BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**4606 of 2022**
Date of complaint	:	**23.06.2022**
Date of order	:	**24.07.2024**

1. Brigadier Atul Kumar Singh,
R/o: D-1001, Ambience Greendale,
Sopon Bagh, Ghorpadi, Pune, Maharshtra-411001.
2. Devina Govila, W/o Late Rajeev Govila,
(Legal heir of Late Rajeev Govila i.e. allottee no.2)
3. Devika Govila, D/o Rajeev Govila,
(Legal heir of Late Rajeev Govila i.e. allottee no.2)
4. Shweta Govila, D/o Rajeev Govila,
(Legal heir of Late Rajeev Govila i.e. allottee no.2)
All R/o: A-1101, Eldeco Apartment, Sector-4,
Vaishali, Ghaziabad, U.P-201010. **Complainants**

Versus

1. M/s Ireo Private Limited
2. M/s High Responsible Realtors Pvt. Ltd.
Both Having Regd. Office at: - A-11, 1st Floor,
Neeti Bagh, New Delhi-110049.
3. M/s Fiverivers Buildcon Pvt. Ltd.
Having Regd. Office at: - 305, 3rd Floor,
Kanchan House, Karampura Commercial Complex,
New Delhi-110015. **Respondents**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Sanchit Kumar (Advocate) Complainants
M.K Dang (Advocate) Respondents

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in

short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottees 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 complainants, 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 of the project	"Skyon", Sector 60, Gurgaon
2.	Project area	18.10 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	192 of 2008 dated 22.11.2008
5.	Name of licensee	M/s High Responsible Realtors Pvt. Ltd. and M/s Five River Buildcon Pvt. Ltd.
6.	RERA Registered/ not registered	367 Of 2017 Dated 24.11.2017 upto 21.11.2018
7.	Approval of building plans	27.09.2011 (Annexure R29 on page 81)
8.	Environmental Clearance	31.07.2012 (Annexure R28 on page 84)
9.	Allotment Letter	07.02.2013 (page 25 of complaint)
10.	Unit no.	F0108, 1st Floor, F tower (page no. 35 of complaint)
11.	Unit area admeasuring (super area)	1524 sq. ft. (page no. 35 of complaint)
12.	Date of execution of Buyer's Agreement	02.05.2013 (page no. 32 of complaint)
13.	Fire Approval	25.09.2013 (Annexure R29 on page 88)

14.	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 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 fulfillment 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.
15.	Due date of possession	27.03.2015 (Calculated as 42 months from date of approval of building plan)
16.	Reminders for payment	For Fourth Instalment: 20.05.2013, 11.06.2013, 10.06.2013, 02.07.2013 For Fifth Instalment: 01.02.2014, 26.02.2014 For Sixth Instalment: 29.04.2014, 20.05.2014 (part payment was made) For Seventh Instalment: 03.08.2014, 24.08.2014

		For Eighth Instalment: 06.12.2014, 27.12.2014 For Ninth Instalment: 18.02.2015, 11.03.2015 Final notice: 23.02.2016, 11.04.2016
17.	Cancellation Letter	24.01.2017 (page no. 77 of reply)
18.	Total sale consideration	Rs. 1,88,49,503/- (As per payment plan on page no. 88 of complaint)
19.	Amount paid by the complainants	Rs. 67,44,932/- (as per cancellation letter)
20.	Occupation certificate	14.09.2017 (as per written submissions dated 11.06.2024)
21.	Offer of Possession	Not offered

B. Facts of the complaint

3. The complainants have made the following submission: -

I. That (1) Brigadier Atul Kumar Singh (allottee no. 1), R/o D-1001, Ambience Greendale, Sopon Bagh, Ghorpadi, Pune, Maharashtra, 411001 and (2) Mrs. Devina Govila W/o Rajeev Govila (Legal Heir of Late Mr. Rajeev Govila, allottee number 2) R/o A-1101, Eldeco Apartment, Sector-4, Vaishali, Ghaziabad, U.P. are the complainants who have filed the instant complaint against the respondents.

II. That the complainants were allotted the flat bearing no. SY-F-01-08, 1st Floor, Tower F, admeasuring 1524 sq.ft. in project of the respondents named Skyon, situated at Sector 60, Gurgaon vide allotment offer letter dated 07.02.2013. Thereafter, an apartment buyer's agreement dated 02.05.2013 was executed between the parties regarding the said allotment for a basic sale consideration of Rs.1,76,78,400/-.

III. That as per the payment plan annexed with the agreement, all the payments were made timely on the information provided by the respondents. However, when the construction of the said flat stopped for a long period, no further payment was made.

IV. That the complainants made payments totalling to Rs.67,44,932 vide various receipts which amounts to 38.15% of the total sale consideration in accordance with the payment plan.

V. That the respondents kept the complainants completely in dark about the actual and true status of the construction status of the said flat. The respondents kept raising the demands, but the construction activities were not visible at the project. The respondents failed to timely construct and develop the project but kept raising demands from the complainants. Due to sluggishness on the part of respondents and their evasive response as to the status of construction and completion of the project, the complainants stopped paying further.

VI. That keeping in view the stalled work at the construction site and the fact that no occupation certificate or completion certificate has been procured by the respondents with respect to the said flat, respondents are in total vhard-earned their contractual as well as statutory duties, the chances of getting physical possession of the assured flat as per the agreement in near future seems bleak and that the same is evident of the irresponsible and desultory attitude and conduct of the respondents, consequently injuring the interest of the buyers including the complainants who has spent their entire hard earned savings in order to buy this flat and stands at a crossroads to nowhere. It is pertinent to bring to the notice of this Authority that allottee no. 2 has passed away in 2017 and therefore the delay caused by the respondents has caused irreparable loss to the complainant no. 2 Mrs. Devina Govila as she has been widowed awaiting the completion of the

flat which her Late husband had purchased for the purpose of using it as their retirement home.

VII. That in furtherance and without prejudice to the ground mentioned herein above, the refund shall be paid with interest as per Section 18(1) of the Act.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):
   i. Direct the respondent to refund the paid-up amount alongwith interest.
   ii. Cost of litigation.

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

6. The respondents have 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 complainants, after checking the veracity of the project namely, 'Ireo Skyon, Sector 60, Gurgaon had applied for allotment of an apartment vide booking application form dated 25.01.2013. The complainants 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 07.02.2013 allotted to the complainants an apartment no. SY-F-01-08 having tentative super area of 1524 sq. ft. for a sale consideration of Rs.1,88,49,503/- (net taxes). The apartment buyer's agreement was

executed between the complainant, his co-allottee and the respondent on 02.05.2013 and agreed to be bound by the terms and conditions contained therein.

v. That the respondent no.1 raised payment demands from the complainant and his co-allottee in accordance with the mutually agreed terms and conditions of the allotment as well as of the payment plan. However, the complainants defaulted in making the payments despite receipt of several reminders. Accordingly, respondent no.1 was constrained to send letter dated 28.08.2015 to the complainant and his co-allottee as they failed to make payments from the 4th installment onwards. Further, the respondent no.1 issued final notice dated 23.02.2016 and letter dated 11.04.2016 giving last and final opportunity to the complainant and his co-allottee to make payment of the outstanding amount due on or before 30 days from the date of issuance of the said letter failing which the respondent no.1 would be constrained to cancel the allotment. The complainants miserably failed in complying with their obligations as per the allotment and as per the buyer's agreement. Left with no other option, respondent no.1 issued cancellation letter dated 24.01.2017 cancelling allotment for the said unit.

vi. That the complainants are real estate investors 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 complainants were never ready and willing to abide by their contractual obligations and they also did not have the requisite funds to honour his commitments.

vii. That respondent no.1 has already completed the construction of the tower in question and applied for grant of occupation certificate on 29.09.2015.

The occupation certificate was granted by the concerned authorities on 26.08.2016.

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 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 respondents.

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 respondents have 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. 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."

13. 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."

14. 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 respondents w.r.t. jurisdiction stands rejected.

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

15. The respondents 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. 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.

16. 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. Further, 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. 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 right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

F.III Objections regarding complaint being barred by limitation.

17. The respondents contended that the present complaint is not maintainable and barred by the law of limitation as the alleged cause of action arose in January 2017, 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 January 2020. 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 respondents w.r.t. the complaint being barred by limitation stands rejected.

F. IV Objection regarding the complainants being investors.

18. The respondents have taken a stand that the complainants are investors and not consumers, therefore, they not entitled to the protection of the Act and entitled to file the complaint under section 31 of the Act. The authority is of view 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 buyer's agreement, it is revealed that the complainants are buyers and paid total price of Rs.67,44,932/- 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;"*

19. 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 complainants are allottees as the subject unit was allotted to them by the promoter. Further, 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 allottees being investors are not entitled to protection of this Act also stands rejected.

G. Findings regarding relief sought by the complainants

G. I Direct the respondents to refund the paid-up amount alongwith interest.

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

> ***"Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-*
> *(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)

21. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 02.05.2013, provides for handing over possession and the same is reproduced below:

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 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."

22. 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.

23. 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., 27.09.2011 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 27.03.2015.

24. The complainants were allotted an apartment bearing no. SY-F-01-08, 1st Floor, Tower F, admeasuring 1524 sq.ft. in project of the respondents named Skyon, situated at Sector 60, Gurgaon vide allotment offer letter dated 07.02.2013. Thereafter, an apartment buyer's agreement dated 02.05.2013 was executed between the parties regarding the said allotment for a basic sale consideration of Rs.1,88,49,503/- against which the complainants have paid an amount of Rs.67,44,932/- in all. The complainants have submitted the respondents failed to timely construct and develop the project but kept raising demands from the complainants. Due to sluggishness on the part of respondents and their evasive response as to the status of construction and completion of the project, the complainants stopped paying further. The respondents have submitted that 25 reminders were sent to the

complainants to pay the outstanding dues as per the payment plan. However, the complainants defaulted in making payments and the respondents was to issue final notice dated 23.02.2016 and letter dated 11.04.2016 giving last and final opportunity to them to comply with their obligation before finally cancelling the allotment of the unit vide cancellation letter dated 24.01.2017. Now the question before the Authority is whether the cancellation made by the respondents vide letter dated 24.01.2017 is valid or not.

25. 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 complainants have paid an amount of Rs.67,44,932/- against the total sale consideration of Rs.1,88,49,503/- and no payment was made by the complainants after October 2013. The respondents/builder have sent several reminders as per the payment plan agreed between the parties, before issuing a final notice dated 23.02.2016 and letter dated 11.04.2016 giving last and final opportunity to them to comply with their obligation to make payment of the amount due, but the same having no positive results and ultimately leading to cancellation of unit vide letter dated 24.01.2017. 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 02.05.2013 is held to be valid. But while cancelling the unit, it was an obligation of the respondents to return the paid-up amount after deducting the amount of earnest money. However, the deductions made from the paid-up amount by the respondents 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*

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."*

26. Keeping in view the aforesaid factual and legal provisions, the respondent is directed to refund the paid-up amount of Rs.67,44,932/- after deducting 10% of the sale consideration of Rs.1,88,49,503/- being earnest money along with an interest @11% 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., 24.01.2017 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G. II Cost of litigation.

27. The complainants are seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)***, has held that an allottee is entitled to claim compensation and litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation and litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation and litigation expenses.

H. Directions of the authority: -

28. 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: -

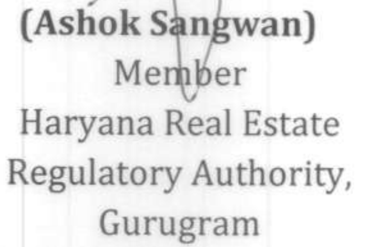
    i. The respondents/promoter are directed to refund to refund the paid-up amount of Rs. 67,44,932/- after deducting 10% of the sale consideration of Rs.1,88,49,503/- being earnest money along with an interest @11% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 on the

the refundable amount, from the date of cancellation i.e., 24.01.2017 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.

29. Complaint stands disposed off.

30. File be consigned to the registry.



Dated: 24.07.2024

HARERA
GURUGRAM

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