BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3358 of 2020
First date of hearing: 08.01.2021
Date of decision : 21.07.2022

1. Sumit Bhuttan
2. Kiran Bhuttan
3. Gulshan Kumar Bhuttan

All R/O: N 3/5, DLF Phase 2, Sector-59 Gurugram **Complainants**

Versus

1. M/S Ireo Private Limited
2. Naresh Gupta
3. Jai Bharat Aggarwal
4. Bhupesh Bansal

Office: - C-4, 1st Floor, Malviya Nagar, Delhi **Respondents**

CORAM:
Dr. K.K Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Ayush Agarwal and
Ashish Garg Advocates for the complainants
Shri M.K Dang Advocate for the respondents

ORDER

1. The present complaint dated 21.10.2020 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 allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"Ireo City Central", Sector-59, Gurugram, Haryana.
2.	Licensed area	3.9375 acres
3.	Nature of the project	Commercial Project
4.	DTCP license no.	56 of 2010 dated 31.07.2010
	License valid up to	30.07.2020
	Licensee	M/s Adson Software Pvt. Ltd. and 2 others
5.	RERA registered/not registered	Not registered
6.	Unit no.	ICC-R-FF-40, first floor [annexure C-4 on page no. 58 of complaint]

7.	Unit measuring	1023.64 sq. ft. [as per provisional allotment on annexure C-2 on page no. 46 of complaint]
8.	Revised unit area	1276.36 sq. ft. [as per allotment letter on annexure C- 4 on page no. 58 of complaint]
9.	Date of provisional allotment letter	06.08.2012 (annexure C-2 on page no. 46 of complaint)
10.	Date of building plans	05.09.2013 (annexure R-26 on page no. 53 of reply)
11.	Date of environment clearance	12.12.2013 (annexure R-27 on page no. 56 of reply)
12.	Date of consent to establish	07.02.2014 (annexure R-28 on page no. 62 of reply)
13.	Date of allotment	26.11.2014 (annexure C-4 on page no. 58 of complaint)
14.	Date of execution of flat buyer's agreement	Cannot be ascertained as buyer's agreement is not executed
15.	Payment plan	Construction linked payment plan (annexure C-4 on page no. 61 of complaint)
16.	Total consideration	Rs. 1,38,43,794/-

		(as per payment plan on page no. 61 of complaint) Rs 1,96,18,303/- (vide statement of accounts on page no. 72 of reply)
17.	Total amount paid by the complainants	Rs 1,24,42,420/- (vide statement of accounts on page no. 72 of reply)
18.	Due date of delivery of possession [Taken from BBA annexed in the file but not executed]	05.03.2017 (As per clause 13.3 of the apartment buyer's agreement- within 42 months from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder along with 180 days grace period to allow for unforeseen delays) **Note:** **1.Calculated from date of approval of building plan.** **2. Grace period of 180 days is not allowed in the present case.**
19.	Occupation certificate	28.08.2019 (annexure R-31 on page no. 68 of reply)

20.	Offer of possession	17.09.2019 (annexure R-32 on page no. 70 of reply)

B. Facts of the complaint

The complainants have submitted as under:

3. That the respondents in the year 2012 launched a scheme namely IREO City Central located at sector, 59, Gurugram. The complainants jointly applied in the said project.
4. That on 6th August 2012 the respondents issued a provisional allotment/application in favour of the complainants for above mentioned unit for the basic sale price of Rs. 8,085/- per sq. ft. and they paid amount of Rs. 7,00,000/-.
5. That the respondents raised various demands without any schedule and total contravention of any conditions. The complainants duly paid an amount of Rs. 1,24,42,419/- whenever raised by them.
6. That on 26.11.2014 the respondents issued allotment letter wherein they arbitrarily increased the super area to 1276.36 sq. ft. and the basic rate was also increased to Rs. 9786.74 sq. ft. which was objected by complainants.
7. That the respondents not only gave an assurance to rectify the same but to pay according to the old rate i.e., Rs. 8,085/- per sq. ft. and stated that it would be adjusted at the time of offer of possession. Believing on such assurances the complainants made all the payments.

8. That thereafter the respondents called upon all the complainants to execute builder buyer agreement with new terms and conditions along with increased basic rate of Rs. 9,786.74 and increased area of 1276.36 sq. ft. to which the complainants objected and till date the builder buyer agreement has not been executed.
9. That the possession of the said unit was to be handed over on/before 05.08.2016. However, the respondents have failed to deliver the possession of the said unit after expiry of more than 43 months from the grace period and have defaulted in the time schedule.
10. That thereafter after a period of 7 year of allotment letter i.e., 06.08.2012 the respondents issued a false and frivolous letter dated 17.09.2019 calling upon the complainants to take possession subject to the payment of Rs. 71,75, 884/-. It is pertinent to mention that out of total sale consideration Rs. 1,25,91,521/- an amount of Rs. 1,24,42,419/- was duly paid by the complainants.
11. That complainants after visiting the site were shocked to see that all averments made by respondents are false and misconceived and the possession letter issued to the complainants are nothing but a sham document as the building was still under construction.
12. That the complainants wrote numerous of letters to the respondents to carry out the necessary activities as well as

correction of the demand but the respondents have failed to do so.

13. That the respondents vide communication dated 07.01.2020 informed the complainants that they are liable for payment of holding charges @ Rs. 15 sq. ft. per month on super area basis which is nothing but a frivolous demand just to pressurize and take advantage of dominant position.

C. Relief sought by the complainants:

14. The complainants have sought following relief(s):

(i) **Direct the respondents to execute the builder buyer agreement as per the terms and condition of the provisional application letter dated 06.08.2012 as per the section 13 of the Act of 2016 and to handover possession of the allotted unit after curing all the aforesaid defects mentioned in the complaint.**

(ii) **Direct the respondents to pay interest on Rs. 1,24,42,419/- paid by the complainants at the same rate as charged by the respondents from the due date of possession till the date of actual possession after all rectification of defects in light of section of Act of 2016.**

(iii) **Direct the respondents to make all adjustments in the calculation on the basis of the payments made by the complainants @ Rs. 8085/- sq. ft. as per the provisional application letter dated 06.08.2012 which was**

unilaterally/arbitrarily increased in clear violation of section 3,13,14 of the Act of 2016.

(iv) **Direct the respondents for executing the conveyance deed in favour of the complainants.**

15. 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 respondent no.1.

16. The respondent no. 1 has contested the complaint on the following grounds: -

I. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed.

II. That there is no cause of action to file the present complaint.

III. That the complainants have no locus standi to file the present complaint.

IV. That the complainants are estopped from filing the present complaint by their own acts, omissions, admissions, acquiescence's, and laches.

V. 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 34 of the buyer's agreement.

17. That the complainants have not approached this authority with clean hands and have intentionally suppressed and concealed the material facts.

18. That the complainants, after checking the veracity of the project namely 'Ireo City Central' Sector 59, Gurugram had applied for an allotment of a commercial unit with respondent no.1. Vide allotment offer letter dated 26.11.2014, respondent no.1 allotted to the complainants unit no. ICC-R-FF-40, First Floor having tentative super area of 1276.36 sq ft. It is pertinent to mention herein that the complainants were aware from the very inception that the super area of the commercial unit allotted to them was tentative and subject to the change as per statutory requirements. As per the terms of the allotment offer letter, it was intimated that the buyer's agreement was to be executed by the complainants and that the terms and conditions of the agreement would be final and binding. Three copies of the buyer's agreement were sent to the complainants by respondent no.1 vide its letter dated 01.12.2014. However, they have failed to execute the same despite several telephonic reminders and letter dated 01.06.2015.

19. That respondent no.1 sent payment demands to the complainants in accordance with the agreed terms and conditions of the allotment as well as of the payment plan and they are defaulters from the very inception. It is submitted that vide payment request letter dated 26.11.2014, respondent no.1

had raised the payment demand towards the second installment for the net payable amount of Rs. 16,09,596.56. However, the complainants failed to remit the due amount despite reminder dated 24.12.2014 and the same was adjusted as arrears in the next installment demand.

20. That vide payment request letter dated 15.01.2015, respondent no.1 had raised the payment demand towards the third installment for the net payable amount of Rs. 31,57,363.54. However, the complainants made only the part-payment out of the total demanded amount despite reminders dated 10.02.2015 and 03.03.2015 and the remaining amount was adjusted in the next installment demand as arrears.

21. That respondent no.1 raised the fourth installment demand dated 28.04.2015 for the net payable amount of Rs. 43,26,934.02. However, the complainants failed to remit the due amount despite reminders dated 25.05.2015, 15.06.2015 and final notice dated 14.07.2015 and the arrears was adjusted in the next installment demand.

22. That vide payment request letter dated 14.10.2015, respondent no. 1 sent the fifth installment demand for the net payable amount of Rs.67,22,190.16. However, yet again, the complainants failed to remit the due amount despite reminders dated 09.11.2015 and 01.12.2015 and the same was adjusted in the next payment installment as arrears. The respondent no.1 had also sent a letter dated 29.02.2016 to the complainants

intimating that on account of delay in making payments as per the terms of the allotment and the interest has been accrued.

23. That vide payment request letter dated 18.04.2016, respondent no. 1 sent the sixth installment demand for the net payable amount of Rs.85,99,144.23. However, the complainants being in continuous default yet again failed to remit the due amount despite reminders dated 16.05.2016 and 08.06.2016 and the same was adjusted in the next payment installment as arrears.

24. That vide payment request letter dated 24.08.2016, respondent no. 1 sent seventh installment demand for the net payable amount of Rs. 98,52,245.33. However, the complainants failed to remit the due amount despite reminders dated 19.09.2016 and 12.10.2016 and final notice dated 27.10.2016 and the same was adjusted in the next payment installment as arrears.

25. That as per the agreed payment schedule vide payment request dated 14.03.2017, respondent no.1 raised the eighth installment demand of net payable amount of Rs. 1,11,05,347.01. However, complainants remitted the part-amount only after reminders dated 10.04.2017 and 01.05.2017 were issued by respondent no.1. The complainants have made the part-payments out of the total sale consideration amount and are bound to pay the remaining due amount along with registration charges, stamp duty charges, service tax and other charges at applicable stage.

26. That the possession of the unit was to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement. It was submitted that clause 13.3 of the buyer's agreement states that the 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 been defaulted under any provisions 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 unit 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 thereunder (Commitment Period). The allottee further agrees and understands that the company shall be additionally be entitled to a period of 180 days (Grace Period)...' From the aforesaid terms of the buyer's agreement, it is evident that the time was to be computed from the date of receipt of all requisite approvals. Even otherwise construction can't be raised in the absence of the necessary approvals. It is pertinent to mention here that it has been specified in Sub-clause (xv) of clause 16 of the building plan dated 05.09.2013 of the said project that the clearance issued by the Ministry of

Environment and Forest, Government of India has to be obtained before starting the construction of the project. It is submitted that the environment clearance for construction of the said project was granted on 12.12.2013. Furthermore, in clause 1 of Part-A of the environment clearance dated 12.12.2013 it was stated that 'consent to establish' was to be obtained before the start of any construction work at site. The consent to establish was granted on 07.02.2014 by the concerned authorities. Therefore, the pre-condition of obtaining all the requisite approvals was fulfilled only on 07.02.2014. There has been no delay on the part of respondent no.1 who has throughout acted in accordance with the provisions laid down by law and in accordance with the rules and regulations. In terms of the buyer's agreement the proposed time for handing over of possession has to be computed from 07.02.2014. Moreover, as per clause 13.5 of the buyer's agreement 'extended delay period' of 12 months from the end of grace period is also required to be granted to respondent no.1. Therefore, 60 months from 07.02.2014 (including the 180 days grace period), expired on 07.02.2019.

27. That respondent no.1 had applied for occupation certificate on 04.05.2017 and the same was granted by the concerned authorities on 28.08.2019. Furthermore, respondent no.1 has even offered the possession of the unit to the complainants vide notice of possession dated 17.09.2019.

28. That the complainants are bound to take the possession of the unit after making payment of the due amount and completing the documentation formalities as the holding charges are being accrued as per the terms of the buyer's agreement and the same is known to the complainants as is evident from a bare perusal of the notice of possession. It is pertinent to mention herein that the due amount has still not been paid by the complainants despite reminders dated 24.10.2019 and 07.01.2020 sent by respondent no.1.

29. That the implementation of the said project was hampered due to non-payment of instalments by the allottees like the complainants on time and also due to the events and conditions which were beyond the control of the respondent no. 1, and which have materially affected the construction and progress of the project. Some of the *force majeure* events/conditions which were beyond the control of the respondent no. 1 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: 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 in cash to the labour. During demonetization, the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on the site of magnitude of the project in question was Rs. 3-4 lakhs approx. per day. 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 on account of the issues faced by contractor due to the said notification of Central Government.

That in view of the 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 years 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 the respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to this, 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

unfavourable 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.

A. That the possession of the unit was supposed to be given in accordance with the terms and conditions of the booking application form as well the buyer's agreement after the grant of occupation certificate by the concerned authorities. Thus, after completing the construction of the project in a timely manner, the respondent has done everything within its power and control for obtaining occupation certificate.

B. That the complainants are real estate investors who have booked the unit in question with a view to earn quick profit in a short period. However, it appears that their calculations have gone wrong on account of slump in the real estate market and they now want to unnecessarily harass, pressurize and blackmail the respondent to submit to their baseless, false and frivolous pleas. Such malafide tactics of the complainants cannot be allowed to succeed.

30. 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

The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

31. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

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

Section 11(4)(a)

> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as*

the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

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

33. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent no. 1.

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

34. The respondent no. 1 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:

> ***"34. 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 reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".

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

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

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

parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

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

37. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the 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."

38. 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 the 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 no. 1 stands rejected.

G. Findings regarding relief sought by the complainants.

G.I Direct the respondents to pay interest on Rs. 1,24,42,419/- paid by the complainants at the same rate as charged by the respondents from the due date of possession till the date of actual possession after all rectification of defects in light of section of Act of 2016.

39. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges at prescribed rate of interest on amount already paid by them as

provided under the proviso to section 18(1) of the Act which reads as under:-

> *"**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, —*
>
> .....
>
> *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."*

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

> *"**13.3** Subject to Force Majeure, as defined herein and further subject to the Allottees 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 Allottees having complied with all formalities or documentation as prescribed by the Company, the company proposes to offer the possession of the said apartment to the allottees within a period of 42 months from the date of approval of the Building plans and/or fulfilment of the preconditions imposed thereunder ("**Commitment Period**"). The Allottees 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 reasonable control of the company."*

41. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both

builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

42. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under

any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

43. 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.

44. Further, in the present case, it is submitted by the respondents promoter that the due date of possession should be calculated

from the date of consent to establish which was obtained on 07.02.2014, as it is the last of the statutory approvals which forms a part of the preconditions. The authority in the present case observes that, the respondents have not kept the reasonable balance between their own rights and the rights of the complainants/allottees. The respondents have acted in a pre-determined and preordained manner. The respondents have acted in a highly discriminatory and arbitrary manner. The provisional allotment of the unit was made on 06.08.2012. The date of approval of building plan was 05.09.2013. It will lead to a logical conclusion that the respondents would have certainly started the construction of the project. On a bare reading of the clause 13.3 of the similar situated agreement reproduced above, it becomes 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 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 ought to be taken as the date for determining the due date of possession of the unit in question to the complainants.

45. Here, the authority is diverging from its earlier view i.e., earlier the authority was calculating/assessing the due date of possession from date approval of firefighting scheme (as it the last of the statutory approval which forms a part of the pre-conditions) i.e., 27.11.2014 and the same was also considered by the Hon'ble Supreme Court in Civil Appeal no. 5785 of 2019 titled as '***IREO Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.***' by observing as under: -

> *"With the respect to the same project, an apartment buyer filed a complaint under Section 31 of the Real Estate (Regulation & Development) Act, 2016 (RERA Act) read with rule 28 of the Haryana Real Estate (Regulation & Development) rules, 2017 before the Haryana Real*

Estate Regulatory Authority, Gurugram (RERA). In this case, the authority vide order dated 12.03.2019 held that since the environment clearance for the project contained a pre-condition for obtaining fire safety plan duly approved by the fire department before the starting construction, the due date of possession would be required to be computed from the date of fire approval granted on 27.11.2014, which would come to 27.11.2018. Since the developer had failed to fulfil the obligation under Section 11(4)(a) of this Act, the developer was liable under proviso to Section 18 to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant, upto the date when the possession was offered. However, keeping in view the status of the project, and the interest of other allottees, the authority was of the view that refund cannot be allowed at this stage. The developer was directed to handover the possession of the apartment by 30.06.2020 as per the registration certificate for the project."

46. On 23.07.2013, the building plans of the project were sanctioned by the Directorate of Town and Country Planning, Haryana. Clause 3 of the sanctioned plan stipulated that an NOC/ clearance from the fire authority shall be submitted within 90 days from the of issuance of the sanctioned building plans. Also, under section 15(2) and (3) of the Haryana Fire Service Act, 2009, it is the duty of the authority to grant a provisional NOC within a period of 60 days from the date submission of the application. The delay/failure of the authority to grant a provisional NOC cannot be attributed to the developers. But here the sanction building plans stipulated that the NOC for fire safety (provisional) was required to be obtained within a period of 90 days from the date of approval

of the building plans, which expired on 23.10.2013. It is pertinent to mention here that the developer applied for the provisional fire approval on 24.10.2013 (as contented by the respondent herein the matter of Civil Appeal no. 5785 of 2019 titled as '***IREO Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors***.) after the expiry of the mandatory 90 days period got over. The application filed was deficient and casual and did not provide the requisite. The respondent submitted the corrected sets of drawings as per the NBC-2005 fire scheme only on 13.10.2014 (as contented by the respondent herein the matter of Civil Appeal no. 5785 of 2019 titled as '***IREO Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.***), which reflected the laxity of the developers in obtaining the fire NOC. The approval of the fire safety scheme took more than 16 months from the date of the building plan approval i.e., from 23.07.2013 to 27.11.2014. The builder failed to give any explanation for the inordinate delay in obtaining the fire NOC. So, the complainants/allottees should not bear the burden of mistakes/ laxity or the irresponsible behaviour of the developer/respondent and seeing the fact that the developer/respondent did not even apply for the fire NOC within the mentioned time. It is a well settled law that no one can take benefit out of his own wrong. In light of the above-mentioned facts the respondent/ promoter should not be allowed to take benefit out of his own mistake just because of

a clause mentioned i.e., fulfilment of the preconditions even when they did not even apply for the same in the mentioned time frame.

47. **Admissibility of grace period:** The respondent's promoter had proposed to hand over the possession of the apartment within 42 months from the date of sanction of building plan and/or fulfilment of the preconditions imposed thereunder which comes out to be 05.03.2017. The respondent's promoter has sought further extension for a period of 180 days after the expiry of 42 months for unforeseen delays in respect of the said project. The respondents raised the contention that the construction of the project was delayed due to *force majeure* conditions including demonetization and the order dated 07.04.2015 passed by the Hon'ble NGT including others.

(i) **Demonetization:** It was observed that due date of possession as per the agreement was 17.11.2015 wherein the event of demonetization occurred in November 2016. By this time, major construction of the respondents' project must have been completed as per timeline mentioned in the agreement executed between the parties. Therefore, it is apparent that demonetization could not have hampered the construction activities of the respondents' project that could lead to the delay of more than 2 years. Thus, the contentions raised by the respondents in this regard are rejected.

(ii) **Order dated 07.04.2015 passed by the Hon'ble NGT:** The order dated 07.04.2015 relied upon by the respondent promoter states that

> *"In these circumstances we hereby direct state of U.P., Noida and Greater NOIDA Authority, HUDA, State of Haryana and NCT, Delhi to immediately direct stoppage of construction activities of all the buildings shown in the report as well as at other sites wherever, construction is being carried on in violation to the direction of NGT as well as the MoEF guideline of 2010."*

A bare perusal of the above makes it apparent that the above-said order was for the construction activities which were in violation of the NGT direction and MoEF guideline of 2010, thereby, making it evident that if the construction of the respondent' project was stopped then it was due to the fault of the respondent themselves and they cannot be allowed to take advantage of their own wrongs/faults/deficiencies. Also, the allottees should not be allowed to suffer due to the fault of the respondent promoter. It may be stated that asking for extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoter themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allotee. It needs to be emphasized that for availing further period for completing the construction the promoter must make out or establish some compelling circumstances which were in fact beyond his control while carrying out the

construction due to which the completion of the construction of the project or tower or a block could not be completed within the stipulated time. Now, turning to the facts of the present case the respondent/ promoter has not assigned such compelling reasons as to why and how it is be entitled for further extension of time 180 days in delivering the possession of the unit. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

48. **Admissibility of delay possession charges at prescribed rate of interest:** The proviso to section 18 provides 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 possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

49. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined

by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

50. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date is 7.80%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.80% per annum.

51. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

52. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e.,

9.80% by the respondents/promoter which is the same as is being granted to the complainants in case of delay possession charges.

G.II Direct the respondents to execute the builder buyer agreement as per the terms and condition of the provisional application letter dated 06.08.2012 as per the section 13 of the Act of 2016 and to handover possession of the allotted unit after curing all the aforesaid defects mentioned in the complaint.

53. The complainants have stated in their complaint that the respondent no. 1 had shared the draft copy of the original builder buyer agreement which was not signed by them. Furthermore, the promoter also admitted to that fact and pleaded that three copies of buyer's agreement were sent to the complainants by the respondent no. 1 vide its letter dated 01.12.2014. However, the complainants have failed to execute the same despite several telephonic reminders and letter dated 01.06.2015.

54. It is a matter of fact that at this stage, when the possession of the subject unit has already been offered on 17.09.2019 i.e., more than 3 years back from today, there is no need of executing buyer's agreement. The terms of the buyer's agreement which were sent to the complainants for execution shall be deemed to be taken as the final terms as agreed inter-se parties.

G.III Direct the respondents to make all adjustments in the calculation on the basis of the payments made by the complainants @ Rs. 8085/- sq. ft. as per the provisional application letter dated 06.08.2012 which was unilaterally/arbitrarily increased in clear violation of section 3,13,14 of the Act of 2016.

55. As per the letter of provisional application for the subject unit dated 06.08.2012 the agreed basic sale price for the unit was Rs. 8,085/- per sq. ft. However, the respondents have unilaterally and arbitrarily vide allotment letter dated 26.11.2014, i.e. more than after 2 years from provisional application, increased the area of the unit as well as the sale price of the unit. No justification for the same has been provided by the respondent no. 1 and such malpractice on its part is condemned by the authority. In view of the same, the respondents/promoter is directed to charge the complainants as per letter of provisional application dated 06.08.2012 i.e., basic sale price of Rs. 8,085/- per sq. ft.

G.IV Direct the respondents for executing the conveyance deed in favour of the complainants.

56. The respondents after obtaining the OC on 28.08.2019 offered the possession to the complainants on 17.09.2019. It is the obligation of the respondents in terms of section 11(4)(f) and section 17 of the Act to execute a registered conveyance deed in favor of the complainants/allottees. Therefore, the

authority directs the respondent to execute a registered conveyance deed in favor of the complainants within 30 days of this order.

57. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent no. 1 is in contravention of the provisions of the Act. By virtue of similar situated apartment buyer's agreement annexed in the file, the possession of the booked unit was to be delivered within 42 months from the date of approval of building plan (05.09.2013) which comes out to be 05.03.2017. The grace period of 180 days is not allowed in the present complaint. Accordingly, non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent no. 1 is established. As such the complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 9.80% p.a. for every month of delay on the amount paid by them to the respondent no. 1 from due date of possession i.e., 05.03.2017 till offer of possession (17.09.2019) plus 2 months i.e., 17.11.2019 as per section 19(10) of the Act read with rules 15 of the rules.

H. Directions of the authority: -

58. 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 function entrusted to the authority under sec 34(f) of the Act:

i. The respondent no. 1 is directed to pay interest at the prescribed rate of 9.80% p.a. for every month of delay from the due date of possession i.e., 05.03.2017 till offer of possession of the booked unit i.e., 17.09.2019 plus two months which comes out to be 17.11.2019 as per the proviso to section 18(1)(a) of the Act read with rules 15 of the rules.

ii. The respondent no. 1 is directed to pay arrears of interest accrued within 90 days from the date of order.

iii. The complainant is also directed to pay the outstanding dues, if any, after adjusting above delayed possession charges dues.

iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.80% by the respondents/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2 (za) of the Act.

v. The respondents shall not charge anything from the complainants which is not part of the apartment buyer's agreement.

vi. The respondent no. 1 is directed to execute the conveyance deed of the allotted unit within two months as per provisions of law.

59. Complaint stands disposed of.

60. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(DR. K.K Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 21.07.2022