BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3104 of 2019
1994 of 2020
189 of 2021
First date of hearing: 15.10.2019
Date of decision : 13.07.2022

Veena Rathi w/o Rampal Rathi
R/O: 26,27 Mahesh Colony,
Seva Sadan Road, Bhilwara,
Rajasthan-311001 **Complainant**

Versus

M/s Ireo Grace Realtech Pvt. Ltd.
Office Address: 304, Kanchan House,
Karampura, Commercial complex,
New Delhi-110015 **Respondent**

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

APPEARANCE:
Shri Sanjeev Sharma Advocate for the complainant
Shri M.K Dang Advocate for the respondent

ORDER

1. The present complaint dated 14.08.2019 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

65

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. After filing of the complaint was transferred to the authority so the new proforma B was generated with the CR/1994/2020 and subsequently CR/189/2021.

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.	Project name and location	"The Corridors" at sector 67A, Gurgaon, Haryana
2.	Licensed area	37.5125 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no.	05 of 2013 dated 21.02.2013
	License valid up to	20.02.2021
	Licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
5.	RERA registered/not registered	**Registered** Registered in 3 phases

64

		Vide 378 of 2017 dated 07.12.2017(Phase 1) Vide 377 of 2017 dated 07.12.2017 (Phase 2) Vide 379 of 2017 dated 07.12.2017 (Phase 3)
	Validity	30.06.2020 (for phase 1 and 2) 31.12.2023 (for phase 3)
6.	Unit no.	903, 9th floor, tower C5 (page no. 28 of complaint)
7.	Unit measuring	1295.78 sq. ft. (page no. 28 of complaint)
8.	Date of approval of building plan	23.07.2013 (annexure R-13 on page no. 63 of reply)
9.	Date of allotment	07.08.2013 (annexure R-2 on page no. 49 of reply)
10.	Date of environment clearance	12.12.2013 (annexure R-14 on page no. 71 of reply)
11.	Date of execution of flat buyer's agreement	07.11.2014 (page no. 27 of complaint)
12.	Total consideration	Rs. 1,27,90,442/- [as per payment plan on page no. 47 of complaint]
13.	Total amount paid by the complainant	Rs. 1,25,47,577/-

		[as per statement of account dated 11.06.2019 annexed with offer of possession on page no. 90 of reply]
14.	Due date of delivery of possession	**23.01.2017** (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.**
15.	Occupation certificate	31.05.2019 [annexure R-18 on page no. 86 of reply]
16.	Offer of possession	11.06.2019 [annexure R-19 on page no. 92 of reply]

B. Facts of the complaint

The complainant has submitted that:

3. That the respondent M/s Ireo Grace Realtech Pvt. Ltd. advertised the project named as "The Corridors" situated at sector-67 A, Gurugram.
4. That the complainant booked a unit in the above-mentioned project for a total sale consideration of Rs. 1,27,90,442/- including other charges of EDC, IDC etc. On 22.03.2013, the booking was made in the project and she paid an amount of Rs. 12,50,000/-.
5. That the apartment buyer agreement was executed between the parties on 07.11.2014 in which it was agreed that the possession of the allotted unit was to be handed over lastly by November 2018.
6. That the complainant has made a total payment of Rs. 1,25,07,795/- upto 30.05.2017.
7. That despite repeated visits by the complainant the respondent has failed to offer possession on time and nor any satisfactory reply in this regard.
8. That the respondent is guilty of deficiency in service within the purview of provisions of the Real Estate (Regulation and Development) Act, 2016 (Central Act 16 of 2016) and the provisions of Haryana Real Estate (Regulation and Development) Rules, 2017.

C. Relief sought by the complainant:

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

(i) Direct the respondent to provide the copy of the occupancy certificate or application for obtaining occupancy certificate along with mandatory documents.

(ii) Direct the respondent to provide the copy of registered declaration w.r.t. common areas, parking areas.

(iii) Direct the respondent to provide the copy of declaration made by the promoter under all sub clauses of clause(l) of sub section (2) of section 4.

(iv) Direct the respondent to pay interest for delayed period for handing over the possession from the time as stated under clause (za) of section 2.

(v) Direct the respondent to pay interest for the period of complaint, pending before the authority as it was an obligation cast upon him under the act to provide and pay interest automatically under the act. The respondent failed to pay the interest when demanded.

(vi) The respondent shall be ordered to recalculate the interest to be charged or already charged at the same rate of interest at which he is ordered to pay to the allottee i.e., @ state bank of India highest marginal cost of lending rate plus 2%.

(vii) Direct the respondent not to charge any holding charges, interest on the pending payments at the time of possession after the settlement of the dues as per the RERA Act.

(viii) The extra money charged on account of parking charges, club housing charges and such other incidental charges be refunded back to the complainant along with interest.

(ix) Direct the respondent to get the conveyance deed of common areas and super areas be made in the name of association of allottees.

(x) Direct the respondent to pay the cost of litigation of Rs. 50,000/- to the complainant

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

D. Reply by the respondent.

11. The respondent 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. The apartment buyer's agreement was executed between the complainant and the respondent prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

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

III. That the complainant has no locus standi to file the present complaint.

IV. That the complainant is estopped from filing the present complaint by her own acts, omissions, admissions, acquiescence's, and laches.

V. That this authority does not have the jurisdiction to try and decide the present complaint.

VI. 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.

VII. 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 35 of the buyer's agreement.

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

12. That the complainant, after checking the veracity of the project namely, 'Corridors; sector 67A, Gurugram applied for allotment of an apartment vide booking application form. The

complainant agreed to be bound by the terms and conditions of the booking application form.

13. That based on the said application, respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainant apartment no. CD-C5-09-903 having tentative super area of 1295.78 sq. ft. for a sale consideration of Rs. 1,27,90,442/-. It is submitted that three copies of the apartment buyer's agreement were sent to the complainant by respondent vide letter dated 24.03.2014. The apartment buyer's agreement was executed between the parties on 07.11.2014 after reminders dated 28.05.2014 and 17.07.2014. It is pertinent to mention herein that when the complainant had booked the unit with the respondent, the Real Estate (Regulation and Development) Act, 2016 was not in force and the provisions of the same cannot be applied retrospectively.
14. That the respondent raised payment demands from the complainant in accordance with the agreed terms and conditions of the allotment as well as of the payment plan and she defaulted from the very inception. It is submitted that the respondent had sent payment demand dated 14.04.2013 to the complainant for net payable amount of Rs. 12,07,910/-. However, the complainant made the payment only after reminder dated 14.05.2013 was sent by the respondent.
15. That the respondent had raised the third instalment demand on 18.03.2014 for the net payable amount of Rs.14,71,382.

However, the complainant made the payment of the due amount despite reminder dated 13.04.2014 was issued by the respondent.

16. That the respondent had raised the ninth installment demand on 19.11.2015 for the net payable amount of Rs. 13,11,945/-. However, the complainant remitted the demanded amount only after reminders dated 07.01.2016 and 16.02.2016. The respondent had even issued a letter dated 14.03.2016 to the complainant intimating her about the interest amount accrued on account of delay payments towards the total sale consideration.

17. That the complainant has made a payment of Rs. 1,25,47,577/- out of the total sale consideration of Rs. 1,42,17,514/- and is bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, payable along with it.

18. That the possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the buyer's agreement. It is submitted that clause 13.3 of the buyer's agreement and clause 43 of the schedule – I of the booking application form states that the '...subject to force majeure conditions and 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 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 the 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 (iv) of clause 17 of the approval of building plan dated 23.07.2013 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 39 of part-A of the environment clearance dated 12.12.2013 it was stated that fire safety plan was to be duly approved by the fire department before the start of any construction work at site.

19. That the last statutory approval which forms a part of the preconditions was the fire scheme approval which was obtained on 27.11.2014 and that the time period for offering the possession, according to the agreed terms of the buyer's agreement, would have expired only on 27.11.2019. However,

55

the complainant has filed the present complaint without any cause of action till date.

20. That the respondent had applied for the grant of occupation certificate on 06.07.2017 and the same was granted by the concerned authorities on 31.05.2019. Furthermore, the respondent has even offered the possession of the unit of the complainant vide notice of possession dated 11.06.2019. That the complainant is 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 apartment buyer's agreement and the same is known to the complainant as is evident from a bare perusal of the notice of possession.

21. 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 her calculations have gone wrong on account of severe slump in real estate market and the complainant now wants to harass and pressurise the respondent to submit her unreasonable demands on highly flimsy and baseless grounds.

22. 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 respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

23. 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

24. 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.*

25. 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 complainant at a later stage.

F. Findings on the objections raised by the respondent.

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.

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

27. 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)*** decided on 06.12.2017 and which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

28. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

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

reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

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

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

> ***"35. 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".*

31. 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.

32. 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."

33. 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

47

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."*

34. 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 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 stands rejected.

G. Findings regarding relief sought by the complainant.

(i) Direct the respondent to provide the copy of the occupancy certificate or application for obtaining occupancy certificate along with mandatory documents.

(ii) Direct the respondent to provide the copy of registered declaration w.r.t. common areas, parking areas.

35. As per section 11(4)(b) of the Act, 2016 the respondent builder is under an obligation to supply copy of the OC/CC to the complainant allottee. The relevant part of section 11 of the Act of 2016 is reproduced as hereunder: -

> *"11(4) (b) The promoter shall be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be."*

36. Even otherwise, it being a public document, the allottee can have access to the it from the website of DTCP, Haryana.

(iii) Direct the respondent to provide the copy of declaration made by the promoter under all sub clauses of clause(I) of sub section (2) of section 4.

45

37. The project is registered in 3 phases vide registration number 378 of 2017 dated 07.12.2017(Phase 1), vide 377 of 2017 dated 07.12.2017 (Phase 2), vide 379 of 2017 dated 07.12.2017 (Phase 3) which is valid upto 30.06.2020 (for phase 1 and 2) and 31.12.2023 (for phase 3).

(iv) Direct the respondent to pay interest for delayed period for handing over the possession from the time as stated under clause (za) of section 2.

(v) Direct the respondent to pay interest for the period of complaint, pending before the authority as it was an obligation cast upon him under the act to provide and pay interest automatically under the act. The respondent failed to pay the interest when demanded.

(vi) The respondent shall be ordered to recalculate the interest to be charged or already charged at the same rate of interest at which he is ordered to pay to the allottee i.e., @ state bank of India highest marginal cost of lending rate plus 2%.

38. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges at prescribed rate of interest on amount already paid by her 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."

39. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 07.11.2014, 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."*

40. 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.

41. 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 complainant 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 her 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.

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

43. Further, in the present case, it is submitted by the respondent promoter that the due date of possession should be calculated from the date of fire scheme approval which was obtained on

27.11.2014, as it is the last of the statutory approval which forms a part of the preconditions. The authority observes that, the respondent has not kept the reasonable balance between his own rights and the rights of the complainant/allottee. The respondent has acted in a highly, discriminatory and arbitrary manner. The unit in question was booked by the complainant on 22.03.2013 and the apartment buyer's agreement was executed between the respondent and the complainant on 07.11.2014. The date of approval of building plan was 23.07.2013. It would lead to a logical conclusion that the respondent would have certainly started the construction of the project. On a bare reading of the clause 13.3 of the 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 aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the "fulfilment of the preconditions" has been mentioned for the timely delivery of

the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject apartment. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous type of clauses in the agreement are totally arbitrary, one sided and against the interests of the allottees and 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.

44. 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/observed 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, up to 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 stage. The developer was directed to handover the possession of the apartment by 30.06.2020 as per the registration certificate for the project."

45. 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 requisites. 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 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. The builder failed to give any explanation for the inordinate delay in obtaining the fire NOC.

46. In view of the above the authority is changing its stand and diverging from its previous view of calculating the due date of possession from the date of fire NOC as the complainant/allottee should not bear the burden of mistakes/ laxity or the irresponsible behavior of the developer/respondent and seeing the fact that the developer/respondent did not even apply for the fire NOC within the mentioned time frame of 90 days. 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 it did not even apply for the same in the mentioned time frame. In view of the above-mentioned reasoning the authority has started to calculate the due date of possession from the date of approval of building plans.

47. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 18% p.a. however, 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.*

48. 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.

49. 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 13.07.2022 is 7.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.70% per annum.

50. 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;"*

51. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.70% by the respondent/promoter which is the same as is being granted to the complainant in case of delay possession charges.

52. 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 is established. As such, the complainant is entitled for delayed possession charges as per the proviso of section 18(1) of the Real Estate Regulation and Development Act, 2016 at the prescribed rate of interest i.e., 9.70% per annum on the amount paid by the complainant to the respondent from the due date of possession i.e., 23.01.2017 till the offer of possession (11.06.2019) plus 2 months i.e., 11.08.2019 as per section 19(10) of the Act.

53. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.70% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

(vii) Direct the respondent not to charge any holding charges, interest on the pending payments at the time

of possession after the settlement of the dues as per the RERA Act.

54. The authority has decided this in the complaint bearing no. 4031 of 2019 titled as **Varun Gupta V/s Emaar MGF Land Ltd.** wherein it has held that the respondent is not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.Therefore, in light of the above, the respondent shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.

(viii) The extra money charged on account of parking charges, club housing charges and such other incidental charges be refunded back to the complainant along with interest.

55. The demand of club charges in pursuance of the stipulation contained in the builder buyer's agreement executed between the promoter and the allottee has been held to be legal and justified by the Hon'ble Supreme Court of India and further the said view has been endorsed **DLF Home Developer Ltd. Vs. Capital Greens Flat Byers Association, civil appeal nos. 3864-3889 of 2020** decided on 14.12.2020; the authority holds that the demand for "club charges" is legal and justified

but club membership registration charges shall be payable once club comes in existence. On perusal of documents of record i.e., statement of account annexed with offer of possession it was observed that no parking charges has been charged by the respondent.

(ix) **Direct the respondent to get the conveyance deed of common areas and super areas be made in the name of association of allottees.**

56. The promoter is directed to take action as per provisions of law within 2 months to execute the execute the conveyance deed as per section 17(1) of the Act.

(x) **Direct the respondent to pay the cost of litigation of Rs. 50,000/- to the complainant.**

57. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as **M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.** (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of

compensation. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of compensation.

58. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of apartment buyer's agreement executed between the parties on 07.11.2014, the possession of the booked unit was to be delivered within 42 months from the date of approval of building plan (23.07.2013) which comes out to be 23.01.2017. 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 is established. As such the complainant is entitled to delayed possession charges at the prescribed rate of interest i.e., 9.70% p.a. for every month of delay on the amount paid by her to the respondent from due date of possession i.e., 23.01.2017 till offer of possession (11.06.2019) plus 2 months i.e., 11.08.2019 as per section 19(10) of the Act read with rules 15 of the rules.

H. Directions of the authority: -

59. 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 promoters as per the function entrusted to the authority under sec 34(f) of the Act:-

i. The respondent is directed to pay interest at the prescribed rate of 9.70% p.a. for every month of delay from the due date of possession i.e., 23.01.2017 offer of possession of the booked unit i.e., 11.06.2019 plus two months which comes out to be 11.08.2019 as per the proviso to section 18(1)(a) of the Act read with rules 15 of the rules.

ii. The respondent 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.

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., 9.70% by the respondent/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 demand of club charges in pursuance of the stipulation contained in the builder buyer's agreement executed between the promoter and the allottee has been held to be legal and justified by the Hon'ble

Supreme Court of India civil appeal nos. 3864-3889 of 2020 decided on 14.12.2020.

vi. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is debarred from claiming holding charges from the complainant/allottee at any point of time even after being part of apartment buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3899/2020 decided on 14.12.2020.

vii. The respondent is directed to execute the conveyance deed of the allotted unit within two months as per provisions of law.

60. Complaint stands disposed of.

61. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 13.07.2022