BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**2293 of 2019**
Date of filing complaint	**21.06.2019**
First date of hearing	**18.09.2019**
Date of decision	**06.10.2022**

	Ramesh Kumar Wadhwa **R/o:** K-5/11, DLF Phase-1, Gurugram, Haryana-122001	**Complainant**
	Versus	
	1. M/s Ireo Pvt. Ltd. **Regd. Office:** A-11, First Floor, Neeti Bagh, New Delhi-110049 2. Ireo Pvt. Ltd. Ireo City Central **Regd. Office:** Ireo Campus, Archview Drive, Ireo City, Golf Course Extension Road, Gurugram, Haryana-122101	**Respondents**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Sh. Sagar Chawla (Advocate)	Complainant
Sh. 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 of the project	"Ireo City Central", Sector 59, Gurgaon
2.	Project area	3.9375 acres
3.	Nature of the project	Commercial Colony
4.	DTCP license no. and validity status	56 of 2010 dated 31.07.2010 valid upto 30.07.2020
5.	Name of licensee	SU Estates Pvt. Ltd.
6.	RERA Registered/ not registered	102 of 2017 dated 24.08.2017
7.	RERA registration valid up to	30.06.2020
8.	Allotment Letter	16.03.2013 (Page 39 of complaint)
9.	Unit no.	R0705, 7th Floor, R tower (Page 51 of complaint)

10.	Unit area admeasuring (super area)	918 sq. ft. (Page 51 of complaint)
11.	Date of execution of Buyer's Agreement	16.09.2013 (Page 46 of complaint)
12.	Possession clause	**13.3 Possession and Holding Charges** Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having 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 Rental Pool Serviced Apartment to the Allottee within a period of **42 months from the date of approval of the Building Plans and/or fulfillment of the preconditions imposed there under ("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.
13.	Environmental Clearance	12.12.2013 (Annexure R19 on page 89 of reply)
14.	Approval of building plans	05.09.2013 (Annexure R18 on page 86 of reply)
15.	Consent to establish from pollution angle	07.02.2014 (Annexure R20 on page 95 of reply)
16.	Due date of possession	05.03.2017

		(Calculated as 42 months from date of approval of building plan i.e., 05.09.2013 as held by the Authority in various cases)
17.	Total sale consideration	Rs. 1,38,14,885/- (SOA at annexure C/4 on page 138 of complaint)
18.	Amount paid by the complainants	Rs. 1,07,44,416/- (SOA at annexure C/4 on page 138 of complaint)
19.	Cancellation Letter	23.01.2017 (Annexure R21 on page 98 of reply)
20.	Restoration of unit	Vide email dated 01.02.2017 (Page 142 of complaint)
21.	Occupation certificate /Completion certificate	Not obtained
22.	Offer of Possession	Not offered

B. Facts of the complaint:

3. That the respondent launched a commercial colony in Sector 59, revenue estate of village Ullawas and Behrampur. Tehsil Sohna, District Gurgaon, Haryana under the name of Ireo City Central'. The representatives of the respondent had approached the complainant showing brochures and other advertisements luring the complainant to purchase a property in the project.

4. That the complainant booked a furnished service apartment no. R0705, type studio, 7th floor, R tower having a super area of 918 sq.ft. with the exclusive right to use 1 parking space at basic sale price of Rs. 14,044.66/- per sq. ft of super area. The respondent charged development charges at the rate of Rs. 459.57/- per sq. ft. of super area.

The respondent further charged a one-time payment of Rs. 5,00,000/- under the garb of initial working capital deposit.

5. That the complainant accordingly paid the booking advance of Rs. 13,00,000/- as per demand of the respondent which was duly received and acknowledged by the respondent under application dated 20.01.2012. Besides the booking amount, the respondent also charged a sum of Rs. 56,400/- from the complainant being the commission of their agents against which no formal receipts was ever issued by the respondent.

6. That the respondent at the time of booking the rental pool serviced apartment in the project had assured the complainant that they have procured all the necessary permissions, licenses and approvals, and further committed that under all circumstances, they would be delivering the possession of the residential plot within 42 months from 20.01.2012.

7. The total cost of the rental pool serviced apartment which has been purchased by the complainant herein is Rs. 1,38,17,125/ inclusive of (i) basic sale price, (ii) development charges and (iii) initial working capital deposit.

8. That as per the statement of accounts shared by the respondent, the complainant has paid more than the total amount due to the respondent. He has paid a total of Rs. 1,07,44,416/- paid against the demanded amount of Rs. 96,15,049/-.

9. That the complainant with the sole objective to construct his own house at the residential plot remained in touch with the respondent and the officials of the respondent kept delaying the matter on one pretext or the

other. The representatives of the respondent also informed the complainant that the project is awaiting certain approvals from the government, thereby, causing delay in delivery of possession of the rental pool serviced apartment.

10. That the respondents have raised various demands from the complainant, as mentioned herein before, on their own whims and fancies and not in accordance with the time linked plan mentioned in the application. The complainant is appalled by the fact that the respondent is demanding 20% interest of the delayed payments, if any.

11. That upon non-completion of the project on time, the complainant made numerous requests to the respondent with respect to the procurement of various approvals/documents/ licenses of the project. It is further submitted that the complainant never received a clear answer from the respondent and all the responses received from the respondent were vague and deflective in nature.

12. That at the time of execution of the application of the rental pool serviced apartment, the complainant had objected towards the highly tilted and one-sided clauses of the application, however, the respondent turned down the concerns of the complainant and curtly informed that the terms and conditions in the application are standard clauses and thus, no changes can be made.

13. That since the respondent was in a dominant position, they fabricated the application according to their whims and fancies. Few of the clauses of the Buyer Agreement, discussed hereinafter, would show the totally unfair and abusive terms imposed on the buyers:

(a) Clause 7.4 envisages that in case of a delay or default in making payment of the instalments by the complainant, the complainant shall be liable to pay interest at the rate of 20% per annum from the date that it is due for payment till the date of actual payment thereof. The respondent further arbitrarily has given itself the right to cancel the allotment and terminate the agreement us the due instalment is beyond a period of 90 days from the due date.

(b) Another example of the one sided agreement and unreasonable clauses of the respondent's application form is clause 13 of the application which reads as follows:

> *"...the Allottee agrees that if it fails, ignores or neglects to take the possession of the said Rental Pool Service Apartment in accordance with the Notice of Possession sent by the Company, the Allottee shall be liable to pay additional charges equivalent to Rs. 20/- (Rupees Twenty only) per sq.ft. on the Super Area per month of the said Rental Pool Service Serviced Apartment ("Holding Charges"). The Holding charges shall be in addition to the standard maintenance cost of the idle Rental Pool Service Apartment as determined by the Company and not related to any other charges/consideration as provided in this Agreement. In addition, the Company may at its sole discretion, although not obliged, at its sole discretion cancel the allotment at any time after the expiry of 120 days from the date of the Notice of Possession in case the Allottee fails to take possession of the said Rental Pool Serviced Apartment."*

(c) The respondent has unilaterally reserved the sole discretion to decide the fallout of their own default in timely delivering of the possession of the rental pool service apartment. The respondent has inserted a non-specific draconian force majeure clause to protect itself in all circumstances and that too after taking advantage of 180 days grace period;

(d) The manner in which the respondent exercised arbitrary power is further seen from clause 7, which stipulates that the purchaser has mandatorily to pay interest @ 20% simple interest per annum on the delayed payment, while the respondent arbitrarily reserves to themselves the sole discretion to even terminate the agreement if the payment is delayed. However, at the same time whenever respondents are in breach/default, it has absolved itself from payment of any interest whatsoever and is offering a meagre rental pool service apartment Rs. 20/- per sq. yard of the plot area per month for the entire period of such delay. The buyer agreement further reflects the abuse on part of the respondent making timely payment as the essence of the allotment. However, by tactfully creating for themselves the power as reflected under buyer agreement, on a single minor default on the part of the complainant, the respondent would cancel/ terminate the allotment.

(e) The manner in which the arbitrary power has been further exercised by the respondent is seen from various clauses of the buyer agreement which the respondent in its sole discretion reserves to itself the right to modify/charge the layout of the building plan, the location, area of the rental pool service apartment and the same is made binding on the purchaser. Similarly, it is evident from this clause how the respondent has stifled/silenced the voice of the buyers, by reserving the right that various crucial decisions which have serious impact on the buyers' right are to be taken at the "Sole Discretion" of the developer respondent.

14. That the respondent has chosen to ignore the requests made by the complainant and have not even bothered to acknowledge or respond to

the requests. The respondent, in utter disregard of their responsibilities, have left the complainant in lurch and the complainant has been forced to chase the respondent for seeking possession of rental pool serviced apartment. Thus, the complainant has no other option but to seek justice from this hon'ble authority and hence the present complaint petition.

C. Relief sought by the complainant:

15. The complainant has 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 not give effect to unlawful clauses incorporated in the buyer's agreement.

D. Reply by respondents:

The respondents by way of written reply made following submissions:

16. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The buyer's agreement was executed between the complainant and the respondent prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

17. That this authority does not have the jurisdiction to try and decide the present complaint. That the complaint is not maintainable as the matter is to be referred to arbitration as per the Arbitration and Conciliation Act, 1996 in view of the fact that buyer's agreement, contains an arbitration clause which refers to the dispute resolution mechanism to be adopted

by the parties in the event of any dispute i.e., clause 34 of the buyer's agreement.

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

- That the complainant, after checking the veracity of the project namely, 'Ireo City Central', Sector 59, Gurugram had applied for allotment of an apartment vide his booking application form.
- That based on the said application, the respondent vide its allotment offer letter dated 16.03.2013 allotted to the complainant apartment no. R0705 having tentative super area of 918 sq.ft for a total sale consideration of Rs 1,38,17,125/-. Accordingly, the buyer's agreement was executed between the parties to the complaint on 16.09.2013.
- That the respondent raised payment demands from the complainant in accordance with the agreed terms and conditions of the allotment as well as of the payment plan. The complainant made payment of some of the instalments on time and then started committing defaults. That the respondent had raised the fourth instalment demand on 15.04.2015 for the net payable amount of Rs 13,29,006. However, the complainant failed to remit the demanded amount despite reminders dated 13.05.2013, 08.06.2015 and final notice dated 03.07.2015 and the same was adjusted in the next instalment demand as arrears.

- That the respondent had raised the fifth instalment demand on 20.11.2015 for the net payable amount of Rs. 29,27,114/-. However, the complainant again failed to remit the demanded amount despite reminders dated 19.01.2016 & 10.02.2016 and the same was adjusted in the next instalment demand as arrears.
- That vide payment demand dated 28.12.2015, the respondent raised the payment demand towards the sixth instalment for net payable amount of Rs. 42,64,348/-. However, the complainant failed to adhere to his obligation in making payment towards the demanded amount despite reminders dated 25.01.2016 & 18.02.2016 and the same was adjusted in the next instalment demand as arrears.
- That vide payment demand dated 24.08.2016, the respondent raised the payment demand towards the seventh instalment for net payable amount of Rs. 56,03,503. However, the complainant again failed to remit the demanded amount despite reminders dated 19.09.2016 & 13.10.2016 and final notice dated 07.11.2016.
- That the possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the buyer's agreement. As per clause 13.3 of the buyer's agreement the possession of the booked unit was to be handed over within a period of 42 months from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder.
- 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 has been specified in

sub-clause (xv) of clause 16 of the building plan dated 05.09.2013 of the said project that the clearance issued by the Ministry of Environment and Forest, Government of India has to be obtained before starting the construction of the project. The environment clearance for construction of the said project was granted on 12.12.2013. Furthermore, in clause 1 of part-A of the environment clearance dated 12.12.2013 it was stated that 'consent to establish' was to be obtained before the start of any construction work at site. The consent to establish was granted on 07.02.2014 by the concerned authorities. Therefore, the pre-condition of obtaining all the requisite approvals were fulfilled only on 07.02.2014.

- That in terms of the buyer's agreement the proposed time for handing over of possession has to be computed from 07.02.2014. Moreover, as per clause 13.5 of the buyer's agreement, 'extended delay period' of 12 months from the end of grace period is also required to be granted to the respondent. The due date to handover the possession was to elapse on 07.02.2019. However, it is submitted that the said due period was subject to the occurrence of the force majeure conditions and the complainant complying with the terms of the allotment. It is submitted that the complainant had admitted and acknowledged in clause 13.6 of the buyer's agreement that in case the completion of the apartment is delayed due to the force majeure then the commitment period and/or the grace period and/or the extended delay period shall stand extended automatically to the extent of the delay caused under the force majeure conditions and that the complainant shall not be entitled to any compensation whatsoever.

- 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 deposited by the complainant along with other charges were forfeited vide cancellation letter dated 23.01.2017 in accordance with clause 20 read with clause 7.4 of the buyer's agreement and the complainant was left with no right, claim, lien or interest whatsoever in respect of the said booking/allotment. However, on the request of the complainant, the respondent being a customer-oriented company has restored the allotment of the unit and the same was intimated to the complainant vide the email dated 01.02.2017.
- That the construction of the tower in which the apartment allotted to the complainant was located is complete. The complainant is bound to pay the remaining due amount along with the applicable charges at the appropriate stage.
- That the implementation of the said project has been hampered due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of the respondent, and which have affected the materially affected the construction and progress of the project. Some of the force majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under:

i. **Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to Demonetization:** [Only happened second time in 71 years of

independence hence beyond control and could not be foreseen]. The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f from 9-10 November 2016 the day when the Central Government issued notification with regard to demonetization. During this period, the contractor could not make payment to the labour in cash and as majority of casual labour force engaged in construction activities in India do not have bank accounts and are paid in cash on a daily basis. During demonetization the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on a site of the magnitude of the project in question are Rs. 3-4 lakhs per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence the implementation of the project in question got delayed due on account of issues faced by contractor due to the said notification of Central Government.

Further there are studies of Reserve Bank of India and independent studies undertaken by scholars of different institutes/universities and also newspaper reports of Reuters of the relevant period of 2016-17 on the said issue of impact of demonetization on real estate industry and construction labour. The Reserve Bank of India has published reports on impact of demonetization. In the report- Macroeconomic Impact of Demonetization, it has been observed and mentioned by Reserve Bank of India at page no. 10 and 42 of the said report that the construction industry was in negative during Q3 and Q4 of 2016-17

and started showing improvement only in April 2017.That in view of the several studies and this report, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should deemed to be extended for 6 months on account of the above.

ii. **Orders Passed by National Green Tribunal: In last four successive years i.e., 2015-2016-2017-2018**, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. Also the Hon'ble NGT has passed orders with regard to phasing out the 10 year old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The Contractor of the respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to following, there was a delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November-December 2016 and November-December 2017. The district administration issued the requisite directions in this regard. In view of the above, construction work remained very badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondent and the said period is also required to be added for calculating the delivery date of possession.

iii. That in the year 2017, there was a **dispute between the respondent and the contractor of the project** on account of which the construction work of project came to a halt and this fact was intimated

to the complainant as well. On account of the stoppage of work by the contractor of the project in question, valuable time to complete the construction was lost and the same is covered under the ambit of the definition of 'force majeure' as defined in Clause 1 of the Buyer's Agreement.

iv. **Non-Payment of Instalments by Allottees:** Several allottees, including the complainant, were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.

v. **Inclement Weather Conditions viz. Gurugram:** Due to heavy rainfall in Gurugram in the year 2016 and unfavourable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions. The said period is also required to be added to the timeline for offering possession by the respondent.

vi. That Divisional Commissioner, Gurgaon directed District Town Planner, Gurgaon to stop construction at site and for nearly two months the implementation was kept in abeyance. Despite all these circumstances mentioned above the respondent worked hard and tirelessly and was able to complete the construction of the apartment allotted to the complainant.

L. That section 51 of the Indian Contract Act, 1872 provides that promisor is not bound to perform, unless reciprocal promisee is ready

and willing to perform. Section 52 of the Indian Contract Act, 1872 provides for order of performance of reciprocal promises wherein it is stated that the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order. In the instant case, the complainant failed to perform its obligation under the contract for timely payment of instalments. However, the respondent still fulfilled its obligations. No claim is maintainable by the complainant against the respondent.

M. That the complainant is a real estate investor who had made the booking with the respondent with the sole intention of earning quick profit in a short span of time. However, on account of slump in the real estate market, his calculations went wrong and he has now filed the present baseless, false and frivolous complaint in order to unnecessarily harass, pressurize and blackmail the respondent to submit to his unreasonable and untenable demands. The complaint is liable to be dismissed with heavy costs payable to the respondent.

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 respondent regarding lack of jurisdiction of the Authority 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 Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

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

25. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and would be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 and which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

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

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

27. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of

the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

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

28. 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:

> *"34. Dispute Resolution by Arbitration*
> *"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The*

company and the allottee will share the fees of the Arbitrator in equal proportion".

29. 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.

30. 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."

31. 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."

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

F.III Objections regarding force majeure

33. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainants is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction during 2015-2016-2017-2018, dispute with contractor, non-payment of instalment by allottees and demonetization. The plea of the respondent regarding various orders of the NGT and demonetisation but all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading

to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Further, any contract and dispute between contractor and the builder cannot be considered as a ground for delayed completion of project as the allottee was not a party to any such contract. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Entitlement of the complainants for refund:

G.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.

34. That the complainant booked a unit in the project of the respondent namely, "Ireo City Central" and was allotted a unit bearing no. R0705, 7th Floor, R tower vide allotment letter 16.03.2013 . Thereafter, a BBA was executed between the parties on 16.09.2013. However, the respondent vide letter dated 23.01.2017 cancelled the unit of complainant on account of non-payment of dues. But on payment of dues, the management as a special case, approved the restoration of unit on 01.02.2017.

35. The respondent-promoters 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 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 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 consent to establish i.e., 07.02.2014 as it was the last pre-condition that was fulfilled.

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 consent to establish which was obtained on 07.02.2014, 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 allotted to the complainant on 16.03.2013. The date of approval of building plan was 05.09.2013. 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.

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 date when the possession was offered. However, keeping in view the status of the project, and the interest of other allottees, the authority was of the view that refund cannot be allowed at 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 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 the 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., 05.09.2013 which comes out to be 05.03.2017.

42. 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.

43. 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....."*

44. 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*

45. 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.

46. 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.

47. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 1,07,44,416/- along 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 not give effect to unlawful clauses incorporated in the Buyer's Agreement

48. The above-mentioned relief sought by the complainant was not pressed during the arguments. The authority is of the view that the complainant

does not intend to pursue the above-mentioned relief sought. Hence, the authority has not raised any findings w.r.t. to the above-mentioned relief.

H. Directions of the Authority:

49. 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. 1,07,44,416/-** 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.

50. Complaint stands disposed off.

51. File be consigned to the registry.

(Sanjeev Kumar Arora) Member | **(Ashok Sangwan)** Member | **(Vijay Kumar Goyal)** Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.10.2022