BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**5106 of 2021**
Date of filing complaint:	**14.01.2022**
First date of hearing:	**11.03.2022**
Date of decision :	**07.09.2022**

1. Babul Kumar Ganguly 2. Barnali Ganguly **Both R/o:** Essel Tower, Amber Court 3, Flat no. 501, MG Road, Gurugram, Haryana-122002	**Complainants**
Versus	
M/s Ireo Victory Valley Pvt. Ltd. **Registered Office:** Ireo Campus, Archview Drive, Ireo City, Golf Course Road, Gurugram, Haryana-122101	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Shri Rajiv Khare (Advocate)	Complainants
Shri M.K. Dang (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	"Ireo Victory Valley" at Golf Course Extension Road, sector 67, Gurgaon, Haryana
2.	Nature of the project	Group Housing Colony
3.	Project area	24.6125 acres
4.	DTCP license no.	244 of 2007 issued on 26.10.2007 valid upto 25.10.2017
5.	Name of licensee	KSS Properties Pvt. Ltd
6.	RERA Registered/ not registered	**Not registered**
7.	Apartment no.	0601, 6th Floor, Tower B (annexure 1 on page no. 31 of complaint)
8.	Unit area admeasuring	2385 sq. ft. (annexure 1 on page no. 31 of complaint)
9.	Date of allotment letter	09.08.2010 [annexure R3 on page no. 43 of complaint]
10.	Date of approval of building plan	29.11.2010 [annexure R-8 on page no. 50 of reply]
11.	Date of environment clearance	25.11.2010 [annexure R-9 on page no. 53 of reply]

12.	Date of fire scheme approval	28.10.2013 [annexure R-10 on page no. 57 of reply]
13.	Date of builder buyer agreement	25.09.2010 [annexure 1 on page no. 28 of complaint]
14.	Possession clause	**13. 3 POSSESSIONS** "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 the allottee not being in default under any part of this agreement including but not limited to timely payment of the total sale consideration, 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 handover the possession of the said apartment to the Allottee **within a period of 36 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 in obtaining the Occupation Certificate etc., from the DTCP under the Act, in respect of the IREO- Victory Valley Project." **(emphasis supplied)**
15.	Due date of possession	29.11.2013 [calculated from the date of approval of building plan]
16.	Total sale consideration	Rs. 1,60,93,076/- [as per payment plan on page no. 59 of complaint]

17.	Amount paid by the complainant	Rs. 1,58,81,102/- [page no. 62 of complaint]
18.	Occupation certificate	28.09.2017 [annexure R-12 on page no. 58 of reply]
19.	Offer of possession	14.11.2017 [annexure R-13 on page no. 60 of reply]
20.	Conveyance deed	07.08.2018 [page no. 66 of complaint]
21.	Grace period utilization	Grace period of 180 days as mentioned in clause 13.3 of the apartment buyer's agreement is not allowed in the present case.

B. Facts of the complaint:

3. That the respondent, a real estate developer, offered for sale to the complainants a residential unit bearing no. B0601 on 6th Floor, admeasuring 2385 sq. ft. (221.56 sq. mt.) in Tower B, in his the then proposed group housing colony, IREO victory valley, located at sector 37C, Gurgaon, Haryana, for a total sale consideration of Rs. 1,60,93,076/- only, excluding applicable taxes, on several false representations.

4. That the complainants booked the said property under construction linked plan and paid booking amount of Rs. 14,31,000/- on 27.07.2010. The complainants were shown a brochure indicating the area of flat booked by them as 2385 sq ft; no carpet area was mentioned which made an ordinary buyer believe that the indicated area is carpet area.

5. That the respondent raised a demand for another sum of Rs. 13,57,912/- and the same was paid by the complainants on 10.09.2010.

6. That the respondent, after having collected 20% of BSP along with applicable taxes, entered into an apartment buyer's agreement – an unfair contract - with the complainants and former's associates on 20.09.2010. That it is pertinent to mention that the agreement was completely one sided, designed to promote and protect the respondent's unlawful interests while throwing the allottees' rights and interests to the wind.

7. The para 13.3 of agreement stated, to the utter surprise of the complainants, "the company proposes to handover the possession of said allotment to the allottees within a period of 36 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder. 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 the unforeseen delays in obtaining occupation certificate etc. from the DTCP under the Act in respect of IREO Victory Valley Project." That the respondent sent a demand note on account of 'commencement of construction' that fell due for payment on 24.12.2010. This demand confirms that the respondent had received all the requisite approvals and met all the preconditions imposed thereunder. Hence the date of handing over

possession is to be reckoned 3 years and 180 days from 24.12.2010 i.e. on 23 June, 2014.

8. That the respondent issued possession letter on 13.04.2018 which makes it crystal clear that handing over of possession was delayed by 3 years 9 months and 21 days which translates into delay penalty compensation of Rs. 53,28,338/- till 13.04.2018. But, the respondent credited a meagre sum of Rs. 1,17,620/- only to complainant's account on account of delayed possession compensation.

9. That the respondent is liable to justify the figure of 2385 sq. ft. for super area, or refund along with accrued interest, the amount of Rs. 30,05,100/- or any other appropriate amount, along with applicable taxes, PLC, EDC+IDC, IFMS etc., collected against fictitious super area. He has utilized these usurped sums as interest free sum.

10. That the respondent charged EDC/IDC at an inflated rate amounting to Rs. 8,44,575/- and refunded the excess amount of Rs 4,12,079/- only on 14.11.2017 after having utilized the unlawfully collected sum for over of 6 ¼ years.

11. That the respondent unlawfully charged on 14.12.2017, Rs. 24,255/- against imaginary 'infra augmentation charge' and Rs. 1,26,023/-against imaginary 'applicable carrying cost' from the

unsuspecting complainants. The respondent also arbitrarily collected Rs. 20,248/- towards imaginary interest charges.

12. That the respondent received occupation certificate on 28.09.2017 for that part of project which houses tower 'B' in which property of the complainants is situated.

13. That the respondent collected stamp duty from the complainants on 14.04.2018 but got the sale deed registered only on 21.08.2018, after having used the money, free of cost, for 4 months. The truth is that the complainants were informed of registration of sale deed only 01.11.2021 which proves that the fact of registration of sale deed came to their notice on 01.11.2021 only.

14. That the respondent has violated terms of the agreement in respect of handing over possession of the booked apartment and is also in violation of provisions of the Act of 2016. Thus, the complainant have approached this Authority seeking various reliefs.

C. Relief sought by the complainant:

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

i. Direct the respondent to pay delayed possession charges at prescribed rate of interest to the complainant from due date of possession till actual date of possession.

ii. Direct the respondent to refund the unlawfully collected infra-augmentation charge and applicable carrying cost along with accrued interest at prescribed rate of interest.

iii. Direct the respondent to refund car parking charges and non-refundable club deposit along with accrued interest at prescribed rate of interest.

iv. Direct the respondent to refund the proportionate excess basic price along with applicable taxes, EDC/IDC, PLC, IFMS and accrued interest at prescribed rate of interest.

v. Direct the respondent to refund all unexplained interest of Rs. 20,348/- charged to complainant along with accrued interest.

vi. Direct the respondent to provide the copies of EC, LOI, license, BRIII, building plans and LC IV A relevant to license under which the suit property is built.

vii. Direct the respondent to pay the interest on stamp duty of Rs. 8,81,500/- for keeping it with him for 4 months.

viii. Direct the respondent to pay the complainant Rs. 50,000/- towards legal expenses.

D. Reply by respondent:

The respondent by way of reply made the following submissions:

16. That the complainants are not allottees but investors in the given project and that the present complaint is not maintainable.

17. That the respondent is a reputed real estate company having immense goodwill.

18. That the complainants, after checking the veracity of the project namely, 'Ireo- Victory Valley', Gurugram had applied for allotment

of an apartment vide the booking application form dated 27.07.2010.

19. That based on the said application, the respondent vide its allotment offer letter dated 09.08.2010 allotted to the complainants an apartment bearing no. B0601, tower no. B, having tentative super area of 2385 sq.ft. Accordingly, an apartment buyer's agreement was executed between the parties to the complaint on 20.09.2010 for total sale consideration of Rs.1,60,93,076.20. However, it is submitted that the total sale consideration amount was exclusive of the registration charges, stamp duty charges, service tax and other charges which were to be paid by the complainants at the applicable stage. 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.

20. That the respondent raised payment demands from the complainants strictly as per the terms of the allotment and mutually agreed payment plan. However, the complainants defaulted in making timely payments towards some of the instalment demands. It is submitted that respondent had raised the payment demand towards the eighth instalment vide payment request dated 23.04.2013. However, the due amount was credited

by the complainants only after reminder dated 19.05.2013 was issued by the respondent.

21. That vide payment request letter dated 26.09.2013, respondent raised the payment demand towards the ninth instalment for the net payable amount of Rs. 11,40,139.83. However, the same was paid by the complainants only after reminder dated 22.10.2013 was sent by the respondent.

22. That the possession of the unit was 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 13.3 of the buyer's agreement and clause 35 of schedule-1 of the Booking application form states that *'...subject to the allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said apartment to the allottee within a period of 36 months from the date of approval of the Building Plans and/or fulfilment of the preconditions imposed thereunder (Commitment Period). The allottee further agrees and understands that the company shall be additionally be entitled to a period of 180 days (Grace Period)...".*. Furthermore, the complainants had further agreed for an extended delay period of 12 months from the date of expiry of the grace period.

23. That from the aforesaid terms of the agreement, it is evident that time was to be computed from the date of receipt of all requisite approvals. Even otherwise, the construction cannot be raised in the absence of necessary approvals. It is pertinent to mention herein that it has been specified in sub-clause (v) of clause 17 of the approval of building plan dated 29.10.2010 that the clearance issued by Ministry of Environment in forest, Government of India has to be obtained before starting the construction of the project. The environment clearance for the construction of the project was granted on 25.11.2010. Furthermore, in Clause (v) of part B of the Environment Clearance dated 25.10.2010, it was stated that the approval from fire department was necessary prior to the construction of the project.

24. That the last of the statutory approvals which forms a part of the preconditions was the fire scheme approval which was granted by the concerned authorities on 28.10.2013 and the time period for offering the possession accordingly to the agreed terms of the agreement expired only on 28.04.2018. The respondent completed the construction of the tower in question. The respondent received the occupation certificate on 28.09.2017 and offered the possession of the unit to the complainants vide notice of possession dated 14.11.2017 and intimated them to make the payment towards balance amount of Rs.17,84,974/-.

25. That the complainants after making complete payment have been put in possession of the said apartment vide possession letter dated 13.04.2018. The conveyance deed and deed of apartment were registered on 21.08.2018. The complainants have conducted their own investigations and were provided with all clarifications and information regarding the project. The complainants had even acknowledged in the conveyance deed that they have taken the possession of the apartment after having inspected and after being fully satisfied that they would not raise any objection or claim or any reason and the same would stand waived.

26. Copies of all relevant documents have been filed and placed on record. Their authenticity id not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

27. 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

28. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the

present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has completed territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

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

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

F. Findings on the objections raised by the respondent:

F.1 Objection regarding complainants being investors

31. 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."*

32. 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.

G. Findings on relief sought by complainants:

G.1. Direct the respondent to pay delayed possession charges at prescribed rate of interest to the complainants from due date of possession till actual date of possession.

33. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

> ***Section 18: - Return of amount and compensation***
>
> *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.*

34. It is relevant to mention that builder buyer agreement was executed between the parties on 25.09.2010. Thus, the due date of possession has been ascertained from clause 13.3 of the agreement which reads as under:

".....the Company proposes to handover the possession of the said apartment to the Allottee ***within a period of 36 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder (Commitment Period)"***

35. The respondent promoter vide clause 13.3 of the buyer's agreement executed inter se parties, had proposed to handover the possession of the subject apartment within a period of 36 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 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.***

36. 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.

37. 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.

38. 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.

39. 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 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 date of approval of building plan was 29.11.2010. 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.

40. 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."

41. On 29.11.2010, 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 29.02.2011. But it is pertinent to mention over here that the developers applied for the provisional fire approval on

02.11.2011 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 23 months from the date of the building plan approval i.e., from 02.11.2011 to 28.10.2013. 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.

42. 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., 29.11.2010 which comes out to be 29.11.2013. Clause 13.3 of the agreement also stipulates for grace period of 180 days after the expiry of the said commitment period to allow for unforeseen delays in obtaining the occupation certificate etc. However, the same has not been allowed as the occupation certificate was obtained only on 28.09.2017.

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

44. 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.

45. 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 i.e., 07.09.2022 is @ 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.

46. 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;"*

Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

47. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 13.3 of the agreement, the respondent is liable to hand over the possession of the apartment within a period of thirty-six months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder. It is pertinent to mention that a lot of sanctions are required when it comes to construction of a building and hence, the requirement of fulfilment of all these preconditions for calculation of due date of possession is a vague concept. Hence, the due date of possession has been calculated from the date of approval of building plan i.e., 29.11.2013. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the agreement. It is the failure on part

of the promoter to fulfil its obligations and responsibilities as per to hand over the possession within the stipulated period.

48. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the respondent had applied for the occupation certificate and same has been received from the competent authority on 28.09.2017. The respondent has offered the possession of the subject unit on 14.11.2017. Therefore, in the interest of natural justice, the complainants should be given two months' time from the date of offer of possession. This two month of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 29.11.2013 till offer of possession i.e.,14.11.2017 plus two months i.e., 14.01.2018.

49. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to delay possession at prescribed rate of interest i.e., 10% p.a. w.e.f. due date of possession i.e. 29.11.2013 till offer of possession (14.11.2017) plus two months i.e. 14.01.2018 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act of 2016.

G.2. Direct the respondent to refund the unlawfully collected infra-augmentation charge and applicable carrying cost along with accrued interest at prescribed rate of interest.

50. An amount of Rs. 24,255/-has been charged on account of Infrastructure Augmentation Charges (IAC). Similarly, the respondent also charged Rs. 1,26,023/- under the head imaginary applicable carrying cost and as detailed in the demand raised at the time of notice of possession (annexure A5). The version of respondent is that the amount was demanded as per terms and conditions of allotment and the complainants did not raise any objection to the same while execution apartment buyer agreement on 20.09.2010. Even otherwise as per clause 8.1 of the buyer's agreement, the complainants agreed to pay statutory taxes and other dues. So, now they cannot plead that the charges raised under the head IAC and IACC are illegal and are not liable to pay the same. Even otherwise infrastructure augmentation charges are payable by a developer for additional FAR used in relation to the area allowed earlier.

G.3. Direct the respondent to refund car parking charges and non-refundable club deposit along with accrued interest at prescribed rate of interest.

51. While executing buyer's agreement, the complainants agreed to pay for car parking charges as Rs. 7,00,000/- and that amount was

demanded and paid by them. So, the same cannot be set to be illegal or refundable to the complainants. A reference in this regard may be made to clause 3.2.3 of the buyer's agreement providing for Rs. 7,00,000/- for two numbers of car parking. Secondly, the respondent also raised a demand of Rs. 3,95,000/- as non-refundable victory valley club deposit. The complainants had already paid a sum of Rs. 1,00,000/-. So, a further demand for Rs. 2,95,000/- was raised along with notice of possession dated 14.11.2017. There is clause 8.5 of buyer's agreement wherein the respondent agreed to construct club/recreational facility at its own cost and the allottees' right use such facility on payment of the club membership charges and routine club usage charges. Thus, in such a situation, the demand raised in this regard is valid. This issue also rose in case of ***Varun Gupta vs. Emaar Mgf Land Ltd. bearing complaint no. CR/4031/2019 decided on 12.08.2021*** by the Authority wherein it was held that demand of money regarding club charges and its membership from the allottees can only be raised after completion of the club and not before that. Moreover, the respondent agreed to construct at its own cost the club in the project and it can raise demand with regard to its membership charges only when recreational facility is operational and not before that. So, the respondent builder is directed to refund that amount to the complainant.

G.4. Direct the respondent to provide the copies of EC, LOI, license, BRIII, building plans and LC IV A relevant to license under which the suit property is built.

52. The builder as per section 11(3) of the Act of 2016, is responsible to make available to the allottees these all documents and hence, the respondent is directed to provide all the documents as requested by the complainants.

G.5. Direct the respondent to refund the proportionate excess basic price along with applicable taxes, EDC/IDC, PLC, IFMS and accrued interest at prescribed rate of interest.

G.6. Direct the respondent to refund all unexplained interest of Rs. 20,348/- charged to complainant along with accrued interest.

G.7. Direct the respondent to pay the interest on stamp duty of Rs. 8,81,500/- for keeping it with him for 4 months.

53. The above mentioned reliefs, G.5, G.6 and G.7., sought by the complainants were not pressed during the arguments. The authority is of the view that the complainants do not intend to pursue the above-mentioned reliefs. Hence, the Authority is not returning any findings w.r.t to the present relief.

G.8. Legal expenses and Compensation:

54. The complainant is claiming compensation under the present relief. The Authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate

entitlement/rights which the allottee(s) can claim. For claiming compensation under sections 12,14,18 and Section 19 of the Act, the complainant may file a separate complaint before the adjudicating officer under Section 31 read with Section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority:

55. 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 is directed to pay the interest at the prescribed rate i.e., 10.00% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e., 29.11.2013 till offer of possession i.e., 14.11.2017 plus two months i.e.. 14.01.2018. If any payment for the delay in possession, has been paid or credited in the account of allottee, it shall be adjusted in the amount of delayed possession charges to be paid as per above directions.

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% 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.

56. Complaint stands disposed of.

57. File be consigned to the Registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 07.09.2022