BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**7765 of 2022**
Order reserved on:	**07.02.2025**
Order Pronounced on:	**02.05.2025**

Ajay Kumar Chaturvedi **R/o:** 83, Sector-4, Gurugram, Haryana	**Complainant**
Versus	
1. M/s Anand Divine Developers Pvt. Ltd. **Office at:** - 711/92, Deepali Nehru Place, New Delhi-110019 2. ICICI Bank Limited **Regd. Office:** ICICI Bank Tower, Near Chakli Circle, Old Padra Road, Vadodara, Gujarat - 390007	**Respondents**

CORAM:	
Shri Arun Kumar	**Chairman**

APPEARANCE:	
Ms. Ada Khursheed	Advocate for the complainant
Shri Vinayak Gupta	Advocate for the respondent no. 1
None	Advocate for the respondent no. 2

ORDER

1. The present complaint dated 19.12.2022 has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project 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:

Sno.	Particulars	Details
1.	Name of the project	"Triumph" at sector 104, Gurgaon, Haryana
2.	Nature of the project	Residential Apartment
3.	Project area	14.093 acres
4.	DTCP license no. and validity status	63 of 2011 dated 16.07.2011 valid till 15.07.2019 10 of 2012 dated 03.02.2012 valid till 02.02.2020
5.	Name of licensee	M/s Great Value HPL Infratech Private Limited M/s Kanha Infrastructure Private Limited
6.	RERA Registered/ not registered	Not Registered (Planning Branch is directed to initiate suo moto proceedings)
7.	Unit no.	1162, 16th Floor, Tower 1 (as per BBA on page no. 49 of complaint)
8.	Unit area admeasuring	2290 sq. ft. (as per BBA on page no. 50 of complaint)
9.	Date of booking	23.06.2014 (page no. 49 of complaint)
10.	Date of allotment letter	28.08.2014 (page no. 27 of complaint)

11.	Date of builder buyer agreement	28.08.2014 (page no. 48 of complaint)
12.	MOU dated	annexed but not executed (page 96 of the complaint) As per clause 8 of the mou the complainant shall be entitled for the buyback option within a time frame of 33 to 36 months from the date of booking Whereas vide letter dated 03.04.2017 the respondent extended the period of 12 months of the mou for buy back.
13.	Tripartite agreement with ICICI bank	28.08.2014 (Page no. 73 of complaint)
14.	Possession Clause	**18: Time of Handing Over Possession** Barring unforeseen circumstances and Force Majeure events as stipulated hereunder, the possession of the said apartment is proposed to be offered by the Company by the Allottee **within a period of 36 months with a grace period of 6 months from the date actual start of construction of a particular Tower Building in which the registration for allotment is made.** Such date shall herein after referred to as stipulated date, subject always to timely payment of all amounts including the Basic Sale Price, EDC/IDC, IFMS, Stamp Duty, registration Fees and other Charges as stipulated herein or as may be demanded by the Company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/engineer-in-charge of the complex and the said certification shall be final and binding on the Allottee

		(Page no 59 of BBA)
15.	Date of commencement of construction	Not provided on record
16.	Due date of possession	28.02.2018 [calculated from the date of agreement i.e., 28.08.2014 as date of commencement of construction of tower is not provided on record including grace period of 6 months as it is unqualified]
17.	Period of buyback as per clause 8 of the MOU	23.03.2017 to 23.06.2017
18.	Letter sent by the respondent to the complainant regarding extending the period of buy back option for a period of 12 months on	03.04.2017 [page no. 36 of complaint]
19.	Period of buyback after extension of time line	23.03.2018 to 23.06.2018
20.	Total sale consideration	Rs.2,10,23,750/- (as per payment plan on page no. 72 of complaint)
21.	Amount paid by the complainant	Rs.2,00,65,000/- [as alleged by complainant at page no. 17 of complaint)
22.	Occupation certificate	28.05.2019 (page no. 48 of reply)
23.	Offer of possession	07.06.2019 (page no. 100 of complaint)

B. Facts of the complaint

3. That on various representations and assurances given by the respondent, complainants booked a unit in the project by paying an amount of Rs. 10,00,000/-towards the booking of the said unit bearing no. 1162, 16th Floor, Tower no.1, having super area measuring 2290 sq. ft. to the respondent dated 06.06.2014 and the same was acknowledged by the respondent.
4. That the respondent sent allotment letter dated 28.08.2014 to the complainant providing the details of the project, confirming the booking of the unit dated 06.06.2014, allotting a unit no. 1162, 16th floor, tower no.1, having super area measuring 2290 sq. ft. in the aforesaid project of the developer for a total sale consideration of the unit i.e. Rs. 2,00,65,000/-, other specifications of the allotted unit and providing the time frame within which the next installment was to be paid.
5. That a buyer agreement was executed between the allottee and the respondent on 28.08.2014. As per the annexure of the buyer's agreement the total sale consideration of the unit i.e. Rs. 2,00,65,000/-.
6. That as per clause 18 of the BBA the company proposes to hand over possession of the unit within a period of 36 from the date of start of construction. Therefore, the due date of possession is calculated from the date of agreement i.e. 28.08.2014. Hence, the due date of possession comes out to be 28.08.2017.
7. That as per the demands raised by the respondent, based on the payment plan, the complainants paid a total sum of Rs. 2,00,65,000/- towards the said unit against total sale consideration of Rs. 2,00,65,000 / -.
8. That the payment of total sale consideration was made by the complainant to the respondent in time bound manner without any default but respondent failed to pay pre EMI since january 2019 and despite the repeated requests

and reminders by complainant, respondent fail to pay the same and even failed to provide any satisfactory response to the complainant.

9. That the complainant went to the office of respondent several times and requested them to allow him to visit the site but he was never allowed saying that they do not permit any buyer to visit the site during construction period.
10. That the respondent has played a fraud upon the complainant and has cheated him fraudulently and dishonestly with a false promise to complete the construction over the project site within stipulated period and paying the monthly assured amount.
11. The complainant has suffered a loss and damage in as much as they had deposited the money in the hope of getting the said unit. He has not only been deprived of the timely possession of the said unit but the prospective return he could have got if he had invested in fixed deposit in bank. Therefore, the compensation in such cases would necessarily have to be higher than what is agreed.
12. That respondent send letter dated 10.02.2017, to the complainant providing the update on the project and further mentioning that if complainant choose to exit from the project.
13. That respondent send a letter dated 03.04.2017, to the complainant to extend the period of the MOU executed between the parties for further 12 months.
14. That various e-mails were sent by the complainant to the respondent regarding refund of the total amount paid as per the agreed terms of buyback option as per the said MOU. The complainant was never informed about the delay in construction of Tower-1. Since the complainant already paid 100% of the amount, and the delay is a sheer distress for them demands refund of the entire amount paid by them.
15. That after repeated requests and reminders respondent sent offer of possession letter dated 07.06.2019 to complainant. That along with offer of

possession respondent raised several illegal demands which are actually not payable as per the builder buyer agreement.

16. That complainant before receiving the above said offer of possession already asked the respondent to opt for the buyback option as agreed at the time of booking but respondent failed to provide any satisfactory response to complainant.

17. That the complainants continuously asking the respondent about the status of the project, time by which the project is expected to be completed, and the penalty amount that respondent is liable to pay but respondent was never able to give any satisfactory response to the complainants.

18. That in year 2020 respondent approached the complainant with new scheme & options and offering the alternative bigger unit to the complainant with adjustment of total amount already paid will be adjusted in the new unit. Hence, respondent send letter dated 02.12.2020 to complainant providing the list of documents required for change in unit and mentioning the unit no. i.e. 7251 admeasuring 3150 sq. ft. The respondent even failed to allot the new unit in favour of the complainant.

19. That the respondent instead of fulfilling and obeying the commitments made to client send illegal demand letter dated 31.10.2022 raising demands of Rs. 15,88,750/- plus Rs.12,69,458/- on account finishing work which never agreed upon between the parties.

20. That the complainants sent various reminders to respondents stating and raising various grievance with respect to buy back, delayed possession charges, alternative unit and illegal demands, as per the agreed terms of the booking but till date respondents have failed to provide the same. Thereafter, various reminder emails and letters were sent to the respondents on the above mentioned issues but till date respondent failed to provide any satisfactory response to the complainants.

C. Relief sought by the complainants:

21. The complainant has sought the following relief:

- Direct the respondent to refund the entire amount as per the buyback scheme agreed upon between the parties along with interest.

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

D. Reply by the respondent-builder.

23. The respondent-builder by way of written reply submitted the following submissions:

24. 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 i.e. Clause 39 of the buyer's agreement.

25. That the complainant has not approached this Hon'ble Forum with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by him maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:

I. That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects in and around NCR region such as ATS Greens-I, ATS Greens-II, ATS Village, ATS Paradiso, ATS Advantage Phase-I & Phase-II, ATS One

Hamlet, ATS Pristine, ATS Prelude & ATS Dolce and in these projects large number of families have already shifted after having taken possession and Resident Welfare Associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.

II. That the complainant, after checking the veracity of the project namely, '**ATS Triumph**', Sector 104, 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. That based on the application of the complainant, unit no. 1162, 16th floor, tower no.1 admeasuring 2290 sq. ft. was allotted to the complainant by the respondent.

III. That the buyer's agreement was executed on 28.04.2014. 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.

IV. That it was agreed that as per clause 4 of the buyer's agreement, the consideration of Rs. 2,00,65,000/- was exclusive of other costs, charges including but not limited to EDC/IDC charges, maintenance deposit, power back up, electricity meter charges, stamp duty and registration charges, service tax, proportionate taxes and proportionate charges for provision of any other items/facilities. As per clause 12 of the buyer's agreement, timely payment by the complainant of the basic sale price and other charges as stipulated in the payment plan was to be the essence of the agreement.

V. That 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 proposed to be offered by the company to the allottee on or before 30 September 2018, from the date of this agreement.

VI. That the complainant opted for upgrading the unit in the same project vide E-mail confirmation dated 04.11.2020 of accepting upgrading earlier allotted unit i.e. unit no. 1162, 16th floor, tower no.1 admeasuring 2290 sq. ft. to unit no. 7251, 16th floor, tower no.1 admeasuring 3150 sq. ft. According to this acceptance, the complainant was supposed to pay total amount of Rs. 2,30,95,000/- being total sale consideration instead of earlier sale consideration amount of Rs. 2,00,65,000/-. This fact of agreeing to upgrade to the bigger unit/apartment by the complainant is also evident from perusal of E-mails dated 25.08.2020. Accordingly, the respondent company also vide letter dated 02.12.2020 gave no objection regarding interchange/up gradation of apartment in the project "ATS Triumph" to the concerned bank. Later on, consistent follow ups were done with the complainant by the respondent company to pay differential price of the upgraded unit but the complainant failed miserably. At last the respondent company was left with no option but to offer the same old unit i.e. unit no. 1162, 16th floor, tower no.1 admeasuring 2290 sq. ft. vide E-mail dated 17.11.2022, which forms part of the main complaint.

26. That the possession of the unit was subject to the occurrence of the force majeure events. 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:** [Only happened second time in 71 years of independence hence beyond control and could not be foreseen]. The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f from 9-10 November 2016 the day when the Central Government issued notification with regard to demonetization. During this period, the contractor could not make payment to the labour in cash and as majority of casual labour force engaged in construction activities in India do not have bank accounts and are paid in cash on a daily basis. During Demonetization the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on a site of the magnitude of the project in question are Rs. 3-4 lakhs per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence the implementation of the project in question got delayed due on account of issues faced by contractor due to the said notification of Central Government.

Further there are studies of Reserve Bank of India and independent studies undertaken by scholars of different institutes/universities and also newspaper reports of Reuters of the relevant period of 2016-17 on the said issue of impact of demonetization on real estate industry and construction labour.

Reserve Bank of India has published reports on impact of Demonetization. In the report- Macroeconomic Impact of Demonetization, it has been observed and mentioned by Reserve Bank of India at page no. 10 and 42 of the said report that the construction industry was in negative during Q3 and Q4 of 2016-17 and started showing improvement only in April 2017.

Furthermore, there have been several studies on the said subject matter and all the studies record the conclusion that during the period of demonetization the migrant labour went to their native places due to shortage of cash payments and construction and real estate industry suffered a lot and the pace of construction came to halt/ or became very slow due to non-availability of labour. Some newspaper/print media reports by Reuters etc. also reported the negative impact of demonetization on real estate and construction sector.

That in view of the above studies and reports, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should deemed to be extended for 6 months on account of the above.

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. Also the Hon'ble NGT has passed orders with regard to phasing out the 10 year old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The Contractor of Respondent

could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to following, there was a delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November- December 2016 and November- December 2017. The district administration issued the requisite directions in this regard. 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. **Inclement Weather Conditions viz. Gurugram:** Due to heavy rainfall in Gurugram in the year 2016 and unfavorable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions. The said period is also required to be added to the timeline for offering possession by the respondent.

27. That the respondent after completing the construction of the unit in question, applied for the grant of the occupation certificate on 03.10.2016 and the same was granted by the concerned authorities on 28.05.2019.

The respondent offered the possession of the unit to the complainant immediately vide letter dated 07.06.2019. The complainant was intimated to remit the outstanding amount on the failure of which the delay penalty amount would accrue.

28. That the complainant has already been offered possession by the respondent company vide communication dated 07.06.2019, hence how can the complainant demand for interest on delayed possession? Complainant is now deliberately trying to unnecessarily harass, pressurizing the respondent to submit to the unreasonable demands.

29. That complainant was intimated to pay the outstanding amount as per agreed terms and conditions as specified in clause 12 of builder buyer agreement dated 28.08.2014, on the failure of which the delay penalty amount would accrue. Various communications were sent to the complainant by the respondent company asking him for clearing the outstanding amount and taking the possession of the unit. The complainant has not been coming forward to take the possession of the unit after remitting the due amount. The complainant is bound to take the physical possession of the unit after making payment towards the due amount along with interest and holding charges.

30. 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 they are now deliberately trying to unnecessarily harass, pressurize and blackmail the respondent to submit to his unreasonable demands.

31. That despite illegal conduct of the complainant the respondent company submits that the same is ready and willing to execute conveyance deed with the complainant.

32. That the respondent no. 1, namely *Anand Divine Developers Pvt. Ltd.*, has filed an application dated 09.10.2024 seeking the impleadment of *ICICI Bank* as a necessary party to the present proceedings. The said application was duly allowed by this Authority, and respondent no. 2 was directed to file a reply thereto. However, despite the lapse of considerable time, no appearance has been made on behalf of respondent no. 2, nor has any reply been filed before this Authority in response to the said application. Therefore, in view of above, the defence of the respondent no. 2 is hereby struck off.

33. 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 written submissions made by the parties and the same have been perused.

E. Jurisdiction of authority

34. 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

35. 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

36. 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.*

37. 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 the compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

38. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2021 (1) RCR (c) 357 and*** *reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint.*

At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

39. 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.

F. Findings on the objections raised by the respondent.

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

40. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment 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.

41. 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."*

42. 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."*

43. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no

scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F.II Objection regarding complainants are in breach of agreement for non-invocation of arbitration

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

> *"39. Dispute Resolution by Arbitration*
>
> *"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 as amended upto date. A sole Arbitrator, who shall be nominated by the Board of the Directors of the Company, shall hold the arbitrary proceedings at the office of the Company at Noida. The Allottee hereby confirms that he shall have no objection to this appointment, more particularly on the ground that the Sole Arbitrator, being appointed by the Board of Directors of the Company likely to be biased in favor of the Company. The Courts at Noida, Uttar Pradesh shall to the specific exclusion of all other courts, alone have the exclusive jurisdiction in all matters arising out of /touching and/or concerning this Agreement, regardless of the place of execution or subject matter of this*

agreement. Both the parties in equal proportion shall pay the fees of the 'Arbitrator'."

45. 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.

46. 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 Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

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

48. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within 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.III Objections regarding force majeure

49. The respondent-promoter raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by National Green Tribunal to stop construction during the years 2015-2016-2017-2018, dispute with contractor, non-payment of instalment by allottees and demonetization. The plea of the respondent regarding various orders of the NGT and demonetisation advanced in this regard is 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. Further, any contract and dispute between contractor and the builder cannot be considered as a ground for delayed completion of project as the allottees were not a party to any such contract. Also, there may be cases where some of the allottees have not paid instalments regularly but all the allottees cannot be expected to suffer because of them. Thus, the promoter respondent cannot be given any leniency on

based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F.IV. Objection regarding the complainant being investor.

50. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. 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;"*

51. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment 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 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 promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainants.

Relief sought by the complainants: The complainants have sought the following relief(s):

- Direct the respondent to refund the entire amount as per the buyback scheme agreed upon between the parties along with interest.

52. The complainant entered into a booking for a residential unit in the project developed by the respondent company, namely "Triumph," located at Sector-104, Gurugram, on 23.06.2014. Pursuant thereto, unit no. 1162, situated on the 16th floor of tower 1, was allotted to the complainant vide allotment letter dated 28.08.2014. Subsequently, a builder-buyer agreement was duly executed between the parties on 28.08.2014. On the same date, a tripartite agreement was also executed among the parties concerning the disbursal of a loan against the said allotted unit, which outlined the details of the subvention scheme, its duration, and the associated terms and conditions. As per the stipulations contained in the builder-buyer agreement, the scheduled date for completion of the project and delivery of possession of the aforementioned unit was fixed as 28.02.2018.

53. The complainant in its pleading has stated that MOU was executed between the parties and as per the said MOU the complainant has an option of buyback within a time frame of 33 months to 36 months from the date of booking. Further as per letter dated 03.04.2017 respondent extending the time period of buyback for a period of 12 months. Therefore, full refund of the amount paid by him as per clause of buyback.

54. The Authority notes that the Complainant has annexed a copy of the Memorandum of Understanding (MOU) at page 96 of the complaint. As per Clause 8 of the said MOU, the Complainant was to be entitled to exercise a buyback option within a period ranging from 33 to 36 months from the date of booking, thereby placing the relevant timeframe for the buyback between 23.03.2017 and 23.06.2017. Subsequently, the Respondent issued a letter dated 03.04.2017, purporting to extend the buyback period by an additional 12 months. Post such extension, the revised buyback window was stated to fall between 23.03.2018 and 23.06.2018. However, it is pertinent to note that the said MOU has not been duly signed or executed by the parties. In view of the fact that the purported Memorandum of Understanding (MOU) has neither been signed nor executed by the parties concerned, and there is no corroborative evidence on record to establish its enforceability, the Authority is of the considered opinion that the said document does not meet the essential requirements of a legally binding contract. Consequently, the MOU lacks legal sanctity and evidentiary value, and therefore, cannot be relied upon or treated as a valid or enforceable instrument for the purpose of adjudication in the present proceedings.

55. The question of refund is now to be determined on the basis of the facts and circumstances of the present case. The Authority notes that, as per clause 18 of the builder-buyer agreement dated 28.08.2014, possession of the allotted unit was to be delivered within a period of 36 months from the date of commencement of construction of the concerned tower, along with a grace period of 6 months. However, the record does not reflect the specific date of commencement of construction. In the absence of such evidence, the due date for possession is calculated from the date of execution of the builder-buyer agreement, including the stipulated grace

period, which results in the due date falling on 28.02.2018. The total sale consideration for the unit was ₹2,10,23,750/-, out of which the complainant has paid a sum of ₹2,00,65,000/-. The occupation certificate for the project was received on 28.05.2019 and subsequently unit was offered for possession on 07.06.2019.

56. 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. The due date of possession as per buyer's agreement was 28.02.2018 and the allottees in this case have filed this complaint on 19.12.2022 after possession of the unit was offered to him on 07.06.2019 after obtaining occupation certificate on 28.05.2019 by the promoter.

57. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or being 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 wishes 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.*

58. 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 complainants have to demand and make their intention clear that they wish to withdraw from the project. Rather, tacitly wished to continue 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.

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

60. Keeping in view of the aforesaid circumstances that the respondent-builder has already offered the possession of the allotted unit after obtaining occupation certificate from the competent authority, 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.

61. The Hon'ble Apex court of the land in cases of ***Maula Bux Vs. Union of India (1973) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136***, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as ***Jayant Singhal and Anr. Vs. M/s M3M India Ltd.*** decided on

26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be deducted in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under-

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

62. Thus, keeping in view the aforesaid legal provisions and the facts detailed above, the respondent is directed to refund the deposited amount of ₹ 2,00,65,000/- after deducting 10% of the sale consideration along with an interest @11.10% (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 surrender/filing of the complaint i.e., 19.12.2022 till actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the Authority

i. The respondent builder is directed to refund the paid-up amount of ₹2,00,65,000/- to the complainants after deducting 10% of the sale consideration along with an interest @11.10% from the date of surrender/filing of the compliant i.e., 19.12.2022 till the actual refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

ii. Out of the total amount so assessed, the amount paid by the bank/financial institution shall be refunded first and the balance amount along with interest will be refunded to the complainant. Further, the respondent is directed to provide the No Objection Certificate to the complainant after getting it from the bank/financial institution.

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.

63. Complaint stands disposed of.

64. File be consigned to registry.

Arun Kumar
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 02.05.2025