BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 356 of 2022
First date of hearing: 17.03.2022
Date of decision : 05.07.2022

Sanjay Gupta
Address: C-26, Friends Colony,
New Delhi **Complainant**

Versus

1. M/s Ireo Pvt. Ltd.
Regd. Office at: - A-11, First Floor,
Neeti Bagh New Delhi
2. M/s Nucleus Conbuild Private Limited
Address: 304, Kanchan House, Karampura
Commercial Complex New Delhi **Respondents**

CORAM:
Shri KK Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Birender Kumar Mishra Advocate for the complainant
Shri M.K Dang Advocate for the respondents

ORDER

1. The present complaint dated 28.01.2022 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed

that the promoters shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Name and location of the project	"Ireo Gurgaon Hills", Gurgaon-Faridabad Road, Village Gwal Pahari, Gurugram, Haryana.
2.	Nature of the project	Group Housing Complex
3.	Project area	11.07 acres
4.	DTCP license no.	36 of 2011 dated 26.04.2011 valid upto 25.04.2026
5.	Name of license holder	M/s Nucleus Conbuild Pvt. Ltd.
6.	RERA Registered/ not registered	**Not Registered**
7.	Apartment no.	GH-C-16-42, 15th Floor, Tower C (page no. 43 of complaint)
8.	Unit measuring	6388.05 sq. ft. (page no. 43 of complaint)
9.	Date of building plan	17.05.2012 [annexure R-7 on page no. 57 of reply]

10.	Date of environmental clearance	26.06.2013 [annexure R-8 on page no. 60 of reply]
11.	Date of allotment letter	10.06.2014 [annexure R-2 on page no. 49 of reply]
12.	Date of builder buyer agreement	12.08.2014 [page no. 40 of complaint]
13.	Possession clause	**14. Possession and Holding charges** **14.3** Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, **the Company proposes to offer the possession of the said Commercial Unit to the Allottee within a period of 42 months from the date of approval of the Building**

		Plans and/or fulfillment of the preconditions imposed there under ("Commitment Period"). The Allottee further agrees and understands that the Company shall additionally be entitled to a period of 180 days ("Grace Period"), after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company. **(emphasis supplied)**
14.	Due date of possession	17.11.2015 [Calculated from the date of approval of building plan]
15.	Termination of contract letter by complainant	14.08.2019, 20.11.2020, 07.04.2021 [page no. 133, 142, 146 of complaint]
16.	Addendum agreement	24.10.2019 [annexure R-17 on page no. 74 of reply]
17.	Total consideration	Rs. 7,60,17,795/- [as per the agreement on page no. 48 of complaint]
18.	Total amount paid by the complainant	**Rs. 4,86,74,946/-** [Rs. 2,85,54,983/- paid towards unit no. GH-C-16-42 + Rs. 2,01,19,963/- adjusted from subsequent unit GH-C-16-32] [as alleged by complainant]

19.	Occupation certificate	29.06.2022 [Vide additional application dated 01.07.2022 submitted by respondents]
20.	Offer of possession	Not offered

B. Facts of the complaint

3. That residential apartment being apartment no. GH-C-16-42, 15th floor, tower C, super area 6388.05 sq. ft. was booked at basic sale price of Rs. 7,97,88,789/- in IREO Gurgaon Hills Project, Gurgaon-Faridabad Road, Gurgaon and an amount of Rs.72,89,962/- was paid on 29.05.2014.
4. That another unit bearing property no. GH-C-17-32, in tower C admeasuring 4886.83 sq. ft. at sector-2, Gwal Pahari, Gurgaon, Haryana was also booked with the same promoters and payment of Rs. 54,62,670/- was made vide cheque on 29.05.2014.
5. That the promoters issued an allotment letter on 10.06.2014 in respect of both the apartments. Further the two separate apartment buyer agreement was executed between the parties in respect of both the units.
6. That further, payments of Rs. 1,69,53,028/- and Rs. 42,38,257/- were made towards instalments in respect of property no. GH-C-16 42 and also payments of Rs. 1,16,81,692/- and Rs. 29,20,423/- towards instalments in respect of property No. GH-C 17-32 were made which was duly acknowledged.

7. That after receiving of the earnest money/booking amount the respondents did not update the progress of construction nor has issued demand notice for further instalments, therefore complainant approached the respondents and terminated the apartment buyer agreement in respect of the unit bearing property No. GH-C-17-32 and requested for adjustment of the earnest money and the instalments paid towards the aforesaid unit to the instalments of the another unit being apartment no. GH-C-16-42 which was duly accepted by the respondents vide letters dated 18.10.2018, 18.01.2019 respectively.

8. That after adjusting the amount paid towards the apartment no. C-17-32 in the apartment no. C-16-42 the adjustment accrues to be Rs. 4,86,74,846/-.

9. That the complainant also availed the loan facility, which has been closed due to breach of terms of agreement, the complainant has paid an amount of Rs. 1,40,98,075/- towards interest. The complainant also suffered the foreclosure charges and processing charges for availing the loan facility. The complainant also paid the charges for appointment of the Architect and other ancillary expenses for getting layout and drawings etc.

10. That the respondents failed to offer the possession in terms of the agreement entered into between the parties according to clause 14 thereof, the possession of the aforesaid unit, was promised to be offered within 42 months of the date of agreement, even after the expiry of the aforesaid 42 months

and the grace period of 180 days, offer of possession was not made and accordingly, the complainant was compelled to issue the notice of termination dated September 2019 thereby expressing his intentions to terminate the contract.

11. That after receipt of the aforesaid notice, officials of respondents approached the complainant and persuaded him to enter into the addendum agreement dated 24.10.2020 thereby specifically agreeing to offer the possession after getting the occupancy certificate and to enable them to get the occupancy certificate, the complainant was required to submit the necessary layout of drawings by the Architect/interior designer and the same was to be approved by the Company. Accordingly, the Architect appointed by the complainant visited the site and got the necessary dimensions etc. and submitted the layout of drawings on 05.02.2020. However, despite the respondents specifically agreed through addendum agreement to give the approval within the specified period, the auto CAD was not provided

12. That vide email dated 22.01.2021 even the architect Mr. Anuj Arya asked for auto CAD versions of the working drawings including the dimension layers but the respondents failed to provide same. The officials of the complainant had been continuously following for getting the approval of the layout of the drawings submitted on 05.02.2020 but till date the approval was not granted. In fact, the respondents had no intentions to honor the promise of delivering the possession within the specified time and hence, they kept avoiding the

grant of approval submitted by the architect. Therefore, finding no other alternative, the complainant was constrained to terminate the apartment buyer agreement dated 12.08.2014 and the subsequent addendum agreement dated 24.10.2019 with immediate effect.

13. That the respondents failed to handover the possession of the aforesaid flat within the specified time and violated the provisions of section 18 of the Real Estate (Regulation and Development) Act, 2016, and the complainant has already terminated the contract/withdrew from the aforesaid project, the respondents are liable to refund the total amount of Rs. 4,86,74,846/- along with the statutory interest since 20.08.2014 i.e., from the date of payment of aforesaid amount in terms are section 18 of the Real Estate (Regulation and Development) Act, 2016 r/w Rule 15 of the Haryana Real State (Regulation and Development) Rules 2017.

14. That the respondents have not complied with the same and hence, the instant complaint is filed for refund of the amount along with the statutory interest for the period in which the said amount has been received, used and utilised by the respondents. The complainant is also entitled for the actual loss suffered by him towards interest of loan and foreclosure charges he paid for availing the loan facilities as well as for the amount he has paid to the architect etc. The complainant is further entitled for compensation on account of mental agony and harassment by the respondents and the rights for

claiming the compensation on aforesaid count is reserved with the complainant.

C. Relief sought by the complainant:

15. The complainant has sought the following relief:

- Direct the respondents to refund an amount of Rs. 4,86,74,846/- along with statutory interest since 20.08.2014 i.e., from the date of payment of amount, in terms of section 18 of the Real Estate (Regulation and Development) Act, 2016 r/w Rule 15 of the Haryana Real Estate (Regulation and Development) Rules 2017.

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

17. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The buyer's agreement was executed between the complainant and the respondents prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be enforced retrospectively.
18. That there is no cause of action to file the present complaint.
19. That the complainant has no locus standi to file the present complaint.

20. That the complainant is estopped from filing the present complaint by his own acts, omissions, admissions, acquiescence's, and laches.
21. That the respondent has filed the present reply within the period of limitation as per the provisions of Real Estate (Regulation and Development) Act, 2016.
22. 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 36 of the residence purchase agreement.
23. That the complainant has not approached this authority with clean hands and have intentionally suppressed and concealed the material facts. The conduct of the complainant has been mala fide and he is not entitled to any relief at all. The correct facts are as under:

    - That the respondent is a reputed real estate developer having immense goodwill, comprised of law abiding and peace-loving persons and have always believed in rendering best services to their customers including the complainant. The respondent along with their associate companies have developed and delivered several prestigious projects such as 'Grand Arch', 'Victory Valley', 'Skyon', 'Uptown', 'Ireo City', 'Ireo City Central', etc. and in most of these projects large number of allottees have already shifted in 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.

- That the complainant, after checking the veracity of the project namely, 'Ireo Gurugram Hills, Gurugram had applied for allotment of an apartment and deposited part payment towards the total sale consideration by signing the booking application form and accordingly allotment offer letter dated 10.06.2014 was issued through which the complainant was allotted unit no. GH-C-16-42 having tentative super area of 6388.05 sq. ft. on 15th floor, tower C in bare shell condition for a sale consideration of Rs. 7,97,88,789/-.

- That vide letter dated 16.06.2014, respondent no.1 sent three copies of the agreement to the complainant which was signed and executed on 12.08.2014. Copy of the agreement has already been attached by the complainant along with complaint. It is pertinent to mention herein that RERA Act, 2016 was not in force when the Agreement was executed and the provisions of the same cannot be applied retrospectively. Furthermore, as already stated above, the apartment was in a bare shell condition as provided in Recitals 'E' and 'H' of the agreement and the complainant was to carry out the interior works as per specifications stated in Annexures I and Annexures V of the agreement.

- That respondent no.1 had vide its payment demand dated 18.07.2014 sent installment demand for the net payable amount of Rs.2,11,91,285.21. However, the complainant failed to make the payment of the due amount on time and respondent no.1 was constrained to issue a reminder dated 13.08.2014 to the complainant.
- That the complainant requested the respondent to cancel another unit in the said project with the respondent in his name and to transfer the funds paid by him for the said other unit towards the unit in question. Although, respondent was not under any obligation to do so yet being customer oriented developers, after scrutiny of the documents submitted and on the basis of mutual understanding that the complainant would remit the due amount towards the retained unit and would take the possession after completing the interior works as per terms of the agreement, they acceded to the requests made by the complainant and gave a no objection for transferring the amount post reduction of service tax, brokerage and interest vide its letter dated 08.10.2018 and requested the complainant to complete the documentation formalities for the purpose of completion of the fund transfer.
- That on the receipt of the relevant documents, the amount paid by the complainant towards the unit no.

GH-C-17-32 was transferred to the retained unit i.e. unit no. GH-C-16-42 and the same was intimated to the complainant vide letter dated 08.01.2019 that henceforth, the complainant would be left with no right, claim or interest with respect to the cancel unit i.e., unit No. GH-C-17-32.

- That the possession of the unit is supposed to be offered to the complainant in accordance with the agreed terms and conditions of the apartment buyer's agreement. It is submitted that as per clause 14.3 of the buyer's agreement and clause 54 of schedule 1 of the booking application form states that ' subject to force majeure, as defined herein and further 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 apartment to the allottee within a period of 42 months from the date of approval of the building plans and/or fulfilment of the preconditions imposed 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)...'.. The complainant vide clause 14.5 of the buyer's agreement and clause 55 of the booking application form had further agreed for an extended delay period of 12 months from the end of grace period. From the aforesaid terms of the buyer's agreement, it is evident that time was to be computed

from the date of receipt of all the requisite approvals. Even otherwise, construction cannot be raised in the absence of necessary approvals. It is pertinent to mention herein that it has been specified in sub-clause (v) of clause 17 of the building plan approval dated 17.05.2012 of the said project that the clearance issued by the Ministry of Environment and Forest, Government of India had to be obtained before starting the construction of the project. That the environment clearance for construction of the said project was granted on 26.06.2013. Furthermore, in clause 22 of the Part A of the environment clearance dated 26.06.2013, it was stated that the fire safety plan was to be duly approved by the fire department before the start of any construction, at site.

- That the last of the statutory approvals which forms a part of the precondition was the fire scheme approval which was granted on 26.12.2013 and the time period for offering the possession, according to the agreed terms would have expired on 26.12.2018. However, the said period is subject to the occurrence of the force majeure condition which is beyond the reasonable control of the respondent no.1 and the complainant also complying with his contractual obligations.
- That the respondent no.1 had intimated the construction status to the complainant and as per clause 13 of the agreement invited him vide letter dated

18.04.2016 to start the interior works of the unit allotted to him by taking physical measurements along with architects and by doing design management. However, the complainant failed to adhere to his obligations.

- That the complainant failed to adhere to his contractual obligations of completing the interior design management and respondent no.1 could not have waited endlessly and accordingly had applied for the grant of occupation certificate on 24.09.2018.
- That DTCP, Haryana vide its letter dated 24.02.2019 intimated to respondent no.1 that the building was not completed as per the approved building plans and that it would not have any objections in getting the figments and fixtures/remaining interior work of the flat completed with either by the colonizer or through the allottees.
- It is reasserted that the obligation of completing the interior work and design management was of the complainant and not of respondent no.1. However, the respondent no.1 being a customer-oriented developer completed the construction of the unit as per Section 7.15 of the Haryana Building Code, 2017 which deals with the minimum provisions with regard to the dwelling unit, although the same was the liability of the complainant as per the terms of the buyer's agreement and respondent no.1 again applied for the grant of

occupation certificate vide its letter dated 13.08.2019. This fact was intimated to the complainant vide letter dated 22.08.2019.

- That in order to make sure that all the interior layouts, detailed drawings and designs are completed by the complainant, respondent no. 1 entered into an addendum agreement dated 24.10.2019. However yet again, the complainant has defaulted in adhering to his obligation under the apartment buyer's agreement and the addendum agreement. Despite signing the said addendum agreement, the complainant has not completed the interior design and has committed defaults. respondent no.1 vide email dated 19.03.2021 again invited the complainant to start the interior work of the apartment.
- That the concerned authorities have already vide order dated 02.08.2021 granted occupation certificate to the respondent in order to give possession to the allottees including the complainant to complete the interior works as per the approved building plans. The complainant is bound by their contractual obligations and complete the interior works and design management as per the terms of the agreement.

24. That the implementation of the project was hampered due to non-payment of instalments by allotees on time and several other issues also materially affected the construction and progress of the project.

- Order passed by Environmental bodies:- In last 4 years i.e. 2015- 2018, Hon'ble Green Tribunal has been passing orders to protect the environment of the country and specially the NCR region. The Hon'ble NGT has 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 contractor of respondent no. 1 could not undertake construction for several months in compliance of the orders of the Hon'ble NGT. Due to the same, there was a delay as labour went back to their hometowns which resulted in shortage of labour as well. In view of the same, construction work remained very badly affected for 6-12 months and the same was beyond the reasonable control of the respondent and the said period is required to be added for calculating the delivery of possession.
- 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.
- Inclement weather conditions in 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.

- 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 payments 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 the 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.

There are also 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 impact of demonetization on real estate industry and construction labour.

Thus, 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.

25. That the complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that his calculations have gone wrong, and he is now trying to somehow unilaterally wriggle out of his obligations by raising baseless and false claims before this Hon'ble Authority. The complainant cannot be allowed to succeed in his malafide motive.

26. 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 submissions made by the parties.

E. Jurisdiction of authority

27. 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

28. 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

29. Section 11(4)(a) of the Act, 2016 provides that the promoters 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.

30. 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 promoters leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondents:

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

31. The respondents submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the buyer's agreement was executed between the complainant and the respondents prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

32. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous

provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** 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."*

33. 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 <u>will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion</u>. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed*

possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

34. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondents w.r.t. jurisdiction stands rejected.

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

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

"36. 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".

36. 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.

37. 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 complainant 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:-*
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> > *"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."*
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> *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."

38. 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."

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

G. Findings on the relief sought by the complainant.

G.I Direct the respondents to refund an amount of Rs. 4,86,74,846/- along with statutory interest since 20.08.2014 i.e., from the date of payment of amount, in terms of section 18 of the Real Estate (Regulation and Development) Act, 2016 r/w Rule 15 of the Haryana Real Estate (Regulation and Development) Rules 2017.

40. In the present complaint, the complainant intends to withdraw from the project and is seeking refund of the amount paid by him as provided under section 19(4) of the Act. Sec. 19(4) reads as under: -

"Section 19: - Rights and duties of allottees-

19(4). The allottee shall be entitled to claim the refund of the amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

41. Clause 14 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

> *"Clause14- 14.3 Subject to force majeure, as defined herein and further subject to the allottee having complied with all obligations under the terms and conditions of this agreement and not having defaulted under any provision(s) of this agreement including but not limited to the timely payment of all dues and charges including the total sale consideration, registration charges, stamp duty and other charges and also subject to the allottee having complied with all formalities or documentation as prescribed by the company, the company proposes to offer the possession of the said residence unit to the allottee within a period of 42 months from the date of approval of building plan and/or fulfilment of the preconditions imposed thereunder* ***(commitment Period).***
>
> *The allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days* ***(Grace Period),*** *after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the company.*

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

builder/promoter and buyer/allottee are protected candidly. The 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 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 promoter/developer to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoter/developer. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoter/developer or gave them the benefit of doubt because of the total absence of clarity over the matter.

43. The respondents/ promoters have proposed to handover the possession of the subject apartment within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 180 days grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondents/promoters.

44. Further, in the present case, it is submitted by the respondents promoters that the due date of possession should be calculated from the date of fire scheme approval which was obtained on 26.12.2013, as it is the last of the statutory approvals which forms a part of the preconditions and in this regard, the counsel for the respondents placed reliance on case titled as **Ireo Grace Realtech Pvt. Ltd. Versus Abhishek Khanna and Ors.** passed by the Hon'ble Supreme Court of India in Civil Appeal no. 5785 of 2019.

45. The counsel for the complainant while rebutting the claims of the respondents submitted that the case cited by the counsel for the respondents belong to the project namely, "The Corridors". However, in the present matter, the subject unit belongs to the project "Ireo Gurgaon Hills".

46. The authority is of the considered view that every case needs to be considered in the light of the facts and circumstance of that case. The nature and extent of relief are always fact dependent and vary from case to case. Further, it is pertinent to mention here that in the case cited above it is a matter of fact that 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 which expired on 23.10.2013. But it is pertinent to mention over here that the developer applied for the provisional fire approval on 24.10.2013 (as contented by the

respondents 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 requisites, the respondents submitted the corrected set of drawings as per the NBC-2005 fire scheme only on 13.10.2014 which reflected the laxity of the developer 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. Thus, the builder failed to give any explanation for the inordinate delay in obtaining the fire NOC.

47. In view of the above, in complaints bearing nos. CR/4325/2020, CR/3020/2020, CR/3361/2020, CR/5003/2020, CR/2549/2020, the authority had struck down the ambiguous possession clause of the buyer's agreement and calculated the due date of handing over possession from the date of approval of building plan.

48. The authority has gone through the possession clause of the agreement in the present matter. On a bare reading of the said clause of the agreement reproduced above, it becomes clear that the possession in the present case is linked to the "fulfilment of the preconditions" which are 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 unit 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 unit. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and totally against the interests of the allottee 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 complainant. Accordingly, in the present matter the due date of possession is calculated from the date of approval of building plan i.e., 17.05.2012 which comes out to be 17.11.2015.

49. **Admissibility of grace period:** The respondents promoters had proposed to hand over the possession of the unit within 42 months from the date of sanction of building plan and/or

fulfilment of the preconditions imposed thereunder which comes out to be 17.11.2015. The respondents' promoters have 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 respondent's project that could lead to the delay of more than 2 years. Thus, the contention 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 respondents promoters 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's project was stopped, then it was due to the fault of the respondents itself and he cannot be allowed to take advantage of his own wrongs/faults/deficiencies. Also, the allottee should not be allowed to suffer due to the fault of the respondents/promoters. 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 promoters itself and now it has become a very common practice to enter such a clause in the agreement executed between the promoters and the allotee. It needs to be emphasized that for availing further period for completing the construction the promoters 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 respondents promoters have not assigned such compelling reasons as to why and how it shall 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 promoters.

50. That the complainant booked two residential apartments i.e., GH-C-16-42 and GH-C-17-32 for total sum of Rs. 7,97,88,789/- on 29.05.2014. Thereafter both the units were allotted to the

complainant on 10.06.2014. A builder buyer agreement was executed on 12.08.2014. The complainant on the basis of agreement started making various payments against the allotted units. The complainant further approached the respondents and terminated the buyer's agreement with regard to the unit no. GH-C-17-32 and requested for transfer the funds collected towards the said unit. The respondents vide letter dated 08.01.2019 transferred the funds collected from unit no. GH-C-17-32 to another unit i.e., GH-C-16-42. Thus, in total complainant has made a payment of Rs. 4,86,74,946/- towards the unit no. GH-C-16-42. As per the clause 14.3 of the builder buyer agreement the possession of the subject unit was proposed to be offered within 42 months from the date of approval of building plans and/ or fulfilment of the preconditions imposed there under with an additional grace period of 180 days after the expiry of the said period to allow for the unforeseen delays beyond the reasonable control of the company which is not allowed in the present case. The date of approval of building plan is 17.05.2012. So, the due date of handing over possession comes out to be 17.11.2015.

51. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and demanding return of the amount received by the promoters in respect of the unit with interest on failure of the promoters to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified

therein. The matter is covered under section 18(1) of the Act of 2016.

52. The due date of possession as per agreement for sale as mentioned in the table above is 17.11.2015 and there is delay of 6 years 2 months 11 days on the date of filing of the complaint.

53. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after filing of application by the complainant for return of the amount received by the promoters on failure of promoters to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. The complainant-allottee has already wished to withdraw from the project and the allottee has become entitled his right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoters as the promoters fails to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoters are liable to return the amount received by him from the allottee in respect of that unit with interest at the prescribed rate. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

54. Further 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. it was observed

> *25. The unqualified right of the allottee 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 allottee, 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 allottee/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 allottee 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.*

55. The promoters are 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 allottee as per agreement for sale under section 11(4)(a). The promoters have failed 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. Accordingly, the promoters are liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount

received by him in respect of the unit with interest at such rate as may be prescribed.

56. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under section 71 read with section 31(1) of the Act of 2016.

57. The authority hereby directs the promoters to return the amount received by him i.e., Rs. 4,86,74,946/- with interest at the rate of 9.50% (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 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the authority

58. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the function entrusted to the authority under section 34(f):

i. The promoters are directed to return the amount received by him i.e., Rs. **4,86,74,946/-** with interest at the rate of 9.50% (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

from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

ii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow

59. Complaint stands disposed of.

60. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 05.07.2022