BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1556 of 2022
First date of hearing: 17.08.2022
Date of decision : 23.11.2022

1. Daya Krishan Dubey
2. Anita Dubey
(Through Attorney Shrigopal Dubey)
Both R/O: 43, Highwood Ave, Eastleigh,
Post Code SO50 9QY, UK

Complainants

Versus

Ireo Grace Realtech Private Limited
Office: - C-4, 1st Floor, Malviya Nagar,
New Delhi-110017

Respondent

CORAM:
Shri Ashok Sangwan — **Member**
Shri Sanjeev Kumar Arora — **Member**

APPEARANCE:
Shri Sonal Anand
Shri Shiva Kapoor — Advocates for the complainants
Shri M.K Dang — Advocate for the respondent

ORDER

1. The present complaint dated 22.04.2022 has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Information
1.	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 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.	Apartment no.	203, 2nd floor, Tower B6 (page no. 33 of complaint)

7.	Unit measuring	1919.64 sq. ft. (page no. 33 of complaint)
8.	Date of approval of building plan	23.07.2013 (annexure R-4 on page no. 46 of reply)
9.	Date of allotment	07.08.2013 (page no. 21 of complaint)
10.	Date of environment clearance	12.12.2013 (annexure R-5 on page no. 54 of reply)
11.	Date of execution of builder buyer's agreement	10.07.2014 (page no. 30 of complaint)
12.	Date of fire scheme approval	27.11.2014 (annexure R-7 on page no. 66 of reply)
13.	Total consideration	Rs. 2,24,78,989/- (as per statement of account on page no. 167 of reply)
14.	Total amount paid by the complainants	Rs. 1,92,16,768/- (as per statement of account on page no. 167 of reply)
15.	Due date of delivery of possession	**23.01.2017** (calculated from the date of approval of building plans) Note: Grace Period is not allowed.
16.	Possession clause	**13. Possession and Holding Charges** Subject to force majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having

		default under any provisions of this Agreement but not limited to the timely payment of all dues and charges including the total sale consideration, registration chares, stamp duty and other charges and also subject to the allottee having complied with all the 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 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), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the Company. **(Emphasis supplied)**
17.	Occupation certificate	27.01.2022 (annexure R-10 on page no. 71 of reply)
18.	Offer of possession	16.02.2022

		(annexure R-11 on page no. 74 of reply)

B. Facts of the complaint

The complainants have submitted that:

3. That the complainants are British nationals and OCI card holder residing in United Kingdom. The complaint is being filed through their attorney Mr. Shrigopal Dubey. They planned to shift in India for which they booked the apartment in Gurugram.
4. That the complainants believing on the assurances of respondent booked a unit and paid a booking amount of Rs. 4,00,000/-. On 07.08.2013 the allotment letter was issued by the respondent to them.
5. That the complainants, after waiting for about 1 year were made to sign the buyer's agreement dated 10.07.2014, of apartment no. 203 at second floor, tower-B6. Even while signing the agreement, they were assured by the respondent no. that all requisite permissions are in place and possession would be handed over as per commitment.
6. That the building plans were approved on 23.07.2013, by the Directorate of town and Country Planning, Haryana (the "DTCP") vide Memo no ZP-871/AD(RA)/2013/4674, according to which the apartment was to be handed over on / before 23.09.2016.
7. That the complainants kept on remitting the demands of the respondent as per their payment requests from time to time and paid a total sum of Rs. 1,92,16,768/- to it till date out of a total sum Rs. 2,24,78,989/-.
8. That on 16.02.2022 the complainants received an email from the respondent stating that the OC for the phase II has been received to which they have already sent reply on 31.03.2022 besides many other

reminders seeking delay compensation as also to be allowed to inspect the apartment.

9. That further with ulterior motives to extract more money from the complainants, a statement of account dated 04.03.2022 was sent by respondent which was totally contrary to the one sent previously. They timely informed the respondent about the discrepancies of the statement of account dated 04.03.2022 through the emails as well by post and requested for revised statement of account. But till date, the respondent has not sent revised statement of account.
10. That recently the complainants through their representative inspected the apartment wherein he was shocked to see that the apartment and common areas like club house, common areas and pool area were totally incomplete and even the apartment was far from ready despite a delay of 5.4 years.
11. That their representative visited the respondent's office, wherein false promises were given by its staff. Further no satisfactory response has been received by the complainants to their email dated 31.03.2022 as well other emails.
12. That it was the gross failure of them in adhering to the commitments and promises to hand over the possession by 23.09.2016.
13. That due to the inordinate delay in giving the possession of the apartment, the complainants were compelled to reschedule their plan for which they had to buy another apartment by taking loan from the bank.
14. That the complainants have been under tremendous mental stress and agony due to the conduct of the respondent as none of its commitments has come true. In these facts and circumstances, the

complainants are now left with no option but to file the present complaint seeking justice and relief inter-alia in terms of a possession of the apartment along with delay possession interest.

C. Relief sought by the complainants:

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

(i) Pass an order by directing the respondent to provide the interest on delayed possession on the total amount paid by the complainants.

(ii) Pass an order by directing the respondent to pay the prescribed interest for the period calculated from time, complainants have paid the money to the respondent.

(iii) Direct the respondent to provide all amenities as was promised and committed as per terms of the agreement.

16. 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.

The respondent has contested the complaint on the following grounds:

17. 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 parties 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.

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

19. That the present complaint is bad for non-joinder of parties.
20. That the complainants have no locus standi to file the present complaint.
21. That the complainants are estopped from filing the present complaint by their own acts, omissions, admissions, acquiescence's, and laches.
22. That this authority does not have the jurisdiction to try and decide the present complaint.
23. 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.
24. That the complainants have not approached this authority with clean hands and have intentionally suppressed and concealed the material facts in the present complaint. It been filed 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:
25. That the complainants, after checking the veracity of the project namely, 'Corridor; sector 67-A, Gurugram applied for allotment of an apartment vide booking application form and agreed to be bound by the terms and conditions of the same.
26. That based on the application for booking, the respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainant's apartment no. CD-B6-02-203 having tentative super area of 1919.64 sq. ft. for a sale consideration of Rs. 2,04,75,154.28. The copies of the apartment buyer's agreement were sent by the respondent vide letter dated 03.04.2013. However, the agreement was executed between the parties on 10.07.2014 only after reminder dated 28.05.2014 in this

respect was sent to the complainants. The complainants agreed to be bound by the terms contained in the apartment buyer's agreement.

27. That the possession of the unit was supposed to be offered to the complainants as per clause 13.3 of the buyer's agreement. 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. 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. As per clause 35 of the environment clearance certificate dated 12.12.2013, the project was to obtain permission of Mines & Geology Department for excavation of soil before the start of construction. The requisite permission from the Mines & Geology Department has been obtained on 04.03.2014.

28. That the last of the statutory approvals which forms a part of the pre-conditions 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 elapse only on 27.11.2019. The complainants are trying to mislead this authority by making baseless, false and frivolous averments. The respondent has already completed the construction of the tower in

which the unit allotted to the complainants is located and have even applied for the grant of the occupation certificate vide application dated 10.09.2019. The concerned authorities after scrutiny of the documents granted the occupation certificate for the tower in question on 27.01.2022 and the respondent has already offered the possession of the unit to the complainants on 16th February 2022.

29. That the reasons for delay in grant of occupation certificate in respect of Phase – II of the project which were beyond the control of the respondent are detailed hereinbelow: -

- That pursuant to the grant of occupation certificate for phase-I, notice of possession to the respective allottees was issued and possession was been handed over to approx. 275 allottees and conveyance deed of approx. 119 apartments in favour of respective allottees have been executed and registered. The respondent applied for grant of occupation certificate to the DGTCP for approx. 658 apartments of phase-II vide application dated 10.09.2019 and the same was subsequently granted on dated 27.01.2022 and notice of possession was given on 16.02.2022 including the complainants herein. Despite completion of the project way back in 2019, the occupation certificate of corridors- phase-II could only be issued on 27.01.2022 by the DTCP, Haryana due to filing of false and frivolous complaints from time to time. The same had created difficulties for the respondent in getting OC on time. Some of the defaulter allottees failed to pay the demanded installments in the present project and the same resulted in extreme pressure upon the respondent. The complaints were totally false and

frivolous alleging violation of licensing norms by the respondent. The aforesaid allottees have on various dates (18.06.2019, 29.06.2019, 04.07.2019, 05.07.2019 and 18.10.2019) filed written complaints before the DTCP, Haryana so as to obstruct the grant of occupation certificate. The said complaints were filed with totally malafide motives so that the allottees are not obligated to take possession of the apartments allotted to them and to gain undue advantage over the developer/respondent.

- The DTCP, Haryana after repeated requests passed a detailed and reasoned order on 25.09.2020 on the complaints of the allottees in favour of the respondent thereby rejecting their plea for cancellation of occupation certificate.
- That some of the aforesaid allotees/homebuyers of the said project preferred appeal against the order dated 25.09.2020 passed by the DTCP, Haryana. The said appeal was filed on 22.10.2020 before Principal Secretary to Government of Haryana, Town and Country Planning Department, Chandigarh. The appeal was filed inter alia with prayer to set aside the Order dated 25.09.2020, seeking to suspend the occupation certificate granted against licence No. 5 of 2013 dated 31.05.2019 and to restrain issuance of remaining OC for Phase-II, etc. The Hon'ble Principal Secretary to Government of Haryana Town and Country Planning Department, Chandigarh on 11.11.2021 was pleased to dismiss the said appeal being devoid of any merits. The respondent was granted occupation certificate on 27.01.2022 after the dismissal of the said appeal. Thus, it can be

seen from the above that occupation certificate was applied on 10.09.2019 but was granted only on 27.01.2022 as the process of granting occupation certificate came to a halt due to the allottees filing various false and frivolous complaints before DTCP, Haryana.

- The occupation certificate with respect to phase – ii of the projects could not have been issued due to the pending writ petition preferred by other allottees/ homebuyers in the said project of the respondent being C.W.P. No. 20261 of 2020 titled "Manju Taneja & Ors. Vs. State of Haryana & Ors." which was filed on 27.11.2020, wherein DTCP, Haryana and other government authorities were made party. The reliefs sought in the said writ petition was to direct the DTCP, Haryana to not issue the occupation certificate applied for remaining/phase-II further to stay the operation and to set-aside/quash the order dated 25.09.2020 passed by DTCP, further seeking direction to initiate proceedings under Section 8 of Haryana Development & Regulation of Urban Areas Act, 1975. All the allottees who had filed the said writ petition had on one hand filed frivolous complaints for opposing the grant of occupation certificate and on other hand they were before NCDRC for seeking refund on the ground of non-grant of occupation certificate. The said writ petition has been filed by 12 petitioners and the entire writ petition was silent about the particulars of the petitioners, their respective allotments and the fact that in the year 2017, all petitioners had already approached the Ld. NCDRC seeking

refund of the sale consideration, which is much before filing of the present writ petition on 24.11.2020.

- That the same group of allottees even approached principal secretary to Government of Haryana, Department of Town and Country Planning and challenged the Order of DTCP dated 25.09.2020 by way of a statutory appeal under section 19 of the Haryana Development and Regulation of Urban Area Act, 1975. The said allottees did not disclose the said facts before the Hon'ble Punjab and Haryana High Court. The said appeal was and dismissed on 11.11.2021.

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

- 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 were 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.

- Orders passed by National Green Tribunal: In last four successive years i.e., 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. The Hon'ble NGT has passed orders with regard to phasing out the 10-year-old diesel vehicles from NCR. The pollution levels of NCR region has been quite high for couple of years at the time of change in weather in November every year. The Contractor of respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to that, there was a delay

of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November-December 2016 and November- December 2017. The district administration issued the requisite directions in this regard.

In view of the above, construction work remained badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondent and the said period is also required to be added for calculating the delivery date of possession.

- 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 viz. Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavourable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions.

31. 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

32. 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

33. 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

34. 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.*

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

F. Findings on the objections raised by the respondent.

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.

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

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

Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017 and which provides as under:

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

38. 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."*

39. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that

there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

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

40. 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".

41. 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.

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

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-

> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

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

43. 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."

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

F.III Objections regarding force majeure

45. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainants is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction during the years 2015-2016-2017-2018, dispute with contractor, non-payment of instalment by allottees and demonetization. The plea of the respondent regarding various orders of the NGT and demonetisation advanced in this regard is devoid of merit. The orders passed by NGT

banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Further, any contract and dispute between contractor and the builder cannot be considered as a ground for delayed completion of project as the allottees were not a party to any such contract. Also, there may be cases where some of the allottees have not paid instalments regularly but all the allottees cannot be expected to suffer because of them. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings regarding relief sought by the complainants.

(i) Pass an order by directing the respondent to provide the interest on delayed possession on the total amount paid by the complainants.

(ii) Pass an order by directing the respondent to pay the prescribed interest for the period calculated from time, complainants have paid the money to the respondent.

(iii) Direct the respondent to provide all amenities as was promised and committed as per terms of the agreement.

46. The complainants booked a residential apartment in the project of the respondent named as "Corridors" situated at Sector-67-A, Gurugram, Haryana for a total sale consideration of Rs. 2,24,78,989/-. The allotment of the unit was made on 07.08.2013. Thereafter the builder buyer agreement was executed between the parties on 10.07.2014.

47. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges at prescribed rate of interest on amount already paid by them as provided under the proviso to section 18(1) of the Act which reads as under:-

> ***"Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

48. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 10.07.2014, 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."*

49. 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 them. 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.

50. 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 possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottees that even a single default by them in fulfilling formalities and documentations etc. as prescribed by the promoter may make the

possession clause irrelevant for their purpose and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

51. 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.

52. The counsel for the respondent promoter argued 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 approvals which forms a part of the preconditions. The authority is of the view that the respondent has not kept the reasonable balance between his own rights and the rights of the complainants/allottees. The respondent has acted in a pre-determined and preordained manner.

53. On a bare reading of the clause 13.3 of the agreement, it becomes apparently clear that the possession in the present case is linked to the "fulfilment of the preconditions" which is so vague and ambiguous in itself. Nowhere in the agreement it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due

date of possession is subjected to in the said possession clause. If the said possession clause is read in entirety the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the "fulfilment of the preconditions" has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject apartment. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and totally against the interests of the allottees must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of possession of the unit in question to the complainants.

54. By virtue of apartment buyer's agreement executed between the parties on 10.07.2014, 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 along with grace period of 180 days which is not allowed in the present case.

55. 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.'**

56. 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 developer. But here the sanction building plans stipulated that the NOC for fire safety (provisional) was required to be obtained within a period of 90 days from the date of approval of the building plans, which expired on 23.10.2013. It is pertinent to mention here that the developer applied for the provisional fire approval on 24.10.2013 (as contented by the respondent herein the matter of Civil Appeal no. 5785 of 2019 titled as **'IREO Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.**) after the expiry of the mandatory 90 days period got over. The application filed was deficient and casual and did not provide the requisite. The respondent submitted the corrected sets of drawings as per the NBC-2005 fire scheme only on 13.10.2014 (as contented by the respondent herein the matter of Civil Appeal no. 5785 of 2019 titled as **'IREO Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.)**, which reflected the laxity of the 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.

57. In view of the above the authority changed its stand and diverged from its previous view of calculating the due date of possession from the date of fire NOC as the complainant/allottees 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 they 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.

58. **Admissibility of grace period:** The respondent promoter had proposed to hand over the possession of the apartment within 42 months from the date of sanction of building plan and/or fulfilment of the preconditions imposed thereunder which comes out to be 23.01.2017. The respondent promoter has sought further extension for a period of 180 days after the expiry of 42 months for unforeseen delays in respect of the said project. The respondent 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 23.01.2017 wherein the event of demonetization occurred in November 2016. By this time, major construction of the respondents' project must have been completed as per timeline mentioned in the agreement executed between the parties. Therefore, it is apparent that demonetization could not have hampered the construction activities of the respondents' project that could lead to the delay of more than 2 years. Thus, the contentions raised by the respondent in this regard is rejected.

(ii) **Order dated 07.04.2015 passed by the Hon'ble NGT:** The order dated 07.04.2015 relied upon by the respondent 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 respondents' project was stopped, then it was due to the fault of the respondent itself and cannot be allowed to take advantage of its own wrongs/faults/deficiencies. Also, the allottee should not be allowed to suffer due to the fault of the respondent/promoter. It may be stated that asking for extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved

by the promoter themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allotee. It needs to be emphasized that for availing further period for completing the construction the promoter must make out or establish some compelling circumstances which were in fact beyond his control while carrying out the construction due to which the completion of the construction of the project or tower or a block could not be completed within the stipulated time. Now, turning to the facts of the present case the respondent promoter has not assigned such compelling reasons as to why and how he is entitled for further extension of time 180 days in delivering the possession of the unit. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

59. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are 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.

60. 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.

61. 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 23.11.2022 is 8.35%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.35% per annum.

62. 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;"*

63. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.35% by the

respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.

64. On consideration of 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 10.07.2014, 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 for the reasons mentioned above. 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 complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 10.35% p.a. for every month of delay on the amount paid by them to the respondent from due date of possession i.e.,23.01.2017 till offer of possession of the booked unit i.e., 16.02.2022 plus two months which comes out to be 16.04.2022 as per the proviso to section 18(1)(a) of the Act read with rules 15 of the rules.

H. Directions of the authority: -

65. 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 promoter as per the functions entrusted to the authority under sec 34(f) of the Act:-

i. The respondent is directed to pay interest at the prescribed rate of 10.35% p.a. for every month of delay from the due date of possession i.e., 23.01.2017 till offer of possession of the

booked unit, plus two months i.e., 16.04.2022 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 complainants are also directed to pay the outstanding dues, if any.

iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.35% 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 respondent shall not charge anything from the complainants which is not part of the builder buyer agreement.

66. Complaint stands disposed of.

67. File be consigned to the registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 23.11.2022