BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**3242 of 2019**
Date of filing complaint	**02.08.2019**
First date of hearing	**11.10.2019**
Date of decision	**30.08.2022**

1. 2.	Rajiv Garg Manisha Sharad Upasani **Both R/o:** 61, Grange Road, 13-02 Beverly Hill, Singapore-249570	**Complainants**
	Versus	
	M/s Ireo Residencies Company Pvt. Ltd. **Regd. office:** C-4, Malviya Nagar, New Delhi-110017.	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Pawan Bhushan (Advocate)	Complainant
None	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. No.	Particulars	Details
1.	Name and location of the project	"Grand Hyatt Gurgaon Residencies" situated at Sector-58, Gurgaon.
2.	Nature of the project	Luxury Residential
3.	Project area	17.224 acres
4.	DTCP license no.	Not mentioned
5.	Name of licensee	Not mentioned
6.	RERA Registered/ not registered	**Not mentioned**
7.	Unit no.	T1-19-NS, 19th Floor, Tower 1 (page no. 55 of complaint)
8.	Unit area admeasuring	4625 sq. ft. (page no. 55 of complaint)
9.	Booking date	02.02.2013 (page no. 46 of complaint)
10.	Date of approval of building plan	03.07.2013 (annexure R-7 on page no. 65 of reply)
11.	Date of environment clearance	25.11.2013 (annexure R-8 on page no. 71 of reply)
12.	Date of residence purchase agreement	13.01.2014 (annexure C-4 on page no. 80 of complaint)
13.	Date of fire scheme approval	08.01.2015 (annexure R-9 on page no. 81 of reply)
14.	Due date of possession	03.07.2017 (calculated from the date of approval of building plans; inadvertently mentioned as 03.01.2017 in proceedings dated 30.08.2022) **Note:** Grace Period is not allowed.
15.	Possession clause	**14.3 Possession and Holding Charges** The company, proposes to offer **the possession of the said residence unit to the allottee within a period of 48 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)**
16.	Total sale consideration	Rs. 11,45,47,375/- (as per payment plan on page no. 79 of complaint)
17.	Amount paid by the complainant	Rs. 8,93,15,855/- (as per statement of account dated 23.07.2018 annexed on page no. 80 of complaint)
18.	Occupation certificate	Not obtained
19.	Offer of possession	Not offered

B. Facts of the complaint:

1. That the respondent launched the project in the name of "Grand Hyatt Gurgaon Residences" in 2012-2013 and invited the public at large to apply for luxury residential units. The brochure and residence purchase agreement had represented to the complainants that the Hyatt International Corporation had lent its brand name - Grand Hyatt to this project. the brochure also showed that an internationally acclaimed interior designer and architect were also part of the project. The existence of Hyatt as a contributor to the project was another reason for the confidence of the complainants in this project of luxury residences.
2. That the present complainants had applied for booking an independent unit admeasuring an approximate super area of 4625 sq. ft bearing unit no. GHGR TI 19 NS on 04.01.2013 and had received a booking confirmation on

02.02.2013 from the promoter company upon an initial first payment of Rs 1 Crore for the Unit. That a booking confirmation and acknowledgment of first payment letter dated 02.02.2013 was issued to the complainants.

3. That a residence purchase agreement dated 13.01.2014 was executed between the complainants and respondent with respect to Unit No. GHGR T1 - 19 - NS. In terms of clause 14.3 of the residence purchase agreement, the respondents were to deliver possession of the aforesaid unit within a period of 48 months from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder. Clause 14.3 provides as follows:

"Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said Residence-Unit to the Allottee within a period of 48 (Forty Eight) months from the date of approval of the 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 (One Hundred and Eighty) days ("Grace Period"), after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company."

4. That the due date of possession after taking into account the grace period comes out to be 03.01.2018.
5. That the complainant made timely payments perfectly in accordance with the payment plan provided in annexure - iv to the residence purchase agreement. In total, a sum of Rs. 8,93,15,855.17/- (Rupees eight crore ninety three lakhs fifteen thousand eight hundred and fifty five point one seven only) out of the total sale price of Rs. 11,45,47,375/- (Rupees eleven crores forty five lakhs forty seven thousand three hundred and seventy five only) has already been paid.
6. It is pertinent to note that the complainants herein along with certain other allottees in the same project had even written to the Board of Directors of the promoter company on 23.10.2017 expressing their deep disappointment with the progress of the project as well as the delay beyond the commitment period contemplated in the residence purchase agreement. All the allottees also specified that they had honoured their commitments of timely payments.
7. It was submitted that the respondent has failed to deliver possession of the unit to the complainants herein, in violation of the terms of the builder-buyer agreement. It is submitted that the date for giving possession has expired for the complainants herein. The dwelling units in the project are still at the stage of skeletal structures even after expiration of 6 and a half years of the launch of the project. the complainant has already paid up more than 75% of the price of the dwelling unit pursuant to the representations made by the respondent and thus, the present complaint.

C. Relief sought by the complainants:

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

i. Direct the respondents to refund the entire amount paid by the complainant along with interest at prescribed rate from the date of payment till the date of refund.

ii. Direct the respondent to pay the litigation cost.

D. Reply by respondents:

The respondents by way of written reply made following submissions:

10. The respondent in its reply has submitted that the complainant is not an allottee in the given project but an investor and that the present complaint is not mainatainable.

11. That the complainants, after checking the veracity of the project namely, 'Grand Hyatt, Gurugram had applied for allotment of an apartment vide their booking application form. The complainants agreed to be bound by the terms and conditions of the booking application form.

12. That based on the said application, the respondent allotted to the complainants unit no. T1-19-NS having tentative super area of 4625 sq.ft for a total sale consideration of Rs. 11,72,48,375/-. It is submitted that the complainants signed and executed the residence purchase agreement on 13.01.2014 and the complainants agreed to be bound by the terms contained therein. It is pertinent to mention herein that when the complainants had booked the unit with the respondent, the Real Estate (Regulation and Development) Act, 2016 was not in force and the provisions of the same cannot be applied retrospectively.

13. That the respondent raised payment demands from the complainants in accordance with the mutually agreed terms and conditions of the allotment as well as of the payment plan and the complainants made the payment of certain instalments amount of time and committed default with respect to certain instalments. It is submitted that the respondent had raised the payment demand dated 15.03.2013 towards the first instalment amount for the net payable amount of Rs. 1,25,03,941/-. However, the due amount was remitted by the complainants only after reminders dated 31.05.2013 and 01.07.2013 were issued by the respondent to the complainants.

14. That vide payment request dated 22.11.2013, the respondent had raised the second instalment demand for the net payable amount of Rs. 97,08,480/-. However, the complainants remitted the due amount only after a reminder dated 09.04.2014 was issued by the respondent.

15. That the complainants have made the part-payment out of the total sale consideration and are bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, stamp duty, service tax as well as other charges payable along with it at the applicable stage.

16. That the possession of the unit is supposed to be offered to the complainants in accordance with the agreed terms and conditions of the Buyer's Agreement. It is submitted that Clause 14.3 of the buyer's agreement and clause 56 of the schedule – I of the booking application form states that

'....., the Company proposes to offer the possession of the said residence-unit to the allottee within a period of 48 months from the date of approval of the Building Plans and/or fulfillment of the preconditions imposed thereunder (Commitment Period). The allottee further agrees and understands that the company shall be additionally be entitled to a period of 180 days (Grace Period) after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the company".

Furthermore, the complainants have agreed for an extended delay period of 12 months from the date of expiry of the grace period as per Clause 14.4 of the residence purchase agreement.

17. That from the aforesaid terms of the agreement, it is evident that the time was to be computed from the date of receipt of all requisite approvals. Even otherwise construction can't be raised in the absence of the necessary approvals. It is pertinent to mention here that it has been specified in sub-clause (iv) of clause 17 of the approval of building plan dated 03.07.2013 of the said project that the clearance issued by the Ministry of Environment and Forest, Government of India has to be obtained before starting the construction of the project. It is submitted that the Environment clearance for construction of the said project was granted on 25.11.2013. Furthermore, in clause 39 of Part-A of the Environment Clearance dated 25.11.2013 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. That it is submitted that the last of the statutory approvals which forms a part of the pre-conditions was the Fire Scheme Approval which was obtained on 08.01.2015 and that the time period for offering the possession, according to the agreed terms of the

Buyer's Agreement, will expired only on 08.07.2020. However, the complainants have filed the present complaint prematurely prior to the due date of possession and no cause of action had accrued till date. The complainants are trying to mislead this Hon'ble 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.

18. All other averments were denied in toto.

19. 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:

20. The plea of the respondents 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

21. 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

22. 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.*

23. 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 respondents:

F.I Objections regarding the complainants being investors:

24. It is pleaded on behalf of respondents 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 respondents 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 the promoter 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."*

25. 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 respondents/promoters. 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 an investor 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:

26. 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:

> *"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".

27. 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.

28. 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."*

29. 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."*

30. 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. 39,18,275/- paid by the complainant along with interest at prescribed rate from the date of payment till the date of refund.

31. That the complainant booked a luxury residential in the project of the respondent named as "Grand Hyatt Gurgaon" situated at sector 58, Gurgaon, Haryana for a total sale consideration of Rs. 11,45,47,375/-. The residence purchase agreement was executed between the parties on 13.01.2014.

32. The respondent promoter vide clause 14.3 of the buyer's agreement executed inter se parties, had proposed to handover the possession of the subject apartment within a period of 48 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 180 days grace period for unforeseen delay beyond the control of the company i.e., the respondents/promoters. It was contended on behalf of the respondent that the due date for delivery of possession of the allotted unit

should be calculated from the date of fire approval i.e., 08.01.2015 and in this regard, the counsel for the respondent placed reliance on case titled as ***Ireo Grace Realtech Pvt. Ltd. Versus Abhishek Khanna and ors. passed by the Hon'ble Supreme Court of India in Civil Appeal no. 5785 of 2019***.

33. 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.

34. 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.

35. 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.

36. 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 08.01.2015, 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 02.02.2013. The date of approval of building plan was 03.07.2013. 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 14.3 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.

37. 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."*

38. On 03.07.2013, 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 03.10.2013. But it is pertinent to mention over here that the developers applied for the provisional fire approval on 19.11.2014 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 03.07.2013 to 08.01.2015. 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.

39. 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 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 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. Accordingly, in the present matter the due date of possession is calculated from the date approval of building plan i.e., 03.07.2013 which comes out to be 03.07.2017.

40. Keeping in view the fact that the allottee complainant wishes 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.

41. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs.***

Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021

> *"" .... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."*

42. 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 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

43. 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 allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

44. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

45. The authority hereby directs the promoter to return the amount received by him i.e., **Rs. 8,93,15,855/-** with interest at the rate of 10% (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 legal costs incurred by the complainants and such reasonable and appropriate compensation.

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

H. Directions of the Authority:

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

i. The respondent/promoter are directed to refund the amount i.e. **Rs. 8,93,15,855/-** received by them 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.

iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount

along with interest thereon to the complainants, and even if, any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainants.

48. Complaint stands disposed off.

49. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.08.2022