BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**4245 of 2022**
Date of filing complaint	**04.07.2022**
First date of hearing	**07.09.2022**
Date of decision	**24.08.2023**

	Sanjeev Kumar Mrs. Prakriti Rashmi **R/o:** Flat no. 1401, Wave Tower, Corniche, Abu Dhabi, UAE-270	**Complainants**
	Versus	
	M/s Ireo Pvt. Ltd. **Regd. Office:** A-11, First Floor, Neeti Bagh, New Delhi-110049	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Hemant Phogat (Advocate)	Complainants
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	107 of 2017 dated 24.08.2017
7.	RERA registration valid up to	30.06.2020
8.	Allotment Letter	18.10.2012 (Page 17 of complaint)
9.	Unit no.	R1504, 15th Floor, R tower (Page 31 of complaint)
10.	Unit area admeasuring (super area)	1346.67 sq. ft. (Page 31 of complaint)
11.	Approval of building plans	05.09.2013

		(Annexure R3 on page 48 of reply)
12.	Date of execution of Buyer's Agreement	16.10.2013 (Page 26 of complaint)
13.	Environmental Clearance	12.12.2013 (Annexure R4 on page 51 of reply)
14.	Consent to establish from pollution angle	07.02.2014 (Annexure R5 on page 57 of reply)
15.	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.
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. 1,42,94,961/- (as per SOA on page no. 116 of complaint)
18.	Amount paid by the complainants	Rs. 1,42,94,961/- (as per SOA on page no. 116 of complaint)
19.	Occupation certificate /Completion certificate	Not obtained
20.	Offer of Possession	Not offered

B. Facts of the complaint:

3. That the complainants have paid a booking amount of Rs.14,57,868/- to the respondents on 18.06.2012 and on the date i.e., 18.10.2012, the respondents have issued the allotment letter to the complainants. The complainants have paid a total amount of Rs.1,42,94,961/- to the respondents in respect of the aforesaid booking.

4. That the respondents are in right to exclusively develop, construct and build residential building, transfer or alienate the unit's floor space and to carry out sale deed, agreement to sell, conveyance deeds, letters of allotments etc.

5. That, as per clause-13.3 of the builder buyer's agreement, the respondents were under legal obligation to handover the possession of the rental pool service apartment within 42 months from the date of approval of building plan or fulfillment of pre-conditions imposed thereunder.

6. That the complainants visited the site during the course of construction and noticed and found that the construction work is delayed beyond the

possession date and since then they have been trying to communicate to the respondents by visiting their offices and through various modes including but not limited to telephonic conversations and personal approach etc.

7. That the complainants made and satisfied all the payments against the demands raised by the respondent and as on the date of filing of the present complaint, the complainants have abided by all the payments plan of the builder buyer's agreement without any delay and default.

8. That, till today the complainants had not received any satisfactory reply from the respondents regarding completion of the project. The complainants have been suffering a lot of mental, physical and financial agony and harassment.

9. That the respondents have not completed the construction of the said real estate project till now and the complainants have not been provided with the possession of the said rental pool service apartment to the complainants despite promises and representation made by respondents. By committing delay in delivering the possession of the aforesaid unit, the respondents have violated the terms and conditions of the builder buyer's agreement and promises made at the time of booking of said rental pool service apartment.

10. That the cause of action accrued in favour of the complainants and against the respondents, when complainants had booked the said apartment and it further arose when respondents failed/neglected to deliver the said apartment within stipulated time period. The cause of action is continuing and is still subsisting on day-to-day basis.

C. **Relief sought by the complainants:**

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

i. Direct the respondent to pay delayed possession charges till offer of possession of the said rental pool service apartment along with prevailing interest as per the provisions of the Act.

ii. Direct the respondent to handover the possession of the said apartment to the complainants.

iii. Direct the respondent to pay Rs. 50,000/- as litigation expenses.

D. Reply by respondent:

The respondents by way of written reply made following submissions:

12. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed.

13. That the complainants have no locus standi to file the present complaint.

14. That the complainants are estopped from filing the present complaint by their own acts, omissions, admissions, acquiescence's and laches.

15. That this authority does not have the jurisdiction to try and decide the present complaint.

16. 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 36 of the buyer's agreement.

17. That the complainants have 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:

18. That the complainants are real estate investors who after checking the veracity of the project had applied for allotment of 'managed service apartment-rental pool' in 'Ireo City Central', project sector 59, Gurugram vide their booking application form. The complainants agreed to be bound by the terms and conditions of the booking application form. The respondent no.1 vide its allotment offer letter dated 18.10.2012 allotted to the complainants apartment no. R1504 having tentative super area of 1346.67 sq. ft. for a sale consideration of Rs 2,08,18,121/-.

19. That the complainants are real estate investors who after checking the veracity of the project had initially booked one service apartment bearing no. R1305 in its aforesaid project 'Ireo City Central'. The complainant no.1 vide his email dated 06.09.2012 had requested to cancel its earlier unit allotted to the complainants. The respondent no.1 being customer-oriented company had acceded to the request of the complainants for surrender of the allotment of the apartment no. R1305 in the project 'IREO City Central' and to adjust the payment made by them with the unit in question in the present complaint on their request.

20. That the respondent no.1 raised payment demands from the complainants in accordance with the agreed terms and conditions of the allotment as well as of the payment plan. It is submitted that the complainants have only made part- payment out of the total sale consideration. However, it is submitted that the complainants are bound to pay the remaining amount towards the total sale consideration of the apartment along with applicable registration charges, stamp duty,

service tax as well as other charges payable along with it at the applicable stage.

21. 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 38 of the schedule – I of the booking application form states that the '...subject to force majeure conditions and 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 42 months from the date of approval of the building plans and/or fulfillment of the preconditions imposed thereunder (Commitment Period). The allottee further agrees and understands that the company shall be additionally being entitled to a period of 180 days (Grace Period)...' From the aforesaid terms of the buyer's agreement, it is evident that the time was to be computed from the date of receipt of all requisite approvals. Even otherwise construction can't be raised in the absence of the necessary approvals. It 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.

22. That on account of certain force majeure circumstances such as construction ban, due to Court Order/ Governmental Authority guidelines, the implementation of the project was affected.

23. Furthermore, the outbreak of the deadly Covid-19 virus resulted in implementation of the project being affected. The outbreak resulted in not only disruption of the supply chain of the necessary materials but also in shortage of the labour at the construction sites as several labourers have migrated to their respective hometowns. The Covid-19 outbreak which has been classified as 'pandemic' is an Act of God and the same was thus beyond the reasonable apprehension of respondents. The time period covered by the above-mentioned force majeure events is required to be added to the time frame mentioned above. The respondents cannot be held responsible for the circumstances which were beyond their control. It is pertinent to mention herein that even this Hon'ble Authority had vide its order no. 9/3-2020 HARERA/GGM(Admin) dated 26.05.2020 had extended the registration and completion date automatically by 6 months due to the outbreak of Covid-19. Even this Hon'ble Authority had agreed vide the said order that due to the force majeure condition, the regular development work of the real estate projects have been getting affected.

24. That further due to outbreak of Covid-19 and its various waves has adversely affected the functioning of various Govt. as well as private Offices and has caused delay in completion of the project in which unit of the complainants is situated. The Hon'ble Apex Court has also taken into consideration the situation due to various waves of Covid-19 and has

granted relief in terms of extension of limitation w.e.f. 15.03.2020 to 28.02.2022 to file various documents before various courts/authorities. Accordingly, this period w.e.f. 15.03.2020 to 28.02.2022 should be counted under Force Majeure while calculating the due date of possession as per the buyer's agreement.

25. That despite the above-mentioned scenario, the respondent have already completed the construction of the tower in which the unit allotted to the complainants is located and it shall soon apply for the grant of the occupation certificate. It is pertinent to mention here that only finishing work in the said tower in question is left and is being undertaken by the respondent no.1 currently.

26. 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:

27. **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.

28. 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.

29. **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.

30. 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 complainants 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.

31. **Non-Payment of Instalments by Allottees:** Several allottees, including the complainants, 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.

32. **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.

33. 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 complainants.

34. 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 complainants 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 complainants against the respondent.

35. That the complainants are 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.

36. 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:

37. 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

38. 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

39. 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.

40. 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.

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

42. 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."

43. 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."*

44. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

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

45. 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:

> ***"36. 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".*

46. 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.

F.III Objections regarding force majeure

47. 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. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent 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.

F.IV Objection regarding delay in completion of construction of project due to outbreak of Covid-19

48. The Hon'ble Delhi High Court in a case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020*** dated 29.05.2020 has observed as under:

> *69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."*

49. In the present case also, the respondent was liable to complete the construction of the project and handover the possession of the said unit by 05.03.2017. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period cannot be excluded while calculating the delay in handing over possession.

G. Entitlement of the complainants:

G.I Direct the respondent to pay delayed possession charges till offer of possession of the said rental pool service apartment along with prevailing interest as per the provisions of the Act.

G.II Direct the respondent to handover the possession of the said apartment to the complainants.

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

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

51. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 16.10.2013, provides for handing over possession and the same is reproduced below:

> *"13.3 Subject to Force Majeure, as defined herein and further subject to the Allottees having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottees having complied with all formalities or documentation as prescribed by the Company, the company proposes to offer the possession of the said apartment to the allottees within a period of 42 months from the date of approval of the Building plans and/or fulfilment of the preconditions imposed thereunder ("Commitment Period"). The Allottees further agrees and understands that the company shall additionally be entitled to a period of 180 days ("Grace Period"), after the expiry of the said Commitment Period to allow for unforeseen delays beyond reasonable control of the company."*

52. 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.

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

54. Further, in the present case, it is submitted by the respondent promoter that the due date of possession should be calculated from the date of consent to establish from pollution angle which was obtained on

07.02.2014, as it is the last of the statutory approvals which forms a part of the preconditions.

55. The authority has gone through the possession clause of the agreement in the present matter. On a bare reading of the said clause of the agreement reproduced above, it becomes clear that the possession in the present case is linked to the "fulfilment of the preconditions" which are 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 unit in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the "fulfilment of the preconditions" has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject unit. According to the established principles of law and 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 against the interests of the allottee must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of possession of the unit in question to the complainants. Accordingly, in the present matter the due date of possession is

calculated from the date of approval of building plans i.e., 05.09.2013 which comes out to be 05.03.2017.

56. **Admissibility of grace period:** The respondent promoter had proposed to hand over the possession of the apartment within 42 months from the date of sanction of building plan and/or fulfilment of the preconditions imposed thereunder which comes out to be 05.03.2017. The respondent promoter has sought further extension for a period of 180 days after the expiry of 42 months for unforeseen delays in respect of the said project. The respondent raised the contention that the construction of the project was delayed due to force majeure conditions including demonetization and the order dated 07.04.2015 passed by the Hon'ble NGT including others.

57. **Demonetization:** It was observed that due date of possession as per the agreement was 05.03.2017 wherein the event of demonetization occurred in November 2016. By this time, major construction of the respondents' project must have been completed as per timeline mentioned in the agreement executed between the parties. Therefore, it is apparent that demonetization could not have hampered the construction activities of the respondents' project that could lead to the delay of more than 2 years. Thus, the contentions raised by the respondents in this regard are rejected.

58. **Order dated 07.04.2015 passed by the Hon'ble NGT:** The order dated 07.04.2015 relied upon by the respondent promoters states that

> *"In these circumstances we hereby direct state of U.P., Noida and Greater NOIDA Authority, HUDA, State of Haryana and NCT, Delhi to immediately direct stoppage of construction activities of all the buildings shown in the report as well as at other sites wherever, construction is being carried on in*

violation to the direction of NGT as well as the MoEF guideline of 2010."

59. A bare perusal of the above makes it apparent that the above-said order was for the construction activities which were in violation of the NGT direction and MoEF guideline of 2010, thereby, making it evident that if the construction of the respondents' project was stopped, then it was due to the fault of the respondent itself and cannot be allowed to take advantage of its own wrongs/faults/deficiencies. Also, the allottee should not be allowed to suffer due to the fault of the respondent/promoter. It may be stated that asking for extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoter themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allotee. It needs to be emphasized that for availing further period for completing the construction the promoter must make out or establish some compelling circumstances which were in fact beyond his control while carrying out the construction due to which the completion of the construction of the project or tower or a block could not be completed within the stipulated time. Now, turning to the facts of the present case the respondent promoters has not assigned such compelling reasons as to why and how they shall be entitled for further extension of time 180 days in delivering the possession of the unit. Accordingly, this grace period of 180 days cannot be allowed to the promoters at this stage.

60. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at prescribed rate of interest similarly, 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]*
>
> *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.*

61. 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. The Haryana Real Estate Appellate Tribunal in Emaar MGF Land Ltd. vs. Simmi Sikka observed as under: -

> *"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the homer buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered into between the parties are one-sided, unfair and unreasonable*

with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding."

62. 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 24.08.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75% per annum.

63. 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—

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 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;"

64. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same as is being granted to the complainant in case of delay possession charges.

65. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of apartment buyer's agreement executed between the parties on 16.10.2013, the possession of the booked unit was to be delivered within 42 months from the date of approval of building plan (05.09.2013) which comes out to be 05.03.2017. The grace period of 180 days is not allowed in the present complaint for the reasons mentioned above. Accordingly, non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 10.75% p.a. for every month of delay on the amount paid by them to the respondent from due date of possession i.e.,05.03.2017 till the handing over of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.

G.III Direct the respondent to pay Rs. 50,000/- as litigation expenses.

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

section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the Authority:

67. 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 builder is directed to pay interest at the prescribed rate of 10.75% p.a. for every month of delay from the due date of possession i.e., 05.03.2017 till the handing over of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.

ii. The respondent builder is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter, monthly payment of interest till date of handing over of possession shall be paid on or before the 10th of each succeeding month.

iii. The complainants are also directed to pay the outstanding dues, if any.

iv. The rate of interest chargeable from the allottees, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. The respondent builder shall not charge anything from the complainants which is not part of the builder buyer agreement.

68. Complaint stands disposed off.

69. File be consigned to the registry.

(Vijay Kumar Goyal)
Member
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 24.08.2023