BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	4292/2019 5142/2021
Date of filing complaint	13.09.2019
First date of hearing	15.10.2019
Date of decision	31.08.2022

	1. Gopal Agrawal **R/o:** 1000, Sector A, Pocket B, Vasant Kunj, New Delhi-110070 2. Rakesh Verma **R/o:** 37A, Ward no. 1, Mehrauli, New Delhi-110030 3. Neha Gupta **R/o:** 182-C, Ward no. 3, Mehrauli, New Delhi-110030	**Complainants**
	Versus	
	M/s Ireo Grace Realtech Pvt. Ltd. (Through its Director) **Regd. office:** C-4, Malviya Nagar, New Delhi-110017.	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Complainant in Person	Complainant
Sh. Keshav Yadav (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in

short, the Act) read with rule 29 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 there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name and location of the project	"The Corridors (phase 2)" situated at Sector-67A, Gurgaon.
2.	Nature of the project	Group Housing Colony
3.	Project area	13.152 acres
4.	DTCP license no.	05 of 2013 dated 21.02.2013 valid up to 20.02.2021
5.	Name of licensee	M/s Precision Realtors Pvt. Ltd. and 5 others
6.	RERA Registered/ not registered	377 of 2017 dated 07.12.2017 valid up to 30.06.2020
7.	Date of Application for Booking	22.03.2013 (Page 53 of complaint)
8.	Allotment Letter	07.08.2013 (annexure C2 at page 53 of complaint)
9.	Unit no.	204, 2nd floor, tower B5 (annexure C2 on page 53 of the complaint)
10.	Unit area admeasuring (super area)	1540.13 sq. ft. (annexure C2 on page 53 of the complaint)
11.	Date of approval of building plan	23.07.2013

		(as per details provided by planning department)
12.	Date of environment clearance	12.12.2013 (as per details provided by planning department)
13.	Date of residence purchase agreement	Not executed
14.	Possession clause (taken from application form as no BBA is on record)	**43.** The company proposes to offer **the possession of the said residence unit to the allottee within a period of 42 months from the date of approval of building plans and/or fulfillment 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)**
15.	Due date of possession	23.01.2017 (calculated from the date of approval of building plan i.e., 23.07.2013) **Note:** Grace Period is not allowed.
16.	Total sale consideration	Rs. 1,51,55,238.53/- (page no. 56 of complaint)
17.	Amount paid by the complainant	Rs. 29, 21, 424/- (page 20 of CRA)
18.	Cancellation Letter	17.11.2014 (page 60 of complaint)
19.	Restoration of unit	At page 116 of reply but neither dated not signed
20.	Surrender of unit	Through legal notice dated 11.02.2017 (Pg. 82 of complaint, annexure C-9)

21.	Occupation certificate	The counsel for respondent during the course of proceedings on 31.08.2022 stated at bar that the OC has been obtained on 27.01.2022
22.	Offer of possession	Not offered

B. Facts of the complaint:

3. That the complainants were approached by the respondent company's agents and representatives who made tall claims regarding their project, its viability, and various amenities it promised etc. The complainants were lured into investing by the respondent company and hence decided to make application for the booking in the project of the opposite party for the unit. The complainant was made to sign and send a blank "application for booking of residential apartment" for allotment of a 2BHK flat in the proposed project of the respondent. It is submitted that the complainant made initial payment/booking amount of Rs. 15,00,000/- through cheque no. 19833 dated 15.03.2013, cheque no. 81372 dated 15.03.2013 and cheque no. 004324 dated 15.03.2013 each amounting of Rs. 5,00,000/-.

4. That the respondent thereafter without officially allotting any flat again raised the demand for second instalment of Rs. 14,21,424/-in the month of May, 2013 which was also duly paid vide cheque no. 995134 dated 04.05.2013, cheque no. 90565 dated 04.05.2013 and cheque no. 19834 dated 06.05.2013 each amounting of Rs. 4,73,808/-.

5. That at the time of application, the complainants were assured that the booking for two-bedroom flat would be charged at BSP @ Rs. 8750 per sq. ft. and the area of the said flat was 1296 sq. ft. But to the utter shock of the complainants, the respondent sent the application with the area being

altered to 1540.13 instead of 1296 sq. ft. and BSP @ Rs. 9,200/- instead of Rs. 8750/- per sq. ft.

6. It was submitted that the respondent company simultaneously issued the confirmation of unit selected for allotment dated 07.08.2013. It was further submitted that the respondent company after a gap of around an year from the issue of allotment letter for the reason best known to them provided a copy of Builder Buyers Agreement after incorporating various unilateral and arbitrary terms. It is also pertinent to note that by the perusal of the copy of the builder buyer agreement the respondent, with malafide intentions, unilaterally mentioned the revised area of the allotted flat along with increased BSP rate.

7. That the complainant requested numerous times over telephone and in-person to the respondent to send a revised draft of builder buyer agreement with the acceptable terms and condition and also with the agreed/allotted flat along with agreed BSP. But the respondent to the contrary sent reminders for execution of the faulty agreement vide reminder letter dated 28.05.2014 and 17.07.2014. The respondent without adhering to the requests of the complainant even demanded instalments and also sent a final notice dated 29.08.2014 and thereafter unilaterally and arbitrarily cancelled the allotment vide termination/cancellation letter dated 17.11.2014. It is also pertinent to note here that the respondent with ulterior motives forfeited the complete received consideration to the tune of Rs. 29,21,424/- (Rupees Twenty Nine Lakhs Twenty One Thousand Four Hundred Twenty Four Only).

8. That the complainants in response to the arbitrary cancellation and forfeiture of the complete consideration sent a letter dated 10.12.2014

stating builder buyer agreement and various other therein objections pertaining to terms & conditions of malpractices/unfair trade practices carried out by the respondent. In view of the said circumstances mentioned in the letter, the complainants clearly stated that they are not interested in signing the unilateral agreement and therefore are requesting for refund of their full paid-up amount along with interest. It is submitted that the respondent sent a letter dated 24.12.2014 wherein it tried to run away from their responsibilities and clearly stated it would not accede to the request for refund of the complainants.

9. That the complainants, aggrieved by the refusal for refund, registered a complaint dated 04.03.2015 before the SHO, PS Sushant Lok, Gurgaon of fraud, forgery and cheating against the respondent company. That in response to the said complaint, the respondent company issued a letter dated 15.04.2015 with the Subject "offer for restoration of cancellation" wherein the respondent company offered to restore the allotment @Rs. 8750/- per sq. ft.

10. That the complainants till date have already made the payment of Rs. 29,21,424/- to the respondent. But the respondent has miserably failed to execute mutually agreed buyer's agreement and also has failed complete the construction of the apartment and deliver the same within the promised time period on the contrary has demanded various further instalment.

11. That the complainants were diligent towards timely payment of the demanded instalments and resulting which the respondent company were pleased to an provide an exclusive offer known as "timely payment rebate scheme" vide letter dated 18.03.2014 wherein the respondent gave a one-

time rebate of Rs. 200/- per sq. ft. for each timely paid instalment at the time of providing the possession.

12. That till now, even after restoring the allotment, the respondent company didn't execute the buyer's agreement and only demanded for further instalment. The complainants were aware of the malpractices of the respondent and hence did not further made payment towards the demanded instalments. That the complainant having lost complete faith in the respondents due to their unfair trade practice has sent them a legal notice dated 11.02.2017 for demanding the refund of the paid amount of Rs. 29,21,424/- (Twenty Nine Lakhs Twenty One Thousand Four Hundred Twenty Four Only) along with interest. The relief so claimed was denied by the respondent vide their reply to the legal notice dated 10.04.2017.

13. It was submitted that the respondent company has miserably failed to complete and thereafter provide possession of the allotted flat to the complainants and as per clause 43 of application for booking of residential apartment, the possession of the flat was to be offered within 42 months from the date of approval of the building plan. It is further submitted that the building plans for the project were approved on 23.07.2013 by the Directorate of Town & Country Planning, Haryana Sector-18, Chandigarh. Thus, the respondent company was supposed to deliver the possession of the apartment latest by 23.01.2017 if we calculate this period from the date of approval of the building plan i.e., 23.07.2013.

14. It is the case of the complainants that the respondent failed miserably to execute the mutually agreed buyer's agreement and, on the contrary, has illegally asked for instalments. The respondent was already in receipt of Rs. 29,21,424/- of the total sale consideration and failed to abide by the

obligations/responsibilities towards the allotted flat and hence, the present complaint has been filed.

C. Relief sought by the complainants:

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

i. Direct the respondent to refund a sum of Rs. 29,21,424/- along with prescribed rate of interest from the day of giving respective amount till its realisation.

ii. Direct the respondent to pay a sum of Rs. 5,00,000/- as compensation for mental agony and a sum of Rs. 50,000/- as cost of litigation.

D. Reply by respondents:

The respondent by way of written reply made following submissions:

16. It was submitted that the complainants are real estate investors in the given project and that their calculations went wrong and hence, they didn't fulfil the contractual obligations. It was further submitted that the present complaint is not maintainable for the reason that the booking application form contains an arbitration clause in clause 54 of Schedule-I, which is reproduced as under:

> *"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".

16. It was submitted that the complainant, after checking the veracity of the project namely, 'The Corridors', Sector 67-A, Gurgaon had applied for allotment of an apartment by filling an application for provisional registration of residential apartment and the booking application form and agreed to be bound by the terms and conditions of the application for provisional registration of residential apartment and booking application form. It is pertinent to mention herein that the complainant undertook vide clause 'd' of the application for provisional registration of residential apartment to execute all documents/agreements and to accept all the terms and conditions contained therein and to pay all charges as applicable therein.

17. That based on the application for booking, the respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainant apartment bearing no. CD-B5-02-204 having tentative super area of 1540.13 sq. ft. for a total sale consideration of Rs.1,51,55,239.54/-.

18. It was further submitted that vide letter dated 12.12.2013 and 02.04.2014, the respondent sent 3 copies of the apartment buyer's agreement to the complainant. However, the complainant failed to return the signed copies of

the agreement despite reminders dated 28.05.2014 and 17.07.2014 by the respondent.

19. That vide payment request dated 14.04.2013, the respondent had raised the demand towards second instalment demand for net payable amount of Rs. 14,21,426/-. The respondent again made a payment request dated 18.03.2014 and raised the demand towards the third instalment for net payable amount of Rs. 17,48,828.10/-. However, the complainant again failed to pay the due instalment amount despite reminders dated 13.04.2014 and 04.05.2014 and final notice dated 29.08.2014.

20. That on account of non-fulfilment of the contractual obligations by the complainant despite several opportunities extended by the respondent, the allotment of the complainant was cancelled, and the earnest money was forfeited vide cancellation letter dated 17.11.2014 in accordance with clause 10 read with clause 12 of the booking application form and the complainant are now left with no right, claim, lien or interest whatsoever in respect of the said booking/allotment.

21. It was further submitted that construction at "The Corridors" group housing project at Sector 67A, Gurgaon on land area admeasuring 37.512 acres is complete. The construction of approx. 1356 apartments stands completed, out of which occupation certificate for 700 apartments in towers A6 to A10, B1 to B4, C3 to C7, EWS, convenient shopping, two level basement has already been granted on 31.05.2019 and the same are ready to move in for possession. Further, the grant of occupation certificate for balance number

of apartments that is cluster – A building number A-1 to A-5, cluster-B building number B-5 to B-8, cluster – C building number C-8 to C-11, community centre, EWS building no.2, convenient shopping -1 (at ground floor of Building No. A-1) convenient shopping-2 (at ground floor of building no. A-2) stands applied on 10.09.2019 and is expected to be granted soon. The alleged delay if any in getting OC for the project, is on account of reasons beyond the control of the respondent on account of time taken in grant of approvals, which form part of the conditions precedent to be satisfied before commencement of construction. Clause 13.3 and 13.6 of the apartment buyer agreement, specifically states that the completion and handover of possession of the project is subject to force majeure.

22. That the date of handing over of the possession has to be determined 'from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder', which in the present case would be the grant of the fire scheme approval on 27.11.2014. Thus, the period of 60 months from 27.11.2014 (including the 6 months grace period and 12 months extended delay period), will expire only on 27.11.2019. Therefore, the respondent has not delayed the handover of the possession and the present petition is liable to be dismissed for being pre-mature. It is infact, the complainant who delayed in payment of the demanded amount.

23. All other averments were denied in toto.

24. Copies of all the relevant documents have been filed and placed on 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:

25. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

26. 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

27. 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.

28. 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 Objections regarding the complainants being investors:

29. It is pleaded on behalf of respondent that complainants are investors and not consumers. So, they are not entitled to any protection under the Act and the complaint filed by them under section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are buyers and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon

the definition of term allottee under the Act, and the same is reproduced below for ready reference:

> *"Z(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold(whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."*

30. In view of above-mentioned definition of allottee as well as the terms and conditions of the flat buyer's agreement executed between the parties, it is crystal clear that the complainants are allottees as the subject unit allotted to them by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as **M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

F.II Objection regarding complaint not being maintainable due to presence of arbitration clause in the agreement between the parties:

31. The respondent submitted that the complaint is not maintainable for the reason that the booking application form which is also an agreement between the parties contains an arbitration clause (clause 54 of schedule-I) 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:

"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".

32. 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.

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

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

> *"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."*

34. 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."*

35. 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.

G. Entitlement of the complainants for refund:

G.I Direct the respondents to refund a sum of Rs. 29,21,424/- along with prescribed rate of interest from the day of giving respective amount till its realisation.

36. The complainants submitted that they booked a flat in the project named as "The Corridors Phase 2" by submitting an application form dated 22.03.2013. On 07.08.2013 an allotment letter was issued for the given unit. Subsequently, the unit of the complainant was cancelled vide letter dated 17.11.2014. However, the respondent vide letter dated 15.04.2015 offered to restore the unit of the complainant which was accepted by them. Thereafter, on 11.02.2017, the complainant sent a legal notice to the respondent asking for refund of the entire amount due to delay in handing possession. It is also pertinent to note that no BBA has been executed between the parties.

37. The due date of possession has been calculated from application form (as no BBA has been executed between the parties) wherein clause 43 specifies that **the possession of the said residence unit shall be offered 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 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.

38. 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 his right accruing after delay in possession. This is just to comment not 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.

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

40. Further, in the present case, it was submitted by the respondent promoters 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 in the present case observed that, the respondents have not kept the reasonable balance between his own rights and the rights of the complainants/allottees. The respondents have acted in a pre-determined and preordained manner. The respondents have acted in a highly discriminatory and arbitrary manner. The unit in question was booked by the complainants on 22.03.2013. The date of approval of building plan was 23.07.2013. It will lead to a logical conclusion that the respondents would have certainly started the construction of the project. On a bare reading of the clause 13.3 of the 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 promoters are 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 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 complainant.

41. 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, upto the dote when the possession was offered. However, keeping in view the status of the project, and the interest of other allottees, the authority was of the view that refund cannot be allowed at this stage. The developer was directed to handover the possession of the apartment by 30.06.2020 as per the registration certificate for the project."

42. 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 23.07.2013. It is pertinent to mention here that the developers applied for the provisional fire approval on 24.10.2013 (as contented by the respondents herein the matter of ***Civil Appeal no. 5785 of 2019 titled as 'IREO Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.***) i.e., 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 approval of the fire safety scheme took more than 18 months from the date of the building plan approval i.e., from 23.07.2013 to 27.11.2014. The builders failed to give any explanation for the inordinate delay in obtaining the fire NOC of the above, in complaints bearing nos. CR/4325/201 CR/3020/2020, CR/3361/2020, CR/5003/2020, CR/2549/2020 and CR/1091/2021, authority had struck down the ambiguous possession clause of the buyer agreement and calculated the due date of handing over possession from the date of approval of building plan.

43. The authority had gone through the possession clause of the agreement in the present matter. On a bare reading of the said clause of the agreement reproduced above, it becomes clear that the possession in the present case linked to the "fulfilment of the preconditions which is so vague and ambiguous in itself. Nowhere in the agreement it has been defined the 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 t flat in question and the promoters are aiming to extend this time peri indefinitely on one eventuality or the other. Moreover, the said clause is inclusive clause wherein the "fulfilment of the preconditions" has be 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 principal of natural justice when a certain glaring illegality or irregularity comes to t notice of the adjudicator, the adjudicator can take cognizance of the same a adjudicate upon it. The inclusion of such vague and ambiguous types of clause 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 t light of the above-mentioned reasons, the authority is of the view that the da 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. According in the present matter the due date of possession is calculated from the date approval of building plan i.e., 23.07.2013 which comes out to be 23.01.2017.

44. It is also pertinent to mention that the legal notice was sent by the complainants to the respondent on 11.02.2017 i.e., after the expiry of due date of possession. Therefore, the complainants are entitled to full refund as per provisions of the Act of 2016. Thus, keeping in view the fact that the allottees/complainants wish to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.

45. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after filing of application by them for return of the amount received by the promoter on failure of promoter to complete or unable to give

possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. The complainant-allottees have already wished to withdraw from the project and the allottee has become entitled his right under section 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as the promoter fails to comply or unable to give possession of the unit in accordance with the terms of agreement for sale. Accordingly, the promoter is liable to return the amount received by him from the allottees in respect of that unit with interest at the prescribed rate.

46. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** and was observed that:

> *25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed*

47. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale

under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as they wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

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

49. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 29,21,424/-with interest at the rate of 10.00% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

G.II Direct the respondent to pay a compensation for mental harassment and cost of litigation.

50. The complainants are claiming compensation in the above-mentioned relief. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority:

51. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondent/promoter is directed to refund the amount i.e., Rs. 29,21,424/- received by it from the complainants along with interest at the rate of 10.00% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount.

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

52. Complaint stands disposed of.

53. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.08.2022