement. The tripartite agreement thus finally settled the understanding between the parties.

35. Written submissions are not filed by the respondent no. 1.

36. Copies of all the relevant do have been filed and placed on record.

37. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

#### **E. Written submissions filed by the respondent no. 2**

38. That the respondent no. 2 is a law-abiding Limited Company registered under the Companies Act, 1956 having its registered office at 23, Shal Tower, 3rd Floor, New Rohtak Road, Karol Bagh, New Delhi- 110005 and provides the housing finance services to its clients. It is submitted that the answering respondent provides housing finance services and helps the public to avail housing loan facilities.

39. It is submitted that the subject matter of the present complaint is a retail loan sanctioned and disbursed to the complainant, repayment of which is absolute and express liability of the complainant. Any dilution to the agreed terms of home loan agreement and the tripartite agreement is unwarranted in law and any such assignment of loan as contended by the complainant is misconceived under law and hence may not be allowed.

40. That the subject matter of the present complaint has arisen due to the alleged default on part of respondent no. 1 in timely construction and handover of the project. However, the complainant has decided to wrongly impleaded ICICI Bank Ltd. as respondent no. 2. The complainant has chosen to ignore the fact that the relationship of ICICI Bank Ltd. and the complainant has arisen out a loan agreement which has no correlation

whatsoever with the builder. In the humble submission of the answering respondent, this Hon'ble Authority lacks jurisdiction to issue any directions or orders to any other person or entity who is not a promoter, real estate agent or allottee and respondent no. 2 being the lender, does not fall under any of the aforementioned categories. The instant complaint is liable to be dismissed on account of mis-joinder of parties. The domain of services provided by the respondent no. 2 is completely separate and independent of respondent no. 1 and hence the complainant ought to be dismissed as against respondent no.2 on account of lack of jurisdiction.

41. That in addition to this the complainant has failed to disclose any separate cause of action against the respondent no. 2. On the grounds as stated, the Hon'ble Authority may be pleased to delete the respondent no. 2 from array of parties and/or dismiss the instant complaint as against respondent no.2. The present complaint suffers from the basic lacuna of mis-joinder or non-joinder of parties and ICICI Bank Ltd. has been wrongly made the party to the complaint because it is neither a necessary nor a proper party in this case. The present complaint may thus be dismissed only on this point.

#### **F. Jurisdiction of the authority:**

42. The plea 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.

##### **F.1 Territorial jurisdiction**

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**

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

### **Section 11**

....

**(4) The promoter shall-**

*(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

### **Section 34-Functions of the Authority:**

*34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

44. 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.

45. 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 judgements



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."*

46. 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 the respondent**

#### **G.I Objection raised by the respondent regarding force majeure Condition**

47. The respondent promoter has raised the contention that the construction of the project has been delayed due to force majeure conditions such as on account of demonetization, ban on construction

activities, orders passed by NGT. The plea of the respondent regarding various orders of NGT and demonetisation and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus , cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit.

48. The respondent further stated the occupation certificate was received on 09.08.2019. According to the possession clause 6.2 of the buyer's agreement dated 05.03.2014, the possession of the subject unit was to be handed over within 42 months from the date of execution of the agreement .Accordingly the due date comes out to be 05.09.2017 .

49. Any contract and dispute between the contractor and the builder cannot be considered as a ground for delayed completion of project as the allottee was not a party to any such contract.

50. All the major construction activities were completed except the finishing works till the application of occupation certificate. Accordingly, the authority is affirmatively of the view that the above said period i.e., from the date of restraint order by SDM(Kapashera) i.e., 23.04.2014 till the case titles as Dilbagh Singh vs GNCTD of Delhi was dismissed i.e., 12.10.2017 cannot be taken as the force majeure event and accordingly the due date of possession remains to be 05.09.2017.

**G.II Objection regarding agreement contains an arbitration clause which refers to the dispute resolution mentioned in the agreement**

51. The respondent has raised an objection that the complainant has not invoked arbitration proceedings as per the provisions of 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:

21 *"All or any disputes that may arise with respect to the terms and conditions of this Agreement, including the interpretation and validity of the provisions hereof and the respective rights and obligations of the parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be under the Arbitration and Conciliation Act, 1996 and any statutory amendments/modification thereto by a sole arbitrator who shall be mutually appoint the Parties or to be mutually appointed or if unable to be mutually appointed, then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties.*

*The venue of Arbitration shall be at Gurgaon and only the courts at Gurgaon shall have the jurisdiction in all matters arising out of this Agreement."*

52. The respondent contended that as per the terms & conditions of the application form duly executed 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.

53. Therefore, the provisions of the Act, the authority is of the view that complainant is well within the 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.

### **G.III Objection regarding the complainant being investor**

54. The respondent took a stand that the complainant is investor and not consumers and therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. However, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the allotment letter, it is revealed that the complainant is buyer's, and he has paid a total price of Rs. 1,71,90,403/- 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;"*

55. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred to 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". Thus, the contention of the promoter that the allottee being investor are not entitled to protection of this Act also stands rejected.

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

56. An objection is raised by the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 and which provides as under:

*"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion*

*of project and declare the same under Section 4, The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....*

*122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

57. 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."*

58. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall

be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

**H. Entitlement of the complainant for refund:**

**G.I Direct the respondent to refund the entire amount paid by the complainant along with interest.**

59. The complainant booked a unit bearing no. 4182 on the 18<sup>th</sup> floor, admeasuring super area of 1750 sq. ft. for a total sale consideration of Rs. 1,87,56,250/-and paid a sum of paid Rs. 1,71,90,403/-Thereafter, buyer's agreement was executed on 05.03.2014.

60. The Section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is a case where the promoter has offered possession of the unit after obtaining occupation certificate and the allottees wish to withdraw from the project and demand return of the amount received by it in respect of the unit with interest at the prescribed rate.

61. The due date of possession as per buyer's agreement as mentioned in the table above is 05.09.2017 and complaint was filed on 01.08.2022 after possession of the unit was offered to them after obtaining occupation certificate by the promoter. The OC was received on 09.08.2019 and whereas the offer of possession was also made on 09.08.2019. The allottees never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made and demand

for due payment was raised, then only, they filed a complaint before the authority.

62. 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.*

63. 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 although it is unqualified one. The complainant has to demand and make their intention clear that they wish to withdraw from the project. However, they continued with the project and thus made themselves entitled to receive interest for every month of delay till handing over of possession. 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.

15. 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.

64. The buyer's agreement was executed between the parties on 05.03.2014. There is a delay in handing over the possession as due date of possession was 05.09.2017 whereas the offer of possession was made on 09.08.2019 and thus, becomes a case to grant delay possession charges. The authority observes that interest of every month of delay at the prescribed rate of interest could be granted to the complainant/allottees. But now, the peculiar situation is that the complainant does not wish to continue in the project and rather want to surrender the unit and want refund. Keeping in view 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, 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"*

65. Thus, keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.1,71,90,403/- after deducting 10% of the sale consideration of Rs.1,87,56,250/- 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 filing of this complaint i.e., 01.08.2022 till its realization.

**I. Directions of the Authority:**


66. 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 promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

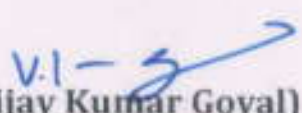
- i) The respondent/builder is directed to refund the paid-up amount of Rs.1,71,90,403/- after deducting 10% of the sale consideration of Rs.1,87,56,250/- being earnest money along with an interest @ 10.85% p.a. on the refundable amount, from the date of filing of this complaint i.e., 01.08.2022 till its realization.
- ii) Out of total amount so assessed, the amount paid by the bank / payee be refunded first in the account of bank and the balance amount along with interest if any will be refunded to the complainant.
- 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.
- iv) The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up

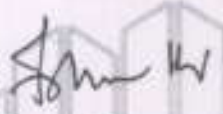
amount along with interest thereon to the complainant, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainants.

67. Complaint stands disposed of.

68. File be consigned to the registry.

  
(Ashok Sangwan)  
Member

  
(Vijay Kumar Goyal)  
Member

  
(Arun Kumar)  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 02.04.2024

**HARERA**  
**GURUGRAM**